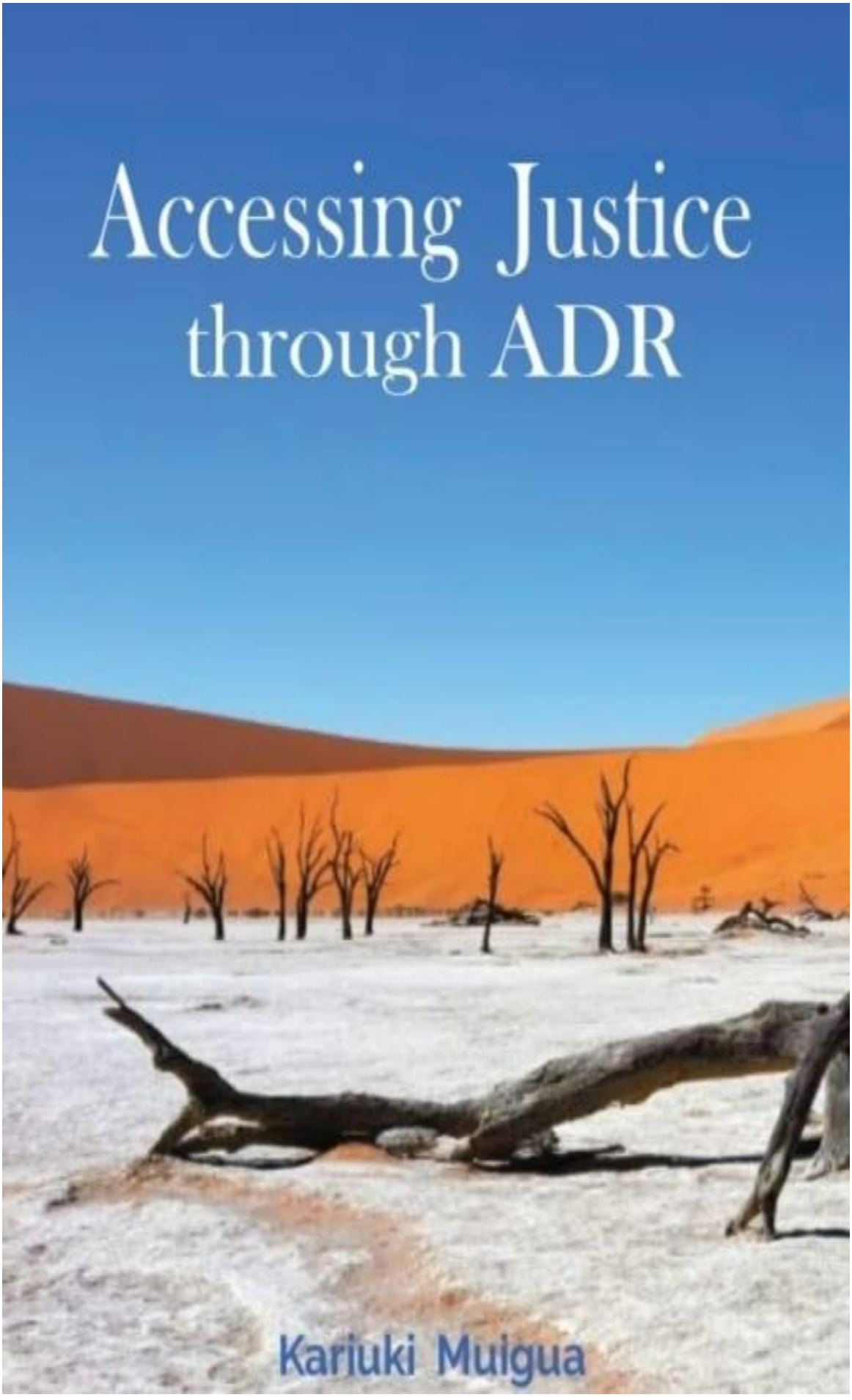
Accessing Justice through ADR



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Author's Note

This book contains a collection of independent articles on Alternative Dispute Resolution (ADR) written over time. Some have been published in Journals and book chapters. Alternative Dispute Resolution has also been described as Appropriate Dispute Resolution[1]. There is a debate as to whether the same is really 'alternative' in the African context. The question "Is ADR really Alternative?" forms part of the discourse.

ADR is part of Conflict Management. Conflict management mechanisms include those that are coercive, such as, arbitration and the collaborative or none coercive ones (negotiation, (re) conciliation and mediation)[2].

The term Alternative Justice Systems is also applied to the many mechanisms that are used to administer Justice in Africa and elsewhere. There is also Traditional Justice Systems which incorporate customary practices negotiation, conciliation and arbitration[3].

The publication was necessitated by the need to consolidate the author's work in ADR and make it easy for the general readers, scholars, judges and academics to access.

The various articles seek to link ADR Mechanisms with the quest for justice. Access to Justice is possible through various mechanisms which include Litigation, Arbitration, Conciliation, Mediation.

These mechanisms have existed for time immemorial in Africa[4].

Conflict management is culture specific[5]. African communities have various cultures that recognize harmony and 'ubuntu' as part of life[6]. 'I am because we are' is part of that philosophy of conflict management and harmonious living.

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[1] Muigua. K., 'Effective Justice for Kenyans: Is ADR Really Alternative?' The Law Society of Kenya Journal, Vol. II, 2015, No. 1, pp. 49-62.

[2]Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers, 2015

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[4] 'Kenyatta. J., 'Facing Mount Kenya: The Tribal life of the Gikuyu', (Vintage Books, New York, 1965)

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At the international level there is the growth of Arbitration[7] and International Commercial Mediation[8]. The debates arising from these developments are also covered in the various papers.

There is a need to write stories from our perspective: The formal and informal mechanisms for conflict management have their place in the totality of the framework for conflict management.

Accessing Justice through ADR is a quest worth pursuing.

Kariuki Muigua
Nairobi, Kenya December 2022

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Dedication

I dedicate this work
To those who
watch the rising sun
and the beautiful sunsets
while reflecting on
Justice for all
And to those who during stormy weather
Seek peace
And promote harmony
Among human beings
And with nature.

And to them who seek
Access to Justice
Elusive as it may be.

This book is dedicated to
those who live on
keep hope alive
And never ever give
up

Dedicated also to those
we met along the rugged paths
Those that made us
be
who we are today.

This book is for the
Dreamers
Those who dream very big
And to those who face
their fears.

Let us spare a thought for the
idea
That success is a Journey
that anyone can achieve
And that luck
Is something we can create

xxx

This book is for those
who believe in a
better tomorrow
warm days and
beautiful beaches;

To the idea that
One day
All we believe in
and dream of
will become
a reality.

This book is also dedicated
To those who welcome
the proposition
That accessing Justice through
Alternative
and Appropriate Dispute Resolution
is realizable.

Acknowledgments

I am grateful to the One Above for allowing me to see the light of day today. Life is short. I do not take that for granted.

I extend my sincere gratitude to those who have inspired me to become what I am. I thank the sages who taught me that I can realize all my dreams; that I am the sum total of all my thoughts, dreams and inspirations.

I appreciate those who have worked with me over the years, ensuring that I keep publishing and mentoring people. Thank you to Ngararu Maina, James Njuguna, Mwati Muriithi, Jack Liaduma, Anne Wairimu and all of Kariuki Muigua and Company Advocates.

I thank those who have conferred on me several awards including: Arbitrator of the Year Award 2021 by Law Society of Kenya; African Arbitrator of the Year 2022 (East African Arbitration Conference); ADR Practitioner of the Year (African Arbitration Association); Lifetime Achievement Award (CIArb); Publication of the Year Award 2021/2022. I am greatly humbled.

Finally, I extend my deepest gratitude to my family. You have walked the journey with me. You have made it possible to bear pain, grief and sorrow. You have been there for me during sunny weather and in violent storms.

You consistently remind me, that after a long night a warm day will slowly unfold, and that we should never, ever give up.

Dr. Kariuki Muigua
December 2022

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List of Acrynyonms

ADR- Alternative Dispute Resolution

APSEA- Association of Professional Societies in East Africa

CADR- Centre for Alternative Dispute Resolution

CAF- Confederation of African Football

CAS- Court of Arbitration for Sport

CIArb- Chartered Institute of Arbitrators (Kenya Branch)

CIC- Commission for Implementation of the Constitution

CUCs- Court User Committees

FIDA- Federation of Women Lawyers

FIFA- Fédération Internationale de Football Association

FKF- Football Kenya Federation

IAAF- International Association of Athletics Federations (World Athletics)

ICAS- International Council of Arbitration for Sport

ICJ- International Commission of Jurists

IOC- International Olympic Committee

KEPSA- Kenya Private Sector Alliances

KLA- Kenya Land Alliance

KLRC- Kenya Law Reform Commission

KNHCR- Kenya National Commission on Human Rights

LSK- Law Society of Kenya

NCIA- Nairobi Centre for International Arbitration

NCMG- Negotiation & Conflict Management Group

NLC- National Land Commission

SDRC- Strathmore Dispute Resolution Centre

TDR- Traditional Dispute Resolution

TDRMs- Traditional Dispute Resolution Mechanisms

TDRs- Traditional Dispute Resolution systems

TJS- Traditional Justice Systems

UNDP United Nations Development Programme

WADA- World Anti-Doping Agency

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Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya

Abstract

This paper explores the possibility of efficiently accessing justice through alternative dispute resolution mechanisms. Access to justice is now well entrenched in the current constitution of Kenya 2010 (hereinafter the constitution) as one of its fundamental pillars.

Access to justice by majority of citizenry has been hampered by many unfavourable factors which are inter alia, high filing fees, bureaucracy, complex procedures, illiteracy, distance from the courts and lack of legal knowhow. Alternative Dispute Resolution (ADR) is used to refer to the management of disputes without resorting to litigation.

ADR has the potential to ensure access to justice for the Kenyan people. This potential should be exploited. ADR mechanisms such as negotiation, conciliation and mediation bear certain attributes that can be tapped and lead to justice and fairness. These attributes include party autonomy, flexibility of the process, non-complex procedures and low cost.

The author argues that where they have been used in managing disputes they have been effective since they are closer to the people, flexible, expeditious, foster relationships, voluntary and cost-effective and thus facilitate access to justice by a larger part of the population.

This paper starts with a brief background and then proceeds to examine the effect of Article 159 of the Constitution, the range of alternative dispute resolution mechanisms, implementation of alternative dispute resolution mechanisms, the challenges and opportunities and ends with a short conclusion.

1. Introduction

Access to justice is now well entrenched in the current constitution of Kenya 2010 (hereinafter the constitution) as one of its fundamental pillars.[1] Access to justice by majority of citizenry has been hampered by many unfavourable factors which are *inter alia*, high filing fees, bureaucracy, complex procedures, illiteracy, distance from the courts and lack of legal knowhow.[2] Alternative Dispute Resolution (ADR) is used to refer to the management of disputes without resorting to litigation.

ADR has the potential to ensure access to justice for the Kenyan people. This potential should be exploited. ADR mechanisms such as negotiation, conciliation and mediation

[1]Articles 19, 22, 48, 159, Constitution of Kenya, 2010, Government Printer, Nairobi

[2]Jackton B. Ojwang', "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), pp. 19-29: 29

bear certain attributes that can be tapped and lead to justice and fairness. These attributes include party autonomy, flexibility of the process, non-complex procedures and low cost.[3]

This paper explores the possibility of efficiently accessing justice through alternative dispute resolution mechanisms. The author argues that where they have been used in managing disputes they have been effective since they are closer to the people, flexible, expeditious, foster relationships, voluntary and cost-effective and thus facilitate access to justice by a larger part of the population. This paper starts with a brief background and then proceeds to examine the effect of Article 159 of the Constitution, the range of alternative dispute resolution mechanisms, implementation of alternative dispute resolution mechanisms, the challenges and opportunities and ends with a short conclusion.

1.1 Background

Before the advent of the current Constitution of Kenya 2010, justice was perceived to be a privilege reserved for a select few who had the financial ability to seek the services of the formal institutions of justice. This is because in the past litigation has been the major conflict management channel widely recognised under our laws as a means to accessing justice.

Litigation however did not and still does not guarantee fair administration of justice due to a number of factors. Courts in Kenya and even elsewhere in the world have encountered a number of problems related to access to justice. These include high court fees, geographical location, complexity of rules and procedure and the use of legalese.[4]

The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.[5] Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. Litigation is so slow and too expensive and it

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[3]What is Alternative Dispute Resolution (ADR)? - African Mediation And Community Service, Available at http://www.metros.ca/amcs/international.htm Accessed on 27th April, 2013; See also Kariuki Muigua, Reflections on ADR and Environmental Justice in Kenya, page 1,
Available at *http://www.chuitech.com/kmco/attachments/article/97/Reflections.pdf*

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

[5] Jackton B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable
Development," Op cit

may at times lose the commercial and practical credibility necessary in the corporate world.[6] Litigation should however not be entirely condemned as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary. Criminal justice may also be achieved through litigation especially where the cases involved are very serious. Litigation is associated with the following advantages: the process is open, transparent and public; it is based on the strict, uniform compliance with the law of the land; determination is final and binding (subject possibly to appeal to a higher court).[7] However, there are also many shortcomings associated with litigation so that it should not be the only means of access to justice. Some of these have been highlighted above. Litigation is not a process of solving problems; it is a process of winning arguments.[8]

As recognition of the above challenges associated with litigation, the Constitution under article 159 now provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and Traditional Dispute Resolution Mechanisms shall be promoted as long as that they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.[9]

Globally, the role of alternative dispute resolution mechanisms in the management of a range of conflicts has been noted over time. [10] Courts can only deal with a fraction of all the disputes that take place in society. Courts have had to deal with an overwhelming number of cases and as one author notes 'one reason the courts have become overburdened is that parties are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted

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[6] Ibid, page 7; See also Patricia Kameri Mbote et al., Kenya: Justice Sector and the Rule of Law, Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011, Available at *http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-2011* Accessed on 27th April, 2013

[7] Chartered Institute of Arbitrators, Litigation: Dispute Resolution, Available at *http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation* Accessed on 27th April, 2013

[8] Advantages & Disadvantages of Traditional Adversarial Litigation, Available at *http://www.beckerlegalgroup.com/a-d-traditional-litigation* Accessed on 27th April, 2013

[9] Article 159(3)

[10] Kariuki Muigua, Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010, page 2. Available at *http://www.chuitech.com/kmco/attachments/article/111/Paper%FINAL.pdf*; See also Sunday E. N. Ebaye, The relevance of arbitration in international relations, Basic Research Journal of Social and Political Sciences Vol. 1(3) pp. 51-56, November 2012 Available at http//www.basicresearchjournals.org Accessed on 15th April, 2013

as legal "entitlements." The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity'.[11]

Regionally most African countries still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common. It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.[12] Another author confirms that access to justice has always been one of the fundamental pillars of many African societies. He notes that 'Igbo justice is practised in land matters, inheritance issues, socio-communal development strategies, interpersonal relationships and sundry avenues'.[13]

Thus, the recognition given to traditional dispute resolution mechanisms in the said Article 159 (2) (c) of the Constitution is thus a restatement of customary jurisprudence.[14] Under our constitution, there however exists a qualification for the application of Traditional Dispute Resolution mechanisms in that they must not be applied in a way that contravenes the Bill of Rights. For instance, they must not lead to outcomes that are gender-biased or act as barriers to accessing justice. They must also not be repugnant to justice and morality or result in outcomes that are repugnant to justice or morality.[15]

Justice and morality are however not defined in the Constitution and therefore it would be difficult to ascertain when a mechanism is repugnant to justice and morality. Alternative and Traditional dispute resolution mechanisms must also not be used in a way that is inconsistent with the constitution or any written law.[16]

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[11] Marc Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society', page 2, 31 UCLA L. Review. 4, October 1983, Available at *http://www.marcgalanter.net/Documents/papers/ReadingtheLandscapeofDisputes.pdf* Accessed on 23rd April, 2013

[12] Mkangi K, Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contexualised Paradigm for Examining Conflict in Africa, Available at www.payson.tulane.edu,

[13] Ikenga K. E. Oraegbunam, The Principles and Practice of Justice in Traditional Igbo Jurisprudence, African Journal Online, page 53, Available at *http://www.ajol.info/index.php/og/article/download/52335/40960* Accessed on 26th April, 2013

[14] Ibid

[15] Article 159(3) of the Constitution , 2010

[16] Repugnancy and morality qualification clauses were seen as obstacles put in place by the British colonial Law makers to undermine the legitimacy of the African customary laws. See also s. 3(2), Judicature Act, Cap 8, Laws of Kenya. Though there are certain aspects of customary laws that do not conform to human rights standards, the subjection of customary laws to the repugnancy clause has been used by courts to undermine the efficacy of these laws. See Kariuki Muigua, Traditional

If ADR mechanisms could be applied in a way that conforms to International Human Rights standards they can play a major role in the management of disputes. ADR mechanisms focus on the interests and needs of the parties to the conflict as opposed to positions, which approach is contrary to the formal common law and statutory law practices.[17]These are capable of ensuring that justice is done to all by addressing the concerns of the poor and vulnerable in the society through legally recognized but more effective means.

1.2 Constitution of Kenya, 2010 and Access to justice

Article 22(1) of the constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article22(3) further provides that the Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy amongst others the criteria that:

a. formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation; and
b. The court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.[18]

Clause (4) provides that the absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court. Article 48 provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice**.**

Article 159 (1) of the Constitution provides that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and that it is administered without undue regard to procedural technicalities.[19]

> Article 159(1) echoes the right of all persons to have access to justice as guaranteed by Article 48 of the constitution. It also reflects the spirit of Article

Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010, Op cit. page 5

[17] See Roger Fisher, William Ury & Bruce Patton, Getting to Yes-Negotiating Agreement Without Giving in, (3rd Ed. (Penguin Books, United States of America, 2011) p.42

[18] Article 22(3) (b)(d) Constitution of Kenya, 2010

[19] Ibid., Article 159(2) (d)

> 27 (1) which provides that *"every person is equal before the law and has the right to equal protection and equal benefit of the law".*

For this constitutional right of access to justice to be realized, there has to be a framework based on the principles of: *expedition*; *proportionality*; *equality of opportunity*; *fairness of process*; *party autonomy*; *cost-effectiveness*; *party satisfaction* and *effectiveness of re medies.*[20]Recognition of ADR and traditional dispute resolution mechanisms is thus predicated on these cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system.[21]

It is also borne out of the recognition of the diverse cultures of the various communities in Kenya as the foundation of the nation and cumulative civilization of the Kenyan people and nation. Most of these mechanisms are entwined within the cultures of most Kenyan communities which are also protected by the Constitution under Article11.[22]

In a report on access to justice in Malawi, the authors rightly note that 'access to justice does not mean merely access to the institutions, but also means access to fair laws, procedures, affordable, implementable and appropriate remedies in terms of values that are in conformity to constitutional values and directives'.[23] If the foregoing is anything to go by, then litigation scores poorly especially in terms of access to fair procedures and affordability.

On the contrary, ADR mechanisms are flexible, cost-effective, expeditious, foster relationships, are non-coercive and result in mutually satisfying outcomes. They are thus more appropriate in enhancing access to justice by the poor in society as they are closer to them. They may also help in reducing backlog of cases in courts.[24] The net benefit to the court system would be a lower case load as the courts' attention would be focused on

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[20] See Maiese, Michelle. "Principles of Justice and Fairness," Beyond Intractability, (Eds.) Guy Burgess and Heidi Burgess, Conflict Information Consortium, University of Colorado, Boulder (July 2003) Op cit

[21] Kariuki Muigua, Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010, op. cit. page 6

[22] Ibid

[23] Wilfried Schärf, et al., Access to Justice for the Poor of Malawi? An Appraisal Of Access To Justice Provided To The Poor Of Malawi By The Lower Subordinate Courts And The Customary Justice Forums, page 4, Available at *http://www.gsdrc.org/docs/open/SSAJ99.pdf* Accessed on 20 April, 2013

[24] See Shantam Singh Khadka, et al., Promoting Alternate Dispute Resolution to reduce backlog cases and enhance access to justice of the poor and disadvantaged people through organizing Settlement Fairs in Nepal, Case Studies on Access to Justice by the Poor and Disadvantaged, (July 2003) Asia-Pacific Rights And Justice Initiative, Available at *http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/Nepal-SettlementFair* Accessed on 20th April, 2013

more serious matters which warrant the attention of the court and the resources of the State.[25] Case backlog is arguably one of the indicators used to assess the quality of a country's judicial system.[26] All the methods that are employed to address conflicts are either "resolving" or "settling" in nature. It is important that we look at each of the concepts closely to decide which of the two approaches is best suited in ensuring an efficient access to justice.

1.3 Resolution and Settlement[27]

ADR mechanisms seek to address the root cause of conflicts unlike litigation which concerns itself with reaching a settlement. Settlement implies that the parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. Since a settlement is power-based and power relations keep changing, the process becomes a contest of whose power will be dominant.[28] It has been observed that a settlement is an agreement over the issue(s) of the conflict which often involves a compromise.[29]

Settlement practices miss the point by focusing only on interests and failing to address needs that are inherent in all human beings, parties' relationships, emotions, perceptions and attitudes. Consequently, the causes of the conflict in settlement mechanisms remain unaddressed resulting to conflicts in future.[30] Examples of such mechanisms are litigation and arbitration. In litigation the dispute settlement coupled with power struggles will usually leave broken relationships and the problem might recur in future or even worse still the dissatisfied party may seek to personally administer 'justice' in ways they think best. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed. ADR mechanisms are thus better suited to resolve disputes where relationships matter.

Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying,

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[25] Ibid

[26] 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 22nd April, 2013

[27] Kariuki Muigua, Resolving Conflicts Through Mediation in Kenya (Glenwood Publishers Ltd, Nairobi, 2012), Chapter six, pp79- 88

[28] Ibid, page 80

[29] David Bloomfield, Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, Journal of Peace Research, vol. 32 no. 2 May 1995 151-164, Available at *http://jpr.sagepub.com/content/32/2/151.short* Accessed on 18th April, 2013

[30] Kariuki Muigua, Resolving Conflicts through Mediation in Kenya, Op cit., Page 81

addresses the root cause of the conflict and rejects power based outcomes.[31] A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.[32] Resolution is based on the belief that the causes of conflicts in the society are needs of the parties which are non-negotiable and inherent to all human beings.[33] Resolution is usually preferred to settlement for its effectiveness in addressing the root causes of the conflict and negates the need for future conflict or conflict management.[34]

Furthermore, resolution is arguably more effective in facilitating realization of justice than settlement. This is tied to the fact that in resolution focus is more on addressing the problem than the power equality or otherwise. This ensures that a party's guarantee to getting justice is not tied to their bargaining power. ADR mechanisms that are directed at dispute resolution should therefore be encouraged.

1.4 Alternative Dispute Resolution Mechanisms

Alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.[35] At an international level, the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they states or individuals is Article 33 of the Charter of the United Nations[36] which outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to.[37] It provides that *the parties to any dispute shall, first of all seek a solution by*

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[31] Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", The Conflict Resolution Information Source, Version IV, December 2005, Available at http://www.beyondintractability.org/bi-essay/culture-of-mediation Accessed on 26th April, 2013; See also Kariuki Muigua, Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010, Op cit. page 7

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

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

[34] Ibid

[35] Kariuki Muigua, "Alternative Dispute Resolution and Article 159 of the Constitution of Kenya" Op cit. page 2; See also Alternative Dispute Resolution, Available at *http://www.law.cornell.edu/wex/alternative_dispute_resolution* Accessed on 23rd April, 2013

[36] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: *http://treaties.un.org/doc/Publication/CTC/uncharter.pdf* Accessed on 17th April 2013

[37] See generally Eunice R. Oddiri, Alternative Dispute Resolution, paper presented by author at the Annual Delegates Conference of the Nigerian Bar Association, 22nd - 27th August 2004, Abuja, Nigeria. Available at *http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.htm Accessed on 17 April, 2013;* See 'The Role of Private International Law and Alternative Dispute Resolution', Available at

negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.[38] ADR in this era of the 21st Century seeks to find domestically and internationally, a faster, economical and more efficient system that contrasts with litigation which is time consuming and expensive. Concerned about efficiency of national court system in cross border disputes, foreign investors normally prefer mediation or arbitration. Dispute settlement through Arbitration/ADR is not only domestic but also an increasingly growing international phenomenon in the context of cross border transactions.[39]

The scope for the application of ADR has been broadly widened by the constitution with Article 189 (4) stating that national laws shall provide for the procedures to be followed in settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. These key provisions form the constitutional basis for the application of ADR mechanisms in Kenya; their import is that ADR can apply to all disputes and hence broadening the applicability of ADR. It is also a clear manifestation of the acceptance of ADR as a means of conflict management in all disputes.[40] These mechanisms can effectively be applied in resolving a wide range of commercial disputes, family disputes and natural resource based conflicts, amongst others thus easing access to justice.[41]

The Ireland Law Reform Commission identifies what they call the main principles of ADR as follows: Voluntariness of the Principle; Confidentiality of the proceedings and outcome; Self-determination/party autonomy; Party empowerment; Neutrality and impartiality of facilitating third parties; Quality and transparency of the Procedure; Efficiency-Cost, time; and Flexibility-Procedural, outcome. [42] The above principles generally apply almost equally to most if not all ADR mechanisms as it will be seen in the following discussion below. Each of the major alternative dispute resolution mechanisms are explored here below.

1.4.1 Negotiation

In negotiation, parties meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. The parties themselves

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http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap4.html Accessed on 17th April, 2013

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

[39] Surridge & Beecheno, Arbitration/ADR Versus Litigation, September 4, 2006, Available at *http://www.hg.org/articles/article_1530.html* Accessed on 23rd April, 2013

[40] Kariuki Muigua, "Court Annexed ADR in the Kenyan Context" page 1. Available at http://www.chuitech.com/kmco/attachments/article/106/Court%20Annexed%20ADR.pdf

[41] See generally, Ireland Law Reform Commission, Consultation Paper on Alternative Dispute Resolution, July 2008, Available at *http://www.lawreform.ie/_fileupload/consultation%20papers/cpADR.pdf* Accessed on 18th April, 2013

[42] Ibid

attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation. Negotiation is thus voluntary. It allows party autonomy in the process and over the outcome. It is non-coercive thus allowing parties the room to come up with creative solutions.

The Ireland Law Reform Commission in their consultation paper on ADR explores the four fundamental principles of what they call principled negotiation: Firstly, Separating the people from the problem; Secondly, Focusing on interests, not positions; Thirdly, Inventing options for mutual gain; and finally, insisting on objective criteria.[43] As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests. Consequently whatever outcome is arrived at in negotiation it is one that satisfies both parties and addresses the root causes of the conflict and that is why negotiation is a conflict resolution mechanism.[44] It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.[45]

It may be argued that negotiation is by far the most efficient conflict management mechanism in terms of management of time, costs and preservation of relationships and has been seen as the preferred route in most disputes.[46] In appropriate cases courts should be at the forefront in encouraging parties to negotiate so as to come up with mutually acceptable solution and allow for the expeditious resolution of their dispute. This ensures that parties obtain justice without losing other important aspects of their lives like relationships be they business or personal. Where parties in a negotiation hit a deadlock in their talks, a third party is called in to help them continue negotiating. This process is called mediation. Mediation has been defined as a continuation of the negotiation process

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[43] Roger Fisher et al., Getting to Yes-Negotiating Agreement Without Giving in Op cit., p. 42; See also Ireland Law Reform Commission, Consultation Paper on Alternative Dispute Resolution, July 2008 Op cit., page 43

[44] Ibid

[45] Negotiations in Debt and Financial Management 'Theoretical Introduction to Negotiation: What Is Negotiation?', Document No.4, December 1994, Available at *http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document4/3Theoretical.htm accessed on 27th April, 2013;* See also Kariuki Muigua, Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010, Op cit. page 2

[46] Attorney General's Office, Ministry of Justice, The Dispute Resolution Commitment-Guidance For Government Departments And Agencies, May, 2011, Available at *http://www.justice.gov.uk/downloads/courts/mediation/drc-guidance-may2011.pdf* Accessed on 27th April, 2013; See also Kariuki Muigua, Avoiding Litigation through the Employment of Alternative Dispute Resolution, page 8, Available at *http://www.chuitech.com/kmco/attachments/article/101/pdf*

by other means where instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the negotiations between the parties.[47]

1.4.2 Mediation

Mediation is defined as "the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute." Within this definition mediators may play a number of different roles, and may enter conflicts at a variety of different levels of development or intensity.[48] It is one of the dispute resolution mechanisms known as alternative dispute resolution (ADR), as opposed to the legal mechanisms, such as litigation and arbitration. The salient features of mediation are that it emphasizes interests rather than (legal) rights and it is cost - effective, informal, private, flexible and easily accessible to parties to conflicts. An example of the use of mediation informally to resolve conflicts is the peace committees in Northern Kenya among the Pastoralist communities.[49]

1.4.3 Conciliation

This process is similar to mediation except for the fact that the third party can propose a solution. Its advantages are similar to those of negotiation. It has all the advantages and disadvantages of negotiation except that the conciliator can propose solutions making parties lose some control over the process. Conciliation works best in trade disputes. For instance, Section 10 of *the Labour Relations Act*,[50] provides that if there is a dispute about the interpretation or application of any provision of Part II of the Act dealing with freedom of association, any party to the dispute may refer the dispute in writing—

a) to the Minister to appoint a conciliator as specified in Part VIII of the Act; or
b) If the dispute is not resolved at conciliation, to the Industrial Court for adjudication.

Conciliation is different from mediation in that the third party takes a more interventionist role in bringing the two parties together. In the event of the parties are unable to reach a

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[47] Makumi Mwagiru, Conflict in Africa: Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), Op cit. pp. 115-116.

[48] Christopher Moore, The Mediation Process: Practical Strategies for Resolving Conflict, 3rd, (San Francisco: Jossey-Bass Publishers, 2004). Summary written by Tanya Glaser, Conflict Research Consortium, Available at <*http://books.google.com/books/about/The_Mediation_Process.html?id=8hKfQgAACAAJ*> Accessed on 17 April, 2013

[49] Kariuki Muigua, Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010, Op cit. page 7; The use of Mediation is envisaged by statute, s. 59A & B of the Civil Procedure Act, Cap 21, Laws of Kenya.

[50] No. 14 of 2007, Laws of Kenya

mutually acceptable settlement, the conciliator issues a recommendation which is binding on the parties unless it is rejected by one of them. While the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, it is not a determinative role. A conciliator does not have the power to impose a settlement.[51] This is a reflection of the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law.[52]

1.4.4 Arbitration

Arbitration is a dispute settlement mechanism. Arbitration arises where a third party neutral (known as an arbitrator) is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award. The *Arbitration Act*, 1995 defines arbitration to mean —*any arbitration whether or not administered by a permanent arbitral institution*. This definition is not an elaborate one and hence regard has to be had to other sources. Arbitration has also been described as a private consensual process where parties in dispute agree to present their grievances to a third party for resolution.[53]

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

> *An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them, and arbitrators are so called because they havearbitrary power; for if they observe the submission and keep within their due bonds, their sentences are definite from which there lies no appeal.*[54]

An arbitrator is also defined as a legal arbitrator; a person appointed by two parties to settle a conflict, arbitrate, and decide by arbitration, judge between two parties to a conflict (usually at the request of the two parties). Arbitration in Kenya is governed by the *Arbitration Act*, 1995 as amended in 2009, the Arbitration Rules, the *Civil Procedure Act* (Cap. 21) and the Civil Procedure Rules 2010. Section 59 of the *Civil Procedure Act* provides that all references to arbitration by an order in a suit, and all proceedings there under, shall be governed in such manner as may be prescribed by rules. Order 46 of the Civil

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[51] Law Reform Commission, Consultation Paper on Alternative Dispute Resolution, July 2008, Op cit. page 49

[52] Article 6 (4) of the Model law states that —The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute, UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002). Available at *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html Accessed on 23 April, 2013*

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

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

Procedure Rules, inter alia, provides that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court for an order of reference wherever there is a difference. Institutional Rules are also used in guiding the arbitrators as they carry out their work.

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

1.4.5 Med-Arb

Med-Arb is a combination of mediation and arbitration. It is a combination of mediation and arbitration where the parties agree to mediate but if that fails to achieve a settlement the dispute is referred to arbitration. It is best to have different persons mediate and arbitrate. This is because the person mediating becomes privy to confidential information during the mediation process and may be biased if he transforms himself into an arbitrator. Med-Arb can be successfully be employed where the parties are looking for a final and binding decision but would like the opportunity to first discuss the issues involved in the dispute with the other party with the understanding that some or all of the issues may be settled prior to going into the arbitration process, with the assistance of a trained and experienced mediator.[55] Elsewhere, the courts have held, the success of the hybrid mediation/arbitration process depends on the efficacy of the consent to the process entered into by the parties.[56]

1.4.6 Arb-Med

This is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. It is best to have different persons mediate and arbitrate. This is because a person arbitrating may have made up his mind who is the successful party and thus be biased during the mediation process if he transforms himself into a mediator. For instance in the Chinese case of *Gao Hai Yan & Another v Keeneye Holdings Ltd & Others* [2011] HKEC 514 and [2011] HKEC 1626 ("Keeneye"), the Hong Kong Court of First Instance refused enforcement of an arbitral award made in mainland China on public policy grounds. The court held that the conduct of the arbitrators turned mediators in the

[55]Mediation-Arbitration (Med-Arb),
Available at *http://www.constructiondisputes-cdrs.com/about%20MEDIATION-ARBITRATION.htm* Accessed on 23 April, 2013

[56] Edna Sussman, Developing an Effective Med-Arb/Arb-Med Process, NYSBA New York Dispute Resolution Lawyer, Spring 2009, Vol. 2, No. 1, page 73,
Available at *http://www.sussmanadr.com/docs/Med%20arb%PDF.pdf* Accessed on 23 April, 2013

case would "cause a fair-minded observer to apprehend a real risk of bias".[57] Although the decision not to enforce the award was later reversed, the Court of Appeal did not have a problem with the observation on risks involved but with the particular details of that case where the parties were deemed to have waived their right to choose a new third party in the matter.[58]

1.4.7 Adjudication

Adjudication is defined under the CIArb (K) Adjudication Rules as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract. Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision within 28 days or the period stated in the contract), flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation. Adjudication is thus effective in simple construction dispute that need to be settled within some very strict time schedules. The demerits of adjudication are that it is not suitable to non-construction disputes; the choice of the adjudicator is also crucial as his decision is binding and that it does not enhance relationships between the parties.[59]

2. Implementation of Alternative Dispute Resolution Mechanisms

In order to realize access to justice through these mechanisms, they must be effectively entrenched within the justice system. Caution should however be taken in linking these mechanisms to the court system to ensure that they are not completely fused with the formal system as is the case with arbitration. The legal environment has swallowed arbitral practice in Kenya. It has become a court process in which lawyers use court technicalities to derail the process. There is thus a need to create awareness especially among the judicial officers on the effective use of these mechanisms to realize access to justice.

The existing framework providing that before parties file a case in court, they should first exhaust alternative dispute resolution mechanisms in appropriate disputes need to be

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[57] Mark Goodrich, Arb-med: ideal solution or dangerous heresy? Page 1, March 2012, Available at *http://www.whitecase.com/files/Publication/fb366225-8b08-421b-9777-*a914587c9c0a/Presentation Accessed on 23 April, 2013

[58] Ibid

[59] K. W. Chau, Insight into resolving construction disputes by mediation/adjudication in Hong Kong, Journal Of Professional Issues In Engineering Education And Practice, ASCE / APRIL 2007, pp 143-147 at Page 143, Available at *http://www.academia.edu/240893/Insight_into_resolving_construction_disputes_by_mediation_* Accessed on 23 April, 2013

enhanced and enforced by courts so as to ease backlogs in courts. Section 59 of the Civil Procedure Act was amended to introduce the aspect of mediation of cases as an aid to the streamlining of the court process. This will involve the establishment of a Mediation Accreditation Committee to be appointed by the Chief Justice which will determine the criteria for the certification of mediators, propose rules for the certification of mediators, maintain a register of qualified mediators, enforce such code of ethics for mediators as may be prescribed and set up appropriate training programmes for mediators.[60]

Whereas court-annexed mediation is a legal process leading to a settlement informal mediations result in a resolution because of their flexibility, informality, voluntariness, autonomy and the fact that they foster rather than destroy relationships. It should be noted that though ADR and Traditional Dispute Resolution Mechanisms have been recognized in the Constitution, they are to operate under the shadow of the law. It can be argued that this denies them the full autonomy which would lead to the enjoyment of the full benefit of the informal mechanisms.

3. Demerits/Criticism of ADR Mechanisms

Although the ADR mechanisms are praised as having all the above advantages, there is still a school of thought that is completely against them. One of the known advocates of this school of thought is Owen Fiss. In his work, '*Against Settlement*', Owen Fiss criticises ADR mechanisms and the whole notion of it on the premises that: There is imbalance of power between the parties; There is absence of authority to consent (especially when dealing with aggrieved groups of people); ADR presupposes the lack of a foundation for continuing judicial involvement; and Adjudication promotes justice rather than peace, which is a key goal in ADR.[61]

He thus argues that a settlement will thereby deprive a court of the occasion and, perhaps, even the ability to render an interpretation. Thus, when parties settle, society gets less than what appears and for a price it does not know; parties might settle while leaving justice undone.[62]

The other demerit is that in mediation power imbalances in the process may cause one party to have an upper hand in the process thus causing the outcome to unfavourably address his/her concerns and /or interests at the expense of the other.[63] Regardless of the type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party. However, it may be claimed that inequality in the relationship does not necessarily

[60] Section 59A of the Civil Procedure Act, Cap 21, Laws of Kenya

[61] Owen Fiss, 'Against Settlement', 93 Yale Law Journal 1073, (1984) pp. 1073-1090. Available at *http://www.law.yale.edu/documents/pdf/againstsettlement.pdf Accessed* on 16 April 2013

[62] Ibid

[63] Kariuki Muigua, "Court Annexed ADR in the Kenyan Context" Op cit. page 5

lead to an exercise of that power to the other party's disadvantage.[64] The other demerit that affects ADR is that most of the mechanisms under ADR that are voluntary in nature mostly rely on the goodwill of the parties and any withdrawal of such goodwill might result in collapse of such a process. Contrary to ADR, adjudication through court is usually based on law, rules and regulations provided for, which results in consistent decisions based on law and precedents; Parties are bound by the decision of the court, which can be enforced; Court decisions are appealable and errors can be corrected, reviewed or reversed by the appellate courts.[65]

4. Challenges

Despite the strides made in coming up with a framework for the use of ADR in Kenya, there are still certain challenges in the effective application of the same to enhance access to justice, reduce backlogs and expedite conflict management.

4.1 Mediator, Conciliator and Arbitrator training

These challenges relate to lack of capacity in terms insufficient personnel who can handle disputes using ADR mechanisms and lack of understanding on the working of some mechanisms such as mediation and/or arbitration. The professional alternative dispute resolvers are overwhelmed by the large number of disputes due to a high population and cannot possibly deal with all the matters suggested by the various laws to be handled using ADR mechanisms and supported by the constitution. There are few institutions that train ADR practitioners in the entire country. The most significant one is the Chartered Institute of Arbitrators (Kenya Chapter), which provides training to its members. The Dispute Resolution Centre also deals with its members only without necessarily offering courses in mediation to the general public. These institutions cannot possibly meet the needs for training and therefore, more institutions ought to take up the training of ADR practitioner, more so the several middle level university colleges spread all over the country.

4.2 Code of Ethics

There is likelihood that there is going to be a flood of mediators, arbitrators and conciliators if training efforts are enhanced. This is against a background of the fact that the code of ethics in place is specific to arbitrators and the provisions in the *Arbitration Act* provide for removal or disqualification of arbitrators only.[66] The major challenge will be

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[64] Shokouh Hossein Abadi, The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration, page 3, Effectius Newsletter, Issue 13, (2011) Effectius: Effective Justice Solutions, Available at *http://effectius.com/yahoo_site_admin/assets/docs/Effectius_Theroleofdisputeresolutionmechanisms*

[65] Surridge & Beecheno, Arbitration/ADR versus Litigation, Op cit

[66] Kariuki Muigua, "Overview of Arbitration and Mediation in Kenya"; A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for

regulating Independent practitioners unless it is made compulsory that every practitioner must belong to a professional body. This way it will be easier to come up with an effective code of ethics and with better mechanisms of enforcement for their regulation.

4.3 Acceptance by the society

Our society still believes in seeking justice through courts. Many people would rather have an order of the court or a decision of an administrative tribunal to enforce, rather than a negotiated agreement that is wholly dependent of parties' goodwill. Even where the law has put in place enforcement mechanisms for negotiated settlements, people still desire the coercive nature of courts and other tribunals, as opposed to all the cordial talks that are ADR. The society has become so litigious that to convince disputants to embrace ADR becomes an uphill task.

4.4 Institutional capacity

There is the need to enhance the capacity of various institutions to meet the demands for ADR mechanisms introduced by the constitution. These institutions include: Chartered institute of Arbitrators (Kenya Chapter) established in 1984, Dispute Resolution Centre, a non-profit organisation established in 1997. There is need to enhance the capacity of these institutions as well as putting in place mechanisms to establish more institutions. This will greatly improve the rolling out of ADR services to a larger group of citizens.

4.5 The changing face of arbitration

The major selling point of the ADR approaches of dispute resolution is their attributes of flexibility, low cost and lack of complex procedures. These attributes are no longer tenable in arbitration as it is gradually becoming as expensive as litigation, especially when the arbitral process is challenged in court.[67] When the matter goes to court, it is back to the same old technicalities that are present in civil proceedings. This challenge also brings in the other factor that is changing the face of arbitration; interference by courts. Ordinarily, courts are not supposed to inquire into the arena of the arbitral proceedings, even where the same are court mandated. Courts are entertaining all manner of applications by parties' intent on derailing the arbitral proceedings and thus delaying justice for all concerned. This means then that parties are slowly losing confidence in the arbitral process at it makes no sense to engage in arbitration for years only for the dispute to end up in courts of law for determination. This comes at a time when the constitution is trying to do the opposite.

Labour Relations In Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6th May, 2011. Page 11, Available at *http://www.chuitech.com/kmco/attachments/article/83/Overview%20of%20Mediation Kenya.pdf*

[67] Ibid. Page 11

5. Prospects

Alternative dispute resolution mechanisms have been effective in administration of justice where they have been used. The constitutionalisation of these mechanisms means that there will be a paradigm shift in the policy on resolution of conflicts towards encouraging their use to enhance access to justice and the expeditious resolution of disputes without undue regard to procedural technicalities. A comprehensive policy and legal framework to operationalise alternative dispute resolution mechanisms is needed. It should be realized that most of the disputes reaching the courts should never have reached there in the first place and can be resolved without resort to court if alternative dispute resolution mechanisms were to be applied and be treated not as inferior alternatives to litigation but as equally appropriate means to realization of justice. Where they have been used in managing conflicts and seeking justice they have been effective since they are closer to the people, flexible, expeditious, foster relationships, voluntary and cost-effective.

The Investment Climate Advisory Services of the World Bank Group while making their recommendations in their work ADR guidelines recommended that providing free ADR services could to an extent help in building up a culture of employment of ADR services in a society. They observe that when first developing ADR services in a jurisdiction, stakeholders may consider providing the service for free to encourage parties to use the process. They go further to suggest that newly trained and enthusiastic ADR practitioners who want to be involved in the project may offer to do this for a while[68].

This, with proper infrastructure in place, could be tried as part of the legal aid programmes in place. However, the above World Bank group also observes that if disputants become accustomed to receiving a service for free, it will be very difficult later to collect a fee for that service[69]. Therefore, this can only be done with very appropriate measures in place to decide when such services should be sought and by which class of people. Alternative dispute resolution has also been said to have indirect benefits. As already noted elsewhere in this paper it can increase the effectiveness of courts by reducing backlog. This can in turn improve trust in the country's legal system, which may increase foreign investment.[70] Another viable recommendation is the adoption of Village Mediation Programmes. The Village Mediation Programme (VMP) is a model of mediation established first in Africa by the Paralegal Advisory Services Institute (PASI)

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[68]World Bank Group, alternative dispute resolution guidelines, page 44,
Available at *http://siteresources.worldbank.org/INTECA/Resources/15322_ADRG_Web.pdf* Accessed on 18 April, 2013

[69] Ibid

[70] Inessa Love, Settling Out of Court: How Effective Is Alternative Dispute Resolution? , page 1, The World Bank Group Financial and Private Sector Development vice presidency, october 2011. Available at
http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Sector Accessed on 22 April, 2013

in Malawi.[71] The VMP introduces a village-based diversion and mediation scheme that can assist poor and vulnerable people to access justice in civil and some minor criminal cases. The Programme is inspired by the *Madaripur Mediation Model* in Bangladesh and other village-based mediation programmes around the world.[72]

6. Conclusion

The direct inclusion, as opposed to inference, of ADR mechanisms as part of the means of conflict management in the Constitution and in Acts of Parliament is a bold ground breaking move. However, there is need for caution so that this effort is not defeated by capacity challenges, some of which are discussed above. The Law Commission in Dublin observes that 'Alternative dispute resolution must be seen as an integral part of any modern civil justice system. It must become such a well-established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like what, if any, expert evidence is required.'[73] They go on to state that while litigation must always remain available for clients, this can be a very stressful undertaking and should be seen as the final place for resolving a dispute.[74] It is essential that in the application of ADR and to achieve a just and expeditious resolution of disputes, the Bill of rights as enshrined in the constitution must at all times be kept in mind and upheld.[75]

The future of ADR in Kenya is bright and really promising in bringing about a just society where disputes are disposed of more expeditiously and at lower costs, without having to resort to judicial settlements. Finally, a party who wishes to avoid the complexities of litigation can seek the services of ADR mechanisms experts and do so legally. There may come a time when ADR becomes the norm rather than the exception in conflict management in our fast growing country and one embracing globalisation where court systems differ significantly. ADR mechanisms can rightly be referred to as Appropriate Dispute resolution mechanisms instead of alternative as the use of the word 'alternative' makes them appear inferior to litigation while this is not the case. The reality is that these mechanisms should at least be treated as equal if not better mechanisms when compared to litigation. These have the potential for being made applicable in all walks of life wherever there exist possibilities of any dispute, a potential only waiting to be tapped. This is the time to recognize that alternative dispute resolution mechanisms stand

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[71] Paralegal Advisory Services Institute (PASI) , Village Mediation Programme, page 2, Available at *http://www.afrimap.org/english/images/documents/PASI-VMP-booklet-Oct09.pdf* Accessed on 20 April, 2013

[72] Ibid

[73] Law Reform Commission, Consultation Paper on Alternative Dispute Resolution, July 2008, Op cit. page 34

[74] Ibid

[75] Articles 19-51, Constitution of Kenya, 2010

independently and not as an alternative to any adjudicatory process.[76] It is possible to herald a new dawn and achieve justice through the effective Application of ADR in Kenya.

[76] Laxmi Kant Gaur, Why I Hate 'Alternative' in "Alternative Dispute Resolution", page 4, Available at *http://delhicourts.nic.in/Why_I_Hat1.pdf* Accessed on 22 April, 2013

Nurturing International Commercial Arbitration in Kenya

Abstract

This paper offers a critical examination of the extent to which international commercial arbitration has taken root in Kenya. In particular, the discourse looks at the legal framework governing arbitration and identifies the challenges therein hindering the prosperity of international commercial arbitration in Kenya. The challenges and opportunities in the practice of international commercial arbitration in Kenya are explored in view of the need to nurture the same in the context of Kenya. The author identifies the main problems facing international commercial arbitration in Kenya and proposes certain measures that would make it flourish in Kenya.

1. Introduction

This paper offers a critical examination of the extent to which international commercial arbitration has taken root in Kenya. In particular, the discourse looks at the legal framework governing arbitration and identifies the challenges therein hindering the prosperity of international commercial arbitration in Kenya. The challenges and opportunities in the practice of international commercial arbitration in Kenya are explored in view of the need to nurture the same in the context of Kenya. The author identifies the main problems facing international commercial arbitration in Kenya and proposes certain measures that would make it flourish in Kenya.

2. International Commercial Arbitration in Kenya: Legal and Institutional Framework

It is noteworthy that international arbitrations take place within a complex and vitally important international legal framework that comprises *inter alia*: contemporary international conventions, national arbitration legislation, and institutional arbitration rules, all of which provide a specialized and supportive enforcement regime for most international commercial arbitrations and international investment arbitrations[1]. Further, it has been observed that the international legal regimes for international commercial and investment arbitrations have been established, and progressively refined with the express goal of facilitating international trade and investment by providing a stable, predictable, and effective legal framework in which these commercial activities may be conducted[2].

This is justified on the ground that enforcement of international arbitral agreements promotes the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation.[3]

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[1] Introduction to International Arbitration', page 1.
Available at *http://www.aspenpublishers.com/%5CAspenUI%5CSampleChaptersPDF%5C625.pdf [Accessed on 08/10/2021)*

[2] Ibid.

[3] David L. Threlkeld & Co. v. Metallgesellschaft Ltd, 923 F.2d 245, 248 (2d Cir. 1991) as quoted in 'Introduction to International Arbitration', op.cit. Page 1.

The basic legal framework for international commercial arbitration was established in the first decades of the twentieth century, with the 1923 Geneva Protocol and 1927 Geneva Convention, the enactment of national arbitration legislation that paralleled these instruments and the development of effective institutional arbitration rules.[4] Further, the current legal regime for international commercial arbitration was developed in significant part during the second half of the twentieth century, with countries from all parts of the globe entering into international arbitration conventions (particularly the New York Convention) and enacting national arbitration statutes designed specifically to facilitate the arbitral process; at the same time, national courts in most states gave robust effect to these legislative instruments, often extending or elaborating on their terms.[5]

It is in recognition of this fact that Kenya, being a key player in international trade and a preferred international investments destination has put in place a legal framework for the recognition and promotion of international commercial arbitration. Arbitration in Kenya is generally governed by the *Arbitration Act*[6] and the Arbitration Rules therein. However, it is worth mentioning that although the words international commercial arbitration are not expressly provided for under the domestic laws on arbitration in Kenya, its inclusion can be inferred from the Arbitration Act, 1995[7].

This is because section 3(1) of the Act defines "arbitration" to mean *any arbitration whether or not administered by a permanent arbitral institution.* Even more significant is section 2 of the Act which provides that *e*xcept as otherwise provided in a particular case the provisions of the Act shall apply to domestic arbitration and international arbitration (emphasis added). Section 3(3) defines an international arbitration as one where: the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; one of the following places is situated outside the state in which the

> *parties have their places of business – the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or any place where a substantial part of the obligations of the commercial relationship (emphasis added) is to be performed or the place with which the subject-matter of the dispute is most closely connected; or the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.*

The inclusion of the phrase commercial relationship in the definition of international arbitration can be construed to mean that the Kenyan *Arbitration Act* contemplates international commercial arbitration. In addition to enacting the *Arbitration Act*, 1995 for domestic and international arbitrations, in legislation that was promulgated in 1995,

[4] Ibid
[5] Ibid
[6] 1995, Act No. 4 of 1995(Amended in 2009) [Revised Edition 2019,] Government Printer, Nairobi
[7] Introduced by Arbitration Amendment Act No. 11 of 2009, s. 2.

Kenya has acceded to the 1958 *New York Convention on the Recognition and Enforcement of Arbitral Awards* (NYC)[8] and to *International Convention on the Settlement of Investment Disputes* (ICSID)[9] both of which deal with international commercial arbitration.

Section 36(2) of the Arbitration Act provides that an international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the *New York Convention*[10] or any other convention to which Kenya is signatory and relating to arbitral awards[11].

The Act provides an exhaustive list of the only grounds upon which the Kenyan courts may refuse recognition of an international arbitration award[12]. These grounds include where a party furnishes proof to the High Court that a party to the arbitration was under some incapacity, the arbitration agreement is not valid under the law to which the parties have subjected it, the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case, the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration and the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.[13] The High Court may also refuse recognition or enforcement of an

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[8] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation. The 1958 New York Convention is an important convention in the recognition and enforcement of foreign arbitral awards and this is an important factor in giving legitimacy to such arbitral awards regardless of state boundaries. This is usually achieved through providing common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.

[9] 575 UNTS 159 / [1991] ATS 23 / 4 ILM 532 (1965) / UKTS 25 (1967)

[10] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation. The Convention, in principle, applies to all arbitral awards (Article I, paragraphs (1) and (2)). However, Article I paragraph (3) allows states to make reservations: 'When ... acceding to this Convention ... any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration. The effect of the above are the two reservations commonly referred to as the reciprocity reservation and the commercial reservation.

[11] The importance of the arbitration clause in an agreement is that any court proceedings commenced are stayed pending the settlement of the dispute by arbitration. An arbitral award can be enforced by the leave of the High Court of Kenya in the same way any court order or decree is enforced.

[12] Arbitration Act, No.4 of 1995, Sec. 37; For a further discussion on the role of court, see Kariuki Muigua, Settling Disputes Through Arbitration in Kenya, 2012 chapter Ten (pp.166-195), Glenwood Publishers, 2012.

[13] Ibid

arbitral award where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya or the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.[14]

3. Extent of Court Intervention in arbitration

The Kenyan Arbitration Act has as far as possible attempted to reflect the international best practices in international commercial arbitration. For instance, Section 10 of the Act states that *except as provided in this Act, no court shall intervene in matters governed by this Act.* The concept of limitation of judicial intervention is generally accepted in arbitral practice across the world.[15] The English Arbitration Act provides that *'in matters governed by this Act the court should not intervene except as provided by this Act*[16]*.'* Further, the UNCITRAL Model Law on International Commercial Arbitration provides that *'in matters governed by this law, no courts shall intervene except where so provided in this law*[17]*.'*

Thus, it has rightly been observed that *the role of courts should therefore be merely facilitative otherwise excessive judicial interference with awards will not only be a paralyzing blow to the healthy functioning of arbitration but will also be a clear negation of the legislative intent of the Arbitration Act.*[18]

Courts in Kenya have pronounced themselves on the issue of judicial intervention in arbitration. The Supreme Court of Kenya in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*[19], stated as follows:

[52] We note in the above context that, the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the Court process. The Act was also formulated in line with internationally accepted principles and specifically the Model Law. With regard to the reason why some provisions of the Act speak to the finality of High Court decisions, the Hansard of the National Assembly during the debate on the Arbitration Act indicates that, "the time limits and the finality of the High Court decision on some procedural matters [was] to ensure that neither party frustrates the arbitration process [thus] giving arbitration advantage over the usual judicial process." It was also reiterated that the limitation of the extent of the Courts' interference was to ensure an, "expeditious and efficient way of handling commercial disputes."

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[14] Ibid

[15] Muigua.K., Arbitration Law and the Right of Appeal in Kenya, available at *http://kmco.co.ke/wp-content/uploads/2021/01/Arbitration-Law-and-the-Right-of-Appeal-in-Kenya-Kariuki-Muigua-9th-January-2021.pdf* (accessed on 09/10/2021)

[16] Arbitration Act, 1996 (Chapter 23), United Kingdom, S 1 (c)

[17] UNCITRAL Model Law on International Commercial Arbitration (United Nations Document A/40/17, annex 1) Section 5.

[18] Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers Limited (2015).

[19] Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), Petition No. 12 of 2016, (2019) eKLR

[53] Similarly, the Model Law also advocates for "limiting and clearly defining Court involvement" in arbitration. This reasoning is informed by the fact that "parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the "finality and expediency of the arbitral process." Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our Constitution in Article 159(2) (c) acknowledges the place of arbitration in dispute settlement and urges all Courts to promote it. However, the arbitration process is not absolutely immune from the Court process, hence the present conundrum.

Further, the Supreme Court of Kenya in *Geo Chem Middle East –vs- Kenya Bureau of Standards* [20]decided as follows:

41. Having so stated, we must reiterate that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of Courts has been greatly diminished notwithstanding the narrow window created by Sections 35 and 39 of the Act. To expect arbitration disputes to follow the usual appeal mechanism in the judicial system to the very end would sound a death knell to the expected expedition in such matters and our decisions in ***Nyutu*** *and* ***Synergy*** *should not be taken as stating anything to the contrary. In this regard, one issue we did not pronounce ourselves on in the* ***Nyutu*** *and* ***Synergy*** *decisions, is whether a further appeal lies to this Court from a determination by the Court of Appeal. For the avoidance of doubt, we now declare that in conformity with the principle of the need for expedition in arbitration matters, where the Court of Appeal assumes jurisdiction in conformity with the principle established in these two decisions, and delivers a consequential Judgment, no further appeal should ordinarily lie therefrom to this Court.*

A similar position was also held by the Supreme Court in *Cape Holdings Limited –vs- Synergy Industrial Credit Limited*[21] where the Supreme Court reiterated the decision in *Geo Chem Middle East –vs- Kenya Bureau of Standards* (supra) and refused to entertain an appeal emanating from the Court of Appeal , where the Court of Appeal had assumed jurisdiction and delivered a consequential judgment in conformity with the principles established in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* (Supra).

The precedent flowing from the above decisions highlights the extent of court intervention in arbitration in Kenya. The Arbitration Act envisages a narrow window of court intervention within the confines of sections 35 and 39. However, the Act also allows intervention by the High Court to determine issues where parties fail to agree or to assist the arbitral tribunal in some other way. Section 6 of the Act confers the High court powers to *stay legal proceedings and refer the matter to arbitration* where there is pre-existing agreement to refer the matter for arbitration.

[20] Geo Chem Middle East –vs- Kenya Bureau of Standards, Petition No. 47 of 2019 (2020) eKLR
[21] Cape Holdings Limited –vs- Synergy Industrial Credit Limited, Application No.5 of 2021

Section 11(1) of the Act confers the High court the power *to determine the number of arbitrators* if parties fail to agree on the same. Regarding the appointment of arbitrators, Section 12 of the Act confers the court the power *to appoint the arbitrator(s) where parties fail to agree on the procedure of appointing the arbitrator(s).* Section 7 of the Act confers the High Court the power to *grant interim measures of protection where a party so requests.* However, the section provides that where the arbitral tribunal has already ruled on such an application, then the High court will treat such a ruling as a conclusive outcome of that application. Section 14(1) of the Act grants the High Court the power to *decide on an application by a party in arbitration proceedings challenging an arbitrator.* Further, Section 15(2) grants the High Court powers to *decide on the termination of the mandate of an arbitrator who fails to act or whom it becomes impossible to act, where party are unable to do so.*

Section 17 thereof also gives the High court the powers to *make the final decision on the question of jurisdiction of the arbitral tribunal.* Section 28 provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court *assistance in taking evidence, and the High Court may execute the request within its competence and according to its rules on taking evidence.*

Section 35 confers the High court powers *to set aside an arbitral award under the circumstances provided under that provision*. Section 35(1) is to the effect that *recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).* This implication here is that the Court will not act in such matters unless a dissatisfied party invites it to do so. The grounds which the applicant must prove for the arbitral award to be set aside are: *incapacity of one of the parties; an invalid arbitration agreement; Lack of proper notice on the appointment of arbitrator, or of the arbitral proceedings or where the applicant was unable to present its case; where the award deals with a dispute not contemplated by or one outside the terms of reference to arbitration or matters beyond the scope of reference; where the composition of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties except where such agreement was in conflict with provisions of the Act and the parties cannot derogate from such; or where fraud, undue influence or corruption affected the making of the award.*

Apart from the above, the High Court may also set aside arbitral awards *where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with the public policy of Kenya*[22].

Kenya has enacted an Act of Parliament in an effort to nurture international commercial arbitration in the country[23]. The object of the *Nairobi Centre for International Arbitration Act is to* provide for the establishment of a regional centre for international commercial

[22] Arbitration Act, No.4 of 1995, S. 35(2) (b)
[23] Nairobi Centre for International Arbitration Act, No 26 of 2013, Government Printer, Nairobi

arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution among other purposes[24].. The Act establishes a centre known as the Nairobi Centre for International Arbitration[25]. The functions of the Centre include to *inter alia*: *promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act; administer domestic and international arbitrations as well as* alternative dispute *resolution techniques under its auspices; and ensure that arbitration is reserved as the dispute resolution process of choice*[26]. Also noteworthy is the fact that the Act establishes a Court to be known as the Arbitral Court[27]. The Court is to have exclusive original and appellate jurisdiction *to hear and determine all disputes referred to it in accordance with this Act or any other written law and its decisions are to be final*[28]. These provisions are useful in guaranteeing *confidentiality and non-interference ordinary national courts*. Also significant is the provision that subject to any other rules of procedure by the Court, *the Arbitration Rules of the United Nations Commission on International Trade Law, with necessary modifications*, shall apply to matters governed by the Act[29].

4. Challenges Facing the Practice of International Commercial Arbitration in Kenya

4.1 InadequateLegalandInstitutionalFrameworkoninternational commercial Arbitration

There have been inadequate legal regimes and infrastructures for the efficient and effective organization and conduct of international commercial arbitration in Kenya[30]. This has denied the local international arbitrators the fora to display their skills and expertise in international commercial arbitration. Progress has made towards addressing this challenge such as the enactment of the Nairobi Centre for International Arbitration Act and the subsequent establishment of the Nairobi Centre for International Arbitration under section 4 of the Act. However, there exists a challenge on the capacity of existing institutions to meet the demands for ADR mechanisms introduced by the constitution as well as handling the commercial arbitration matters[31]. Much needs to be done to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitation of ADR.

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[24] Ibid, Recital
[25] Ibid, Sec 4
[26] Ibid, Sec 5
[27] Ibid, Sec 21
[28] Ibid, Sec 22
[29] Ibid, Sec 23
[30] Muigua. K, 'Promoting International Commercial Arbitration in Africa', page 14, available at *http://www.kmco.co.ke/attachments/article/119/PROMOTING%20INTERNATIONAL%20COMMERCIAL%20A RBITRATION%20IN%20AFRICA.pdf [Accessed on 08/10/2021];*
[31] Muigua.K., Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya, available at *http://kmco.co.ke/wp-content/uploads/2018/08/Making-East-Africa-a-Hub-for-International-Commercial-Arbitration.pdf* (accessed on 08/10/2021)

4.2 Appointment of International Arbitrators by Parties

Despite there being individuals with the relevant knowledge, skill and experience on international dispute resolution and competent institutions, which specialize in, or are devoted to, facilitating alternative dispute resolution (ADR), there has been a general tendency by parties to a dispute doing business in Africa to go back to their home turfs to appoint arbitrators[32]. Most disputants prefer to appoint their non-nationals as arbitrators in international disputes, thus resulting in instances where even some Africans go for non-Africans to be arbitrators. Indeed, it has been observed that the near absence of African arbitrators in ICSID arbitration proceedings can in part be explained by the fact that African states predominantly appoint international lawyers to represent their interests[33]. This portrays Africa to the outside world as a place where there are no qualified arbitrators to be appointed as international commercial arbitrators.

4.3 Inadequate Marketing

Kenya and the African continent in general have been portrayed as less developed in terms of handling international commercial arbitration, and little has been done in marketing of Kenya as a centre for international commercial arbitration[34]. Many people outside Africa still carry with them the perception that Africa does not have adequate qualified international commercial arbitrators. They have therefore not sought to know whether this is the position as there has also not been much effort from Africans themselves to refute this assumption[35].

4.4 Uncertainty in Drafting Arbitration Clauses

There is the need to draft the arbitration clause in a clear manner to avoid misinterpretation. Uncertainty in drafting arbitration clauses has always drawn the attention of courts leading to unnecessary interference. This interference intimidates the foreigners thus making them shy away from African centres[36]. There is also need to ensure that the instances of court intervention are kept to the minimum so as to boost the confidence of commercial disputants in the willingness of courts to uphold the outcome of the international commercial arbitrations held in the country.

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[32] See generally, Amazu A. Asouzu, 'Some Fundamental Concerns and Issues about International Arbitration in Africa', African Development Bank, Law for Development Review. Available at *https://www.mcgill.ca/files/isid/LDR.2.pdf* [Accessed on 08/10/2021].

[33] Daele. K., & De Reya. M, 'Africa's track record in ICSID proceedings' Kluwer Arbitration Blog, 30 May2012, available at *http://kluwerarbitrationblog.com/blog/2012/05/30/africa%E2%80%99s-track-record-in-icsid- proceedings/* [Accessed on 08/10/2021].

[34] Muigua. K., Promoting International Commercial Arbitration in Africa', op. cit. page 15.

[35]Lovells.H, 'Arbitrating in Africa'. Available at*http://www.hoganlovellsafrica.com/_uploads/Publications/Arbitrating_in_Africa_-Hogan_Lovells_March_2013.pdf* [Accessed on 08/10/2021].

[36] Drafting of arbitration clause will depend on what law informs it. For instance, jurisdictions that have embraced UNCITRAL Model Law will adopt this law while those that are not signatories may have different laws informing the same. This may result in conflict in the understanding of such a clause.

4.5 Interference by National Courts

Section 10 of the Kenyan Arbitration Act provides that except as provided in the Act, no court shall intervene in matters governed by the Act[37]. This provision echoes Article 5 of the UNCITRAL Model Law on international commercial arbitration. In effect, the article limits the scope of the role of the court in arbitration only to situations that are contemplated under the Model Law.

However, it has been noted that even when an African state has become a party to the relevant treaties, there might still be the perception that its courts could not be relied on to apply the text correctly or in good faith, with a further argument that national legal frameworks are not conducive for the constitution of arbitral tribunals and to the conduct of arbitration, permitting the 'local court' to interfere unduly in arbitral proceedings[38]. Sometimes matters will be appealed all the way to the highest court on the law of the land in search of setting aside of awards. Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending[39]**.** This delays finalization of the matter as well as watering down the perceived advantages of arbitration and ADR in general.

This can only be corrected through setting up tribunals or courts with finality in their decisions and operating free of national courts interference. Court interference intimidates investors since they are never sure what reasoning the court might adopt should it be called upon to deliberate on such disputes.

4.6 Uncertainty of Costs

It has been observed that arbitration is now a service industry, and a very profitable one at that with the arbitral institution, the arbitrators, the lawyers, the expert witnesses and the providers of ancillary services all charging fees on a scale[40]. 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. This is because the issue is often left to the particular institutional guidelines. For instance, the Kenyan branch of Chartered Institute of Arbitrators has its own rules and guidelines on the remuneration of its

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[37] Arbitration Act, No.4 of 1995, S 10

[38] Muigua.K., Role Of The Court Under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration In Kenya, Kenya Law Review (2010), Available at *http://www.kenyalaw.org/klr/index.php?id=824* For instance, the Arbitration between Kanyotta Holdings Limited and Chevron Kenya Limited (CALTEX) made its way to the Kenya High Court and Court of Appeal after the award was challenged (2012 eKLR)

[39] Ibid

[40] Lord Mustill, Arbitration: History and Background (1989) 6:2 J. Int'l Arb. 43. Op. cit. Page 10. Available at *http://law.queensu.ca/international/globalLawProgramsAtTheBISC/courseInfo/courseOutlineMaterials2012/internationalCommercialArbitration/Mustill1989.pdf* [Accessed on 08/10/2021].

arbitrators. However, these are only applicable to those who practice arbitration under the Institute and thus have limited applicability[41].

4.7 Perception of Corruption

A bleak image is painted to the international community regarding the governance system in place in Kenya. This hinders the expansion of the scope of international commercial arbitration as the view is taken to imply that justice is impossible to achieve in Africa. Further, it has been argued that at times governments are also perceived to be interfering with private commercial arbitration matters[42]. For instance, the government may try to influence the outcome of the process especially where there are its interests at stake and put forward the argument of grounds of public policy.[43]

4.8 Bias against Africa

With racism still existing in society, Africa has borne the blunt of it with the bias rendering Africa's image as a corrupt and uncivilized continent. It has been observed that Parties to disputes rarely select African cities as venues for international arbitration, and this is so even for some international arbitral institutions or arbitrators, when asked to make the choice[44].

5. Way Forward

In the face of globalisation, it is important that international trade and investment take place with minimal interference by territorial barriers such as unnecessary domestic courts' intervention[45]. It has been asserted that the settlement of disputes between parties to an international transaction, arbitration has clear advantages over litigation in national courts. The foreign court can be an alien environment for a businessman because of his unfamiliarity with the procedure which may be followed, the laws to be applied, and even the mentality of the foreign judges[46]. In contrast with international commercial arbitration

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[41] See CIArb Kenya Website Available at www.ciarbkenya.org [Accessed on 08/10/2021].

[42] Muigua.K., Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya, available at http://kmco.co.ke/wp-content/uploads/2018/08/Making-East-Africa-a-Hub-for-International-Commercial-Arbitration.pdf (accessed on 08/10/2021)

[43] Ibid

[44] Amazu A. Asouzu, International Commercial Arbitration and African States: Practice, Participation and Institutional Development, University Press, Cambridge, 2001. PP. 5-6 Available at *http://catdir.loc.gov/catdir/samples/cam031/2001018482.pdf* [Accessed: 08/10/2021].

[45] See generally United Nations, Uniform Commercial Law in the Twenty-First Century: Proceedings of the Congress of the United Nations Commission on International Trade Law, New York, 18-22 May 1992. Available at *http://www.uncitral.org/pdf/english/texts/general/Uniform_Commercial_Law_Congress_199*2_e.pdf [Accessed on 08/10/2021].

[46] Albert Jan van den Berg, 'The New York Arbitration Convention of 1958', T.M.C. Asses Institute,The Hague, 1981, Kluwer Law and Taxation Publishers. Page 1.
Available at www.newyorkconvention.org/userfiles/.../312_nyac-i-in-one-document. [Accessed on 08/10/2021].

parties coming from different legal systems can provide for a procedure which is mutually acceptable. They can anticipate which law shall be applied: a particular law or even a *lex mercatoria*[47] of a trade. They can also appoint a person of their choice having expert knowledge in the field[48]. Thus, it is argued that these and other advantages are only potential until the necessary legal framework can be internationally secured, at least providing that the commitment to arbitrate is enforceable and that the arbitral decision can be executed in many countries, precluding the possibility that a national court review the merits of the decision[49].

There is a need to employ mechanisms that will help nurture and demonstrate Kenya to the outside world as a place with international commercial arbitrators with sufficient knowledge and expertise to be appointed to arbitrate international arbitrators. There is also the need to put

in place adequate legal regimes and infrastructure for the efficient and effective organization and conduct of international commercial arbitration in Africa. This ranges from legislating comprehensive law on international commercial arbitration as well as setting up world class arbitration centres in Kenya to complement the Nairobi Centre for International Arbitration (NCIA). There is also the Centre for Alternative Dispute Resolution (CADR) which is an initiative by the Chartered Institute of Arbitrators, Kenya and was incorporated in May, 2013. Its objective is to establish and maintain a regional Dispute Resolution Centre in the country. The CADR is a positive step towards nurturing international commercial arbitration in Kenya[50]. This will afford the local international commercial arbitrators the fora to showcase their skills and expertise in international commercial arbitration and will also attract international clients from outside Africa. It has been noted that there should be basic minimum standards for international commercial arbitration centres or institutions. These include: modern arbitration rules; modern and efficient administrative and technological facilities; Security and safety of

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[47] It has been rightly noted that though called the "lex mercatoria," the merchants' law was not statutory law in any country nor was it enforceable in any national Court. The "law merchant" was a more or less unwritten code representing the trade customs and trade practices habitually and uniformly observed by the merchants of every great trading city or country. As traders made their way laboriously from one country to another with their merchandise for sale or barter, with them they carried not merely their goods but also their own law. It, and not the national law of their own country or of the country in which they happened to be, applied as between them in regard to all commercial transactions. It was enforced by consular courts held in any country by itinerant consuls who accompanied groups of their own national merchants to the great fairs in that country. [See Lynden Macassey, International Commercial Arbitration,—Its Origin, Development And Importance,American Bar Association Journal, Vol. 24, No. 7 (July 1938), pp. 518-524, 581-582, page 519. Available at *http://www.jstor.org/stable/25713701* [Accessed: 09/10/2021].

[48] Ibid

[49] Ibid

[50]See CIArb Kenya Website, Op. Cit.

documents; Expertise within its staff; and some serious degree of permanence[51].

There is a need to set up more regional centres for training of international commercial arbitrators in Africa and Kenya. The Kenyan Chapter of Chartered Institute of Arbitrators trains arbitrators across Africa and has trained arbitrators in countries like Nigeria, Zambia, Uganda and even Malaw[52]i. Kenya can indeed play a pivotal role in nurturing international commercial arbitration, not only in Kenya but also across the African continent.

There is also need for the existing institutions to seek collaboration with more international commercial arbitration institutions since this will work as an effective marketing tool for the exiting institutions. For instance, the Kenyan Chartered Institute of Arbitrators Branch maintains a close relationship with the International Law Institute (ILI) Kampala and the Centre for Africa Peace and Conflict Resolution (CAPCR) of California State University to conduct Courses in Mediation and other forms of ADR both locally and internationally. There is need for all African centres and institutions to do the same to promote international commercial arbitration in Africa.

The Kenyan law on arbitration appreciates the need to limit court intervention in arbitration to a basic minimum[53]. It has been argued that the relationship between the courts and the arbitral process can be made much closer, both practically and psychologically[54]. The psychological link can be strengthened by encouraging all or at least a good number of the commercial judges and advocates to take up training in arbitration and consequently ensuring that they benefit from having prior experience of arbitration either as representative advocates or actual arbitrators[55]. This will subsequently boost the confidence of foreigners in the African Arbitration institutions as well as the role of courts. Effective and reliable application of international commercial arbitration in Kenya has the capacity to encourage investors to carry on business with confidence knowing their disputes will be settled expeditiously.

6. Conclusion

There is need to develop a clear framework in Kenya within which international

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[51] See Muigua.K, 'Promoting International Commercial Arbitration in Africa', op.cit. page 14; See also Emilia Onyema, Effective Utililization of Arbitrators and Arbitration, Institutions in Africa by Appointors, 4th Arbitration and ADR in Africa Workshop, Empowering Africa in the 21st Century through Arbitration & ADR Conrad Hilton Hotel, Cairo Egypt 29-31 July 2008, Available at < *http://eprints.soas.ac.uk/5300/1/Arbitrators_and_Institutions_in_Africa.pdf*> *1. [Accessed on 08/10/2021].*

[52] See CIArb Kenya Website, Op. Cit.

[53] Arbitration Act, No.4 of 1995, S 10

[54] Muigua. K., Settling Disputes Through Arbitration in Kenya, Glenwood Publishers Limited, 3rd Edition, 2017

[55] Lord Mustill, Arbitration: History and Background (1989) 6:2 J. Int'l Arb. 43. Op. cit. Page 4.

commercial arbitration can be further nurtured. There are arbitral institutions already in place in Kenya as highlighted in this paper. The presence of such institutions in the country points to an acceptance of alternative dispute resolution modes as well as the need to nurture the practice of international commercial arbitration other than exporting commercial disputes to foreign countries for settlement[56]. With the right frameworks in place, Kenya indeed has the capacity to conduct successful international commercial arbitration. Nurturing international commercial arbitration in Kenya is a necessity whose time has come.

[56] Muigua.K, 'Promoting International Commercial Arbitration in Africa', op. cit. page 15.

Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges

Abstract

The paper critically discusses the fusion of Alternative Dispute Resolution (ADR) mechanisms with modern dispute resolution in Kenya. It considers the concept of conflict management in Africa and the salient features of this process. The paper further highlights attempts towards fusing ADR mechanisms with modern dispute resolution in Kenya and canvasses some of the concerns emanating from this endeavor. The paper also proposes recommendations towards promoting ADR mechanisms in modern dispute resolution in a manner that preserves the key attributes of these mechanisms.

1. Introduction

Mediation is a form of Alternative Dispute Resolution (ADR). ADR refers to a set of mechanisms that are used to manage conflicts without resort to courts[1]. These mechanisms include arbitration, mediation, negotiation, conciliation and Traditional Dispute Resolution Mechanisms (TDRMs). In Kenya, ADR mechanisms have been recognized under the Constitution which mandates courts and tribunals to promote alternative forms of dispute resolution[2]. ADR mechanisms have been hailed for their attributes which include informality, privacy, confidentiality, flexibility and the ability to promote expeditious and cost-effective management of disputes. They are thus seen as a viable tool of enhancing access to justice as envisioned under the Constitution[3].

Mediation has been defined as a method of conflict management where parties to a conflict seek a solution with the assistance of a third party who facilitates discussion and flow of information and thus aiding in the process of reaching an agreement[4]. Mediation is a continuation of the negotiation process and arises where parties to a conflict have attempted negotiations, but have reached a deadlock[5]. Parties thus involve a third party known as a mediator to assist them continue with the negotiations and ultimately break the deadlock[6]. Mediation and other ADR mechanisms have been practiced in Africa for many centuries[7].

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[1] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Glenwood Publishers Limited, 2015;There is a debate on whether ADR is really 'alternative':See Muigua K.'Effective Justice for Kenyans:Is ADR really alternative? Law Society of Kenya Journal Vol 11(1)2015. Should it be referd to as Appropriate Dispute resolution?

[2] Constitution of Kenya, 2010, article 159 (2) (c), Government Printer, Nairobi

[3] Constitution of Kenya, 2010, article 48

[4] Bercovitch. J., 'Mediation Success or Failure: A Search for the Elusive Criteria.' Cardozo Journal of Conflict Resolution, Vol. 7, p 289

[5] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

[6] Ibid

[7] Ibid

The paper discusses mediation as a conflict management mechanism in the African context. It highlights the salient features of conflict management in Africa. The paper further looks at the fusion of mediation and other ADR mechanisms with modern legal practice. It analyses the concerns arising from the current practice of ADR in Kenya and proposes solutions towards promoting ADR while preserving its salient features.

2. Conflict Management in Africa

Conflicts are a common occurrence in human interactions. Conflicts can be seen as the incompatibility of interests between two or more individuals[8]. They are often caused by a misalignment of goals, actions or motivations which can be real or only perceived to exist[9]. Conflict management refers to the various mechanisms undertaken towards stopping or preventing overt conflicts and aiding the parties involved to reach a durable and peaceful solution to their differences[10].

Conflict management can result in either settlement or resolution of the underlying dispute[11]. Settlement mechanisms are highly coercive, power based and involve a lot of compromise in addressing the conflict[12]. These mechanisms include litigation and arbitration. They may be effective in providing an immediate solution to a dispute but fail to address underlying issues in a dispute leaving the likelihood of disputes remerging in future[13]. Resolution on the other hand entails mutual problem sharing with the conflicting parties cooperating towards managing the conflict[14]. Resolution mechanisms include mediation, negotiation and facilitation. These mechanisms are non-coercive, non-power based and focus on the needs and interest of parties[15]. They result in mutually satisfying outcomes that address the root causes of conflicts thus creating long lasting outcomes[16].
The Conflict process is greatly influenced by culture[17]. Differences in attitudes, belief systems, religious practices, language, social set ups and economic practices among different cultures means that conflicts may take different forms in each culture[18]. Culture

[8] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' International Journal of Intercultural Relations 30 (2006) 579–603
[9] Ibid
[10] Leeds. C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners.' International Journal of Peace Studies, Volume 2, No. 2, 1997
[11] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Op Cit
[12] Ibid
[13] Ibid;see also,Makumi Mwagiru,'Conflict in Africa:Theory,Processes and Institutions of Management, Centre for Conflict Research,Nairobi 2006;Makumi Mwagiru,'The Water's Edge:Mediation of Violent Electoral Conflict in Kenya(Institute of Diplomatic Studies),July 2008
[14] Bloomfield. D., 'Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland.' Journal of Peace Research, Volume 32, No. 2, 1995
[15] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Op Cit
[16] Ibid
[17] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' Op Cit
[18] Ibid

thus plays an important role in conflict management. The African culture upholds norms and values aimed towards promoting social cohesion and smooth running of the community[19]. These values include respect and honor for elders, unity, cooperation, forgiveness, harmony, truth, honesty and peaceful co-existence[20]. Conflicts are therefore seen as a threat to the social fabric that holds the community together[21]. African communities have thus developed conflict management strategies that are aimed towards effectively dealing with conflicts in order to ensure peaceful co-existence within the community[22]. These mechanisms gave prominence to communal needs over individual needs[23].

The main objective of conflict management in Africa is to create consensus, facilitate reconciliation and maintain social cohesion within the community[24]. African communities have thus developed conflict management strategies that revolve around the communities' social and cultural values, beliefs, norms and practices[25]. Conflict management is administered by institutions such as the council of elders which ensures compliance with the final outcome due to the importance bestowed upon such institutions[26]. Conflict resolution amongst African communities has since time immemorial taken the form of informal negotiation, mediation, reconciliation and arbitration by elders[27].

ADR mechanisms such as mediation have thus been part and parcel of the African culture. Colonization however resulted in subjugation of African cultural values that include conflict management practices[28]. The introduction of Western Justice Systems resulted in disregard for traditional dispute resolution mechanisms as evidenced by the repugnancy clause[29]. Traditional justice systems could only be applied in Kenya to the extent that they

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[19] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' Journal of Sustainable Development in Africa , Volume 17, No.1, 2015

[20] Ibid

[21] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' An International Multidisciplinary Journal, Ethiopia Vol. 8 (2).

[22] Ibid

[23] Ibid

[24] Oladeji. T., & Bamidele. O., 'Africa: Understanding and Managing Violent Conflicts' Conflict Studies Quarterly, Issue 22, January 2018

[25] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' available at *http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf* (accessed on 04/11/2022)

[26] Ibid

[27] Ibid

[28] Ghebretekle. T., & Rammala. M., 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' available at *https://www.ajol.info/index.php/mlr/article/view/186176* (accessed on 04/11/2022)

[29] Judicature Act, Cap. 8, Laws of Kenya, S 3 (2)

were not repugnant to the Western conception of 'justice and morality[30].' However, the importance of ADR mechanisms continues to be recognized as evidenced by the Constitution of Kenya, 2010 which advocates for their promotion[31]. This has resulted in fusion of ADR mechanisms such as mediation with modern legal practice in Kenya.

3. Fusion of Mediation and other ADR Mechanisms with Modern Legal Practice in Kenya

The Constitution of Kenya envisages the use of mediation and other ADR mechanisms in promoting access to justice[32]. The Constitution further recognizes the role of culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation[33]. Mediation and other ADR mechanisms including Traditional Dispute Resolution Mechanisms (TDRMs) are an expression of the cultural heritage of the people of Kenya.* Promoting ADR mechanisms is thus in line with recognition of the fundamental role of culture as the foundation of the nation.

There have been various attempts to fuse mediation and other ADR mechanisms with modern legal practice in Kenya. A good example is the Court Annexed Mediation (CAM) project that was introduced in 2016 in the Commercial and Family Division of the High Court in Nairobi[34]. The programme has been hailed for its ability to promote expeditious and efficient management of disputes[35]. It further incorporates other attributes of mediation since parties are not forced to reach a settlement[36]. CAM in the Family Division of the High Court has been hailed for promoting management of disputes in a reconciliatory and cost-effective manner and helping to restore broken relationships[37].

Another milestone towards fusion of ADR mechanisms with modern legal practice in Kenya is the use of Court-Annexed Alternative Justice Systems. This has been adopted in specific court stations such as Isiolo whereby council of elders are involved in management of disputes[38]. Under this system, court may refer disputes to the elders

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[30] Ibid
[31] Constitution of Kenya, 2010, article 159 (2) (c),
[32] Constitution of Kenya, 2010, Article 159 (2) (c)
[33] Ibid
[34] World Bank., 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans' available at *https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans* (accessed on 04/11/2022)
[35] Ibid
[36] Ibid
[37] Business Daily., 'Judiciary Counts gains of Court Annexed Mediation' available at *https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/judiciary-counts-gains-of-court-annexed-mediation-3420850* (accessed on 04/11/2022)
[38] Judiciary., 'Alternative Justice Systems Baseline Policy' available at *https://www.unodc.org/documents/easternafrica//Criminal%20Justice/AJS_Baseline_Policy_2020_Kenya.pdf* (accessed on 04/11/2022)

where parties have agreed to the process or where it is determined that the elders are best placed to resolve the dispute[39]. This process recognizes the importance of Traditional Justice Systems especially among indigenous communities in Kenya and seeks to adopt it within modern legal practice in Kenya.

There has also been the growth of institutions offering ADR services especially arbitration and mediation in Kenya. These institutions include the Chartered Institute of Arbitrators, Kenya, the Nairobi Centre for International Arbitration and the Mediation Training Institute among others. These institutions have promoted the fusion of ADR mechanisms within modern legal practice by formulating rules and guidelines to govern the ADR processes conducted by them[40].

In the commercial justice sector in Kenya, ADR mechanisms especially mediation and arbitration have been successfully adopted[41]. Most commercial contracts contain dispute resolution clauses which envisage the use of ADR mechanisms such as negotiation, mediation and arbitration in management of disputes between the parties. In commercial disputes, there is need to manage such disputes efficiently and expeditiously in order to preserve the commercial interests of parties[42]. Parties can thus benefit from the attributes of ADR mechanisms including privacy, confidentiality and the ability to promote expeditious and cost effective management of disputes towards managing commercial disputes in Kenya.

4. Key Concerns

The fusion of mediation and other ADR mechanisms with modern legal practice in Kenya raises several concerns. This could result in the loss of some of the attributes of ADR mechanisms such as informality[43]. Fusion of mediation and other ADR mechanisms with modern legal practice could result in regulation of these mechanisms which may defeat some of their attributes that are critical for their success[44]. There is need to safeguard key

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[39] Ibid

[40] See for example the Nairobi Centre for International Arbitration, Arbitration and Mediation Rules, available at https://ncia.or.ke/wp-content/uploads/2021/02/Final-NCIA-Revised-Rules-2019.pdf (accessed on 04/11/2022); See also the Chartered Institute of Arbitrators, Kenya Branch, Arbitration rules, available at https://ciarbkenya.org/wp-content/uploads/2021/03/chartered-institute-of-arbitrators-kenya-branch-arbitration-rules-2020.pdf (accessed on 04/11/2022)

[41] Muigua. K., 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' available at *http://kmco.co.ke/wp-content/uploads/2018/09/*access-to-justice-and-alternative-dispute-resolution-mechanisms-in-kenya-23rd-september-2018.pdf (accessed on 04/11/2022)

[42] Moses. L.M, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

[43] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' available at http://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISING-alternative-dispute-resolution-mechanisms-in-kenya.pdf (accessed on 05/11/2022)

[44] Ibid

features of ADR mechanisms even as they are adopted in modern legal practice. Further, globalization has had significant impacts on the African culture affecting the traditional notion of conflict management[45]. Disputes among people from different cultures or communities are now common. In such disputes, one party may not be willing to submit himself/herself to the conflict management process of another culture or community[46]. The efficaciousness of the traditional concept of mediation and other ADR mechanisms is thus limited to disputes involving people from the same community[47].

Further, cross border legal practice has resulted in emergence of new areas of practice such as International Commercial Mediation that go beyond the traditional understanding of mediation[48]. International Commercial Mediation is highly regulated through procedural laws and a legal framework governing the enforcement of international commercial mediation agreements[49]. This may defeat some of the attributes of mediation in the African context such as informality and confidentiality[50]. The scope of ADR mechanisms such as arbitration and mediation has also expanded and they are now being used to manage disputes in emerging areas such as Environmental, Social and Governance (ESG) disputes[51]. These include climate change disputes[52]. Fusion of ADR mechanisms with modern legal practice should take into account emerging frontiers of legal practice.

5. Way Forward

ADR mechanisms such as mediation play a vital role in enhancing access to justice in Kenya. Fusion of mediation and other ADR mechanisms with modern legal practice is important towards increasing the uptake of these mechanisms. However, certain

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[45] Madu, C. J. (2019). 'Globalization and African development: an overview' African Journal of Social Issues (AJOSI), 2(1), 96-105.

[46] Ibid

[47] Ibid

[48] Erie. M., 'The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution' available at *https://ora.ox.ac.uk/objects/uuid:85a05c4c-8aab-45e2-bc8e-f699e93c8f7c/download_file?file_format=pdf&safe_filename=The%2520New%2520Legal%2520Hubs_SSRN.pdf&type_of_work=Journal+article* (accessed on 05/11/2022)

[49] Muigua. K., 'The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States.' available at *http://kmco.co.ke/wp-content/uploads/2019/12/The-Singapore-Convention-on-International-Settlement-Agreements-Resulting-from-Mediation-Kariuki-Muigua-December-2019.pdf* (accessed on 05/11/2022)

[50] Ibid

[51] Muigua. K., 'The Place of Environmental, Social and Governance (ESG) in Arbitration' available at *http://kmco.co.ke/wp-content/uploads/2022/09/The-Place-of-Environmental-Social-and-Governance-ESG-in-Arbitration-2.pdf* (accessed on 05/11/2022)

[52] Doyle, J. 'Mediating climate change.' available at *https://scholar.google.com/scholar?cluster=17010099440521737254&hl=en&as_sdt=0,5#d=gs_cit&t=1667633789581&u=%2Fscholar%3Fq%3Dinfo%3AlZv1Gb-ncRcJ%3Ascholar.google.com%2F%26output%3Dcite%26scirp%3D1%26scfhb%3D1%26hl%3Den* (accessed on 05/11/2022)

measures can be undertaken to streamline this process. There is need for a clear legal and policy framework governing ADR mechanisms in order to recognize and affirm the importance of these mechanisms in the administration of justice and establish a clear interface between ADR mechanisms and the formal processes[53]. Such framework should be designed in a way that harmonizes ADR mechanisms with modern legal practice by delimiting the nature of disputes that can be managed ADR mechanisms, the institutions responsible for administering ADR mechanisms and enforcement of decisions resulting from these processes[54]. There have been attempts towards achieving this such as the introduction of the Alternative Dispute Resolution Bill in Parliament and the formulation of the ADR policy[55]. There is need to fast-track this process in order to promote ADR mechanisms in Kenya. Further, the ADR framework in Kenya should Re-Africanize conflict management by preserving the African values of justice which are based on reconciliation and restorative justice[56].

Further, fusion of mediation and other ADR mechanisms with modern legal practice should ensure that key attributes such as informality and confidentiality are maintained. It has been asserted that this process such as the Court-Annexed Mediation Programme could result in the loss of some of the attributes of ADR mechanisms such as voluntariness, confidentiality and party autonomy[57]. There is need to preserve the key features of ADR mechanisms in modern legal practice in order to ensure their viability in promoting access to justice[58].

ADR mechanisms such as mediation and arbitration should also be promoted in emerging areas such as Environmental, Social and Governance (ESG) disputes. These mechanisms are viable in managing ESG disputes[59]. Through this, the landscape of ADR will be expanded towards fostering '*Appropriate Dispute Resolution*[60].'

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[53] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' available at *http://kmco.co.ke/wp-content/uploads/2018/08/legitimising-alternative-dispute-resolution-mechanisms-in-kenya.pdf* (accessed on 05/11/2022)

[54] Ibid

[55] The Alternative Dispute Resolution Bill, 2021, available at *http://www.parliament.go.ke/sites/default/files/2021-06/34-The%20Alternative%20Dispute%20Resolution%20Bill%2C%202021%20%281%29.pdf* (accessed on 05/11/2022); See also

[56] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' Op Cit

[57] Shako. F., 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' Alternative Dispute Resolution (2017): 130

[58] Ibid

[59] Muigua. K., 'The Place of Environmental, Social and Governance (ESG) in Arbitration' Op Cit

[60] Menkel-Meadow, C. 'Alternative and Appropriate Dispute Resolution in Context Formal, Informal, and Semiformal Legal Processes.' Chapter, 50, 1-28.

6. Conclusion

ADR mechanisms such as mediation have been practiced in Africa for many centuries[61]. These mechanisms are an expression of the cultural heritage of the African people[62]. The importance of ADR mechanisms in Kenya has resulted in their recognition under the Constitution[63]. Consequently, there have been attempts towards fusion of ADR mechanisms with modern legal practice in Kenya such as the Court-Annexed Mediation Programme[64]. However, fusion of ADR mechanisms with modern legal practice raises certain concerns such as the loss of key features including informality, privacy and confidentiality[65]. There is need to promote ADR mechanisms by fusing them with modern legal practice. However, this should be done in a way that ensures key attributes of ADR mechanisms are preserved in order to ensure their viability in promoting access to justice[66]. Further, there is also need to Re-Africanize conflict management by preserving the African values of justice which are based on reconciliation and restorative justice[67]. Through this, the fusion of ADR mechanisms such as mediation with modern legal practice will enhance access to justice while promoting the key goals of conflict management in Africa.

[61] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' Op Cit

[62] Ibid

[63] Constitution of Kenya, 2010, Article 159 (2) (c)

[64] World Bank., 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans' Op Cit

[65] Shako. F., 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' Op Cit

[66] Ibid

[67] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' Op Cit

Role of ADR in Management of Disputes in the Financial Industry in Kenya

Abstract

The paper seeks to critically discuss the role of Alternative Dispute Resolution (ADR) mechanisms in management of disputes in the financial industry. The paper argues that the financial industry has been slow in embracing ADR with litigation being the preferred mechanism of managing disputes in this sector. It analyses some of the reasons informing the reluctance to embrace ADR in the financial industry. The paper then discusses the progress towards adoption of ADR mechanisms in the financial industry. It further analyses both the advantages and concerns related to the use of ADR in the financial industry and proposes reforms towards enhanced uptake of ADR mechanisms in management of disputes in the financial industry.

1. Introduction

Alternative Dispute Resolution (ADR) mechanisms have continued to be embraced in management of disputes in many sectors owing to their inherent advantages. These mechanisms which include arbitration, mediation, negotiation and traditional justice systems have been hailed for being efficient, flexible, confidential, promoting party autonomy and cost effective management of disputes[1]. Further, ADR mechanisms can be less adversarial in nature and thus have the ability to reconcile parties and preserve relationships beyond the dispute management process[2]. Due to these features, ADR mechanisms can effectively be applied in management of a wide range of disputes including family disputes, commercial disputes, natural resource based disputes among others[3].

The importance of ADR mechanisms in Kenya has resulted in their recognition under the Constitution. The Constitution calls for promotion of ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms[4]. ADR mechanisms are thus critical in achieving access to justice as envisioned under the Constitution[5]. With many sectors embracing ADR mechanisms, the paper seeks to critically examine the extent to which this has been achieved in the financial industry. The paper will analyse the nature of disputes in the financial industry and the general reluctance in embracing ADR in management of these disputes in the recent past. Further, the paper will discuss the recent uptake of ADR in the financial industry and factors that have necessitated this change. The paper will also analyse some of the concerns with the

[1] Muigua.K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Glenwood Publishers Limited, 2015

[2] Wambua. M., 'The Challenges of Implementing ADR as an Alternative Mode of Access to Justice in Kenya' (2013) 1 Alternative Dispute Resolution

[3] Muigua. K., 'Heralding a New Dawn: Achieving Justice through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya.' (2013) 1 Alternative Dispute Resolution

[4] Constitution of Kenya, 2010, Article 159 (2) (c)

[5] Ibid, Article 48

use of ADR in the financial sector and propose recommendations towards addressing these concerns and enhancing the role of ADR in management of financial disputes.

2. Nature of Disputes in the Financial Sector

The financial industry in Kenya comprises different players including the banking sector, the capital markets, the insurance sector, Savings and Credit Cooperatives (Saccos) and the pension sector. It has been asserted that financial disputes are not entirely different from other disputes in the commercial sphere since financial contracts are similar to other commercial contracts[6]. Thus, interpreting financial contracts requires no special expertise beyond that required for other commercial contracts[7].

However, the operation of particular financial markets such as capital markets, banking and the insurance sector can be very technical and thus management of disputes in these sectors will require a certain level of understanding of their operation and the applicable legal rules[8]. Managing of disputes in the financial sector in Kenya thus necessitates an understanding of financial markets and products and investments in the markets such as shares, derivatives, bonds, treasury bills and mutual funds[9]. In most instances, expert evidence may be required to assist decision makers in management of disputes in the financial industry.

The financial industry in Kenya and across the globe is also highly regulated and this has an impact on management of disputes in this sector. Financial regulation entails the control of certain financial affairs of players in the financial industry including banks, capital markets, insurance companies, savings and credit cooperative societies and pension schemes in order to protect consumers and achieve soundness, transparency and accountability in the financial industry[10]. Financial regulation is aimed at enhancing the functioning of the financial system.[11] The financial industry is volatile in nature and without effective regulation, financial systems can become unstable, triggering crises that can devastate economies in their respective countries or even at the global stage as evidenced by the great depression and the global financial crisis of 2008[12].

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[6] Blair.W., 'Arbitrating Financial Disputes- Are they Different and What Lies Ahead?' available at *https://static1.squarespace.com/static/5fc4c63ed27ff856c265d945/t/61b72f776ae5c41e61c4bfe4/1639395191861/15th+Kaplan+lecture+2021+Sir+William+Blair+Arbitrating+financial+disputes.pdf (*accessed on 7th September 2022)

[7] Ibid

[8] Ibid

[9] Central Bank of Kenya., 'Financial Markets' available at https://www.centralbank.go.ke/financial-markets/ (accessed on 7th September 2022)

[10] Armour.J. et al 'Principles of Financial Regulation' Oxford University Press, 2016

[11] Ibid

[12] Mwega. F., 'Financial regulation in Kenya: Balancing inclusive growth with financial stability' available at *https://assets.publishing.service.gov.uk/media/57a09dd4ed915d622c001be5/9279.pdf (accessed* on 23/03/2022

Such crises have precipitated the need for sound financial regulation. Indeed, the World Bank and the International Monetary Fund among other international financial institutions have attempted to promote financial stability and economic development by urging countries to adopt and implement appropriate regulations and supervisory measures in the financial sector[13]. This is reflected in Kenya with the enactment of laws and institutions for the regulation of all the players in the financial industry. The banking industry is regulated by the Central Bank of Kenya established under the Central Bank of Kenya Act[14]. The capital markets sector is regulated by the Capital Markets Authority established under the Capital Markets Act[15]. Similarly, the insurance sector is regulated by the Insurance Regulatory Authority established under the Insurance Act[16]. It is thus asserted that unlike ordinary commercial disputes where the only consideration may be whether there was breach of contract, in managing financial disputes there is need to ascertain regulatory compliance as set out in the various laws and rules formulated by the regulatory entities[17].

It can thus be argued that financial disputes are of a unique nature when compared to ordinary commercial disputes. Consequently, the financial industry has generally been reluctant to embrace ADR mechanisms in management of disputes[18]. This reluctance has been attributed to a number of factors including a general respect for customs and certainty in the financial sector[19]. Players in the financial industry will thus be more willing to resort to dispute management mechanisms that result in consistency and predictability in decision making in order to ensure the stability of financial institutions[20]. Further, due to the unequal bargaining power between the parties such as a bank and a borrower, the party with the strong bargaining power especially banks usually impose their preferable dispute management mechanism in the contract[21]. In most instances, financial institutions prefer giving jurisdiction to the lender's national courts to manage disputes arising out of financial transactions[22]. Courts in major financial centres are seen

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[13] Barth. J et al., 'Financial Regulation and Performance : Cross-Country Evidence'
[14] Central Bank of Kenya Act, Cap 491, S 3
[15] Capital Markets Act, No.17 of 1989, S 5
[16] Insurance Act, Cap 487, S 3
[17] Blair.W., 'Arbitrating Financial Disputes- Are they Different and What Lies Ahead?' Op Cit
[18] Henriques. D., 'Arbitrating Disputes in Third Party Funding: A Parallel with Arbitration in the Financing Sector' available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3285723* (accessed on 07/09/2022)
[19] Park. W, 'Arbitration in Banking and Finance' (1998) 17 Annual Review of Banking Law, 216, *http://heinonline.org/HOL/Page?handle=hein.journals/annrbfl17&div=6&g_sent=1&collection=journals#219* (accessed on 07/09/2022)
[20] Ibid
[21] Alamdari,B.H ., 'The Emerging Popularity of International Arbitration in the Banking and Financial Sector- Is this a Fashionable Trend or a Viable Replacement' available at *https://sas-space.sas.ac.uk/6401/1/Hatami%20Alamdari,%20Bahar.pdf* (accessed on 07/09/2022)
[22] Ibid

by the financial industry as reliable and predictable[23]. Parties are thus more comfortable in resorting to courts in major financial centres such as London and New York.

On this basis, it is argued that the future of ADR mechanisms such as arbitration in the financial sector depends on the expertise and commitment of arbitrator and the competence of state courts[24]. Thus as long as national courts are more responsive to the needs of players in the financial industry, the financial industry will remain reluctant to embrace ADR[25]. However, ADR mechanisms especially arbitration still remains a viable option for management of disputes in the financial sector. Indeed, there has been progress towards embracing ADR mechanisms such as arbitration in management of disputes in the financial sector.

3. Progress towards Embracing ADR in Management of Disputes in the Financial Sector

It is argued that there has been a rise in the uptake of ADR mechanisms in management of disputes in the financial sector since the 2008 financial crisis[26]. This has been attributed to globalisation and the need for non-national forums to manage disputes[27]. The rise of international finance which involves parties from different jurisdictions makes arbitration a preferred mode of dispute settlement due to the ease of enforcement of international arbitration awards. The *New York Convention*[28] ensures ease and certainty in enforcement of foreign arbitral awards across all jurisdictions. The New York Convention provides the legal framework for the recognition and enforcement of foreign arbitral awards which is essential in providing legitimacy to such awards despite jurisdictional differences between states.[29] Further, courts may lack neutrality when it comes to parties or assets within their jurisdiction at the expense of those from other jurisdiction. Arbitration thus allows parties to appoint neutral decision makers to manage their disputes[30]. Further, due to the complexity of financial disputes, court may not effectively manage such disputes especially where judges lack expertise in financial matters[31]. Arbitration allows parties to

[23] Hanefeld. I., ''Arbitration in Banking and Finance' (2013) 9(3) New York University Journal of Law and Business 917 at 939

[24] Ibid

[25] Ibid

[26] Alamdari,B.H ., 'The Emerging Popularity of International Arbitration in the Banking and Financial Sector- Is this a Fashionable Trend or a Viable Replacement' Supra note 21

[27] Dalhuisen. J.H, 'Arbitration in International Finance, The Emergence of P.R.I.M.E' (SSRN, 8 October 2012) , available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2158764* (accessed on 07/09/2022)

[28] United Nations Conference on International Commercial Arbitration, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' United Nations, 1958

[29] Muigua. K., 'Promoting International Commercial Arbitration in Africa' available at *http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA.pdf* (accessed on 07/09/2022)

[30] Ibid

[31] Petrovna et al., 'New trends in Developing Alternative Ways to Resolve Financial Disputes.' J. Pol. & L., 13, 280, 2020.

appoint arbitrators with the requisite capacity in financial matters to manage their disputes.

Due to the increasing recognition of the importance role of ADR mechanisms especially arbitration in management of financial disputes, there has been growth of arbitral institutions offering specialised services towards management of financial disputes. The *Panel of Recognised International Market Experts in Finance (P.R.I.M.E) Finance* is a financial disputes centre based in the Hague, Netherlands which offers dispute resolution services in the financial sector including arbitration and mediation[32]. It is comprised of a panel of over 200 experts in legal and financial matters including sitting and retire judges, regulators, central bankers, academics and representatives from private practice[33]. It conducts its arbitrations under the P.R.I.M.E Finance Arbitration Rules administered by the Permanent Court of Arbitration (PCA)[34]. The Arbitration Rules provide for both procedural and substantial issues concerning the conduct of arbitrations by P.R.I.M.E Finance[35]. On the issue of nominating and appointing arbitrators, the rules parties to consider appointing qualified, independent and impartial arbitrators and recommend parties to appoint arbitrators from the P.R.I.M.E Finance Panel of Experts[36]. The rules also provide for expedited proceedings in financial disputes to be conducted within one hundred and eight (180) days within which an arbitral tribunal must render its final award[37]. It can be argued that this provision is aimed at facilitating expeditious management of financial disputes in order to preserve the commercial interests of parties. The rules further grant an arbitral tribunal powers to issue interim reliefs such as security for costs[38]. Another salient provision of the rules is that of emergency arbitration in cases where parties need urgent interim measures that cannot wait the constitution of the arbitral tribunal[39].

Further, The *International Swaps and Derivative Association (ISDA)* has issued an arbitration guide which provides for arbitration for parties to derivatives transactions[40]. The guide

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[32] Panel of Recognised International Market Experts in Finance (P.R.I.M.E Finance), available at https://primefinancedisputes.org/page/mission (accessed on 07/09/2022)
[33] Ibid
[34] Ibid
[35] P.R.I.M.E Finance Arbitration Rules, 2022., available at *https://primefinancedisputes.org/files/2021-11/211111-Prime-booklet-for-web.pdf* (accessed on 07/09/2022)
[36] Ibid, Article 8
[37] Ibid, Article 17
[38] Ibid, Article 24
[39] Ibid, Article 25
[40] International Swaps and Derivative Association (ISDA), 2018 ISDA Arbitration Guide, available at *https://www.isda.org/bookstore-license/?redirect_to=https%3A%2F%2Fwww.isda.org%2Fa%2FfVWgE%2FISDA-2018-Arbitration-Guide-%E2%80%93-Version-2.1-May-31-2022.pdf* (accessed on 07/09/2022)

includes a range of model clauses which can be used with the ISDA Master Agreement[41]. The model clauses provide for seats in a number of major financial centres including New York, London, Singapore, Paris, Hong Kong and Zurich[42]. The guide sets out one of the major advantages of arbitration in financial disputes to be the avoidance of litigation in a jurisdiction whose courts a party does not have confidence while producing an award that has an advantage over a foreign judgment at the enforcement stage in many jurisdictions[43].

In addition, the *Financial Dispute Resolution Centre* (FDRC) of Hong Kong provides for the management of financial disputes through mediation and arbitration[44]. It facilitates management of financial disputes by way of 'mediation first' and 'arbitration next[45].' Under this framework, where mediation does not yield in the management of the dispute, parties may decide to resort to arbitration[46]. However, the scope of dispute management under FDRC is limited to disputes between an eligible claimant and a financial institution that was entered into or arose in Hong Kong[47].

Another body that offers management of financial disputes through ADR is the *Financial Industry Regulatory Authority (FINRA)* in the United States of America. FINRA's role is facilitating vibrant capital markets in the USA by protecting investors and safeguarding the integrity of the market[48]. It provides for a framework of managing securities disputes through non-judicial proceedings including arbitration and mediation. Arbitrations by FINRA are conducted in accordance with the Code of Arbitration Procedure[49]. FINRA has both a Customer Code that governs arbitrations between investors and brokers or brokerage firms and an Industry Code that governs arbitrations between or among industry parties only.

Finally, the *International Chamber of Commerce* (ICC) has also recognised the importance role of ADR mechanisms especially arbitration in the management of financial disputes. This resulted in the formation of a taskforce by the ICC on Financial Institutions and

[41] Ibid
[42] Ibid, Article 1.9
[43] Ibid, Article 2.4
[44] Financial Dispute Resolution Centre, available at *https://www.fdrc.org.hk/en/html/aboutus/aboutus_welcome.php* (accessed on 07/09/2022)
[45] Ibid
[46] Ibid
[47] Ibid
[48] Financial Industry Regulatory Authority (FINRA), available at https://www.finra.org/about (accessed on 07/09/2022).
[49] FINRA Dispute Resolution Services., 'Code of Arbitration Procedure' available at *https://www.finra.org/arbitration-mediation/code-arbitration-procedure* (accessed on 07/09/2022)

International Arbitration which released its report in 2017[50]. The report found a general lack of awareness of the potential benefits of arbitration in banking and financial matters and some common misperceptions about the process[51]. The report reiterated the fact that financial institutions have preferred courts in key financial centres such as London, New York, Frankfurt and Hong Kong but have generally avoided courts in emerging markets[52]. The report however acknowledges the benefits of international commercial arbitration and international investment arbitration and recommends their increased adoption due to the changing nature of financial disputes[53]. It recommends practical ways through which parties can tailor the process of arbitration to suit the needs of the banking and finance sector[54].

In Kenya, management of disputes in the financial sectors has followed the traditional approach of litigation. However, there is tremendous potential for adoption of ADR mechanisms such as arbitration and mediation in the management of disputes in the financial sector in Kenya. The Credit Information Sharing Association of Kenya (CIS) recommends the use of ADR mechanisms in management of disputes in the credit markets[55]. Further, there has been growth of institutions offering arbitration and mediation services including the Nairobi Centre for International Arbitration (NCIA), the Chartered Institute of Arbitrators Kenya Branch and the Mediation Training Institute East Africa. These institutions can tailor their services to incorporate provisions on management of financial disputes.

4. Concerns with the Use of ADR in the Management of Disputes in the Financial Sector

a. Lack of Summary Judgments and Interim Measures

One of the potential drawbacks in the use of ADR in management of disputes in the financial sector is the lack of expedited and summary judgments, interim measures and sale and seizure of assets among other powers available to state courts[56]. This is one of the main reasons why financial institutions have often opted for litigation in courts in major financial institutions such as New York and London due to the ability to obtain summary judgments[57]. Thus, where there is no factual dispute, a party may wish to quickly obtain

[50] ICC Commission Report., 'Financial Institutions and International Arbitration' available at *file:///C:/Users/King%20Sultan/Downloads/icc-financial-institutions-and-international-arbitration-icc-arbitration-adr-commission-report.pdf* (accessed on 07/09/2022)
[51] Ibid, Paragraph 3
[52] Ibid, Paragraph 4
[53] Ibid, Part III
[54] Ibid, Part II
[55] CIS Kenya., 'Towards a more open credit market' available at https://ciskenya.co.ke/vision-mission/ (accessed on 07/09/2022)
[56] Henriques. D., 'Arbitrating Disputes in Third Party Funding: A Parallel with Arbitration in the Financing Sector' Op Cit
[57] ICC Commission Report., 'Financial Institutions and International Arbitration' Op Cit

a summary judgment in order to continue with its business interests[58]. Further, a party may wish to obtain interim measures of protection such as the preservation of assets which powers may not be available under some ADR mechanisms. Parties in financial transactions who wish to manage their disputes through ADR mechanisms such as arbitration and mediation may therefore need to tailor the dispute resolution clause in order to grant powers to arbitrators and mediators to address these concerns.

b. Lack of Precedents

One of the shortcomings of ADR mechanisms is lack of precedents[59]. It has been asserted that the use of precedents is the most effective form of dispute prevention especially in commercial disputes where parties receive similar advice as to what the outcome of a dispute will be if litigation ensues[60]. This enables parties to tailor their activities to avoid disputes or predict the outcome of disputes. However, this is not possible in ADR mechanisms such as arbitration and mediation since they do not adhere to the doctrine of precedents. It is argued that some financial institutions consider the lack of precedents to be a disadvantage of ADR mechanisms such as arbitration[61]. Precedents are important in this sector in order to enable financial institutions to tailor their affairs to a certain degree of predictability and certainty in cases of disputes.

c. Costs

One of the selling points of ADR mechanisms is cost effective management of disputes. However, it is argued that some ADR mechanisms such as arbitration may become too expensive in the long run in case of delays since parties have to pay arbitrators' fees, fee for the arbitration forum and legal fees where they are presented by lawyers[62]. Thus in some financial disputes where court proceedings are minimal and characterized by short hearings and no examination of witnesses, arbitration may be more expensive when compared to litigation[63]. Where parties resort to ADR mechanisms such as arbitration to manage financial disputes, they be required to adopt measures geared towards controlling time in order to minimize costs.

d. Transparency Concerns

The private and confidential nature of ADR mechanisms such as arbitration and mediation may raise transparency concerns and affect their suitability in management of financial disputes. It is asserted that the nature of these mechanisms may raise transparency and accountability concerns since proceedings and the outcome are not

[58] Ibid

[59] Bochner, K. (2019). Alternative dispute resolution and access to justice in the 21st century. Adelaide Law Review, The, 40(1), 343-352.

[60] Ibid

[61] ICC Commission Report., 'Financial Institutions and International Arbitration' Op Cit

[62] Muigua.K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Op Cit

[63] ICC Commission Report., 'Financial Institutions and International Arbitration' Op Cit

available to the public unless with the express consent of the parties[64]. This is unlike in litigation where the public can attend court proceedings and judgments are published and can be accessed by everyone. Thus, parties to financial disputes may not be comfortable with ADR mechanisms such as arbitration especially where they are using them for the first time[65]. There is need to address transparency concerns in ADR in order to enhance the effectiveness of these mechanisms in managing financial disputes.

5. Way Forward

ADR mechanisms raise some pertinent concerns that need to be addressed before they can be effectively applied in the managing of disputes in the financial sector. The following can be done towards addressing these concerns:

i. Conflict Avoidance

There is need for effective conflict in financial institutions in order to mitigate negative effects on customers and operational processes[66]. Financial institutions should consider conflict avoidance strategies in order to prevent legal and financial challenges that may arise if such conflicts escalate[67]. They should adopt mechanisms such as conciliation at early stages of conflicts in addition to enhancing efficiency in order to limit incidences of conflicts[68]. This allows the commercial life of all parties to proceed without affecting their legal rights should such processes fail.

ii. Structuring Effective Dispute Resolution Clauses

From the foregoing discussion, it is evident that the financial industry has been slow to embrace ADR mechanisms due to concerns such as lack of summary procedures and interim reliefs in ADR mechanisms[69]. Parties can address this concern by drafting effective dispute resolution clauses which give arbitral tribunals including powers to grant interim reliefs such as preservation of assets and powers to order joinder and consolidation of parties. These are essential in ensuring effective and effective management of disputes. Parties can also consider utilising institutional arbitration through institutions such as P.R.I.M.E Finance and the International Chamber of Commerce which have clear rules on aspects such as interim measures of protection, emergency arbitrations and joinder of parties[70].

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[64] Biard. A., 'Monitoring Consumer ADR in the EU: a Critical Perspective' European Review of Private Law, 2-2018, 171-196

[65] ICC Commission Report., 'Financial Institutions and International Arbitration' Op Cit

[66] Pollack Peacebuilding Systems., 'Conflict Resolution for Banks & Financial Institutions' available at *https://pollackpeacebuilding.com/conflict-resolution-banks-financial/* (accessed on 08/09/2022)

[67] Ibid

[68] Blair.W., 'Arbitrating Financial Disputes- Are they Different and What Lies Ahead?' Op Cit

[69] Henriques. D., 'Arbitrating Disputes in Third Party Funding: A Parallel with Arbitration in the Financing Sector' Op Cit

[70] See for example article 24 of the P.R.I.M.E Finance Arbitration Rules, 2022 which provides for interim measures of protection.

iii. Case Management Procedures

It is evident that ADR processes such as arbitration may end up being expensive especially in case of delays. Parties in financial disputes should consider adopting case management procedures in order to reduce the time and costs of disputes[71]. Through this, parties are able to agree on strict timelines on aspects such as filing and exchange of pleadings and conduct of the hearing[72]. This will go a long way in reducing the time and costs of ADR processes.

iv. Adopting ADR Mechanisms in Management of Financial Disputes

ADR processes such as arbitration and mediation present immense opportunities in the management of financial disputes. These mechanisms can be private and confidential, flexible, guarantee party autonomy and are able to promote expeditious and cost effective management of disputes[73]. This is very critical in financial disputes where there is need to effectively and expeditiously manage such disputes in order to protect commercial interests at stake[74]. Mechanisms such as International Commercial Arbitration further guarantee neutrality and address jurisdictional challenges when it comes to enforcement of decisions due to the New York Convention that provides the legal framework for the enforcement of international arbitral awards[75]. Parties should thus consider adopting ADR mechanisms such as arbitration and mediation in management of financial disputes due to the advantages of these processes.

6. Conclusion

ADR mechanisms continue to be widely embraced in management of disputes across different sectors. This can be attributed to the advantages of ADR mechanisms. The important role of ADR mechanisms is finally being acknowledged in the financial industry which has hitherto been slow to embrace this concept. ADR mechanisms are very viable in management of financial disputes both in Kenya and across the globe. The concerns inherent in ADR mechanisms can be addressed in order to enhance their viability in management of financial disputes. The use of ADR in management of disputes in the financial sector is an achievable dream.

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[71] ICC Commission Report., 'Financial Institutions and International Arbitration' Op Cit
[72] Ibid
[73] Muigua.K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Op Cit
[74] Blair.W., 'Arbitrating Financial Disputes- Are they Different and What Lies Ahead?' Op Cit
[75] Muigua. K., 'Promoting International Commercial Arbitration in Africa'

Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR

Abstract

The paper discusses the need for promoting professional conduct, ethics, integrity and etiquette in Alternative Dispute Resolution (ADR). It critically addresses some of the ethical concerns in ADR that can potentially hinder the efficacy of the various mechanisms. It then discusses attempts towards enacting rules of ethics in ADR by various institutions and national laws. The paper concludes by suggesting solutions towards promoting professional conduct, ethics, integrity and etiquette in ADR.

1. Introduction

The practice of Alternative Dispute Resolution has evolved and now encompasses various mechanisms including arbitration, mediation, adjudication, conciliation and traditional justice systems. ADR practitioners are increasingly viewing themselves as part of a distinct profession[1]. Despite the fact that most ADR practitioners are associated with other professions such as law, engineering and accounting and are subject to the professional standards of those professions, there is consensus that the practice of ADR raises its own distinctive concerns that may not be adequately addressed by the codes of individual professions[2]. Due to the multidisciplinary nature of the practice of ADR, codes of individual professions may not be applicable to some ADR practitioners. For example, requiring arbitrators to be guided by the code of conduct applicable to the legal profession may not be attainable since arbitrators can be members of other professions such as engineering and accounting thus not bound by such rules.

The extraterritorial nature of some ADR mechanisms further raises concern in respect of promoting a professional code of conduct. Some ADR mechanisms such as International Commercial Arbitration and International Commercial Mediation apply across jurisdictions which means that enforcement of national ethical codes applicable to different professions may not be suitable[3]. Further, differences in cultures, languages and legal traditions in such mechanisms means that ADR practitioners may abide by different ethical obligations which could potentially result in conflict of laws with respect to ethics in the practice of ADR[4]. This may necessitate regulation of such mechanisms at an international level to ensure uniformity and certainty[5].

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[1] Feerick.J et al., 'Standards of Professional Conduct in Alternative Dispute Resolution' Journal of Dispute Resolution, Issue 1, 1995

[2] Ibid

[3] Rogers. C., 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration' 23Mich. J. Int'l L. 341 (2002).

[4] Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' 28 Fordham Urb. L.J. 979-990 (2001)

[5] Ibid

However, despite these concerns, there is need for regulations, rules and best practices to ensure that ADR is practiced appropriately towards attaining the ideal of Appropriate Dispute Resolution[6]. It is arguable that regulation of ADR through a code of conduct, ethics and etiquette will protect users of the various mechanisms from professional malpractices that may be perpetuated by practitioners[7]. The paper critically looks at the need for a professional code of conduct, ethics, integrity and etiquette in ADR. It discusses the relevant sources of professional conduct and ethics in ADR. The paper also highlights the ethical concerns in ADR and suggests reforms towards promoting professional conduct, ethics, integrity and etiquette in ADR.

2. Professional Conduct, Ethics, Integrity & Etiquette in ADR in Kenya

Professional conduct, ethics, integrity and etiquette in ADR principles can be discerned from various sources. These sources are discussed below.

2.1 Constitution of Kenya 2010

The Constitution of Kenya sets out national values and principles of governance that are to bind and guide all persons. These values and principles include integrity, transparency and accountability[8]. ADR practitioners in Kenya are thus bound by these principles and should ensure that their conduct is done in a transparent and accountable manner. Further, the Constitution also recognises the role of ADR mechanisms as tools of access to justice[9]. To this extent, the Constitution sets out certain principles to guide persons exercising judicial authority including ADR practitioners. Among these principles is fairness, the need for expeditious management of disputes and respect of the Constitution[10]. ADR practitioners should be guided these principles in discharge of their mandate. The Constitution of Kenya 2010 thus represents a good source of authority for professional conduct, ethics, integrity and etiquette in ADR.

2.2 Civil Procedure Act

The Act provides for the management of disputes through ADR mechanisms such as arbitration and mediation[11]. The Act establishes the Mediation Accreditation Committee whose mandate is certification of mediators and maintaining a register of qualified mediators[12]. The Committee is also mandated to enforce such code of ethics for mediators as may be prescribed and set up appropriate training programmes for mediators[13]. The

[6] Ibid
[7] Keli. J., 'Mediation as A Profession in Kenya: A Call for Regulation' (2018) 6(3) Alternative Dispute Resolution
[8] Constitution of Kenya, 2010, Article 10 (2) (c)
[9] Ibid, article 159 2 (c)
[10] Ibid
[11] Civil Procedure Act, Cap 21, Part VI
[12] Ibid, S 59 A (4)
[13] Ibid

Mediation Accreditation Committee established under the Civil Procedure Act is thus an important body in promoting professional conduct and ethics for mediators.

2.3 The International Bar Association Guidelines on Conflicts of Interest in International Arbitration

One of the fundamental ethical concerns in International Commercial Arbitration is conflict of interest. The IBA Guidelines on Conflicts of Interest in International Arbitration seek to address this concern by stipulating a code of conduct on conflict of interest in international arbitration.[14] Among the salient provisions of the guidelines is the aspect of impartiality. The guidelines provide that every arbitrator shall remain impartial and independent of the parties at the time of appointment and shall remain so until the final award is rendered[15]. The guidelines further provide that an arbitrator shall decline to accept an appointment or refuse to continue to act where there is likelihood of conflict of interest[16]. There is also a requirement for arbitrators to disclose facts that may give rise to doubts as to the arbitrator's impartiality or independence[17]. The IBA guidelines represent an attempt to formulate a code of conduct, ethics, integrity and etiquette in ADR at the international level. The guidelines have gained wide acceptance within the international arbitration community[18].

2.4 The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members, 2009

The Code sets out professional and moral principles to govern the conduct of members of the Chartered Institute of Arbitrators while discharging their mandate. The Code requires members to maintain integrity and fairness of the dispute resolution process and withdraw if this is no longer possible[19]. The Code further requires members to disclose all interests, relationships and matters likely to affect their independence and impartiality before and throughout the dispute resolution process[20]. It further requires members to be competent and only accept appointments to manage disputes only when they are appropriately qualified or experienced[21]. The Code also requires members to ensure that parties are adequately informed of all the procedural aspects of the process[22]. It further

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[14] International Bar Association, 'Guidelines on Conflicts of Interest in International Arbitration' available at *https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918* (accessed on 24/05/2022)

[15] Ibid, General Standard 1.

[16] Ibid, General Standard 2.

[17] Ibid, General Standard 3.

[18] Ibid

[19] The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members, 2009, Part 2, Rule 2, available at *https://www.ciarb.org/media/4231/ciarb-code-of-professional-and-ethical-conduct-october-2009.pdf* (accessed on 25/05/2022)

[20] Ibid, Rule 3

[21] Ibid, Rule 4

[22] Ibid, Rule 5

requires members to maintain trust and confidence of the dispute resolution process[23]. The Code is therefore an important source of professional conduct, ethics, integrity and etiquette for members of the Chartered Institute of Arbitrators.

2.5 The Chartered Institute of Arbitrators (Kenya) Arbitration Rules, 2020

The rules stipulate the expected code of conduct for arbitrators in respect of arbitration proceedings conducted under the auspices of the Chartered Institute of Arbitrators (Kenya). The rules provide for the independence and impartiality of an arbitral tribunal[24]. The rules require an arbitrator to disclose circumstances likely to give justifiable doubts as to the impartiality or independence of an arbitrator[25]. The rules further require arbitration proceedings to be private and confidential[26]. Arbitrators should thus not disclose proceedings unless by consent of the parties. The rules also require arbitrators to avoid conflict of interest[27].

2.6 Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021

The Code stipulates fundamental ethical guidelines for persons appointed to mediate disputes under the NCIA mediation rules. Among its fundamental ethical rules is independence and impartiality[28]. Before accepting an appointment to act, a mediator is required to disclose anything within his/her knowledge that may materially affect his/her impartiality[29]. The Code of conduct further requires a mediator to avoid conflict of interest or the appearance of a conflict of interest during and after mediation[30]. Conflict of interest in mediation can potentially arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and either of the participants in the mediation process. The Code further requires a mediator to possess the necessary competence required to mediate effectively[31]. Competence in mediation can be acquired through training, experience and cultural understandings. In addition, the Code requires mediators to promote confidentiality, quality and fairness of the mediation process[32].

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[23] Ibid, Rule 8

[24] The Chartered Institute of Arbitrators (Kenya) Arbitration Rules, 2020, available at *https://ciarbkenya.org/wp-content/uploads/2021/03/chartered-institute-of-arbitrators-kenya-branch-arbitration-rules-2020.pdf* (accessed on 24/05/2022)

[25] Ibid

[26] Ibid, Rule 134

[27] Ibid, Rule 8

[28] Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021, available at *https://ncia.or.ke/wp-content/uploads/2021/07/5.-NCIA-CODE-OF-CONDUCT-FOR-MEDIATORS-2021.pdf* (accessed on 25/05/2022)

[29] Ibid

[30] Ibid, Principle 3

[31] Ibid, Principle 4

[32] Ibid, Principles 5 and 7.

2.7 The Alternative Dispute Resolution Bill

The purpose of the Bill is to provide for an Act of parliament that will govern the settlement of civil disputes through ADR mechanisms and in particular conciliation, mediation and traditional dispute resolution mechanisms[33]. The Bill sets out certain guiding principles and ethical considerations to govern management of disputes through the stipulated ADR mechanisms. The Bill requires ADR practitioners to promote confidentiality in the process except in the case of traditional dispute resolution[34]. Further, the Bill requires ADR practitioners to facilitate expeditious determination of disputes taking into account the nature of the dispute[35]. ADR practitioners are also required to be impartial and disclose any conflict of interest that may arise during the process[36]. Finally, the Bill requires ADR practitioners to be competent in their respective fields before facilitating the management of disputes[37]. If enacted into law, the ADR Act will enhance professional conduct, ethics, integrity and etiquette in the practice of ADR in Kenya.

3. Ethical Concerns in Alternative Dispute Resolution

The practice of ADR raises certain ethical concerns. These include:

3.1 Confidentiality

One of the fundamental attributes of ADR mechanisms is confidentiality. Confidentiality in ADR entails maintaining integrity of the process and not disclosing matters to third parties[38]. Confidentiality is central to ADR since it allows parties to freely engage in candid, informal discussions of their interests to reach the best possible settlement of their dispute without concerns of such information leaking to third parties[39]. The parties and the neutral thus have a duty to maintain confidentiality and not disclose any information to third parties unless in situations where such disclosure is allowed[40]. Confidentiality in ADR raises fundamental ethical concerns. Where this duty is breached, information pertaining the process may be leaked to third parties thus affecting the integrity of the process. The importance of confidentiality in ADR has seen various Codes of Conduct on

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[33] Alternative Dispute Resolution Bill, available at *http://www.parliament.go.ke/sites/default/files/2021-06/34-The%20Alternative%20Dispute%20Resolution%20Bill%2C%202021%20%281%29.pdf* (accessed on 25/05/2022)

[34] Ibid, Clause 5.

[35] Ibid

[36] Ibid

[37] Ibid

[38] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' University of Miami Law Review, Volume 56, No.4

[39] Interagency ADR Working Group Steering Committee, 'Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators' (April 2006)

[40] Muigua. K., 'Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future' available at *http://kmco.co.ke/wp-content/uploads/2018/08/Regulating-ADR-Practice-in-Kenya-Kariuki-Muigua-June-2018.pdf* (accessed on 25/05/2022)

ADR capturing it as an important ethical obligation[41]. However, there may be situations where confidentiality in ADR may be limited. This could be by consent of the parties; where prescribed by law or in situations where a crime may be committed[42].

3.2 Conflict of Interest

Conflict of interest is a major concern in the practice of ADR. The rules on conflict of interest in ADR are aimed at preventing bias in management of disputes which could arise due to involvement by a neutral with the subject matter of the dispute or relationship between the neutral and either of the participants in the ADR process[43]. This is in line with the principles of natural justice and the right to a fair hearing enshrined under the Constitution[44]. Conflict of interest concerns includes situations where the same individual performs multiple roles such as an arbitrator or mediator and later as a party representative[45]. It also includes situations where mediators and arbitrators practice in law firms with other advocates who may represent parties before such a mediator or arbitrator[46]. The rules on conflict of interest are aimed at addressing such situations and ensuring that there is fairness and integrity in the ADR process.

3.3 Competence

Competence is critical for the success of all ADR mechanisms. Since most ADR mechanisms especially arbitration and mediation rely on courts for their enforcement, there is need for competence that may be exhibited through the writing of reasoned awards and mediation agreements[47]. Competence in ADR may also be exhibited through following due process, rules of conduct and evidence. Where this duty is breached, there may challenges against the outcome of the ADR process such as arbitral awards. In Kenya, the Arbitration Act provides recourse to the High Court against an arbitral award on grounds including where the award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration[48]. Competence is thus essential to ensure that arbitrators confine themselves within the scope of reference to arbitration. To address

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[41] The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members, Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021 and the Alternative Dispute Resolution Bill among other laws and rules capture confidentiality as a fundamental ethical obligation.

[42] Muigua. K., Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future, Op Cit

[43] See for example the the Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, Principle 3

[44] Constitution of Kenya, 2010, Article 50.

[45] Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' Op Cit

[46] Ibid

[47] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

[48] Arbitration Act, No.4 of 1995, S 35 (2) (iv).

this concern, most Codes of conduct on ADR stipulate competence as fundamental ethical obligation[49]. Competence in ADR may be acquired through education, training and experience. Further to ensure competence, ADR institutions such as the Chartered Institute of Arbitrators (Kenya) and the Nairobi Centre for International Arbitration provides for a system of accreditation of their members.

3.4 Costs and Fees

The issue of costs and fees raises ethical concerns in the practice of ADR. Such concerns involve the appropriateness and reasonableness of fees charged by ADR practitioner such as arbitrators and mediators[50]. In some instances, these practitioners have been accused of charging exorbitant fees thus defeating the essence of ADR of facilitating cost effective management of disputes. To guard against this, some ADR mechanisms such as arbitration allow parties to negotiate with the arbitrator over the scale of fees to be charged. Further, arbitral institutions such as the Chartered Institute of Arbitrators (Kenya) and the Nairobi Centre for International Arbitration have formulated fees schedules governing administrative costs and arbitral fees.

4. Way Forward

Various measures can be undertaken towards promoting professional conduct, ethics, integrity and etiquette in ADR. They include:

4.1 Promoting Access to Justice through ADR

The advantages of ADR mechanisms such as party autonomy, privacy, confidentiality, expeditious and cost effective management of disputes makes them viable mechanisms for management of disputes compared to other processes such as litigation[51]. There is therefore need to enhance access to justice through these mechanisms in order to benefit from their advantages. ADR practitioners such as mediators, conciliators and arbitrators should spearhead the principles inherent in these mechanisms in order to promote public confidence in their uptake. Enactment into law of the ADR Bill in Kenya will be an important step towards promoting access to justice through ADR.

4.2 Promoting Standards and Accreditation of ADR Practitioners

It is argued that promoting standards and accreditation in ADR will enhance accountability, efficiency and competence of ADR practitioners[52]. This can also serve the

[49] See for example the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members and the Alternative Dispute Resolution Bill.

[50] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

[51] See generally Muigua.K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Glenwood Publishers Limited, 2015

[52] Aloo, L.O. & Wesonga, E.K., 'What is there to Hide? Privacy and Confidentiality Versus Transparency:

purpose of promoting public awareness and confidence in the use of ADR mechanisms. To achieve this goal, ADR institutions have developed various tools such as training of practitioners and maintaining a list of licensed individuals[53]. This is important towards promoting ethics and integrity in ADR since practitioners are expected to adhere to the rules of conduct stipulated by the respective institutions.

4.3 Adhering to the Rules of Conduct, Ethics, Integrity and Etiquette by ADR Practitioners

ADR practitioner should always adhere to the rules of conduct, ethics, integrity and etiquette while discharging their mandate. These rules include impartiality and integrity in management of disputes. ADR practitioners should thus avoid conflict of interest in order to promote the right to a fair hearing. They should also only accept appointments in situations where they are competent to manage the dispute in question. By adhering to such rules, it will be possible to enhance efficient management of disputes through ADR mechanisms.

5. Conclusion

Rules of conduct, ethics, integrity and etiquette are important in ADR. These rules ensure efficiency and viability of ADR mechanisms. There have been challenges in adopting and promoting such rules due to the multidisciplinary practice of ADR and the international nature of some ADR mechanisms such as international commercial arbitration and international commercial mediation. However, the success of ADR mechanisms calls for adoption of these rules. This has seen various ADR institutions adopting codes of conduct and ethics to govern such concerns[54]. There is thus need for promoting access to justice through ADR, promoting standards and accreditation for ADR practitioners and adhering to the rules stipulated by various ADR institutions. Promoting professional conduct, ethics, integrity and etiquette in ADR is an ideal which can be achieved.

Government Arbitrations in Light of the Constitution of Kenya 2010,' Alternative Dispute Resolution, Vol. 3, No. 2 (Chartered Institute of Arbitration- Kenya, 2015).

[53] See for example the training programme offered by the Chartered Institute of Arbitrators, Kenya Branch, available at *https://ciarbkenya.org/our-courses/* (accessed on 27/05/2022)

[54] These include the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members and the Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators.

The Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya

Abstract

For the longest time, Alternative Dispute Resolution practice and infrastructure in Africa has been focusing on the traditional processes dealing with traditional commercial and investment related disputes. However, with the evolution of technology, many new areas of commerce have emerged, especially in the area of digital technologies and businesses. This paper makes a case for African countries to embrace digital dispute resolution mechanisms in addressing the emerging disputes related to digital commerce, in a timely and cost effective manner, through putting in place responsive legal and institutional infrastructure.

1. Introduction

A perusal through many of the African countries' legal, policy and institutional frameworks on Alternative Dispute Resolution (ADR) practice reveal that most of them are still focused on the traditional arbitral processes that are mainly physical in nature. However, with technological evolution, there has been emergence of new areas of commerce which naturally also come with related disputes. One such area is the digital commerce platforms. Consumer behavior and business models have changed dramatically as a result of digitalisation and technological disruption, which has been expedited by the effect of the COVID-19 pandemic.[1] Apart from pandemic impacts, the rise of information technology, globalization of economic activity, blurring of distinctions between professions and sectors, and increased integration of knowledge have all contributed to developments in the legal sector.[2] Technology has greatly impacted the way law and legal experts are operating in this era as far as enhancing efficiency is concerned.[3]

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[1] 'Digital Economy Agreements' <*https://www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements*> accessed 16 April 2022.

[2] Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' From Washington Lawyer, May 2011 <*https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm*> accessed 11 April 2022.

[3] Abigail Hess, 'Experts Say 23% of Lawyers' Work Can Be Automated—Law Schools Are Trying to Stay Ahead of the Curve' (CNBC, 7 February 2020) <*https://www.cnbc.com/2020/02/06/technology-is-changing-the-legal-profession-and-law-schools.html*> accessed 10 April 2022; Alej, ro Miyar | February 06 and 2020 at 09:46 AM, 'Technology Trends That Will Affect the Legal Profession in 2020' (Daily Business Review) <*https://www.law.com/dailybusinessreview/2020/02/06/technology-trends-that-will-affect-the-legal-profession-in-2020/*> accessed 10 April 2022; Singapore Academy of Law, 'Deep Thinking: The Future Of The Legal Profession In An Age Of Technology' (Medium, 19 July 2019) <*https://medium.com/@singaporeacademyoflaw/deep-thinking-the-future-of-the-legal-profession-in-an-age-of-technology-6b77e9ddb1e9*> accessed 10 April 2022; 'Disruptive Technology in the Legal Profession' (Deloitte United Kingdom) <*https://www2.deloitte.com/uk/en/pages/financial-advisory/articles/the-case-for-disruptive-technology-in-the-legal-profession.html*> accessed 10 April 2022; 'New Technologies and the Legal Profession' (nyujlb) <*https://www.nyujlb.org/single-post/2019/04/08/New-Technologies-and-the-Legal-Profession*> accessed 10 April 2022; Tanya Du Plessis,

Furthermore, the rise of platforms and apps with multiple integrated services ranging from transportation to finance and telemedicine has altered how services are consumed, with businesses increasingly relying on electronic transactions and digital solutions for everything from sourcing to invoicing and payments. Secure and smooth cross-border data transfers are critical for the digital economy's growth and the protection of consumers' interests.[4] The traditional legal and institutional frameworks on arbitration cannot, arguably, respond to the related disputes as they currently are. This paper makes a case for African countries, with a focus on Kenya, to respond to this digital and technological evolution by putting in place corresponding infrastructure to address the disputes that are bound to arise from the same.

OECD points out that the digital transformation has decreased the costs of international commerce, facilitated the coordination of global value chains (GVCs), aided the diffusion of ideas and technology, and connected a larger number of firms and customers throughout the world.[5] It goes on to point out that even if international commerce has never been easier, the adoption of new business models has resulted in more complicated international trade transactions and policy challenges.[6] As a result, Governments are confronted with new regulatory problems in today's fast-paced and linked world, not just in addressing concerns originating from digital disruption, but also in ensuring that the potential and advantages of digital commerce are realized and shared equally.[7]

Notably, Kenya is making positive steps towards enhancing the productivity of the digital economy as evidenced by the development of the 2019 Digital Economy Blueprint[8]. The Blueprint proposes five pillars as foundations for the growth of a digital economy which include: Digital Government; Digital Business; Infrastructure; Innovation-Driven Entrepreneurship and Digital Skills and Values.[9] The Blueprint sets clear results, recognizes open doors and regions that need further concentration, while outlining relating game plans for Government, private area and the citizens. By working together, citizens can partake in the chances of a developing, all around the world serious present day economy, empowered by innovation.[10] The paper makes some comparative analysis borrowed from countries that have made reasonable progress in this area.

'Competitive Legal Professionals' Use of Technology in Legal Practice and Legal Research' (2008) 11 Potchefstroom Electronic Law Journal.

[4] Ibid.

[5] 'Digital Trade - OECD' <*https://www.oecd.org/trade/topics/digital-trade/*> accessed 16 April 2022.

[6] Ibid.

[7] Ibid.

[8] Republic of Kenya, Digital Economy Blueprint, 2019. Available at *https://www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf [* Accessed on 16 April 2022].

[9] Ibid, chapter Two.

[10] Ibid, p. 28.

2. Nature of Digital Economy

With the fast development of the web beginning in the mid-1990s, the advanced scene has extended and changed how organizations work and how shoppers take part in exchanges with organizations and with one another.[11] It has been contended that the digital economy is fundamentally different from the traditional economy as it existed during the twentieth century, when many economic theories crystallized, and that traditional theories fail to capture the abstract, global, oligopolistic, intangible, and knowledge-driven nature of the digital economy as it has emerged in the twenty-first century.[12]

The digital economy has revolutionized the way we do business and live our lives, and the growth of digitized innovation, such as cloud, mobile services, and artificial intelligence, has accelerated this shift and given us with unprecedented services and benefits.[13] There are no universally accepted definitions of the terms 'digital economy' or 'digital trade'. The United States International Trade Commission (USITC) defines digital trade as the delivery of products and services over fixed-line or wireless digital networks. This includes both domestic and international trade, but excludes most physical goods, such as goods ordered online and physical goods with a digital counterpart, such as books and software, music, and movies sold on CDs or DVDs.[14] The United Kingdom Digital Dispute Resolution Rules defines a digital asset includes a cryptoasset, digital token, smart contract or other digital or coded representation of an asset or transaction; and a digital asset system means the digital environment or platform in which a digital asset exists.[15]

Physically delivered and digitalized purchases of digital services, such as remote cloud computing or architectural plans delivered on-line; or digitally enabled but physically delivered goods and services, such as the purchase of a good on an online marketplace or the booking of a hotel through a matching service. Because trade policy commitments and norms for goods (GATT) and services (WTO) differ, the trade policy environment will be determined by how the transaction is delivered and what sort of product is being transacted (GATS).[16] Digitization minimizes marginal production and distribution costs while widening access to global commerce, lowering the cost of engaging in trade not only

[11] Barefoot, K., Curtis, D., Jolliff, W., Nicholson, J.R. and Omohundro, R., 'Defining and Measuring the Digital Economy' (2018) 15 US Department of Commerce Bureau of Economic Analysis, Washington, DC, p.3.

[12] Usman W Chohan, 'Some Precepts of the Digital Economy' [2020] SSRN Electronic Journal 1 <*https://www.ssrn.com/abstract=3512353*> accessed 16 April 2022.

[13] Watanabe, C., Naveed, K., Tou, Y. and Neittaanmäki, P., 'Measuring GDP in the Digital Economy: Increasing Dependence on Uncaptured GDP' (2018) 137 Technological Forecasting and Social Change 226, at p. 226.

[14] Lund S and Manyika J, 'How Digital Trade Is Transforming Globalisation' (by International Centre for Trade and Sustainable Development (ICTSD) 7 … 2016), 3.

[15] Rule 2, Digital Dispute Resolution Rules, 2021.

[16] González JL and Jouanjean M-A, "Digital Trade: Developing a Framework for Analysis OECD." Trade Policy Papers 205 (2017), at p. 13.

for major enterprises, but also for individuals, small businesses, and entrepreneurs. This is already causing business model innovations and the rise of micro-multinationals, micro-work, and micro-supply chains that may take advantage of international markets.[17]

3. Traditional Alternative Dispute Resolution Processes Versus Digital Disputes

ADR procedures have been linked to a number of benefits over litigation, including being quicker, cheaper, and less restrictive on procedural norms. In the twenty-first century, alternative dispute resolution (ADR) aims to develop a faster, more cost-effective, and more efficient approach than litigation, which is time-consuming and expensive.[18] Foreign investors prefer mediation or arbitration over the national court system because they are concerned about the effectiveness of national courts in cross-border conflicts. In the context of cross-border commerce, dispute resolution through arbitration/ADR is not just a domestic but also an increasingly rising worldwide phenomena.[19]

Contemporary ADR methods and procedures are thought to be more efficient and constructive than traditional schemes for managing conflicts and settling disputes because they help parties collaborate by reducing animosity and diminishing competitive incentives during the process, and in part, allows for a more satisfactory process through the conflict management expertise of professional negotiators and state-of-the-art in the field.[20] The features of flexibility, cheap cost, absence of complex processes, collaborative issue solving, salvaging relationships, and familiarity with the general public are the core selling points of ADR methods.[21]

Digital disruption has been felt across all modes: digital versions of products or services compete with physically embodied versions, and digital distribution/facilitation business models compete with conventional distribution business models.[22] Technology has also crept into the realm of alternative dispute resolution thanks to advancements in the field. There is now online mediation, online arbitration, and even block chain arbitration, which

[17] Lund S and Manyika J, 'How Digital Trade Is Transforming Globalisation' (by International Centre for Trade and Sustainable Development (ICTSD) 7 … 2016), at p.1.

[18] Muigua, K., "Heralding A New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya", Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution, Vol. 1, No 1, (2013), pp. 43-78 at p.55.

[19] Surridge & Beecheno, Arbitration/ADR Versus Litigation, September 4, 2006, Available at *http://www.hg.org/articles/article_1530.html*

[20] Peters, S., "The evolution of alternative dispute resolution and online dispute resolution in the European Un." CES Derecho 12, no. 1 (2021): 3-17, at p.5.

[21] Muigua, K., 'ADR: The Road to Justice in Kenya' Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution, Vol. 2, No 1, (2014), pp. 28-95.

[22] Ciuriak D and Ptashkina M, 'The Digital Transformation and the Transformation of International Trade' [2018] RTA Exchange. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB), at p. 1.

employs the same block chain technology as cryptocurrencies. Alternative conflict resolution, sometimes known as "online dispute resolution," is becoming more popular.[23] The United Kingdom's Digital Dispute Resolution Rules provide for an automatic dispute resolution process which means a process associated with a digital asset that is intended to resolve a dispute between interested parties by the automatic selection of a person or panel or artificial intelligence agent whose vote or decision is implemented directly within the digital asset system (including by operating, modifying, cancelling, creating or transferring digital assets).[24] It is, however, worth pointing out that these Rules have also created room for the traditional ADR mechanisms by providing that 'any dispute between interested parties arising out of the relevant contract or digital asset that was not subject to an automatic dispute resolution process shall be submitted to arbitration in accordance with the current version of these rules at the time of submission; however, any expert issue shall be decided by an appointed expert acting as such rather than as an arbitrator'.[25]

The emergence of Online Dispute Resolution (ODR) as a supplement to Alternative Dispute Resolution (ADR) might result in a meaningful paradigm shift in how conflicts are resolved outside of conventional court systems.[26] It has been argued that the traditional court system is incapable of administering justice 'on a large scale,' and that ADR and ODR are more appropriate because they provide the architecture and tools to handle online disputes and can more proportionally handle functions that judicial authorities can no longer handle.[27] International commercial disputes may quickly grow into huge trade disputes with significant political and economic ramifications, necessitating the greater use of extrajudicial dispute settlement rather than litigation in national courts.[28] As a result of globalization, effective and dependable systems for resolving commercial and other general issues involving parties from several jurisdictions have become not only desirable but also essential.[29]

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[23] Yeoh D, 'Is Online Dispute Resolution the Future of Alternative Dispute Resolution?' (Kluwer Arbitration Blog, 29 March 2018) <*http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/*> accessed 17 April 2022.

[24] Rule 2, United Kingdom Digital Dispute Resolution Rules 2021.

[25] Ibid, Rule 5.

[26] Peters S, "The evolution of alternative dispute resolution and online dispute resolution in the European Un." CES Derecho 12, no. 1 (2021): 3-17, at p. 3.

[27] Peters, S., "The evolution of alternative dispute resolution and online dispute resolution in the European Un." CES Derecho 12, no. 1 (2021): 3-17, at p.6.

[28] Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," Ohio St. J. on Disp. Resol. 13 (1997): 675, at p. 675.

[29] Alternative Dispute Resolution Methods, Document Series No. 14, page 2, Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September,2000)<*http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf* > accessed 17 April 2022.

3.1 Kenya's Preparedness in Embracing Digital Dispute Resolution

While various factors have contributed to the Internet economy's rise, the growing rate of innovation in information and communication technology remains the most significant.[30] It has been observed that E-commerce has risen significantly in Kenya, owing to legislation regulating information and communications technology (ICT) services, e-commerce transactions, data protection, and information access.[31]

In April 2021, the UK Jurisdiction Taskforce published the Digital Dispute Resolution Rules which are meant to facilitate the rapid and cost-effective resolution of commercial disputes, particularly those involving novel digital technology such as cryptoassets, cryptocurrency, smart contracts, distributed ledger technology, and fintech applications.[32] They must be agreed upon in writing by both parties, either before or after a disagreement arises. The guidelines provide language for use in a contract, a digital asset (such as a cryptoasset, digital token, smart contract, or other digital or coded representation of an asset or transaction), or a digital asset system.[33] There is need for African countries to consider investing in similar rues to enhance the growth of digital dispute resolution mechanisms.

3.2 Data Privacy Protection: Data Transfer, Processing, and Storage

Most modern enterprises are progressively bound by national and international data privacy laws, which require companies to know where they are storing Personally Identifiable Information (PII) and Personal Health Information (PHI) and to implement strict controls around the processing, use, and transfer of such PII and PHI.[34] Due to the considerable dangers and problems offered by technology in terms of such data, the impact of this will become even more apparent as businesses adopt technology.[35] Data breach notification procedures, Data Subject Access Requests (DSARs), and cross-border e-discovery projects are just a few examples of legal processes that demand extreme caution in identifying and managing PII and PHI while working under tight deadlines.[36]

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[30] Ahmed U and Aldonas G, 'Addressing Barriers to Digital Trade' (by International Centre for Trade and Sustainable Development (ICTSD) 7 … 2015), at p.1.

[31] Kiriti-Nganga T and Mbithi M, 'The Digital Trade Era - Opportunities and Challenges for Developing Countries: The Case of Kenya' (2021), in book: Adapting to the Digital Era: Challenges and Opportunities (pp.92-109), World Trade Organization, at p.94 < *https://www.wto.org/english/res_e/booksp_e/adtera_e.pdf*> accessed on 16 April 2022.

[32] United Kingdom, Digital Dispute Resolution Rules, April 2021 < *https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech_DDRR_Final.pdf*> accessed on 16 April 2022.

[33] 'Ground-Breaking Digital Dispute Resolution Rules Published' (Walker Morris) <*https://www.walkermorris.co.uk/publications/ground-breaking-digital-dispute-resolution-rules-published/*> accessed 17 April 2022

[34] Katharine Perekslis, 'Four Strategies to Navigate Data Privacy Obligations for Compliance, Litigation, and E-Discovery Professionals' (Law.com) <*https://www.law.com/native/?mvi=7bd540437dde4b60991f35c257adc521*> accessed 3 June 2020.

[35] Ibid.

[36] Ibid.

Data protection rules in one nation may not be as sophisticated as those in another, necessitating a significant investment in this area not only to earn the trust of clients and partners in another country, but also to avoid the legal ramifications that may result from a data privacy breach.[37]

Local businesses must make a deliberate decision to invest in data protection infrastructure that will allow them to function efficiently and secure their clients' data regardless of the state of local data protection regulations. As dispute resolution professionals and corporate legal departments seek more cost-effective ways to improve the delivery of legal services, they should look for paralegals and legal assistants with experience in technology-driven systems who can not only help the firm operate more efficiently but also ensure data privacy.[38]

It may be necessary for policymakers to collaborate closely with other stakeholders to reexamine existing data protection rules in order to improve their efficacy. Relevant personnel should also be prepared with the required data protection skills and knowledge. Information security management, for example, is a collection of rules and procedural controls that Information Technology (IT) and business organizations use to safeguard their informational assets against threats and vulnerabilities-security of information.[39] These professionals would be in charge of an institution's or company's Information Security Management System (ISMS). ISMS is essential to ensure that any data is kept secret, has integrity, and is conveniently accessible when needed. Regardless of whether the data is stored in a digital or physical format, the discipline of Information Security Management is essential for preventing illegal access or theft.[40] This is because any technology-driven business operation, including the legal profession, is vulnerable to

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[37] United Nations Conference On Trade And Development, 'Data protection regulations and international data flows: Implications for trade and development,' UNCTAD/WEB/DTL/STICT/2016/1/iPub, United Nations, 2016 <*https://unctad.org/en/PublicationsLibrary/dtlstict2016d1_en.pdf* >*10 April 2022; 'How Organizations Can Stay Ahead of Changing Privacy Laws' (Digital Guardian, 22 August 2019)* <*https://digitalguardian.com/blog/how-organizations-can-stay-ahead-changing-privacy-laws*> accessed 10 April 2022.

[38] 'Future Law Office 2020: Redefining the Practice of Law | Robert Half' <https://www.roberthalf.com/research-and-insights/workplace-research/future-law-office-2020-redefining-the-practice-of-law> accessed 10 April 2022.

[39] 'What Is Information Security Management?' (Sumo Logic) <*https://www.sumologic.com/glossary/information-security-management/*> accessed 10 April 2022.

[40] Ibid.

security and privacy concerns.[41] The security controls can follow common security standards or be more focused on the industry.[42]

3.3 Training/Education in E-Literacy

To meet the needs of today's legal consumer, it has been correctly stated that "with the emerging concepts of artificial intelligence, Block chain, Education, and digital technology, capabilities and potential must develop, and efforts must be made at the school and university level for upgrading digital skills, running special basic and advanced skill-based programs."[43] Law schools must step in to bridge the knowledge and skills gap if attorneys are to stay relevant and on top of their game. Indeed, it has been correctly said that "the rivalry in the field of law has expanded tremendously to the point that it is now a worldwide platform and every student who steps into the shoes of a lawyer is required to manage many topics."[44]

To prepare the overall population, there is a requirement for the Government, through the Ministry of Information Communication Technology in a joint effort with the other significant partners to make it simple for general society to procure the applicable abilities in innovation through customized courses at all levels of the school educational program as well as through other improved on courses accessible to those all-around out of school and not liable to profit from work related phases of preparation nearby. This will also make it simpler for the general population to have meaningful interactions with the legal system.

This is especially relevant given that the judiciary is on the verge of incorporating technology into the administration of justice. The necessity for embracing justice—to allow efficient access to justice for all—will be defeated if the disseminators/facilitators of justice are empowered and the consumers of justice are excluded. Leaving them out will instead encourage digital apartheid, which is the systematic exclusion of particular populations from digital access and experience as a result of political and commercial policies and practices.[45] With the increased digitization of government services, such as the Huduma Center service delivery model, a Government of Kenya initiative aimed at advancing citizen-centered public service delivery through a variety of channels,

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[41] 'Introduction to Information Security Management Systems (ISMS) – BMC Blogs' <*https://www.bmc.com/blogs/introduction-to-information-security-management-systems-isms/*> accessed 10 April 2022.

[42] Luke Irwin, 'ISO 27001: The 14 Control Sets of Annex A Explained' (IT Governance UK Blog, 18 March 2019) <*https://www.itgovernance.co.uk/blog/iso-27001-the-14-control-sets-of-annex-a-explained*> accessed 10 April 2022.

[43] Raizada S and Mittal JK, 'Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education' (2020) 20 Medico Legal Update 188, 189.

[44] Ibid, 189.

[45] Paula Barnard-Ashton and others, 'Digital Apartheid and the Effect of Mobile Technology during Rural Fieldwork' (2018) 48 South African Journal of Occupational Therapy 20.

including deploying digital technology and establishing citizen service centers across the country, there is an urgent need to address digital illiteracy in order to improve access for all. The process will benefit from virtual access to justice.[46] The government can collaborate with the judiciary to establish Digital Villages Projects around the country to improve access to justice-related services.[47] Such centers should concentrate on providing digital training and education relating to access to justice.

In addition, the government should work with both domestic and international IT businesses to spread out internet access services across the country so that everyone has easy access. They should also collaborate with local mobile service providers to make mobile data accessible to the majority of Kenyans. Furthermore, all people should be able to afford electricity. The Kenyan government's efforts to guarantee that all Kenyans have access to power through the Last Mile Electricity Connectivity Project are noteworthy.[48]

4. Digital Dispute Resolution: The Future of Commercial Alternative Dispute Resolution?

With the introduction of diverse social media platforms that allow interconnectivity beyond national boundaries and enable cross-border relationships between clients and their dispute resolvers, the experts can use technology to tap into the ever-growing international Alternative modes of Dispute Resolution such as international arbitration, mediation, and Online Dispute Resolution (ODR), especially in the face of rapidly growing networking and borderless legal practice.[49]

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[46] Sarah aru and Moses Wafula, 'Factors Influencing the Choice of Huduma Centers' Services (A Case Study of Mombasa Huduma Centre)' (2015) 5 International Journal of Scientific and Research Publications; Amir Ghalib Abdalla and others, 'Effect of Huduma Centers (One Stop Shops) in Service Delivery – A Case Study of Mombasa Huduma Centre' (2015) 5 International Journal of Academic Research in Business and Social Sciences 102; 'Study Heaps Praise on Revolutionary Huduma Centres' (Daily Nation) <*https://www.nation.co.kehttps://www.nation.co.ke/dailynation/news/study-heaps-praise-on-revolutionary-huduma-centres-89030*> accessed 11 April 2022.

[47] 'Broadband in Kenya | Broadband Strategies Toolkit' <*http://ddtoolkits.worldbankgroup.org/broadband-strategies/case-studies/broadband-kenya*> accessed 11 April 2022.

[48] 'Last Mile Connectivity Program Kenya - Inclusive Infrastructure' <*https://inclusiveinfra.gihub.org/case-studies/last-mile-connectivity-program-kenya/*> *accessed 11 April 2022; 'Kenya - Last Mile Connectivity Project II'* <*https://projectsportal.afdb.org/dataportal/VProject/show/P-KE-FA0-013*> accessed 11 April 2022; African Development Bank, 'Kenya - Last Mile Connectivity Project - Project Appraisal Report' (African Development Bank - Building today, a better Africa tomorrow, 24 January 2020) <*https://www.afdb.org/en/documents/kenya-last-mile-connectivity-project-project-appraisal-report*> accessed 11 April 2022; 'Last Mile Project – Ministry of Energy' <https://energy.go.ke/?p=914> accessed 11 April 2022.

[49] Emmanuel Oluwafemi Olowononi and Ogechukwu Jennifer Ikwuanusi, 'Recent Developments in 21st Century Global Legal Practice: Emerging Markets, Prospects, Challenges and Solutions for African Lawyers' (2019) 5 KIU Journal of Social Sciences 31; Samuel Omotoso, 'Law, Lawyers And

4.1 Online Mediation

Mediation is a negotiation process between two parties in the presence of a third party. Through a framework that will not force any solution that is not mutually acceptable, negotiation permits parties to fully control both the process and the outcome.[50] As an informal dispute resolution procedure, negotiation gives parties complete authority over the process of identifying and discussing their difficulties, allowing them to negotiate a mutually acceptable solution without the involvement of a third party. It focuses on the parties' similar interests rather than their respective strength or position.[51] It is linked to voluntariness, cost-effectiveness, informality, an emphasis on interests rather than rights, innovative solutions, personal empowerment, greater party control, addressing fundamental causes of conflict, non-coerciveness, and long-term results. This makes it particularly applicable to normal life conflicts that would otherwise be exacerbated by any attempts to resolve them through litigation.[52] When participants in a negotiation reach a stalemate, they invite a third party of their choosing to assist them in resolving the issue, which is known as mediation.[53] Mediation has many of the same benefits as negotiating. However, because mediation has no enforcement mechanism and relies on the goodwill of the parties, it suffers from its non-binding character, which means that if compliance is necessary, one must go to court to acquire it.[54]

The added advantages of online mediation are that parties need not to travel and the cost of mediation is fixed and parties can prepare financially from the start.[55]

4.2 Online Commercial Arbitration

Due to its clear benefits over litigation, arbitration has grown in favour as the preferred method of resolving disputes, particularly among businesses.[56] The most notable advantage of arbitration over litigation is its transnational application in international

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The Social Media In The 21st Century: Challenges And Prospects' Law, Lawyers And The Social Media In The 21st Century: Challenges And Prospects <*https://www.academia.edu/40663364/LAW_LAWYERS_AND_THE_SOCIAL_MEDIA_IN_THE_21ST_CENTURY_CHALLENGES_AND_PROSPECTS*> accessed 10 April 2022.

[50] See generally, Muigua, K., Resolving Conflicts through Mediation in Kenya (Nairobi: Glenwood Publishers, 2017).

[51] 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, pp. 773-780, ACM, 2003.

[52] Muigua, K., 'ADR: The Road to Justice in Kenya' Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution, Vol. 2, No 1, (2014), pp. 28-95.

[53] Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management (Nairobi: Centre for Conflict Research, 2006), p. 115.

[54] See generally, Muigua, K., 'Effective Justice for Kenyans: is ADR Really Alternative?' The Law Society of Kenya Journal, Vol. II, 2015, No. 1, pp. 49-62.

[55] 'The Benefits of Online Mediation' (Mediation Center of Los Angeles | MCLA, 2 November 2020) <https://www.mediationla.org/the-benefits-of-online-mediation/> accessed 17 April 2022.

[56] See Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," Ohio St. J. on Disp. Resol. 13 (1997): 675 at p.678.

conflicts with low or no intervention from national courts, giving parties confidence that justice would be served in the most efficient manner possible. As a result, countries and regions all over the world are advocating international arbitration as the preferred method for resolving international conflicts.[57]

International commercial arbitration in Africa will assist the business and investment community because it provides a viable structure for resolving international and regional conflicts.[58] However, while commercial arbitration's inherent flexibility has allowed it to adapt well to recent global changes, particularly the Covid-19 pandemic, due to its familiarity with remote communications, videoconferencing, and the use of technology to drive efficiencies, holding proceedings entirely (or nearly entirely) virtually has posed its own set of challenges, including concerns about worries over fair treatment, straightforwardness, secrecy, security, data protection and management; the presentation of submissions in a different way; how to manage numerous time regions; screen weariness; and network issues.[59]

Thus, even as the world moves towards embracing online commercial arbitration, there is a need for countries and stakeholders to come up with ways of overcoming the above listed challenges.

4.3 Block Chain Arbitration

Blockchain is defined as a "open, distributed ledger that can efficiently and permanently record transactions between two parties." In its most basic form, a blockchain's functioning premise is built on the connection of each transaction or movement as a "block" to the system, allowing the platform to develop indefinitely. The whole system is updated with each new transaction, and the transaction is accessible to all parties involved anywhere in the globe.[60] The self-executing, next generation contracts used in Smart Contracts, Blockchain, and Arbitration are designed to achieve preset conditions. By activating the arbitration clause embedded in the smart contract, Blockchain Arbitration

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[57] Karl P. S. and Federico O., Improving the international investment law and policy regime: Options for the future, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at *http://www.formin.finland.fi/public/download.aspx?ID=113259&GUIDE*

[58] Muigua, K., 'Promoting International Commercial Arbitration in Africa,' Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution, Volume 5, No 2, (2017), pp. 1-27.

[59] 'Recent Trends in International Arbitration' (Walker Morris) <https://www.walkermorris.co.uk/publications/recent-trends-in-international-arbitration/> accessed 17 April 2022.

[60] 'Blockchain, Smart Contracts And Arbitration - Technology - Turkey' <*https://www.mondaq.com/turkey/fin-tech/967452/blockchain-smart-contracts-and-arbitration*> accessed 17 April 2022.

can enable the storage and verification of rules, as well as automatic implementation (on a specific occurrence constituting a breach of the agreement).[61]

If a disagreement arises, the smart contract will alert the Arbitrator via a blockchain-based dispute resolution interface. A party can digitize the conditions of an agreement, lock the cash in a smart contract, and condition the smart contract such that the work is completed and the monies are received. The smart contract's self-executing nature will automatically enforce the award and transmit the stipulated fee to the Arbitrator once the procedure is completed.[62]

Due to its decentralized nature, blockchain arbitration currently presents several incompatibilities with the existing arbitration legal framework, such as the cryptographic form of the arbitration agreement and the lack of a seat of arbitration, to name a few.[63] The notion of blockchain arbitration is one of the most recent advancements in ADR, and it aims to harness the benefits of the technology in dispute resolution. It is linked to the proliferation of e-contracts and smart contracts in commercial transactions throughout the world.[64] There is, however, need for independent and further research on the topic of blockchain arbitration even as the international community moves to embrace the process.

5. Conclusion

The expansion of digital trade and digitally enabled transactions has been tremendous in Kenya, and digitization has become a vital element of a wide range of daily activities and service delivery.[65] With more and more individuals throughout the globe engaged in immediate cross-border exchanges of digital commodities, and as the infrastructure that supports the Internet increases, obstacles of distance and cost that previously appeared insurmountable have begun to fall away.[66]

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[61] 'Blockchain Arbitration: The Future of Dispute Resolution' (Foxmandal, 23 November 2021) <https://www.foxmandal.in/blockchain-arbitration-the-future-of-dispute-resolution/> accessed 17 April 2022.

[62] Ibid.

[63] Chevalier M, 'Arbitration Tech Toolbox: Is a Mexican Court Decision the First Stone to Bridging the Blockchain Arbitral Order with National Legal Orders?' (Kluwer Arbitration Blog, 4 March 2022) <*http://arbitrationblog.kluwerarbitration.com/2022/03/04/arbitration-tech-toolbox-is-a-mexican-court-decision-the-first-stone-to-bridging-the-blockchain-arbitral-order-with-national-legal-orders/*> accessed 17 April 2022.

[64] Bansal R, 'Enforceability of Awards from Blockchain Arbitrations in India' (Kluwer Arbitration Blog, 21 August 2019) <*http://arbitrationblog.kluwerarbitration.com/2019/08/21/enforceability-of-awards-from-blockchain-arbitrations-in-india/*> accessed 17 April 2022.

[65] Kiriti-Nganga T and Mbithi M, 'The Digital Trade Era - Opportunities and Challenges for Developing Countries: The Case of Kenya' (2021), in book: Adapting to the Digital Era: Challenges and Opportunities (pp.92-109), World Trade Organization, at p.94.

[66] Lund S and Manyika J, 'How Digital Trade Is Transforming Globalisation' (by International Centre for Trade and Sustainable Development (ICTSD) 7 … 2016), at p.1.

The transnational nature of this kind of commerce and the limitations that come with the traditional means of dispute resolution create the need for enhanced use of digital dispute resolution in Africa. 'The quality of an institute depends on the incorporation of current changing dynamics and environmental challenges, and if institutions fail to keep pace with these changes, they will be perceived as increasingly irrelevant, failing to add value to society and shaping and grooming future leaders who can contribute in creative ways to accelerating sustainable economic development,' it has been correctly stated.[67] This, therefore, calls for investment in institutional frameworks that will ably overcome the challenges that come with digital economy, as far as management of the digital trade disputes is concerned. Alternative Dispute Resolution practice is rapidly evolving-there is clearly a need to invest in Digital Dispute Resolution in Kenya and the rest of the world.

[67] Raizada S and Mittal JK, 'Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education' (2020) 20 Medico Legal Update 188, 189.

The Viability of Arbitration in management of Climate Change Related Disputes in Kenya

Abstract

Climate change has affected many areas of the society ranging from environmental, economic, political and even social aspects. It has also brought about disputes and conflicts that have been associated with climate change, both directly and indirectly, as it is seen as a conflict multiplier. This paper discusses the disputes related to climate change implications, and how the same can be addressed using arbitration as a dispute settlement mechanism. The author argues that arbitration has certain advantages over litigation which makes it more viable in addressing the disputes in question.

1. Introduction

Climate change is considered to be one of the greatest challenges facing mankind in this century and beyond.[1] Climate change and conflict have been linked by some observers in both industrialized and poor countries, although the connection is deemed to be indirect.[2] Climate change's effects on poverty, mental health, food security, and migration further complicate the link between climate change and war.[3] As a result, the goals of the Conference of Parties Twenty Sixth session (COP 26), held in Glasgow from 31 October to 13 November 2021 included to: secure global net zero by mid-century and keep 1.5 degrees within reach; adapt to protect communities and natural habitats; mobilise finance; and work together to deliver,[4] where countries were expected to, *inter alia* accelerate action to tackle the climate crisis through collaboration between governments, businesses and civil society.[5] Achieving these will naturally require some adjustments by countries' leadership and other stakeholders. Arguably, climate change comes with a lot of conflicts and/or disputes that need sustainable means of handling them.[6]

Over the years, there has been an appreciation of the impact that climate may have in economic results, as well as rising public concern about climate change.[7] The term "climate" refers to observations of climatic factors such as temperature, rainfall, and water

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[1] See Dervis, K., "Devastating for the World's Poor Climate Change Threatens the Development Gains Already Achieved," UN Chronicle Online Edition
< *https://www.uncclearn.org/wp-content/uploads/library/undp30.pdf*> accessed 6 April 2022.

[2] 'Does Climate Change Cause Conflict?' (IGC, 2 June 2021) <*https://www.theigc.org/blog/does-climate-change-cause-conflict/*> *accessed* 6 April 2022.

[3] Ibid.

[4] 'COP26 Goals' (UN Climate Change Conference (COP26) at the SEC – Glasgow 2021) <https://ukcop26.org/cop26-goals/> accessed 5 April 2022.

[5] Ibid.

[6] See Vally Koubi, 'Climate Change and Conflict' (2019) 22 Annual Review of Political Science 343 <*https://www.annualreviews.org/doi/10.1146/annurev-polisci-050317-070830*> accessed 11 April 2022.

[7] Marshall Burke, Solomon M Hsiang and Edward Miguel, 'Climate and Conflict' (2015) 7 Annual Review of Economics 577, 578 <*https://www.annualreviews.org/doi/10.1146/annurev-economics-080614-115430*> accessed 27 March 2022.

availability, as well as climate indices that serve as proxy measures for these variables.[8] While climatic circumstances do not generate conflict on their own, they can modify the environment under which particular social interactions take place, potentially altering the risk of conflict.[9] The environmental principle of polluter pays, which holds that polluters should be held accountable for destroying the environment, justifies the concept of resolving climate change disputes through restorative dispute management approaches.[10]

It is, however, worth noting that despite the constitutional provisions that seek to promote the use of Alternative Dispute Resolution (ADR) Mechanisms in the country, Kenya's *Climate Change Act 2016*[11] is silent on the role of ADR in addressing climate change related disputes and conflicts and only provides for the role of Environment and Land Court.[12] This paper critically discusses the nature of climate change related conflicts and disputes, and how arbitration, both domestic and international, can be used to address the disputes, in the context of achieving sustainability in Kenya. It is worth noting that the discussion leans more towards management of the disputes as against conflicts. The paper, in justifying the use of arbitration, will discuss the differences between conflicts and disputes, and why the climate change related disputes are more suitable for arbitration than the conflicts.

2. Nature of Climate Change Related Conflicts and Disputes

Climate is described as a region's averaged temperature and precipitation patterns, as well as their range of fluctuation, across time.[13] "Climate change" is defined by the UNFCCC as "a change in climate that is ascribed directly or indirectly to human activity that modifies the composition of the global atmosphere and is in addition to natural climate variability seen over comparable time periods."[14] Kenya's *Climate Change Act 2016* defines "climate change" to mean 'a change in the climate system which is caused by significant changes in the concentration of greenhouse gases as a consequence of human activities and which is in addition to natural climate change that has been observed during a

[8] Marshall Burke, Solomon M Hsiang and Edward Miguel, 'Climate and Conflict' (2015) 7 Annual Review of Economics 577, 578 <https://www.annualreviews.org/doi/10.1146/annurev-economics-080614-115430> accessed 27 March 2022.

[9] Ibid, 579.

[10] K. Segerson, Environment, in Encyclopedia of Energy, Natural Resource, and Environmental Economics
Volume 3, 2013.

[11] Climate Change Act, No. 11 of 2016, Laws of Kenya.

[12] Ibid, section 23.

[13] '15.1: Global Climate Change' (Geosciences LibreTexts, 26 December 2019) <https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change> accessed 20 March 2022.

[14] Article 1(2), UN General Assembly, United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189.

considerable period'.[15] Climate change mitigation is one of the key environmental goals of the United Nations' 2030 Agenda for Sustainable Development Goals (SDGs)[16], as encapsulated in Sustainable Development Goal 13, which aims to help countries attain resilience and adaptability.[17]

There is no universally accepted definition of a climate change-related dispute.[18] Some authors have observed that climate change is a "threat multiplier," which can increase human security issues such as food and water scarcity while also leading to (violent) conflict in climate-vulnerable countries.[19] This is as a result of the fact that climate change's negative repercussions, such as water scarcity, crop failure, food insecurity, economic shocks, migration, and displacement, can exacerbate the risk of conflict and violence[20]. Environmental conflicts and disputes can be divided into two categories: first, access to environmental resources as a source of livelihood and as a foundation for economic activity, and second, conflicts over what are known as "side effects" of economic activity, such as biodiversity loss and pollution.[21]

3. Approaches to Management of Disputes and Conflicts

There are numerous techniques for preventing conflicts, resolving conflicts, settling disputes, and transforming conflicts.[22] The choice of mechanism chosen depends on whether one is dealing with conflicts or disputes, as both have different causes and underlying issues.[23]

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[15] Section 2, Climate Change Act, No. 11 of 2016, laws of Kenya.

[16] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

[17] Ibid, SDG 13.

[18] C. Mark Baker, Cara Dowling, Dylan McKimmie, Tamlyn Mills, Kevin O'Gorman, Holly Stebbing, Martin Valasek, "What are climate change and sustainability disputes? Key arbitration examples (Part 1 contractual disputes)", in James Rogers, London; Cara Dowling, Vancouver (eds), International arbitration report, Norton Rose Fulbright – Issue 16 – June 2021, p. 40. < https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/international-arbitration-report-issue-16.pdf?revision=40c8a703-6e1d-413c-8c7e-ac1201697383&revision=40c8a703-6e1d-413c-8c7e-ac1201697383> accessed 30 March 2022.

[19] Froese, Rebecca, and Janpeter Schilling, "The Nexus of Climate Change, Land Use, and Conflicts." (2019).

[20] 'Tackling the Intersecting Challenges of Climate Change, Fragility and Conflict' <*https://blogs.worldbank.org/dev4peace/tackling-intersecting-challenges-climate-change-fragility-and-conflict*> accessed 30 March 2022.

[21] Arild Vatn, Environmental Governance: Institutions, Policies and Actions (Paperback edition, Edward Elgar Publishing 2016) 2.

[22] Corissajoy, 'Settlement, Resolution, Management, and Transformation: An Explanation of Terms' (Beyond Intractability, 29 June 2016) <*https://www.beyondintractability.org/essay/meaning_resolution*> accessed 6 April 2022.

[23] See K. Muigua, Resolving conflicts through mediation in Kenya, Glenwood Publishers, Nairobi, 2nd Ed., 2017, Chapter Four.

3.1 Conflicts

Conflicts are concerns of non-negotiable ideals. The parties share these wants and ideals. Needs or values are inherent in all human beings and are at the foundation of conflict, whereas interests and issues are surface-level and are not at the root of conflict.[24] They're limitless. Conflicts develop as a result of the conflicting parties' non-negotiable wants or values not being met. As a result, if all requirements are addressed, the outcome is non-zero-sum, resulting in integrative and innovative solutions rather than a zero-sum answer.[25]

A conflict usually involves at least two parties that disagree over the allocation of material or symbolic resources or who believe their underlying cultural values and beliefs are irreconcilable. Conflicts may also arise as a result of society's social and political makeup and structure, according to some theories.[26] This supports the viewpoint that conflict must be addressed on two levels: psychologically to overcome 'blocks' to positive communication and ontologically to discover the 'true' causes of conflict.[27]

Conflicts are usually resolved because they are about fundamental values, hence the term "conflict resolution." Resolution is the mutual development of a valid relationship in which each party's demands are met. It is the mutual construction of a conflict because conflict is dynamic, interactive, and ever-changing with different stages of escalation and de-escalation such as formation, escalation, crisis, and endurance, improvement and de-escalation, settlement or resolution, and finally reconstruction and reconciliation through political processes such as negotiation and mediation. As a result, conflict resolution is stated to probe into the roots or underlying causes of conflict and relationships, with the goal of resolving them completely.[28]

3.2 Disputes

When conflicts are not or cannot be adequately managed, disputes arise.[29] It's about an issue or a situation that interests you. Needs are not negotiable, divisible, or finite, while interests are. They aren't negotiable due to their intrinsic nature. They are not transferable

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[24] Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", Journal of Peace Research, Vol.32, No. 2 (May, 1995), pp.152-153.

[25] Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4 (April, 2000), pp. 2-4.

[26] See Serge, L, et al, "Conflict Management Processes for Land-related conflict", A Consultancy Report by the Pacific Islands Forum Secretariat, available at www.forumsec.org, [Accessed on 04/06/2012].

[27] Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op.cit.

[28] Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", The Conflict Resolution Information Source, Version IV, December 2005.

[29] Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, (CIArb, London, 2002), pp.12-13.

or divisible. Needs are also inexhaustible, which means that the more security I have, the less security you have. When two or more persons or groups believe their rights, interests, or aims are incompatible, they communicate their perspective to the other person or group, which can lead to a dispute. Similarly, conflicts can arise from societal power imbalances, rights, or interests. These issues or interests can be discussed and even bargained over.[30]

Because a dispute can be based on interests, rights, or power, the approaches to resolving it vary. Negotiation and mediation are the best ways to resolve an interest-based dispute. If the issue is about rights, the best response is litigation; if the issue is about power, the best response is the use of force, threats, and violence, such as that used by the police and the army. Understanding the roots or grounds of a dispute is critical because if it is not addressed appropriately, the likelihood of escalatory responses grows, which can lead to violence and long-term societal fission.

It's worth noting that tensions tend to repeat in specific sorts of disputes, such as those concerning natural resource use and access. The recurrence of a disagreement over time could be a sign of a much deeper conflict in which people or organizations are involved. In such circumstances, the responses used must take into account the greater context of the dispute's interests, rights, and power imbalances. As a result, answers must be tailored to the various levels of the conflict. Some solutions could be aimed at resolving the specific conflict, such as through adjudication processes like courts and arbitration.

Other intervention techniques might seek to address the dispute's underlying causes, which are frequently considerably broader. This can be done, for example, through political negotiations or mediation involving the entire community or perhaps a number of communities, with the goal of airing complaints and injustices seen by various groups in the region. Other intervention techniques might attempt to rebuild or restore the community's broken or damaged ties as a result of disagreements or conflicts.[31]

Interests or concerns are only surface-level; they do not address the conflict's basic or primary causes. As a result, conflicts can be resolved, thus the term "conflict resolution." A settlement, according to eminent conflict management specialists, is an agreement on the dispute's issue(s), which frequently entails a compromise. A settlement aims to appease the opposing party without addressing the dispute's root causes. As a result, adjudicatory, legal, or coercive processes like courts and arbitration can be used to settle disputes.

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[30] Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op.cit; Mwagiru, M., The Water's Edge: Mediation of Violent Electoral Conflict in Kenya, op.cit, pp.36-38.

[31] See Serge, L, et al, "Conflict Management Processes for Land-related conflict", A Consultancy Report by the Pacific Islands Forum Secretariat, op.cit.

When it comes to disputes about interests rather than values, coercive means such as litigation and arbitration are useful.[32]

4. Arbitration Process and management of Disputes

Arbitration is a mechanism for settling disputes that usually occurs in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the arbitrator's decision based on law, or, if so agreed, other considerations, following a full hearing and such decision is enforceable at law.[33] Arbitration restricts appeals against decisions, which benefits the arbitral process' efficiency, and the arbitrator's award is final and binding on the parties save in the most glaring instances of incompetent arbitrating.[34]

As previously stated, adjudicatory, coercive, or legal procedures can be used to settle disputes, whereas non-legal, non-adjudicatory, or non-coercive approaches can be used to resolve conflicts. The key power- and rights-based mechanisms include litigation and arbitration. They're mechanisms for settling disputes. The parties in a disagreement have little or no autonomy, and the means for settling disputes are coercive. Legal tools like as courts, police, and the army, among others, are used to enforce a settlement.

Although the parties have considerable autonomy in choosing the venue and arbitrator in arbitration, one party will be offended when an award is made, despite the fact that the parties agree to be bound by the arbitrator's judgment at the outset. As a result, it becomes coercive because the parties must comply with the decision, diminishing its usefulness as a conflict resolution method but effective in settlement.[35]

Arbitration is viewed as a viable alternative to state court litigation with the purpose of getting a legally binding and enforceable outcome from a panel of legal and industrial experts.[36] Arbitration has great attributes which include: parties can agree on an arbitrator to decide the subject; the arbitrator has experience in the field of dispute; anybody can represent a party in the dispute; adaptability; cost-effective; confidential; quick; and the outcome is binding. Thus, unlike court procedures, which are accessible to the public, commercial arbitration proceedings are private, thus parties that want to keep their trade secrets confidential may select commercial arbitration while still benefiting from the binding character of court verdicts.

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[32] Mwagiru, M., Conflict in Africa; Theory, Processes and Institutions of Management, op. cit. pp. 109-114.

[33] Barnstein, R. The Handbook of Arbitration Practice: General Principles (Part 2) (Sweet & Maxwell, London, 1998), p. 313.

[34] Section 35-The Arbitration Act, 1995- Grounds of setting aside an arbitral award.

[35] Mwagiru, M., The Water's Edge: Mediation of Violent Electoral Conflict in Kenya, op.cit, pp.36-38.

[36] '*Arbitration in Africa | White & Case LLP*' <*https://www.whitecase.com/publications/insight/arbitration-africa*> accessed 4 April 2022.

5. Using Arbitration as a Tool for management of Climate Change Disputes: Challenges and Prospects

Disputes related to climate change may increase in future due to: actions of commercial entities giving rise to groups or affected individuals having rights of action; climate change inaction – failure by states to take measures in response to climate change, giving rise to potential inter-state and investor-state disputes, and claims by groups of concerned citizens; climate change action– taking response measures, giving rise to potential inter-state and investor-state disputes; dilution or revocation of responsive measures by states, giving rise to potential renewable energy treaty arbitrations; commercial contract enforcement –private sector is central to climate change mitigation, and there may be an increase commercial contracts relating to climate change mitigation and adaptation; coming into effect of the Paris Agreement, which may give rise to arbitration.[37]

While discussing the role of arbitration in addressing climate change disputes, some commentators have highlighted the following disputes: 1. cases brought to either mandate or change climate-related policy or conduct; 2. cases brought to seek financial redress for damages associated with the effects of climate change; 3. contractual disputes arising out of the industry transitions which the energy sector and all major industries are currently undergoing; 4. contractual disputes resulting from climate-related weather events; 5. related disputes between foreign investors and host states; and 6. related disputes between states, and between other transnational actors, while observing that a key reason for selecting these categories is that the potential role for arbitration varies significantly depending on the category of dispute, with arbitration having a greater role (in practice and in potential) in categories 3 to 6.[38]

Notably, Kenya's Environment and Land Court Act, 2011[39] provides for the jurisdiction of the Environment and Land Court as including power to hear and determine disputes relating to climate issues.[40] Also worth pointing out is the recognition of alternative means of dispute resolution and even affirming that where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court is mandated to stay proceedings until such condition is fulfilled.[41] While it is to be

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[37]'Resolving Climate Change Disputes through Arbitration' (Pinsent Masons) <*https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration*> accessed 7 April 2022.

[38] C. Mark Baker, Cara Dowling, Dylan McKimmie, Tamlyn Mills, Kevin O'Gorman, Holly Stebbing, Martin Valasek, "What are climate change and sustainability disputes? Key arbitration examples (Part 1 contractual disputes)", in James Rogers, London; Cara Dowling, Vancouver (eds), International arbitration report, Norton Rose Fulbright – Issue 16 – June 2021, p. 41.

[39] Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.

[40] Ibid, section 13(2)(a).

[41] 20. Alternative dispute resolution

(1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation,

acknowledged that the judges appointed to head environment and land courts are appointed on the basis of having relevant knowledge in the area, it must also be acknowledged that they may not always be well versed with all matters that come before them. It is during such times, either on court's own motion, with the agreement of or at the request of the parties, that the court may consider any other appropriate means of alternative dispute resolution including arbitration especially in respect of technical issues relating to climate change disputes.

The provisions of *Climate Change Act 2016*[42] acknowledge the role of courts in upholding rights relating to climate change and spells out the role of the court in the following words: "a person may, pursuant to Article 70 of the Constitution, apply to the Environment and Land Court, alleging that a person has acted in a manner that has or is likely to adversely affect efforts towards mitigation and adaptation to the effects of climate change".[43] In such applications, the court may make an order or give directions to: prevent, stop or discontinue an act or omission that is harmful to the environment; compel a public officer to take measures to prevent or discontinue an act or omission that is harmful to the environment; or provide compensation to a victim of a violation relating to climate change duties.[44]

While this is a commendable step towards empowering local courts in discharging their mandate in promotion of sustainable development, parties may not always be both citizens of Kenya and where the violating party is a foreign investor, there may be need to invoke international commercial or investment arbitration. In addition, it must be noted that parties may invoke section 20 (2) of the Environment and Land Court Act 2011 which provides that '*where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled*'. Such parties may opt to have the dispute settled by expert arbitrators in the area of climate change disputes and only go back to court for declaratory rights and enforcement of the outcome(s).

The advantages of arbitration highlighted above make it a viable alternative way of managing climate change related disputes as against litigation, while still ensuring that the outcome thereof can be enforced. Parties, even where they already filed a case before

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mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.

(2) Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.

[42] Climate Change Act, No. 11 of 2016, Laws of Kenya.
[43] Section 23(1), Climate Change Act, 2016.
[44] Section 23(2), Climate Change Act, 2016.

a court, may not always be willing to let out commercial secrets and may, therefore, wish to refer the matter to arbitration, court-annexed or otherwise.

The distinction between conflicts and disputes, as discussed above, is important in analyzing any disagreements that are attributable to climate change in a bid to decide the most viable mechanism of addressing them. Such analysis and management of disputes may require expertise in that particular area of law, namely environmental law and climate change. This is where arbitration becomes useful because, as already pointed out, parties in arbitration proceedings are allowed to pick the third party expert with the relevant experience and knowledge to help them settle the particular aspects of the dispute.

It has also been noted that local disputes over food and water supplies can spread to neighboring nations as people seek extra resources and safety, putting further strain on other countries' resources and perhaps escalating tensions.[45] In light of such possibilities, addressing such problems through local courts becomes impossible. However, in addition to the specialized expertise that is potentially available to parties through arbitration, there is also the advantage of the transnational nature of arbitration process unlike litigation, and the subsequent nature of ease of enforcement of arbitral awards across borders.

Article 14.1 of 1992 *United Nations Framework Convention on Climate Change* provides that 'in the case of a dispute between two or more Parties concerning the interpretation or application of the Convention, the Parties concerned should seek a settlement of the matter by discussion or any other peaceful measures of their own choice." Article 14.2(b) envisages the use of arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration. Article 19 of *Kyoto Protocol* also provides that "the provisions of Article 14 of the Convention on settlement of disputes shall apply mutatis mutandis to this Protocol". Similarly, Article 24 of the *Paris Agreement*, a legally binding international treaty which entered into force on 4 November 2016, provides that "the provisions of Article 14 of the Convention on settlement of disputes shall apply mutatis mutandis to this Agreement".

While legislators should make climate change policy, courts and arbitral tribunals also have a role to play, as climate change disputes are on the rise and will likely continue to do so in the future, and disagreements over the proper interpretation and application of climate change legislation may arise.[46]

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[45] UNESCO, 'Climate Change Raises Conflict Concerns' (UNESCO, 29 March 2018) <*https://en.unesco.org/courier/2018-2/climate-change-raises-conflict-concerns*> accessed 11 April 2022.
[46] 'Resolving Climate Change Disputes through Arbitration' (Pinsent Masons) <*https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration*> accessed 11 April 2022.

It has been observed that even where international dispute settlement mechanisms exist, they are deemed ineffective due to a lack of mandatory rules or enforcement procedures, so mechanisms like 'international adjudication are unlikely to provide effective relief, either in reducing emissions or compensating victims'.[47] Arbitration, on the other hand, has huge benefits over litigation in dealing with climate change disputes because arbitrators with the right mix of expertise can be picked, multiparty proceedings can be handled, and the New York Convention on the Enforcement of Arbitral Awards provides certainty pertaining award enforcement.[48] The Permanent Court of Arbitration (PCA) has been noted as a regular forum for dispute resolution under bilateral and multilateral treaties, contracts, and other instruments relating to natural resources and the environment, and provides specialized rules for arbitration and conciliation of these disputes.[49] Notably, PCA already has in place the *PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources* ("Environmental Rules"), adopted in 2001[50], and the Rules are applicable where all parties have agreed in writing that a dispute that may arise or that has arisen between them shall be referred to arbitration under the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.[51]

It is also worth noting that the PCA Environmental Rules provide for the establishment of a specialized list of arbitrators considered to have expertise in this area, establishment of a list of scientific and technical experts who may be appointed as expert witnesses pursuant to these Rules, and parties to a dispute are free to choose arbitrators, conciliators and expert witnesses from these Panels but with the understanding that the choice of arbitrators, conciliators or experts is not limited to the PCA Panels.[52] As a way of supporting and building capacity of States, States, international organizations, and private parties involved in the creation and administration of new, specialized environmental dispute settlement procedures can seek guidance and support from the

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[47] 'LSE Law Review Blog' <*https://blog.lselawreview.com/2022/03/commercial-arbitration-fight-against-climate-change-role-actually-play*> accessed 11 April 2022.

[48] 'Resolving Climate Change Disputes through Arbitration' (Pinsent Masons) <*https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration*> accessed 11 April 2022.

[49] 'Environmental Dispute Resolution' (Permanent Court of Arbitration, 2022) <https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/> accessed 11 April 2022.

[50] 'Environmental Dispute Resolution' (PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources, 2001) <*https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf*> accessed 11 April 2022.

[51] Article 1 (1), PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources, 2001.

[52] 'Panels of Arbitrators and Experts for Environmental Disputes' (Permanent Court of Arbitration, 2022)<*https://pca-cpa.org/en/about/structure/panels-of-arbitrators-and-experts-for-environmental-disputes/*> accessed 11 April 2022.

PCA.[53] This is possible considering that the PCA is responsible for resolving disputes between States and non-State players that arise through a variety of bilateral and multilateral investment treaties, contracts, and other instruments.[54]

Just like PCA has special rules for arbitration of environmental and natural resource related disputes, there may be a need, going forward, for both domestic and international institutions (both courts and arbitral institutions) to build capacity in terms of expertise and legal framework in preparation for the climate change related disputes ranging from energy, finance and technology sectors, as follows: Energy – in particular, the transition away from fossil fuels to renewables, and the growth especially of the solar and wind sectors; Finance – carbon trading and green certificates; and Technology – the drive for efficient power grids, as well as low emission energy and data storage.[55] The other areas that may need special attention have already been identified by the International Chamber of Commerce Commission on Environment and Energy task force on "Arbitration of Climate Change Related Disputes" (the "Task Force") in their 2019 Report titled *Report on Resolving Climate Change Related Disputes through Arbitration and ADR* (the "Report")[56] where they observed that a number of specific features of international arbitration that may assist in resolving climate change related disputes going forward include utilization and optimization of: use of and recourse to appropriate scientific and other expertise; existing measures and procedures for expediting early resolution of disputes or providing urgent interim or conservatory relief; integration of climate change commitments and principles of international law, including arising out of the UNFCCC and Paris Agreement; enhanced transparency of proceedings; potential third-party participation, including through amicus curiae briefs; and costs, including advances and allocation of costs, to promote fair, transparent and appropriate conduct of climate change related disputes.[57]

As already observed, Kenya's Climate Change Act, 2016 does not make reference to the use of ADR mechanisms, including arbitration in addressing disputes that arise therefrom. However, it makes reference to Environment and Land Court Act 2011 (ELC Act) which empowers Environment and Land Court to hear and determine disputes

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[53] 'Environmental Dispute Resolution' (Permanent Court of Arbitration, 2022) <*https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/*> accessed 11 April 2022.

[54] Ibid.

[55] 'Arbitrating climate change disputes | Actualités | DLA Piper Global Law Firm' (DLA Piper) <*https://www.dlapiper.com/fr/france/insights/publications/2020/01/arbitrating-climate-change-disputes/*> accessed 11 April 2022.

[56] 'ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR' (ICC - International Chamber of Commerce) <*https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/*> accessed 11 April 2022.

[57] Report on Resolving Climate Change Related Disputes through Arbitration and ADR, p. 19.

relating to climate issues. The ELC Act, however, gives these courts the power to resort to ADR mechanisms. There is a need for policy makers and other stakeholders to borrow a leaf from the PCA Environmental Rules and the recommendations from the 2019 ICC Task Force Report to consider coming up with special rules and panel of experts that may either address disputes requiring specialized knowledge such as those relating to climate change or those who may offer specialized guidance to courts while dealing with these disputes. Arbitral institutions such as Chartered Institute of Arbitrators and Nairobi Centre for International Arbitration, among others, should also be left behind in building specialized capacity along the same lines. Climate change related disputes are unlikely to go away in the near future and stakeholders should, therefore, prepare adequately.

6. Conclusion

Climate change related disputes come with many implications across all sectors of economy from environmental, political, economic and even social, where they also come with disputes and conflicts. While different approaches to conflict management apply to conflicts and disputes due to the underlying issues therein, this paper has focused on disputes relating to climate change. As already pointed out by various commentators, this paper acknowledges that some of these disputes may be indirectly linked to climate change, which is seen as a multiplier of already existing causative factors. However, the settlement of these disputes may require specialized knowledge, may be of transnational nature and may require coercion in abiding by outcome. This paper argues that these features may not be met through litigation, hence the need to explore arbitration, both domestic and international, in addressing the said disputes.

Arguably, putting in place measures meant to address the related disputes is part of the mitigation and adaptation approaches to address climate change since while mitigation and adaptation policies have different goals and opportunities for implementation, many drivers of mitigation and adaptation are common, and solutions can be interrelated.[58] There is a need for local policy makers and conflict management institutions, including courts and arbitral institutions, to build capacity towards utilizing arbitration in management of climate change related disputes.

[58]Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018), "Integrating mitigation and adaptation: Opportunities and challenges," In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network. Cambridge University Press, New York. 101–138, 102 < *https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com_.pdf*> accessed 7 April 2022.

Promoting Peaceful and Inclusive Societies for Sustainable Development in Kenya

Abstract

Peace is considered an important element of sustainable development and has even been given attention under the 2030 Agenda on Sustainable Development Goals. Kenya seeks to become a middle-income country by 2030 and this, arguably, cannot be achieved if the factors that threaten the peaceful coexistence of all communities are not adequately addressed. This paper, largely informed by the Sustainable Development Goal 16, focuses on Kenya and offers some recommendations on how the country can successfully move towards the realization of peaceful and inclusive societies.

1. Introduction

Sustainable Development Goal (SDG) 16 requires all countries to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.[1]

The UN explains: "*Goal 16 of the Sustainable Development Goals is dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels. This aims to promote peaceful societies at national levels, as well as the role of cooperation at the international level*".[2] This is also captured in the *Addis Ababa Action Agenda*[3] which commits to promote peaceful and inclusive societies and to build effective, accountable and inclusive institutions at all levels to enable the effective, efficient and transparent mobilization and use of resources.[4]

It has rightly been pointed out that we cannot hope for sustainable development without peace, stability, human rights and effective governance, based on the rule of law.[5]

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[1] SDG 16, UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

[2] 'Goal 16: Peace, Justice and Strong Institutions - SDG Tracker' (Our World in Data) <*https://sdg-tracker.org/peace-justice*> accessed 26 November 2020

[3] United Nations, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015.

[4] United Nations Inter-Agency Task Force on Financing for Development, 'Promoting peaceful and inclusive societies' <*https://developmentfinance.un.org/promoting-peaceful-and-inclusive-societies*> accessed 26 November 2020.

[5] 'Goal 16: Peace, Justice and Strong Institutions | UNDP' <*https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-16-peace-justice-and-strong-institutions.html*> accessed 26 November 2020.

2. Peace: meaning and Scope

While it is difficult to define the term 'peace' using particular words or phrases, many societies often link it to harmony, tranquility, cooperation, alliance, well-being, and agreement.'[6] It is however worth pointing out that 'peace is not just the absence of violence, it is much more.[7] Thus, every culture may have a unique but related understanding of what peace entails. Besides, peace may be classified into positive peace or negative peace, where negative peace is defined as the absence of violence or the fear of violence while positive peace is the attitudes, institutions and structures, that when strengthened, lead to peaceful societies.[8]

In this respect, positive peace is often seen as a true, lasting, and sustainable peace built on justice for all peoples, a concept that may have informed the drafting of SDG 16. The concept of positive peace is frequently associated with the elimination of the root causes of war, violence, and injustice and the conscious attempt to build a society that reflects these commitments. Positive peace assumes an interconnectedness of all life.[9] On the other hand, in a negative peace situation, while there may not be witnessed conflict out in the open, the tension is usually boiling just beneath the surface because the conflict was never reconciled and thus negative peace seeks to address immediate symptoms, the conditions of war, and the use and effects of force and weapons.'[10] In Kenya, both situations may be existing in different parts of the country, depending on the political and socio-economic conditions of the group of people in question. This is because conflict is grounded in social, structural, cultural, political and economic factors since depreciation in one increases the chances of conflict in a particular society.[11] This paper mainly focuses on the ways through which Kenya can promote peacebuilding measures that will ensure the realization of the dream of a peaceful and inclusive society. Peacebuilding approaches and methods are geared towards ensuring people are safe from harm, have access to law

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[6] Spring Ú.O. (2008) Peace and Environment: Towards a Sustainable Peace as Seen From the South. In: Brauch H.G. et al. (eds) Globalization and Environmental Challenges. Hexagon Series on Human and Environmental Security and Peace, vol 3. Springer, Berlin, Heidelberg, 113-126<*https://link.springer.com/chapter/10.1007/978-3-540-75977-5_5*> accessed 26 November 2020.

[7] Galtung, J., "Violence, peace, and peace research," Journal of peace research, Vol. 6, no. 3 (1969): 167-191.

[8] Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106. Available at *http://repository.kln.ac.lk/bitstream/handle/123456789/12056/journal1%20%281%29.104-107.pdf?sequence=1&isAllowed=y* accessed 26 November 2020.

[9] Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106.

[10] Ibid, pp.106-107.

[11] Maiese, M., 'Social Structural Change,' in G. Burgess & H. Burgess (eds), Beyond Intractability, (Conflict Information Consortium, University of Colorado, Boulder, July 2003), available at *http://www.beyondintractability.org/essay/social-structural-changes* accessed 26 November 2020; See also Maiese, M., 'Causes of Disputes and Conflicts,' in G. Burgess & H. Burgess (eds), Beyond Intractability, (Conflict Information Consortium, University of Colorado, Boulder, October, 2003), available at *http://www.beyondintractability.org/essay/underlying-causes* accessed 26 November 2020.

and justice, are included in the political decisions that affect them, have access to better economic opportunities, and enjoy better livelihoods.[12]

3. Peace efforts in Kenya: Challenges and Prospects

The Government of Kenya has undertaken various measures to foster national unity and patriotism. For instance, it adopted Sessional Paper No. 9 of 2013 on National Cohesion and Integration (NCI), Sessional Paper No. 3 of 2014 on National Policy and Action Plan on Human Rights and the Sessional Paper No. 5 of 2014 on Peacebuilding and Conflict Management.[13]

These efforts have been informed by the fact that Kenya has grappled with historical land injustices that not only violate a raft of economic, social and cultural rights but also posed a threat to national unity due to marginalisation and dispossession of community land.[14] Despite these efforts, Kenya is far from boasting of a peaceful and inclusive society as it still experiences widespread poverty, huge gaps between the rich and the poor and conflicts among and between communities. Indeed, this state of affairs may have informed the National 'Building Bridges Initiative'[15] which has been pushed by the Jubilee Government and its allies and hailed as capable of promoting peace, security and unity in Kenya. The resultant report is still undergoing political deliberations.

The bottom line is that Kenya is still experiencing social, economic and political injustices which in turn lead to conflicts and marginalization of various communities and groups of people. This is despite the constitutional and statutory provisions which seek to promote equality, peace and inclusive development in the country.

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[12] The Institute for Economics and Peace (IEP), 'Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)', p. 2 <https://issat.dcaf.ch/ser/Learn/Resource-Library/Policy-and-Research-Papers/Pillars-of-Peace-Understanding-the-key-attitudes-and-institutions-that-underpin-peaceful-societies> accessed 26 November 2020.

[13] Realisation of the National Values and Principles of Governance and Fulfilment of Kenya's International Obligations for the Period 2013-2017: Jubilee Government Score Card (Kenya National Commission on Human Rights 2017), 10 <https://www.knchr.org/Portals/0/GeneralReports/Jubilee%20Government%20Scorecard.pdf?ver=2018-06-06-193327-647> accessed 26 November 2020.

[14] Realisation of the National Values and Principles of Governance and Fulfilment of Kenya's International Obligations for the Period 2013-2017: Jubilee Government Score Card (Kenya National Commission on Human Rights 2017), 11.

[15] Republic of Kenya, 'Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report,' Building Bridges to a United Kenya: from a nation of blood ties to a nation of ideals, October, 2020< https://e4abc214-6079-4128-bc62-d6e0d196f772.filesusr.com/ugd/00daf8_bedbb584077f4a9586a25c60e4ebd68a.pdf > accessed 26 November 2020.

4. Promoting Sustainable Peace and Inclusive Societies for Sustainable Development in Kenya

Kenya has been making efforts geared towards peacebuilding as opposed to peacemaking only.[16] Peacebuilding efforts aim at addressing the reasons that lead to fights and/or conflicts and seek to support societies to manage their differences and conflicts without resorting to violence.[17] It, therefore, involves a broad range of measures, either focusing on before, during and/or after conflict. These are meant to prevent the outbreak, escalation, continuation and recurrence of conflict.[18] These efforts can also be geared towards either 'positive' or 'negative' peace.[19] This section offers some diverse recommendations that, if explored, may assist the country in moving closer to achieving sustainable peace and building an inclusive society as part of efforts geared towards realizing the sustainable development agenda in Kenya.

5. Securing Sustainable Community Livelihoods for Peace: Sustainable Development Planning and Capacity Development

It has been suggested that food security and a healthy agricultural sector can play a critical role in preventing conflict and distress migration, and in building peace. This is because, in many countries, disasters or political instability have resulted in protracted crises and food shortages.[20] Also, rural populations continue to be the most affected in conflicts; attacks on farming communities undermine livelihoods and may result in forced migration. As such, any peacebuilding efforts should include ensuring food security as part of addressing the root causes of conflict since peace and food security are often mutually reinforcing.[21] Economically and socially empowered people are likely to participate more in governance matters and less likely to be influenced politically as they

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[16] 'Sustainable Peacebuilding Strategies : Peacebuilding Operations in Nakuru County, Kenya : Contribution to the Catholic Justice and Peace Commission (CJPC)' <*https://repository.globethics.net/handle/20.500.12424/3863583*> accessed 26 November 2020; 'Peacebuilding Networks and Alliances in Kenya: A Retrospective Look at Collective Peacebuilding Effectiveness - Kenya' (ReliefWeb) <*https://reliefweb.int/report/kenya/peacebuilding-networks-and-alliances-kenya-retrospective-look-collective-peacebuilding*> accessed 26 November 2020; Rono EC, 'The Role of Women in Post Violence Peace Building in Kenya: A Case Study of Nakuru County in 2007-2008 Post Election Violence' (PhD Thesis, University of Nairobi 2013); Mutahi P and Ruteere M, 'Violence, Security and the Policing of Kenya's 2017 Elections' (2019) 13 Journal of Eastern African Studies 253.

[17] Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016),

[18] International Alert, "What is Peace Building?" Available at *https://www.international-alert.org/what-we-do/what-is-peacebuilding* accessed 26 November 2020.

[19] Ibid.

[20] 'SDG 16. Peace, Justice and Strong Institution | Sustainable Development Goals | Food and Agriculture Organization of the United Nations' <*http://www.fao.org/sustainable-development-goals/goals/goal-16/en/*> accessed 26 November 2020.

[21] Ibid.

may not follow their political leaders blindly.[22] This is because politicians often exploit the people's social vulnerability, marginalization and poverty to cause conflicts and divisions for their selfish interests.[23]

5.1 Addressing Gender Equality and Equity for Sustainable Peace and Inclusive Society

Notably, inequalities in wealth and income lead to a cascade of consequential social inequalities in a range of areas such as housing, work, energy, connectivity, health care, education, and related social benefits.[24]

It has been acknowledged that where conflict strikes, men are more likely to die on battlefields, but a disproportionate share of women will be targeted for sexual violence, among other violations, and homicide rates among women typically rise.[25] It has also been documented that more broadly, whether in global, regional or national governance, women tend to be underrepresented in the governance of institutions. This is discriminatory, but it also entrenches gender disparities, during times of war and peace, as women's voices go unheard in decision-making.[26]

Some of the recommendations from the United Nations work on gender equality and equity focus on strengthening good governance, inclusive rule of law, and access to justice; removing structural barriers to women's participation in decision-making and promoting inclusive and sustainable economic growth and social development that achieves gender equality and empowers all women and girls; investing in national statistical capacities to promote evidence-based policy-making, planning, and budgeting,

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[22] 'Promoting Empowerment of People in Achieving Poverty Eradication, Social Integration and Full Employment and Decent Work for All': <*https://digitallibrary.un.org/record/777727?ln=en*> accessed 26 November 2020; 'Political Empowerment' (GSDRC) <*https://gsdrc.org/topic-guides/voice-empowerment-and-accountability/supplements/political-empowerment/*> accessed 26 November 2020; 'Social and Economic Empowerment' (GSDRC) <*https://gsdrc.org/topic-guides/voice-empowerment-and-accountability/supplements/social-and-economic-empowerment/*> *accessed* 26 November 2020.

[23] 'Exclusion as a Cause and Consequence of Violent Conflict' (GSDRC) <*https://gsdrc.org/topic-guides/social-exclusion/dynamics/exclusion-as-a-cause-and-consequence-of-violent-conflict/*> accessed 26 November 2020; Nantulya, Paul. "Exclusion, Identity and Armed Conflict: A historical survey of the politics of confrontation in Uganda with Specific Reference to the Independence Era." In Politics of Identity and Exclusion in Africa: From Violent Confrontation to Peaceful Cooperation, conference proceedings, Senate Hall, University of Pretoria, pp. 81-92. 2001; Nduku E, Corruption in Africa: A Threat to Justice and Sustainable Peace (Globethics net 2015).

[24] 'Expert Group Meeting on "Tackling Global Challenges to Equality and Inclusion through the Gender-Responsive Implementation of the 2030 Agenda for Sustainable Development: Spotlight on SDGs 10, 13 and 16": Report and Recommendations | UN Women – Headquarters', 7 <*https://www.unwomen.org/en/digital-library/publications/2019/06/egm-tackling-global-challenges-to-equality-and-inclusion*> accessed 26 November 2020.

[25] 'Sustainable Development Goal 16: Peace, Justice and Strong Institutions' (UN Women | Europe and Central Asia) <https://eca.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-16-peace-justice-strong-institutions> accessed 26 November 2020.

[26] Ibid.

and ensure better monitoring of progress and accountability for results; and increasing financing for the gender-responsive implementation of the 2030 Agenda through domestic resource mobilization policies and global action to address the systemic imbalances in domestic and international tax, trade, and investment arrangements.[27]

It has been asserted that *realizing SDG 16 on peaceful, just, and inclusive societies requires a power shift that re-centres work on equality, development and peace around the voices, human security and rights of women and those most marginalized. This requires not just technical fixes, but the structural transformation that moves from institutionalizing a form of governance that enables domination and violence to institutionalize a form of governance that enables equality and peace for people and planet (emphasis added).*[28]

In some countries such as Colombia, women have been at the forefront of peacebuilding efforts.[29] There is thus a need to promote gender equality and equity as a way of promoting peaceful and inclusive societies for sustainable development. The human rights of both men and women and indeed all groups in society should be respected, protected and implemented for the realization of just, inclusive and peaceful societies. The *UN Conference on Environment and Development, Agenda 21*[30] under section 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making.[31]

5.2 Streamlining Environmental and Natural Resources Governance and Climate Change Mitigation

The 2030 SDGs Agenda acknowledges that while the causes of conflict vary widely, the effects of climate change only aggravate them.[32] Climate-related events such as drought threaten food and water supplies, increase competition for these and other natural resources and create civil unrest, potentially adding fuel to the already-disastrous

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[27] 'Expert Group Meeting on "Tackling Global Challenges to Equality and Inclusion through the Gender-Responsive Implementation of the 2030 Agenda for Sustainable Development: Spotlight on SDGs 10, 13 and 16": Report and Recommendations | UN Women – Headquarters', 7 <*https://www.unwomen.org/en/digital-library/publications/2019/06/egm-tackling-global-challenges-to-equality-and-inclusion*> accessed 26 November 2020.

[28] By Abigail Ruane, Women's International League for Peace and Freedom (WILPF) (as quoted in 'SDG 16 – Governing for Gender Equality and Peace? Or Perpetual Violence and Conflict?' <*https://www.2030spotlight.org/en/book/1883/chapter/sdg-16-governing-gender-equality-and-peace-or-perpetual-violence-and-conflict*> accessed 26 November 2020).

[29] Newsroom, 'Women the "Driving Force" for Peacebuilding in Colombia' (Modern Diplomacy, 31 October 2020) <*https://moderndiplomacy.eu/2020/10/31/women-the-driving-force-for-peacebuilding-in-colombia/*> accessed 26 November 2020.

[30] United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

[31] See also Article 10, Constitution of Kenya 2010 on national values and principles of governance.

[32] SDG Goal 13.

consequences of conflict.[33] Thus, investing in good governance, improving the living conditions of people, reducing inequality and strengthening the capacities of communities can help build resilience to the threat of conflict and maintain peace in the event of a violent shock or long-term stressor.[34]

Article 69(1) of the Constitution of Kenya outlines the obligations of State in respect of the environment as follows: The State should: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance the intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment, and utilise the environment and natural resources for the benefit of the people of Kenya. Besides, every person must cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[35]

The Government should work closely with all the relevant stakeholders to meet these obligations as a way of ensuring that communities benefit from such resources for empowerment as this will go a long way in promoting peaceful and inclusive societies for sustainable development. This is due to the likely effect of reduced poverty levels.

5.3 Building Accountable and Inclusive Institutions for Peaceful and Inclusive Society

Putting in place accountable and inclusive institutions governed by the rule of law may promote and ensure participatory decision-making and responsive public policies that leave no one behind, ensuring citizens have unfettered justice and rule of law, without which there can be no sustainable development.[36]

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[33] Muigua, K., Securing Our Destiny Through Effective Management of the Environment, Journal of Conflict Management and Sustainable Development, Volume 4, No 3, (May, 2020).

[34] United Nations, The Sustainable Development Goals Report, 2018, p.15. Available at *https://unstats.un.org/sdgs/files/report/2018/TheSustainableDevelopmentGoalsReport2018-EN.pdf* [Accessed on 22/01/2020]; Muigua, K., Securing Our Destiny Through Effective Management of the Environment, Journal of Conflict Management and Sustainable Development, Volume 4, No 3, (May, 2020).

[35] Article 69(2), Constitution of Kenya, 2010.

[36] 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP) *<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html> accessed 26 November 2020.*

The law can be useful in contributing to the change in institutional norms as well as shaping the changes in attitudes and behaviour.[37] The rule of law provides a viable framework for the peaceful management of conflicts due to its defining features: establishing the operating rules of society and therefore providing reliability, justice and stability in the society; norms defining appropriate societal behaviour; institutions able to resolve conflicts, enforce laws, and regulate the political and judicial system; laws and mechanisms protecting citizens' rights.[38]

The role of law and the above features are exemplified in the Constitution which provides that 'the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.[39] The national values and principles of governance include- patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.[40] All these values and principles are not only meant to promote good governance but also build a peaceful and inclusive society for the people of Kenya. There is a need for active promotion and implementation of these national values and principles of governance as part of the peacebuilding efforts in Kenya. Ensuring that all governance institutions abide by these values and principles will also strengthen these institutions and ensure that they discharge their constitutional and statutory mandates effectively for the eventual realization of the sustainable development agenda in Kenya.

6. Conclusion

Some commentators have asserted that achieving SDG 16 — and the SDGs in general — requires partnerships, integrated solutions, and for countries and member states to take charge and lead in reshaping the institutional and social landscape, preparing grounds for important reforms that help build sustainable peace.[41] This is because it is crucial to have an inclusive and participatory approach to development to counteract the potentially destabilizing impact of marginalization and exclusion.[42] Peaceful societies

[37] Muigua, K., Securing Our Destiny Through Effective Management of the Environment, Journal of Conflict Management and Sustainable Development, Volume 4, No 3, (May, 2020).
[38] Peace Building Initiative, "Introduction: Justice, Rule of Law & Peacebuilding Processes, 2009" <*http://www.peacebuildinginitiative.org/indexe33f.html?pageId=1844*> accessed 26 November 2020.
[39] Article 10(1), Constitution of Kenya 2010.
[40] Article 10(2), Constitution of Kenya 2010.
[41] 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP) <*https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html*> accessed 26 November 2020.
[42] 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP)

have enjoyed better business environments, higher per capita income, higher educational attainment and stronger social cohesion.[43] Better community relationships tend to encourage greater levels of peace, by discouraging the formation of tensions and reducing chances of tensions devolving into conflict.[44]

Peacebuilding is done collaboratively, at local, national, regional and international levels. Individuals, communities, civil society organisations, governments, regional bodies and the private sector all play a role in building peace. Peacebuilding is also a long-term process, as it involves changes in attitudes and behaviour and institutional norms.[45]

Kenya cannot achieve peaceful and inclusive societies through investing in security alone; it must address the various underlying factors such as poverty, marginalization, environmental degradation and corruption, among others. In the absence of measures to deal with these, peace will only be short-lived or even impossible to achieve. Peace is the outcome of concerted efforts geared towards building self-sustaining societies where all people can meet their socio-economic needs. Promoting peaceful and inclusive societies for sustainable development in Kenya is a goal that is clearly attainable, in the fullness of time.

<*https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html*> accessed 26 November 2020.

[43] The Institute for Economics and Peace (IEP), 'Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)', p. 2 <*https://issat.dcaf.ch/ser/Learn/Resource-Library/Policy-and-Research-Papers/Pillars-of-Peace-Understanding-the-key-attitudes-and-institutions-that-underpin-peaceful-societies*> accessed 26 November 2020.

[44] The Institute for Economics and Peace (IEP), 'Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)', p. 6.

[45] International Alert, "What is Peace Building?" *https://www.international-alert.org/what-we-do/what-is-peacebuilding* Accessed 26 November 2020.

Arbitration Law and the Right of Appeal in Kenya

Abstract

The paper critically discusses the right of appeal under the arbitration law in Kenya. One of the hallmarks of arbitral practice is limitation of court intervention in the process. However, the law envisages certain instances where parties to an arbitration may seek recourse to the High Court in instances such as enforcement or setting aside of an award. Section 35 of the Arbitration Act which provides the mechanism for setting aside of an award is silent on whether an appeal lies to the Court of Appeal pursuant to the High Court's decision. Consequently, conflicting decisions have emanated from the Court of Appeal on whether section 35 of the Arbitration Act confers a right of appeal. It was not until recently that the Supreme Court of Kenya sought to put the matter to rest. The paper seeks to critically analyse the foregoing provision and relevant decisions on the right of appeal under the arbitration law in Kenya. It will also suggest the best approach in interpreting the right of appeal in order to promote the purpose of arbitration while safeguarding the right of access to justice especially for the business community in the country.

1. Introduction

Arbitration is one of the forms of Alternative Dispute Resolution (ADR). ADR refers to a set of mechanisms that are applied in management of disputes without resort to adversarial litigation.[1] The legal basis for their application is provided under the Charter of the United Nations which is to the effect that the parties to a 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.[2] Arbitration has been defined as private and consensual process where parties to a dispute agree to present their grievances to a third party for resolution.[3] It is an adversarial process and resembles litigation in many ways.[4] Arbitration falls under the category of coercive ADR processes and parties are bound by the final award expect for limited grounds of appeal.[5]

Several benefits have been attributed to arbitration. It is a private and confidential[6]. Parties enjoy a lot of autonomy and considerable control over the proceedings including the

[1] Muigua, K., & Kariuki, F, ADR, Access to Justice and Development in Kenya, available at *http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf* (accessed on 04/11/2020)./

[2] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XV1.

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

[4] Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers Limited (2015).

[5] Muigua, K., Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises, available at *http://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf* (accessed on 22/10/2020).

[6] Muigua, K., Settling Disputes Through Arbitration in Kenya, Glenwood Publishers, 3rd Edition, February 2017, P 3.

appointment of an arbitrator and the process of arbitration.[7] Further, it has the ability to promote expeditious and cost-effective management of disputes.[8] Arbitration also ensures finality of dispute resolution due to the binding nature of an arbitral award.[9]

Due to its private and confidential nature, arbitration is characterised by limited court intervention in the process.[10] Consequently, questions have emerged over the years on the extent of court intervention in arbitration and whether some of the decisions of an arbitral tribunal are subject to appeal. The paper thus seeks to critically discuss the right of appeal under the arbitration law in Kenya. In doing so, the paper will analyse salient provisions of the Arbitration Act which confer or deny court intervention in the arbitration process and judicial interpretation of the right of appeal under the arbitration law in Kenya. Of particular interest, the paper will focus on section 35 of the Arbitration Act and with the aid of relevant court decisions, it will critically analyse whether the section confers the right of appeal on decisions made under section 35.

Notably, the right to appeal under the provisions of section of section 39 of the Arbitration Act in relation to any questions of law is only restricted to domestic arbitrations only. Section 39 is to the effect that 'where in the case of a domestic arbitration, the parties have agreed that—an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court'.[11] Section 39(3) is also categorical that 'notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)—if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection(2)'.[12] This was indeed affirmed by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR,* where the Dissenting Opinion of Justice D.K. Maraga, CJ & P stated that:

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[7] Ibid.

[8] Gaakeri, J., 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' International Journal of Humanities and Social Science, Volume 1, No. 6, June 2011.

[9] See generally Valverde, G., 'Potential Advantages and Disadvantages of Arbitration v Litigation in Brazil: Costs and Duration of the Procedures' Law and Business Review of the Americas, Volume 12, No. 4.

[10] Bachand, F., 'Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism' Dispute Resolution Journal 83 (2012).

[11] Sec. 39(1), Arbitration Act, No. 4 of 1999 (2009), Laws of Kenya.

[12] Sec. 39(3), Arbitration Act.

> *[102] It is indeed true that Section 35 is silent on appeals against High Court decisions thereunder. As a matter of fact, the explanatory notes on the UNCITRAL Model Law acknowledge that appeals may lie to a higher Court against the first instance Court decisions on arbitral proceedings but only in limited circumstances as may be determined by each State in its adaptive legislation.* ***The Kenyan Arbitration Act allows appeals under Section 39 thereof only in domestic arbitrations and by the consent of the parties.*** *In this case, parties never consented to any appeal. In the circumstances, given the clear, categorical and unambiguous wording of Sections 10 and 32A and, more importantly, the said overall objective of the enactment of the Arbitration Act No. 4 of 1995 as is manifest from the Parliamentary Hansard report of 20th July 1995, I find no warrant whatsoever to imply the silence in Section 35 as a tacit right of appeal against decisions made thereunder.*

It is worth pointing out that, while section 39 is quite clear, appeals on decisions rendered by the High Court under section 35 have not been as clearly provided for. Thus, while this paper will comment on section 39, it will mainly focus on appeals under section 35 of the Act as these have been the most controversial.

2. Legal Framework on Arbitration in Kenya

The Arbitration Act is the primary legal instrument governing arbitration in Kenya. The Act defines arbitration as any arbitration whether or not administered by a permanent arbitral institution.[13] The Arbitration Act also provides for both domestic and international arbitration.[14] The Act governs certain aspects pertinent to the practice of arbitration including the composition and jurisdiction of the arbitral tribunal, conduct of arbitral proceedings, arbitral award and termination of arbitral proceedings, recourse to the High Court against an arbitral award and recognition and enforcement of awards.[15]
The Civil Procedure Act provides that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules.[16] Pursuant to this provision, Order 46 of the Civil Procedure Rules allows parties to a dispute who are not under disability at any time before judgment is pronounced to apply to court for referral of the dispute to arbitration.[17]

The Constitution of Kenya enshrines the fundamental right of access to justice and mandates the state to ensure access to justice for all persons.[18] Article 159 of the Constitution provides that:

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[13] Arbitration Act, No. 4 of 1995, s. 3 (1), Government Printer, Nairobi.
[14] Ibid, s. 3(2)(3).
[15] Ibid.
[16] Civil Procedure Act, Cap 21, Laws of Kenya, S 59, Government Printer, Nairobi; see also sections 59A, 59B and 59C.
[17] Civil Procedure Rules, Order 46, Rule 1, Government Printer, Nairobi.
[18] Constitution of Kenya 2010, Article 48, Government Printer, Nairobi.

> *"(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);*

Previously, the idea of access to justice in Kenya had been equated to litigation which for a long time has been the predominant mechanism though which parties enforce their rights.[19] However, there has been a paradigm shift under the Constitution of Kenya, 2010 which mandates courts and tribunals while exercising judicial authority to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.[20] Arbitration thus enjoys constitutional recognition in Kenya pursuant to this provision. Courts have slowly embraced this shift and acknowledged the different aspects of what constitutes access to justice as was captured by the High Court in the case of *Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd*[21] in the following words:

> *[110] "Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay*."

While the High Court in the above case seemed to give prominence to the formal adjudicatory processes[22], ADR has been embraced by the courts. In addition, while the effectiveness of ADR processes under the guidance and direction of courts may have its pros and cons (which are beyond the scope of the current discussion), it is indeed a step in the right direction in making access to justice accessible by the public.

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[19] International Development Law Organization, 'Enhancing Access to Justice through Alternative Dispute Resolution in Kenya' available *at https://www.idlo.int/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya* (accessed on 04/11/2020).
[20] Constitution of Kenya 2010, Article 159 (2) (c), Government Printer, Nairobi.
[21] Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd High Court Constitutional Petition No.328 of 2011 [2012] eKLR.
[22] See also **Kenya Bus Service Ltd & another v Minister for Transport & 2 others** [2012] eKLR, where the Court emphasized that "the right of access to justice protected by the Constitution involves the right of ordinary citizens being able to access remedies and relief from the Courts."

3. Right of Appeal Under the Arbitration Law in Kenya

In interpreting the right of appeal under the arbitration law in Kenya, the point of departure is to note that the law envisages limitation of judicial intervention within the parameters provided. This has been succinctly captured by the Arbitration Act which provides that *'except as provided by the Act, no court shall intervene in matters governed by the Act.'*[23] The concept of limitation of judicial intervention is generally accepted in arbitral practice across the world. The English Arbitration Act provides that *'in matters governed by this Act the court should not intervene except as provided by this Act.'*[24] Further, the UNCITRAL Model Law on International Commercial Arbitration provides that *'in matters governed by this law, no courts shall intervene except where so provided in this law.'*[25]

Limitation of judicial intervention in arbitration is in line with the principle of finality of arbitration which is aimed at facilitating expeditious settlement of disputes. To this extent, it has been rightly observed that unwarranted judicial review of arbitral proceedings will simply defeat the object of the Arbitration Act and thus *the role of courts should therefore be merely facilitative otherwise excessive judicial interference with awards will not only be a paralyzing blow to the healthy functioning of arbitration but will also be a clear negation of the legislative intent of the Arbitration Act* (emphasis added).[26] The Supreme Court of Kenya, while commenting on the same in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR*, stated as follows:

> [52] We note in the above context that, the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the Court process. The Act was also formulated in line with internationally accepted principles and specifically the Model Law. With regard to the reason why some provisions of the Act speak to the finality of High Court decisions, the Hansard of the National Assembly during the debate on the Arbitration Act indicates that, "*the time limits and the finality of the High Court decision on some procedural matters [was] to ensure that neither party frustrates the arbitration process [thus] giving arbitration advantage over the usual judicial process*." It was also reiterated that the limitation of the extent of the Courts' interference was to ensure an, "*expeditious and efficient way of handling commercial disputes*."
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> [53] Similarly, the Model Law also advocates for "limiting and clearly defining Court involvement" in arbitration. This reasoning is informed by the fact that "*parties to an arbitration agreement make a conscious decision to exclude court jurisdiction*

[23] Arbitration Act, No. 4 of 1995, S 10.
[24] Arbitration Act, 1996 (Chapter 23), United Kingdom, S 1 (c).
[25] UNCITRAL Model Law on International Commercial Arbitration (United Nations Document A/40/17, annex 1) Section 5.
[26] Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Op Cit.

> *and prefer the "finality and expediency of the arbitral process*." Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our Constitution in Article 159(2) (c) acknowledges the place of arbitration in dispute settlement and urges all Courts to promote it. However, the arbitration process is not absolutely immune from the Court process, hence the present conundrum.

The principle of finality of arbitration which is the basis of limitation of court's intervention in arbitral proceedings has been upheld in numerous court decisions. In *Kenya Shell Limited v Kobil Petroleum Limited*[27], the Court of Appeal in upholding the principle decided that as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act underscores that policy.[28]
Further in *Mahan Limited v Villa Care*[29], the Court while giving effect to the principle of finality of arbitration decided as follows:

> 'It may well be that the conclusion reached by the Arbitrator is not sustainable in law yet by clause 13.2 (Dispute Resolution and Arbitration Clause) the parties made a covenant to each another that *the decision of the Arbitrator would be final and binding on them* (emphasis added). It must have been within the contemplation of the parties that the Arbitrator may sometimes get it wrong but they agreed to bind themselves to the risks involved in a final and binding clause and to live with the outcome absent the grounds in Section 35 of the Act'.

A similar position was also held in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*[30] where the Court of Appeal decided that:

> ''that the principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for determination by a body put forth by themselves, and adding to all that as in this case, that *the arbitrators' award shall be final*, it can be taken that as long as the given award subsists, it is theirs (emphasis added). But in the event it is set aside as was the case here, that decision of the High Court is final and remains their own. None of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agreed must live with it unless, of course, they agree to go for fresh arbitration. The High Court decision is final and must be considered and respected to be so because the parties voluntarily chose it to be so. They put

[27] Kenya Shell Limited v Kobil Petroleum Limited NRB CA Civil Appl. No. 57 of 2006 [2006] eKLR.
[28] Ibid.
[29] Mahan Limited v Villa Care, HC Misc. Civil App. No. 216 of 2018 [2019] eKLR.
[30] Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), Supreme Court Petition No. 12 of 2016 (2019) eKLR

> that in their agreement. They desired limited participation by the courts in their affairs and that has been achieved."

The above position in *Nyutu case* was the position taken by the Court of Appeal, and the Supreme Court, when it was called upon to pronounce itself on the same issue had the following to say:

> [48] That same view of the finality of High Court decisions is evident in other Court of Appeal decisions such as *Anne Mumbi Hinga v Victoria Njoki Gathara* Civil Appeal No. 8 of 2009; [2009] eKLR, *Micro-House Technologies Limited v Co-operative College of Kenya* Civil Appeal No. 228 of 2014; [2017] eKLR and *Synergy Industrial Credit Ltd v Cape Holdings Ltd* Civil Appeal (Appl.) No. 81 of 2016.
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> [49] However, in other cases, the Court of Appeal has taken a different position. For example, in the earlier case of *Kenya Shell Limited v Kobil Petroleum Limited* Civil Application No. 57 of 2006 (unreported) Omolo JA expressed himself thus:
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> "[T]he provisions of Section 35 of the Arbitration Act have not taken away the jurisdiction of either the High Court or the Court of Appeal to grant leave to appeal from a decision of the High Court made under that section. If that was the intention, there was nothing to stop Parliament from specifically providing in Section 35 that there shall be no appeal from a decision made by the High Court under that section."
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> [50] Similarly, in *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited* Civil Application No. Nai. 302 of 2015; [2017] eKLR, the Court of Appeal rendered itself as follows:
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> "In our view, the fact that Section 35 of the Act is silent on whether such a decision is appealable to this Court by itself does not bar the right of appeal. The Section grants the High Court jurisdiction to intervene in arbitral proceedings wherein it is invoked. It follows therefore that the decision thereunder is appealable to this Court by virtue of the Constitution."
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> [51] Thus, it is evident that there is no consensus by the Court of Appeal both before and after 2010 on how Section 35 should be interpreted. There is need therefore to properly interrogate the matter and establish why, unlike other provisions in the Arbitration Act, Section 35 does not specifically state that decisions of the High Court are final, and unlike Section 39, it does not also state that an aggrieved litigant may appeal to the Court of Appeal. We shall also need to understand the import of Section 10 of the Act and its relevance, if at all to the interpretation before us. A proper interpretation would also require a broader

> understanding of the principles of arbitration vis-a-vis the lingering powers of the Courts to intervene in arbitral proceedings. And finally, any interpretation adopted should not negate the fundamental purpose for which the Arbitration Act was enacted.

While agreeing with the position adopted by the Court of Appeal in Nyutu case, the Supreme Court had the following to say:

> [57] Thus, it is reasonable to conclude that just like Article 5 [of the Model Law], Section 10 of the Act was enacted, to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a Court may intervene. Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the Courts may be invoked. According to the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds.
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> [58] Having stated as above therefore we reject Nyutu's argument that Section 10 is unconstitutional to the extent that it can be interpreted to limit the Court of Appeal's jurisdiction to hear appeals arising from decisions of the High Court determined under Section 35 of the Act. We have shown that Section 10 is meant to ensure that a party will not invoke the jurisdiction of the Court unless the Act specifically provides for such intervention. With regard to Section 35, the kind of intervention contemplated is an application for setting aside an arbitral award only. However, Section 10 cannot be used to explain whether an appeal may lie against a decision of the High Court confirming or setting aside an award. This is because by the time an appeal is preferred, if at all, a Court (in this case the High Court) would have already assumed jurisdiction under Section 35 and made a determination therefore. Thus, by the High Court assuming jurisdiction under Section 35, it would conform to Section 10 by ensuring that the Court's intervention is only on instances that are specified by the Act and therefore predictability and certainty commended by Article 5 of the Model Law is assured. The question whether an appeal may lie against the decision of the High Court made under Section 35 thus still remains unanswered because, just like Section 35, Section 10 does not answer that question.

Notably, in *GEO Chem Middle East v Kenya Bureau of Standards [2020] eKLR*, the Supreme Court also commented on the status of appeals under section 35 in the following words:

48. In the premises, we have no option but to hold that the Judgment of the Court of Appeal, to the extent to which it purported to interrogate the merits of an arbitral award, in the absence of the High Court's pronouncement on the same, was rendered in excess of

jurisdiction. This means that even if we had found that we had jurisdiction to decide the appeal on its merits, this jurisdictional conundrum would have stopped us in our tracks.

49. In conclusion, having declined to delve into the merits of the Court of Appeal Judgment for the reasons stated, and having also found that the Appellate Court prematurely, and in excess of its jurisdiction, sat on an appeal that was not ripe, instead of remitting the same to the High Court for determination, what course of action is open to us? To answer this question, we must first address the issue as to whether the leave that triggered these proceedings in the first place, ought to have been granted. Or put another way, had the application for leave to appeal been made after the delivery of Nyutu and Synergy, would such leave have been likely granted by the Court of Appeal? It is to this question that we must now turn.

50. Towards this end, we have already made two critical observations, firstly, that in granting leave on 31st May 2018, the Court of Appeal did not interrogate the substance of the intended appeal and whether it fell within the said Section (read, Section 35 of the Arbitration Act). Secondly, that in granting leave, the Court of Appeal appeared to suggest or must be taken to have been suggesting that such appeals were open-ended. At that time there were two divergent schools of thought at Court of Appeal; the one which argued that appeals lay to the Court from decisions of the High Court and the other which was categorical that no such appeals could lie to the Court. And then came our decisions in Nyutu and Synergy of which we shall say no more, save that the window to appeal is severely restricted.

51. The applicable law is now settled regarding the vexed question as to whether an appeal lies or not, under Section 35 of the Arbitration Act and if so, under what circumstances. We appreciate the fact that at the time leave was granted, the Supreme Court was yet to pronounce itself on the issue. However, the law as enunciated must now henceforth be the yardstick for granting or refusing to grant leave to appeal in such matters. After our pronouncements in Nyutu and Synergy, it is not possible that the Court of Appeal can grant leave to appeal from a Section 35 Judgment of the High Court without interrogating the substance of the intended appeal, to determine whether, on the basis of our pronouncement, such an appeal lies. A general grant of leave to appeal would not suffice. Yet this is exactly what happened in the instant case before us.

52. In conclusion, having declined to delve into the merits of the substantive Judgment of the Court of Appeal for the reasons stated, and having further determined that the said Judgment was nonetheless rendered in excess of jurisdiction, and finally having determined that the initial leave to appeal was granted without interrogating the substance of the intended appeal, the only course of action open to us is to maintain the Ruling of the High Court.

The precedent flowing from the above decisions is that arbitration being a private and confidential process is not subject to court intervention unless as provided under the Act in line with the principle of finality. Consequently, the Arbitration Act expressly bars certain matters from being subject of appeal. Under section 12 of the Act, the decision by the High Court in relation to appointment of an arbitrator is final and not subject of appeal (emphasis added).[31] The Act also expressly bars appeals from the decision of the High Court on an application challenging an arbitrator (emphasis added).[32] In addition, the decision of the High Court on the termination of the mandate of the arbitrator is final and not subject to appeal (emphasis added).[33] Further, the decision of the High Court upon an application for relief by an arbitrator who withdraws from his office is final and not subject to appeal.[34] Under section 17 of the Act, the decision of the High Court on the jurisdiction of the Tribunal is final and cannot be appealed against (emphasis added).

The Act, however, envisions certain instances that may warrant court intervention in the arbitral process in form of an application or appeal to the High Court. Under section 39 of the Act, where parties have agreed that an application by an party may be made to a court to determine any question of law arising in the course of the arbitration or an appeal by an party may be made to a court on any question of law arising out of the award, such application or appeal may be made to the High Court.[35] The High Court is granted power under this provision such an application or appeal to determine the question of law arising or confirm, vary or set aside the arbitral award.[36] The section further grants the right of appeal to the Court of Appeal against a decision of the High Court if the parties have agreed so prior to the delivery of the arbitral award and if the Court of Appeal is of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties involved (emphasis added).[37] The import of this provision is that parties through an agreement can allow for the right of appeal against a High Court decision made pursuant to section 39 of the Arbitration Act (emphasis added). This provision mirrors the English Arbitration Act which allows appeals on questions of law arising out of an award with the agreement of all parties to the proceedings and with the leave of the court.[38] However, it must be pointed out that the right to appeal to the Court of Appeal under section 39 is only restricted to domestic arbitration and can only be on questions of law.[39]

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[31] Arbitration Act, No. 4 of 1995, S 12 (8).
[32] Ibid, S 14 (6).
[33] Ibid, S 15 (3).
[34] Ibid, S 16A (2).
[35] Ibid, S 39.
[36] Ibid S 39 (2).
[37] Ibid, S 39 (3).
[38] Arbitration Act, 1996 (Chapter 23), United Kingdom, S 69 (2).
[39] See Kenyatta International Convention Center v Congress Rental South Africa [2020] eKLR, Civil Application 231 of 2018; GEO Chem Middle East v Kenya Bureau of Standards [2020] eKLR, Petition (Application) 47 of 2019.

4. Right of Appeal Under Section 35 of the Arbitration Act

One of the contentious issues in arbitral practice in Kenya has been whether a right of appeal accrues automatically from the decision of the High Court under section 35 of the Arbitration Act. The section provides for recourse to the High Court against an arbitral award through an application for setting aside an award. The High Court upon such an application may set aside the award if it is proved that: *a party to the arbitration agreement was under some incapacity*; *the arbitration agreement is not valid under the law to which the parties have subjected it or the laws of Kenya*; *the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings*; *the arbitral award deals with a dispute not contemplated by or not falling within the terms of reference to arbitration*; *the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties* or *the making of the award was induced or affected by fraud, bribery, undue influence or corruption* (emphasis added).[40] The High Court may also set aside the award if it finds that *the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya or the award is in conflict with the public policy of Kenya* (emphasis added).[41]

The issue of the right of appeal under section 35 of the Arbitration was given prominence by the Supreme Court in the case *Nyutu Agrovet Limited -vs- Airtel Networks Kenya Limited*[42]. The Supreme Court in the case decided *that an appeal may lie to the Court of Appeal against a decision of the High Court made pursuant to section 35 of the Arbitration Act upon grant of leave in exceptional cases* (emphasis added). Specifically, the majority of the Supreme Court judges had the following to say:

> "[71] We have in that context found that the Arbitration Act and the UNCITRAL Model Law do not expressly bar further appeals to the Court of Appeal. We take the further view that from our analysis of the law and, the dictates of the Constitution 2010, Section 35 should be interpreted in a way that promotes its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. Thus our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under Section 35 of the Act for Orders of setting aside of the award. And hence the purpose of Section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would taint the process of arbitration. Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice. Therefore, whereas we acknowledge the need to shield arbitral proceedings from unnecessary Court intervention, we also

[40] Arbitration Act, S 35 (2) (a)
[41] Ibid, S 35 (2) (b)
[42] Nyutu Agrovet Limited -vs- Airtel Networks Kenya Ltd; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), Supreme Court Petition No. 12 of 2016, (2019) eKLR

> acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions.
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> [72] Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in AKN and another (supra) that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the 'no Court intervention' principle."
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> "[77] In concluding on this issue, we agree with the Interested Party *to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction*." (emphasis added)

The issue also arose in the case of *Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR*[43] where the Supreme Court held that:

> [86] For the avoidance of doubt, we hereby restate the principle that not every decision of the High Court under Section 35 is appealable to the Court of Appeal. It also follows therefore that an intended appeal, which is not anchored upon the four corners of Section 35 of the Arbitration Act, should not be admitted. In this regard, an intended appellant must demonstrate (or must be contending) that in arriving at its decision, the High Court went beyond the grounds set out in Section 35 of the Act for interfering with an Arbitral Award.

Prior to the Supreme Court decision in the above cases, conflicting decisions had emanated from the Court of Appeal on whether a party dissatisfied with the decision of the High Court under section 35 of the Arbitration Act can appeal against such a decision. One school of thought has been that since there is no express bar of the right of appeal under section 35 of the Act, such decisions should be appealable to the Court of Appeal

[43] Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR, Petition No. 2 of 2017.

under Article 164 (3) of the Constitution of Kenya, 2010. This provision gives the Court of Appeal unlimited jurisdiction to hear appeals from the High Court.[44] On the other hand, it has been contended that there is no right of appeal under section 35 of the Act and that where the Act requires the Court of Appeal's intervention, it explicitly states so with the example of section 39 of the Act.

In the Court of Appeal decision in *Nyutu Agrovet Limited -vs- Airtel Networks Limited*, the court dismissed an appeal emanating from a High Court decision under section 35 of the Arbitration Act and decided that:

> 'The principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for determination by a body put forth by themselves, and adding to all that as in this case, that the arbitrators' *award shall be final*, it can be taken that as long as the given award subsists it is theirs. But in the event that it is set aside as was the case here, that decision of the High Court is final remains their own. None of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agreed must live with it unless, of course, they agree to go for fresh arbitration. *The High Court decision is final and must be considered and respected to be so because the parties voluntarily choose it to be so*. They put that in their agreement. They desired limited participation by the courts in their affairs and that has been achieved. Despite the loss or gain either party may impute to, the setting aside remains where it falls. *The courts, including this Court, should respect the will and desire of the parties to arbitration* (emphasis added).'[45]

Further, the court rejected the notion that the right of appeal to the Court of Appeal automatically accrues under article 164 (3) of the Constitution and noted that the power or authority to hear an appeal is not synonymous with the right of appeal which a litigant should demonstrate that a given law gives him or her to come before the Court.[46]
In, *Anne Mumbi Hinga -vs- Victoria Njoki Gathara*, the Court of Appeal also held that no right of appeal accrues under section 35 of the Arbitration Act and that appeals will only lie to the court in circumstances set out under section 39 of the Act.[47] The Court of Appeal in the case expressed itself as follows:

> '*We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal*

[44] Constitution of Kenya, 2010, Article 164 (3), Government Printer, Nairobi
[45] Nyutu Agrovet Limited -vs- Airtel Networks Limited, Civil Appeal No.61 of 2012 (2015) eKLR.
[46] Ibid.
[47] Anne Mumbi Hinga -vs- Victoria Njoki Gathara, Civil Appeal No. 8 of 2009; [2009] eKLR.

> *to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act'48*

Further, in *Micro-House Technologies Limited -vs- Co-Operative College of Kenya*, the Court of Appeal decided that there is no right of appeal from a High Court decision made pursuant to section 35 of the Arbitration Act.[49]

However, the Court of Appeal has also held a different view on the issue of the right of appeal under section 35 of the Arbitration Act. In *Kenya Shell Limited -vs- Kobil Petroleum Limited*[50], the court decided that:

> *"The provisions of Section 35 of the Arbitration Act have not taken away the jurisdiction of either the High Court or the Court of Appeal to grant leave to appeal from a decision of the High Court made under that section. If that was the intention, there was nothing to stop Parliament from specifically providing in Section 35 that there shall be no appeal from a decision made by the High Court under that section."*

A similar position was also held by the Court of Appeal in the case of *DHL Excel Supply Chain Kenya Limited -vs- Tilton Investments Limited*, where the court in its interpretation of section 35 of the Arbitration decided as follows:

> *"In our view, the fact that section 35 of the Act is silent on whether such a decision is appealable to this Court by itself does not bar the right of appeal. The Section grants the High Court jurisdiction to intervene in arbitral proceedings wherein it is invoked. It follows therefore that the decision thereunder is appealable to this Court by virtue of the Constitution."*[51]

An analysis of the foregoing Court of Appeal decisions shows that prior to the Supreme Court decisions in *Nyutu Agrovet Limited -vs- Airtel Networks Kenya Limited* and *Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR*, the question of whether the right of appeal accrues under section 35 of the Arbitration Act remained unsettled. Where the Court of Appeal decided that it has no jurisdiction, it has observed that the Court of Appeal's intervention is only envisaged under section 39 of the Arbitration Act.[52] Further, the court had also made the finding that the right of appeal is conferred by a specific statute and does not generally flow from article 164 (3) of the Constitution.[53] In other

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[48] Ibid.
[49] Micro-House Technologies Limited -vs- Co-Operative College of Kenya, Civil Appeal No. 228 of 2014, (2017) eKLR.
[50] Kenya Shell Limited -vs- Kobil Petroleum Limited, Civil Application No. 57 of 2006 (Unreported).
[51] DHL Excel Supply Chain Kenya Limited -vs- Tilton Investments Limited, Civil Application No. NAI. 302 of 2015; [2017] eKLR.
[52] See Nyutu Agrovet Limited -vs- Airtel Networks Limited, Civil Appeal No.61 of 2012.
[53] Ibid.

instances, where the court had decided that it had jurisdiction to entertain appeals under section 35 of the Act, it had taken the view that since the section is silent on the issue of appeal, it should be interpreted to confer jurisdiction to the Court of Appeal.[54] Further, in support of this view, the Court of Appeal had also decided that if the legislature had the intention of limiting the right of appeal under section 35, it would have expressly done so similar to other specific provisions of the Arbitration Act.

Unlike section 35 of the Arbitration Act which does not expressly bar or allow an appeal from a High Court decision made pursuant to the section, the English Arbitration Act provides clarity on this issue. The Act provides that leave of the court is required for any appeal from a decision of the court on an application challenging an arbitral award.[55] Amidst the conflicting decisions that have emanated from the Court of Appeal in regard to the right of appeal under section 35 of the Arbitration Act, the Supreme Court has rendered some certainty on the issue in a number of cases it has decided dealing with the right of appeal under section 35 of the Arbitration Act.

5. The Import of Supreme Court's Decisions on the Right of Appeal Under Section 35 of the Arbitration Act

In its interpretation of the right of appeal under section 35 of the Arbitration Act, the Court has emphasized the need to balance between finality and limited court intervention and decided that *leave to appeal may be granted where the High Court decision is patently wrong* (emphasis added). This was succinctly captured in the case of *Nyutu Agrovet Limited -vs- Airtel Networks Kenya Limited*.[56] The parties had entered into a distributorship agreement where Nyutu Agrovet Limited was contracted to distribute telephone handsets belonging to Airtel Networks Kenya Ltd. A dispute arose when an agent of Nyutu placed orders for Airtel's products totaling Kshs.11 million for which Airtel made payment. Upon delivery, Airtel realised that the orders were made fraudulently. Nyutu had also failed to pay the said amount and the agreement between the parties was thus terminated and a dispute in that regard arose. The dispute was referred to arbitration and upon conclusion of the arbitral proceedings, an award of Kshs.541, 005,922.81 was made in favour of Nyutu Agrovet Limited.

Being dissatisfied with the award, Airtel Networks Kenya Limited filed an application before the High Court under section 35 of the Arbitration Act seeking to set it aside. The entire arbitral award was then set aside purely on the ground that the award contained decisions on matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties. On appeal to the Court Appeal against the High Court decision setting aside the award, the court struck out the appeal and held that

[54] See Kenya Shell Limited -vs- Kobil Petroleum Limited, Civil Application No. 57 of 2006.
[55] Arbitration Act, 1996 (Chapter 23), United Kingdom, S 67 (4).
[56] Nyutu Agrovet Limited -vs- Airtel Networks Kenya Ltd; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), Supreme Court Petition No. 12 of 2016, (2019) eKLR.

the decision by the High Court made under Section 35 of the Act was final and no appeal lay to the Court of Appeal. Aggrieved by the Court of Appeal decision, Nyutu Agrovet Limited filed an appeal to the Supreme Court. *The Supreme Court decided that an appeal can lie from the High Court to the Court of Appeal in very limited circumstances upon grant of leave* (emphasis added). The Court emphasized *the need to balance between finality and limited court intervention and decided that leave to appeal may be granted where the High Court decision is patently wrong* (emphasis added). The court noted that an unfair determination by the High Court should not be absolutely immune from appellate review. The court highlighted instances where leave to appeal may be granted including; *where there is unfairness or misconduct in decision making process, the need to protect integrity of the judicial process and prevent injustice and the importance of the subject matter including the economic value or legal principle at issue* (emphasis added).

A similar decision was made in the case of *Synergy Industrial Credit Limited -vs- Cape Holdings Limited*[57]. The case emanated from a decision of the High Court which set aside an arbitral award under section 35 of the Arbitration Act on the grounds that the arbitrator acted outside the scope of reference. Dissatisfied with the ruling, the petitioner filed an appeal to the Court of Appeal. The Court of Appeal struck out the appeal and held that there was no right of appeal from decisions of the High Court made pursuant to section 35 of the Arbitration Act[58]. Being aggrieved with the decision, the petitioner filed a petition before the Supreme Court.

The Supreme Court allowed the appeal and set aside the ruling of the Court of Appeal. It directed that the petitioner's appeal before the Court of Appeal be reinstated and heard on priority basis.[59] However, it is worth pointing out that the Supreme Court in analysing

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[57] Synergy Industrial Credit Limited -vs- Cape Holdings Limited, Supreme Court, Petition No. 2 of 2017.

[58] Synergy Industrial Credit Limited -vs- Cape Holdings Limited, Court of Appeal No. 81 of 2016.

[59] The Court of Appeal has since heard and determined the Appeal in Synergy Industrial Credit Limited v Cape Holdings Limited [2020] eKLR, Civil Appeal No. 81 of 2016. In determining the appeal, the Court of Appeal held as follows:

> Where the terms of the arbitral agreement are clear and unrestricted, it is not open to the court to look for and impose its own strictures and restrictions on the arbitral agreement. If the parties wished to restrict the arbitration to only the written agreements, we would have expected them to state so expressly in the arbitral agreement itself. Furthermore, a look at how the learned judge dealt with the question leaves no doubt in our minds that he did not confine himself to the real question, namely the terms of the arbitral agreement, but instead went into a determination that amounts to saying the arbitral award was erroneous under the law of contract.
>
> This was tantamount to undertaking a merit review of the arbitral award, based on consideration of provisions of the written agreements far removed from the arbitral agreement itself, so as to reach a different finding from the arbitral tribunal, which we think the learned judge was not entitled to do.

the issues in dispute stated that *there is no express right of appeal against the decision of the High Court in setting aside or affirming an award and leave to appeal will only be granted in very limited circumstances* (emphasis added). The court held that *the intended appellant must demonstrate that in arriving at its decision, the High Court went beyond the grounds set out under section 35 of the Act (emphasis ours)*. Further, it held *that leave to appeal may be granted where there is unfairness or misconduct in the decision-making process and in order to protect the integrity of the judicial process and to prevent injustices* (emphasis added). In summary, the Supreme Court decided that *the Court of Appeal has residual jurisdiction to entertain an appeal under section 35 of the Arbitration Act in exceptional and limited circumstances where there is need to correct palpable injustice* (emphasis added).

The Court, however, cautioned that care must be taken not to delve into merits of the award. Consequently, the Court of Appeal upon hearing the matter on merits set aside the ruling of the High Court and decided that where the terms of the arbitral agreement are clear and unrestricted, it is not open to the court to look for and impose its own strictures and restrictions on the arbitral agreement.[60] The Court of Appeal found that the *High Court decision was manifestly wrong* and that the learned judge was not justified in setting aside the arbitral award on the grounds that the arbitral tribunal had dealt with a dispute that was not contemplated by the parties, or one beyond the terms of the reference to arbitration, or had decided matters beyond the scope of the reference.[61]

The upshot of these decisions is that leave to appeal may be granted under section 35 of the Arbitration Act in very limited circumstances *in order to ensure fairness and integrity in the administration of justice* (emphasis ours). However, some have criticised the position of the Supreme Court in the above decisions arguing that it goes against the principle of

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> …..
>
> If, as we have found, the learned judge was not entitled to set aside the arbitral award on the basis that it dealt with disputes not contemplated by or not falling within the terms of the reference or contained decisions on matters beyond the scope of the reference to arbitration, then all the respondent's arguments on award of interest, compound interest, income opportunity loss and foreign exchange loss, which are founded on the argument that written agreements were the sole basis of the reference, cannot be sustained and therefore do not merit further consideration.
>
> …..
>
> Ultimately we find merit in this appeal. The learned judge was not justified in setting aside the arbitral award on the grounds that the arbitral tribunal had dealt with a dispute that was not contemplated by the parties, or one beyond the terms of the reference to arbitration, or had decided matters beyond the scope of the reference. The appellant will have the costs of the appeal. It is so ordered.

[60] Synergy Industrial Credit Limited -vs- Cape Holdings Limited, Civil Appeal No. 81 of 2016.
[61] Ibid.

finality in arbitration by allowing unwarranted court intervention.[62] However, as correctly pointed out by the Supreme Court, *a balance ought to be struck between finality in arbitration proceedings and the need to promote the right of access to justice* (emphasis added).

6. Conclusion

The Supreme Court has rendered some certainty on the issue of the right of appeal under section 35 of the Arbitration Act. However, the decisions analysed in the foregoing discussion have not yet fully settled the issue of grant of leave under section 35 of the Arbitration Act and the grounds that will warrant the same. This necessitates *the need for legislative intervention that will see amendment of section 35 of the Arbitration Act in order to capture the Supreme Court's decision on the issue and provide certainty on instances that may warrant grant of leave to appeal* (emphasis added). Further, *section 35 of the Act ought to be interpreted in a way that promotes the purpose and objectives of arbitration law and limit court intervention while at the same time ensuring expeditious yet just resolution of disputes* (emphasis added). Thus, *there is need for a leave mechanism to ensure that frivolous appeals are sieved out and leave to appeal is only granted in matters raising substantive issues under section 35 of the Arbitration Act* (emphasis added). Through this, the sanctity of the arbitral process will be protected by ensuring that there is reduced court intervention yet at the same time safeguarding the right of access to justice.

[62] See generally Mutubwa, M, 'Is Nairobi a Safe Seat for International Arbitration? A Review of the Latest Decision from the Supreme Court of Kenya and Its Possible Effects' Alternative Dispute Resolution Journal, Volume 8, No. 1.

Managing Governance Conflicts through Alternative Dispute Resolution in Kenya

Abstract

The paper critically analyses the suitability of Alternative Dispute Resolution (ADR) mechanisms in managing governance conflicts. It begins by giving an overview of governance and the importance of good corporate governance as a conflict avoidance strategy. The paper then discusses the nature, causes and underlying issues in governance conflicts to set the tone for the discussion that follows on ADR and governance conflicts. It gives a succinct overview of ADR mechanisms; their advantages and the difference between settlement and resolution in ADR. The paper then delves into the applicability of ADR in managing governance conflicts and highlights the shortcomings of ADR towards this course. Finally, the paper proposes recommendations aimed at ensuring good corporate governance through the use of ADR as a tool for managing governance conflicts.

1. Introduction

Governance, in the corporate context, refers to the system through which a corporation is directed and controlled in order to protect the interests of all stakeholders and ensure reasonable return on investments.[1] Corporate governance has also been defined as the system through which a corporation is directed and controlled and which specifies distribution of rights and responsibilities among various players in a corporation being the board of directors, shareholders and other stakeholders and further sets out the rules and procedures for corporate decision making.[2] The Global Corporate Governance Forum in advocating the need for good corporate governance notes that:

> *"Corporate Governance has become an issue of worldwide importance. The Corporation has a vital role to play in promoting economic development and social progress. It is the engine of growth internationally, and increasingly responsible for providing employment, public and private services, goods and infrastructure. The efficiency and accountability of the corporation is now a matter of both private and public interest, and governance has, thereby, come to the head of the international agenda."*[3]

Good corporate governance is important in attracting investors, creating competitive and efficient corporations, enhancing accountability and performance in an organization and promoting effective and efficient use of resources in an organization.[4] On this basis, it is

[1] Cadbury, A. (2002). Corporate Governance and Chairmanship: A Personal View. New York: Oxford University Press.

[2] Organisation for Economic Co-Operation and Development (OECD), Principles of Corporate Governance, available at *http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf* (accessed on 06/07/2020)

[3] Global Corporate Governance Forum, 'Corporate Governance' available at *https://www.ifc.org/wps/wcm/connect/0ca17952-3244-4801-a6c2-ee8b1896dc32/User%2BGuide.pdf?MOD=AJPERES&CVID=jtCxBar* (accessed on 23/07/2020)

[4] Private Sector Initiative for Corporate Governance, 'Principles for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance' available at *https://www.ics.ke/wp-*

argued that good corporate governance is a prerequisite for national economic development.[5]

In order to give effect to the ideal of good corporate governance, several principles have been generally accepted as pillars of ideal corporate governance. The Constitution of Kenya enshrines national values and principles of governance which bind all persons. These include *inclusiveness, equality, non-discrimination, good governance, integrity, transparency, accountability and sustainable development* (emphasis added).[6] The Organisation for Economic Co-operation and Development (OECD) identifies the principles of corporate governance to include: *equitable treatment of shareholders; disclosure and transparency; role of stakeholders in corporate governance and responsibilities of the board* (emphasis added).[7]

Good corporate governance cannot thrive in an environment of conflicts. Governance conflicts are bound to occur in an organization due to the different players involved and the difference in ideas, principles and plans that such players may hold.[8] The parties in an organization may have a conflict about the distribution of resources, or they may have a more fundamental conflict about the very structure of their organization and the basic nature of their interaction.[9] A corporation entails multiple personnel including the directors, the Chief Executive Officer, shareholders and employees. In their day to day interactions, these personalities are likely to differ leading to conflicts. If such conflicts are not addressed effectively and in a timely manner, they may pose a threat to the business affairs of a corporation and defeat the core purpose of good corporate governance. The paper critically analyses governance conflicts and explores the use of Alternative Dispute Resolution in managing such conflicts. It addresses some of the causes of governance conflicts and the need to have such conflicts managed in an efficient, effective and timely manner. It highlights the benefits of using ADR in managing governance conflicts and proposes reforms aimed at enhancing good corporate governance through effective, efficient and timely conflict management.

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content/uploads/bsk-pdf manager/Principles_of_good_corporate_Governance_Private_Sector_-_CS_Gabriel_Kimani_110.pdf (accessed on 07/07/2020)

[5] Ibid

[6] Constitution of Kenya, 2010, Article 10, Government Printer, Nairobi

[7] Organisation for Economic Co-Operation and Development (OECD), Principles of Corporate Governance, Op Cit

[8] Bercovitch. J., Conflict and Conflict Management in Organizations: A Framework for Analysis, available at *https://legacy.earlham.edu/~chriss/ConflictRes/pdf%20files/Conflict.Conflict%20Management%20in%20Organizations.pdf* (accessed on 16/07/2020)

[9] Ibid

2. Alternative Dispute Resolution (ADR) And Conflict Management

Conflict has been described as a situation whereby two or more parties perceive that they possess mutually incompatible goals.[10] A conflict relates to the needs and values shared by the parties whereas a dispute concerns interests or issues.[11] Conflict management involves the processes required for stopping or preventing overt conflicts and aiding the parties involved to arrive at durable peaceful settlement of their differences.[12]

Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms that are utilised to manage conflicts without resort to the often costly adversarial litigation.[13] The *Constitution of Kenya* advocates for promotion of alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms* (emphasis added).[14] Internationally, the *Charter of the United Nations* outlines various conflict management mechanisms and 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).[15] ADR mechanisms have been hailed for their advantages which include *inter alia* cost effectiveness, flexibility, expeditiousness, promoting party autonomy and preserving relationships among parties.[16] These advantages make ADR a preferable mode of conflict management to the adversarial litigation.

Conflict management can result in settlement or resolution. Most of the ADR mechanisms seek to address the root cause of conflicts unlike litigation which concerns itself with reaching a settlement.[17] Settlement mechanisms focus on interests of parties at the expense of human needs such as relationships, emotions, perceptions and attitudes.[18] Consequently, the causes of the conflict in settlement mechanisms remain unaddressed leaving the possibility of conflicts remerging in future.[19] Settlement mechanisms include litigation and arbitration.

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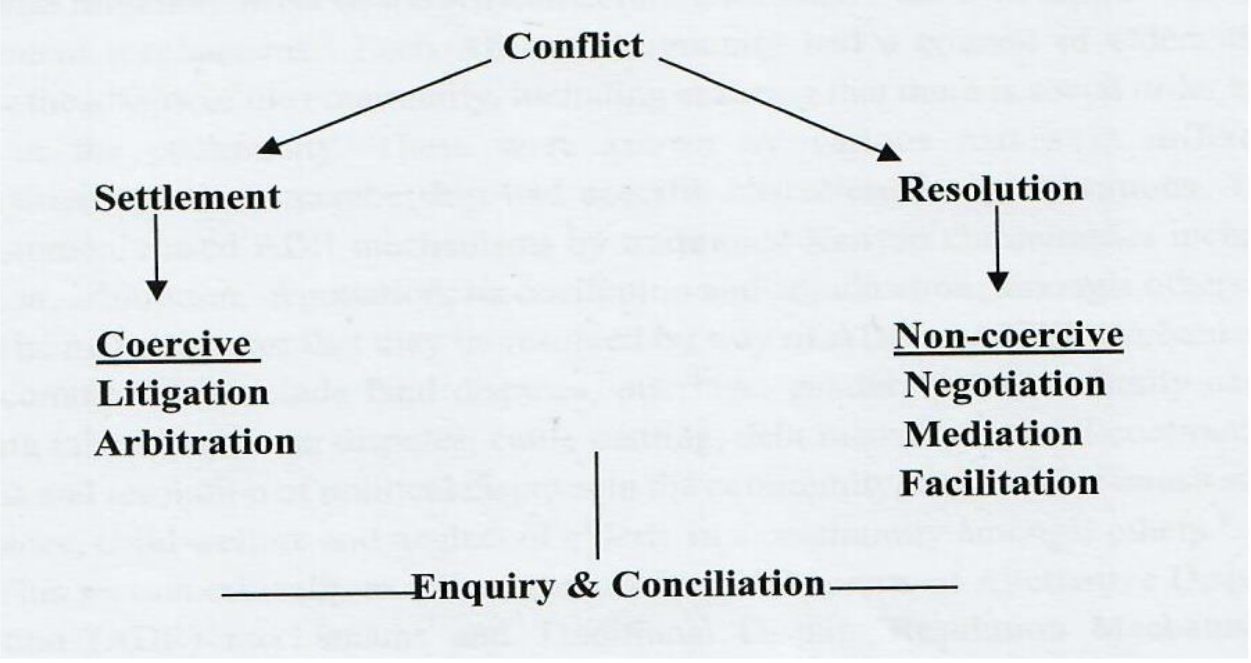
[10] Demmers J., Theories of Violent Conflict: An Introduction, (Routledge, New York, 2012)
[11] Muigua. K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers Limited (2015)
[12] Leeds, C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners,' International Journal of Peace Studies, Vol. 2, No. 2, 1997.
[13] Ibid
[14] Constitution of Kenya, 2010, Article 159 (2) (c)
[15] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 33
[16] Muigua. K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers Limited, 2015
[17] Muigua. K., Heralding a New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya, available at http://kmco.co.ke/wp-content/uploads/2018/08/Heralding-a-New-Dawn-Access-to-Justice-PAPER.pdf (accessed on 07/07/2020)
[18] Ibid
[19] Muigua. K., Resolving Conflicts Through Mediation in Kenya, Glenwood Publishers, 2017

Resolution mechanisms on the other hand focus on outcomes based on mutual problem-sharing whereby parties to a conflict cooperate in order to redefine their conflict and their relationship.[20] This results in outcomes that are enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.[21] Resolution mechanisms address the root causes of conflicts and are preferred to settlement mechanisms for their effectiveness in conflict management. These mechanisms minimise the likelihood of the same conflicts remerging in future.[22]

Figure 1: Methods of Conflict Management



***Source: The authors**

Figure 1 shows that there are certain methods of conflict management that can only result in settlement. These are categorised as coercive methods where parties have little or no autonomy over the process. The coercive methods are litigation and arbitration. It also shows the non-coercive methods (negotiation, mediation and facilitation) which lead to resolution. In the non-coercive conflict management methods, parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome. Conciliation and enquiry can be classified as coercive (when the reports emanating from them are enforced) and non-coercive, for example, when the reports are used as the basis for negotiation between the parties.

[20] Ibid

[21] Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", The Conflict Resolution Information Source, Version IV, December 2005, Available at *http://www.beyondintractability.org/bi-essay/culture-of-mediation* (accessed on 07/07/2020)

[22] Ibid

3. Governance Conflicts

It has been argued that most corporate governance conflicts arise because of how board members interact with each other in discharge of their duties. [23] Such conflicts could take the form of disagreements between directors and top management over corporate strategy or financial policy.[24] Boardroom conflicts are inevitable. Decision making within the boardroom results from a process in which directors consider all the information reasonably available to them and engage in a vigorous debate on issues such as company strategy, company control and financial policy.[25] This increases the likelihood of disagreements within the board. Indeed, it has been argued that a board that never argues or disagrees is most likely to be an inactive or passive board.[26]

Governance issues, requirements and standards have been attributed as a fertile source of misunderstandings and disputes within an organization.[27] These can include; the relationship between directors and the Chief Executive Officer; the interplay between oversight and management; and the balancing of an organization's short and long term interests. Further, governance disputes can also arise as a result of poor corporate performance or disputes involving stakeholders.

When a disagreement or dispute arises within an organization, it is in the best interest of the organization to have them managed effectively, expeditiously and efficiently. How such disagreements are managed determines whether the underlying issues can be resolved or whether the disagreement can ripen into a dispute that can have detrimental effects on the affairs of an organization including its financial performance and public image.[28] It is thus essential for an organization to develop and adopt efficient dispute management mechanisms. Efficient dispute management within an organization is part of good risk management since it enables an organization to cushion itself against the adverse effects of disputes whenever they occur.[29]

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[23] Agrawal. A., & Chen. M., Boardroom Brawls: An Empirical Analysis of Disputes Involving Directors, Quarterly Journal of Finance, Vol. 7, No. 3

[24] Ibid

[25] Jon Masters and Alan Rudnick, Improving Board Effectiveness: Bringing the Best of ADR into the Corporate Boardroom
(Washington, D.C.: American Bar Association, 2005).

[26] Runesson. E., & Guy. M., Mediating Corporate Governance Conflicts and Disputes, available at http://documents1.worldbank.org/curated/en/969191468314989975/pdf/418270NWP0Focu1ion0321443B01PUBLIC1.pdf (accessed on 01/07/2020)

[27] Omisore, B.O & Abiodum, A.R., 'Organizational Conflicts: Causes, Effects and Remmedies' International Journal of Academic Research in Economics and Management Sciences, Nov2014, Vol. 3, No. 6

[28] Ibid

[29] International Finance Corporation, Resolving Corporate Governance Disputes, available at *https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+cg/topics/resolving+corporate+governance+disputes* (accessed on 01/07/2020)

4. Applicability of ADR Mechanisms in Managing Governance Conflicts

Well governed corporations are less likely to have conflicts.[30] However, where conflicts arise, there is need to have in place a suitable process and venue to manage the conflict in a timely and cost-effective manner.[31] A good corporate governance framework ensures availability of a reliable mechanism for managing emerging and existing disputes. In managing governance disputes, there are several underlying issues that need to be addressed.It has been rightly pointed out that corporations hate to go public with their governance disputes.[32] Such disputes if brought to limelight could affect public perception of an organization and ultimately its overall performance.[33] Further, if governance disputes are not managed expeditiously, much of the Board's resources and time will be diverted at the expense of the success of the organization. Litigation therefore cannot effectively deal with the underlying issues in governance conflicts. It has been pointed out that the court's role is dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves.[34] Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations.[35] Litigation is so slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world.[36]

The shortcomings of litigation makes it a less viable mechanism of managing governance conflicts due to the need for expeditious results and continued working relations. These challenges can be effectively addresses through the suitable use of ADR solutions which can be tailored by the parties to deal with ongoing situations in a manner that allows the parties to continue working together.[37] Indeed, most global and national corporate governance statutes, principles and codes advocate the use of ADR in managing governance conflicts.

The *OECD Principles of Corporate Governa*nce encourage equitable treatment of shareholders and the need to provide a framework through which shareholders can enforce their rights and initiate legal and administrative proceedings against management

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[30] Pondy, L., Reflections on Organizational Conflict, Journal of organizational Behaviour, Vol 13 (2) pp257-261

[31] Ibid

[32] International Finance Corporation, Resolving Corporate Governance Disputes, Op Cit

[33] Ibid

[34] Ojwang', J. B. "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), pp. 19-29: 29

[35] Muigua. K.., Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes, available at *http://kmco.co.ke/wp-content/uploads/2018/09/Utilising-Alternative-Dispute-Resolution-Mechanisms-to-Manage-Commercial-Disputes-Kariuki-Muigua-7th-September-2018.pdf* (accessed on 13/07/2020)

[36] Ibid

[37] International Finance Corporation, 'Resolving Corporate Governance Disputes, available at *https://www.ifc.org/wps/wcm/connect/cdd4b694-32b2-4609-8adc-fdf9334cb90b/ADR_Toolkit_volume1.pdf?MOD=AJPERES&CVID=jtCvQlC* (accessed on 14/07/2020)

and board members.[38] Towards this end, OECD notes that "a balance must be struck between allowing investors to seek remedies for infringement of ownership rights and avoiding excessive litigation. Many countries have found that alternative adjudication procedures, such as *administrative hearings or arbitration procedures* organised by the securities regulators or other regulatory bodies, *are an efficient method for dispute settlement*, at least at the first instance level (emphasis added)."[39]

The King III Report on Corporate Governance for South Africa[40] advocates the use of ADR as a tool of good corporate governance. It encourages directors to preserve business relationships. Consequently, when a dispute arises, in exercising their duty of care, directors should endeavour to *resolve it expeditiously, efficiently and effectively (*emphasis added).[41] Further, in advocating the use of mediation, the Report notes that it enables novel solutions which may not be attained in litigation which is constrained to enforce legal rights and obligations.[42] The Report correctly states that in mediation, the *parties' needs are considered, rather than their rights and obligations*.

In Kenya, The *Code of Corporate Governance Practices for Issuers of Securities to the Public*[43] while providing the guidelines for managing internal and external disputes involving companies states that "Disputes involving companies are an inevitable part of doing business. Companies shall establish mechanisms for *resolving the disputes in a cost effective and timely manner. Mechanisms to avoid their recurrence shall also be established and implemented*. It is incumbent upon directors and executives, in carrying out their duty of care to a company *to ensure that disputes are resolved effectively, expeditiously and efficiently*. Further, *dispute resolution shall be cost effective and not a drain on the finances and resources of the company* (emphasis added)."[44]

Further, The *Code of Governance for State Corporations in Kenya* advises the Board to ensure that disputes with and among stakeholders are resolved effectively, efficiently and expeditiously.[45] Under the Code, the Board is encouraged *to take reasonable steps towards managing disputes involving stakeholders through the use of Alternative Dispute Resolution*

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[38] (OECD), Principles of Corporate Governance, Op Cit
[39] Ibid
[40] King Report on Governance for South Africa, available at *https://cdn.ymaws.com/www.iodsa.co.za/resource/resmgr/king_iii/King_Report_on_Governance_fo.pdf* (accessed on 13/07/2020)
[41] Ibid, Chapter 8 (Principles 8.6)
[42] Ibid
[43] Capital Markets Authority, Gazette Notice No. 1420, The Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015, available at *https://www.cma.or.ke/index.php?option=com_phocadownload&view=category&id=92&Itemid=285* (accessed on 13/07/2020)
[44] Ibid, Chapter 4.3
[45] Mwongozo, The Code of Governance for State Corporations, 2015' Chapter 6, Stakeholder Relationships'

Mechanisms (emphasis added).[46] Board members are expected to *resolve issues in a fair and respectful manner which considers informal processes such as dialogue or mediation* (emphasis added).[47]

ADR mechanisms especially mediation are viable in managing governance disputes. The King Report in while advocating the use of mediation in managing governance conflicts notes that "mediation is often more appropriate where interests of the disputing parties *need to be addressed and where commercial relationships need to be preserved and even enhanced (emphasis added)*."[48] It has been noted that governance conflicts have at least three dimensions; emotional, legal and commercial.[49] Mediation is able to effectively manage such disputes since it considers all the three dimensions unlike litigation which only considers the legal dimension of a case. In *K.M. Patel and another v. United Assurance Company Ltd*[50], mediation was successfully used in managing a governance conflict. In the case, two shareholders filed a petition against the Respondent company on allegations that their 40-percent shares in the company had been wrongfully and illegally diluted during the company's restructuring and sale without prior notice. With the consent of both parties, the Commercial Court offered to mediate the case. In encouraging the parties to engage in the mediation process, the mediator stated that "Both parties should sit down as business partners and come to an amicable understanding because at the end of the day, you may find that no one has benefited if the company has wound up." Consequently, the mediation was successful and led to a consent judgement in which the company bought out the two shareholders and amicably resolved the dispute.

Arbitration is also a preferable mechanism of conflict management especially in conflicts between an organization and third parties. In Kenya, most organizations are using arbitration to manage conflicts with suppliers, dealers and other third parties.[51] Most contracts governing business engagements usually contain arbitration clauses which provide for referral of any dispute arising under the contract to arbitration.[52] Further, employment agreements between some corporations and senior executives call for the use of arbitration in case of any employment related dispute. Even though closely related to litigation, there are certain salient features of arbitration which make it an important and attractive alternative to litigation in managing governance disputes. In arbitration the parties have autonomy over the choice of the arbitrator, place and time of hearing, and as

[46] Ibid
[47] Code of Conduct and Ethics for State Corporations, 5
[48] King Report on Governance for South Africa, Op Cit
[49] Runesson. E., & Guy. M., Mediating Corporate Governance Conflicts and Disputes, Op Cit
[50] Company Cause No 5 of 2005 (Commercial Court, Uganda)
[51] Muigua. K., Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises, available at *http://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf* (accessde on 21/07/2020)
[52] Ibid

far as they can agree, autonomy over the arbitration process which may be varied to suit the nature and complexity of the conflict.[53]

Negotiation is also one of the most fundamental ADR mechanism that can be effectively utilised in managing governance conflicts. It refers to the process where parties attempt to find mutually acceptable solutions to the issues at hand without the assistance of a third party.[54] Negotiation focuses on the common interests of parties over their relative power and positions.[55] This mechanism can be effectively applied in governance conflicts such as conflicts between board members or board members and shareholders. This is due to the underlying common interest at hand which is to promote success of the organization.[56] Parties will be more than willing to give up their individual positions and adopt a common position that is mutually acceptable and in the interest of the organization. Negotiation leads to mediation where parties have reached a deadlock.[57] An organization should thus endeavour to use negotiation in managing governance conflicts before resorting to mediation or other ADR mechanisms such as arbitration where the negotiation fails.

5. Shortcomings of ADR as A Tool for Managing Governance Conlicts

Despite their inherent advantages, ADR mechanisms face certain challenges that could potentially hinder their suitability in managing governance conflicts. One of the cardinal principles of ADR is party autonomy. However, in the case of an organization, it may not be possible to get a common position due to the different players at stake. Most organizations have formal procedures for identifying the persons who are authorized to speak for them but such procedures are imperfect and merely designed to facilitate transactions between the organization and outsiders, rather than to insure that the members of the organization in fact agree with a particular decision.[58] Consequently the management of a corporation may settle a suit through ADR mechanisms to prevent embarrassing disclosures about its managerial policies when such disclosures might well be in the interest of the shareholders of the organization.[59]

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[53] Building Disputes Tribunal, New Zealand, available at *http://www.buildingdisputestribunal.co.nz/.html, accessed on 21/07/2019*

[54] Fischer, R. & Ury, W., Getting to Yes: Negotiating Agreement Without Giving In, (Penguin Books, New York, 1981), p. 4

[55] Ibid

[56] Nisanasala, MBS, Win-Win Settlement: Applicability of Negotiation Principles for Dispute Negotiations in Construction Projects, available at http://dl.lib.uom.lk/handle/123/13841 (accessed on 23/07/2020)

[57] Mwagiru, M., Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), p 115.

[58] Fiss. O, 'Against Settlement' The Yale Law Journal, Vol. 93: 1073, 1984

[59] Ibid

Unlike litigation, there is a lack of foundation for continuing judicial involvement in most of the ADR mechanisms such as mediation.[60] In litigation, judgment does not bring an end to a lawsuit and many other processes may follow. Parties may seek several remedies from the court which issued the judgment such as rectification of an order and review.[61] A dissatisfied party can also appeal to a higher court to challenge a lower court's decision. These remedies are not available in some of the ADR mechanisms where the principle of finality is emphasised. Where parties have recorded a consent decree as in the case of mediation, there no basis through which a party can seek to modify or vary the decree.[62] ADR Mechanisms also impede vigorous enforcement measures.[63] In litigation, measures such as contempt powers and execution of decrees and orders are available in enforcing court's decision. However, decisions in ADR mechanisms such as negotiation and mediation are non-binding and their enforcement depends on the goodwill of the parties.[64] This could be problematic for an organization especially in dealing with outside parties such as debtors who may refuse to comply with negotiated or mediated agreements.[65] The organization may thus be forced to seek the judicial process due to its ability to guarantee enforcement of decisions.

6. Recommendations

6.1 Conflict Avoidance

The best conflict management strategy is conflict avoidance. It has been argued that in conflict management, individuals prefer avoidance to confrontation even at the risk of a financial loss, in the belief that confrontation might disrupt interpersonal harmony between the parties involved.[66] Organizations can endeavour towards conflict avoidance through simple techniques involving their day to day operations such as facilitating harmonious working relationships, Corporate Social Responsibility and adhering to principles of good corporate governance.

6.2 Adopting an Effective Conflict Management Strategy

The aim of conflict management is to help parties possessing incompatible goals to find some solution to their conflict. [67] To achieve this aim, it is necessary to identify the source

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[60] Ibid

[61] Civil Procedure Rules, 2010, Orders 43 and 45, Government Printer (Nairobi)

[62] Fiss. O, 'Against Settlement' The Yale Law Journal, Op Cit

[63] Ibid

[64] Reza, S., The Shortcomings of Family Mediation and Restorative Justice Proceedings, 4 SOAS L.J. 73 (2017)

[65] Runesson. E., & Guy. M., Mediating Corporate Governance Conflicts and Disputes, Op Cit

[66] Zhang. Z & Wei. X., 'Superficial Harmony and Conflict Avoidance Resulting from Negative Anticipation in the Workplace' Management and Organization Review 13:4, December 2017, 795–820

[67] Bercovitch. J., Conflict and Conflict Management in Organizations: A Framework for Analysis, available at

of the conflict, the participants and the most appropriate conflict management mechanism for the particular situation.[68] It has been argued that there are three sources of organizational conflict; *structural conflict* arising out of the need to manage the inter-dependence between different organizational sub-units); *role conflict* arising from sets of prescribed behaviour and *resources conflict* stemming from interest groups competing for the resources of an organization.[69] Understanding the source of a conflict within an organization improves the probability of effective conflict management. An organization should thus adopt an effective conflict management strategy that is able to detect the source of the conflict and recommend a suitable mechanism in handling such conflict. In large organizations, it is possible to find a committee or group tasked with conflict management. For small organizations, it is important to ensure availability of an individual skilled in conflict management. Organizations can also facilitate conflict management training skills such as negotiation and mediation to the management and board members.

6.3 Incorporating the use of ADR in an Organization's Policy Framework

The foregoing discussion has demonstrated that ADR mechanisms especially mediation and negotiation are effective in managing governance conflicts. Organizations should encourage their use by incorporating them in their policy framework. Further when entering into contracts with third parties such as creditors, clients and suppliers, it should be ensured that such contracts contain dispute resolution clauses which clearly stipulate the mechanism of conflict management. This prevents the uncertainties that might ensue in case a conflict arises and the possibility of such a conflict ending up in court due to absence of an ADR clause.

7. Conclusion

Governance conflicts are inevitable. However, what sets a good organization apart is the ability to manage governance conflicts in an effective, efficient and expeditious manner without prejudicing its core business. ADR mechanisms especially mediation and negotiation offer a channel through which this goal can be attained. Managing governance conflicts through ADR is an ideal that can be achieved for sound corporate governance.

https://legacy.earlham.edu/~chriss/ConflictRes/pdf%20files/Conflict.Conflict%20Management%20in%20 Organizations.pdf (accessed on 16/07/2020)

[68] Ibid

[69] Robbins. S. P, Managing Organizational Conflict: A Non-Traditional Approach (EnglewoodCliffs, N.J.: Prentice-Hall, 1974).

Mainstreaming the Role of Women in Peacebuilding and Peacemaking in Environmental-Related Conflicts in Kenya

Abstract

This paper examines and discusses ways in which women can meaningfully participate in peacemaking efforts and environmental management as far as addressing environmental related conflicts in Kenya is concerned. The paper is based on the hypothesis that societal gendered division of labour makes women interact more with the environment as the caretakers of families and this places them at a better position to be included in managing environmental resources. Any adverse effects of conflict also affect their lives as they are left in charge of their homes and children. The paper argues that there is a need to promote a more participatory role of women in not only preventing emergence of conflict but also in quelling the same where it arises and also to enhance their role in environmental management.

1. Introduction

Peace is considered to be an important part of any society as self-determination is not possible without peace. Where conflict arises, it is often grounded in social, structural, cultural, political and economic factors, and depreciation in one increases chances of conflict in a particular society.[1] This paper focuses on environmental and natural resource related conflicts and how these types of conflict affect efforts towards achieving peace in any given society. In discussing this, the author also offers suggestions on the role that women can play in peacemaking efforts and environmental management. Natural resources are an important source of livelihoods of many households in especially in rural areas.[2] In addition, it has been observed that conflicts over natural resources can be useful in making needs and rights clear and helping to solve injustices or inequities in resource distribution. However, some conflicts have the potential for becoming obstacles to livelihoods and sustainable resource management if they are not addressed.[3] It has also been rightly pointed out that women play a critical role in managing natural resources on

[1] Maiese, M., 'Social Structural Change,' in G. Burgess & H. Burgess (eds), Beyond Intractability, (Conflict Information Consortium, University of Colorado, Boulder, July 2003), available at http://www.beyondintractability.org/essay/social-structural-changes> Accessed on 28 June 2020; See also Maiese, M., 'Causes of Disputes and Conflicts,' in G. Burgess & H. Burgess (eds), Beyond Intractability, (Conflict Information Consortium, University of Colorado, Boulder, October, 2003), available at http://www.beyondintractability.org/essay/underlying-causes Accessed on 28 June 2020.

[2] 'Negotiation and Mediation Techniques for Natural Resource Management' <*http://www.fao.org/3/a0032e/a0032e04.htm*> accessed 4 July 2020.

[3] Ibid.

family and community levels and are most affected by environmental degradation.[4] In addition, world's women are seen as the key to sustainable development, peace and security.[5] It is for these reasons that this paper argues that women must and should be included in not only any peacemaking efforts where environmental related conflicts arise, but also in environmental management as a way of preventing any future conflicts from arising.

There are as many approaches to peace efforts as there are players. The three main approaches to peace include: peacekeeping, peacebuilding and peacemaking.[6] The three approaches are applied to different scenarios and stages in a conflict situation. This paper is mainly concerned with peacemaking approach to peace efforts. As already pointed out, there are different players in a conflict situation. This paper is concerned with women as key players in conflict situations. Women's roles are closely tied up to satisfying the basic needs of the extended family, among which are the global economic, and social needs and hence the need to include them in environmental management.[7]

The scope and context of the paper is limited to discussing the connection between the role of women and peacemaking approaches in environmental-related conflict situations. Arguably, both men and women are affected differently by environmental-related conflicts. It has rightly been pointed out that the role of women in the exploitation of natural resources during the war is rarely acknowledged.[8] As such, this discourse calls for a more inclusive role of women in environmental management.

2. Peacemaking and Environmental Management: The Linkage

Conflicts are issues about values which are non-negotiable. These needs and values are shared by the parties. Needs or values are inherent in all human beings and go to the root of the conflict while interests and issues are superficial and do not go to the root of the conflict.[9] They are infinite. Conflicts, therefore, arise out of the non-fulfillment of these

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[4] Bureau of International Information Programs and United States Department of State, 'Chapter 11: Women and the Environment', Global Women's Issues: Women in the World Today, extended version (Bureau of International Information Programs, United States Department of State 2012) <https://opentextbc.ca/womenintheworld/chapter/chapter-11-women-and-the-environment/> accessed 8 July 2020.

[5] Ibid.

[6] Johan, Galtung, Three approaches to peace: Peacekeeping, peacemaking and peacebuilding. 1976 <*https://www.galtung-institut.de/wp-content/uploads/2016/06/galtung_1976_three_approaches_to_peace.pdf*> Accessed on 28 June 2020.

[7] Emmanuel Ngwa Nebasina, 'The Role of Women in Environmental Management: An Overview of the Rural Cameroonian Situation' (1995) 35 GeoJournal 516.

[8] 'Understanding Gender, Conflict and the Environment' (CEOBS, 5 June 2017) <https://ceobs.org/understanding-gender-conflict-and-the-environment/> accessed 4 July 2020.

[9] Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", Journal of Peace Research, Vol.32, No. 2 (May, 1995), pp.152-153.

non-negotiable needs or values of the conflicting parties in the society. Accordingly, if all needs are met, the result is non-zero-sum which produces integrative and creative solutions and not a zero-sum solution.[10]

A conflict involves at least two parties disagreeing over the distribution of material or symbolic resources or perceives their underlying cultural values and beliefs to be different or incompatible. It has also been argued that conflicts could also originate from the social and political make-up and structure of society.[11] This supports the perspective that conflict has to be dealt with at the psychological level to get past 'blocks' to positive communication and at an ontological level to uncover the 'real' causes of the conflict.[12] Thus, peacemaking efforts work towards stopping active conflicts (whether armed or not).[13] The term peace is related to the well-being of any person and is also linked to harmony, tranquility, cooperation, alliance, well-being, and agreement.'[14] Peace is considered to be more than just the absence of violence.[15] As such, peace may be classified into positive peace or negative peace. Negative peace is the absence of violence or the fear of violence while positive peace is the attitudes, institutions and structures, that when strengthened, lead to peaceful societies.[16]

Positive peace is considered as a true, lasting, and sustainable peace built on justice for all peoples. The concept of positive peace involves the elimination of the root causes of war, violence, and injustice and the conscious attempt to build a society that reflects these commitments. Positive peace assumes an interconnectedness of all life.[17] In a negative peace situation, it may not see conflict out in the open, but the tension is boiling just beneath the surface because the conflict was never reconciled. The concept of negative

[10] Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4 (April, 2000), pp. 2-4.
[11] See Serge, L, et al, "Conflict Management Processes for Land-related conflict", A Consultancy Report by the Pacific Islands Forum Secretariat, available at www.forumsec.org, [Accessed on 4/7/2020].
[12] Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op.cit.
[13] International Alert, "What is Peace Building?" Available at https://www.international-alert.org/what-we-do/what-is-peacebuilding [27/6/2020].
[14] Spring, Ú.O., "Peace and Environment: Towards a Sustainable Peace as Seen from the South." In Globalization and Environmental Challenges, Springer, Berlin, Heidelberg, 2008, pp. 113-126.
[15] Galtung, J., "Violence, peace, and peace research," Journal of peace research, Vol. 6, no. 3 (1969): 167-191.
[16] Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106. Available at http://repository.kln.ac.lk/bitstream/handle/123456789/12056/journal1%20%281%29.104-107.pdf?sequence=1&isAllowed=y [Accessed on 26/6/2020].
[17] Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106.

peace addresses immediate symptoms, the conditions of war, and the use and effects of force and weapons.'[18]

Peacemaking generally includes measures to address conflicts in progress and usually involves diplomatic action to bring hostile parties to a negotiated agreement.[19] In most African setups, the traditional conflict resolution mechanisms have been employed, for example, in resolving environmental conflicts where the council of elders, provincial administration, peace committees, land adjudication committees and local environmental committees play a pivotal role in managing conflicts.[20]

Peace and the environment are closely related as affirmed in the sustainable development discourse.[21] The United Nations *2030 Agenda for Sustainable Development*[22] (SDGs) provides a global blueprint for dignity, peace and prosperity for people and the planet, now and in the future. SDG Goal 16 focuses on promoting peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.[23]

Some scholars have argued that environmental peacemaking fundamentally utilizes cooperative efforts to manage environmental resources as a way to transform insecurities and create more peaceful relations between parties in dispute.[24] In addition, environmental management may help overcome political tensions by promoting interaction, confidence building, and technical cooperation.[25]

An environmental conflict has been described as a particular social conflict characterised by: the qualitative or quantitative reduction of available environmental resources (water, biodiversity, arable land, raw materials and other finite common goods) due to the imposition of profitable projects by multinational companies and/or inappropriate

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[18] Ibid., pp.106-107.
[19] 'Terminology' (United Nations Peacekeeping) <https://peacekeeping.un.org/en/terminology> accessed 4 July 2020.
[20] Muigua, K., Resolving Conflicts through Mediation in Kenya, 2nd Ed., Glenwood Publishers, Nairobi – 2017.

[21] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, Target 35.
[22] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.
[23] Goal 16, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.
[24] Ken Conca and Geoffrey D Dabelko, 'Environmental Peacemaking /' (Olin College Library Catalog) <http://olin.tind.io/record/126690> accessed 28 June 2020.
[25] Ken Conca and Geoffrey D Dabelko, 'Environmental Peacemaking /' (Olin College Library Catalog) <http://olin.tind.io/record/126690> accessed 28 June 2020.

policies by Governments, International financial organisations; and the escalation of protests by local residents and/or larger opposition movements in civil society, in an effort to protect the environment, common goods and people's rights.[26] In Northern Kenya, the resource based conflicts have been worsened by diminishing pasture and water resources, the proliferation of small arms and light weapons, disputes over land and ethnic boundaries, the absence of adequate state security, and the commercialization of cattle rustling.[27]

Environmental conflicts have been perceived as a symptomatic manifestation of global model of economic development based on the exploitation of natural resources, disregard for people's rights and lack of social justice.[28] Furthermore, it has been suggested that there are about four key factors that contribute in the creation of environmental conflict: poverty, vulnerable livelihoods, migration and weak state institutions – all problems that are present at the local level.[29]

It is also argued that environmental factors often interact with the visible drivers of ethnic tensions, political marginalisation and poor governance to create a causal framework that allows degradation to affect livelihoods, interests and capital – which, in turn, lead to conflict.[30] It is thus clear that if communities are guaranteed environmental security, where they are able to meet all their resource needs, peace becomes easier to achieve. Where there are threats to sources of livelihoods especially in communities that mainly rely on environmental resources it means increased chances of conflict.

3. Role of Women in Peacemaking: Challenges and Prospects

It has been observed that natural resource based conflicts can, arguably, involve three broad themes: actors (or stakeholders, groups of people, government structures and private entities), resource (land, forests. rights, access, use and ownership) and stakes

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[26] CDCA, 'Why environmental conflicts?' Available at <http://cdca.it/en/perche-i-conflitti-ambientali >accessed 5 July 2020.

[27] 'Peace by All Means: Women Crusaders in Northern Kenya Make the Search for Peace Personal | International Organization for Migration - Nairobi' </article/peace-all-means-women-crusaders-northern-kenya-make-search-peace-personal> accessed 5 July 2020.

[28] CDCA, 'Why environmental conflicts?' Available at http://cdca.it/en/perche-i-conflitti-ambientali accessed 5 July 2020.

[29] Barnett, J., & Adger, W. N., 'Climate change, human security and violent conflict,' Political Geography, Vol.26, 2007, pp. 639-655, at p.643 (As quoted in Akins, E., "Environmental Conflict: A Misnomer?" Environment, Climate Change and International Relations: 99, available at http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/].

[30] Akins, E., "Environmental Conflict: A Misnomer?" Environment, Climate Change and International Relations: 99, available at http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/ [Accessed on 5/5/2020]; See also Sosa-Nunez, G. & Atkins, E., Environment, Climate Change and International Relations, (E-International Relations, 2016). Available at http://www.e-ir.info/wp-content/uploads/2016/05/Environment-Climate-Change-and-International-Relations-E-IR.pdf [Accessed on 5/7/2020].

(economic, political. environmental and socio-cultural).[31] As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.[32] Despite this, there are key principles such as, inter alia, participatory approaches[33], equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.[34] Natural resource based conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.[35] It is for this reason that this paper advocates for inclusion of women in peacemaking efforts and environmental management as important actors and stakeholders in tackling environmental and natural resource related conflicts.

While the inclusion of women in making processes has gained momentum in policy discussions over the last 15 years, the number of women in decision-making positions remains relatively small.[36] Peacemaking efforts have relatively remained a man's affair, the same group of people who largely participate in conflicts.[37] Some authors have rightly pointed out that 'peace processes increasingly go beyond outlining cease-fires and dividing territory to incorporate elements that lay the foundations for peace and shape the structures of society'.[38] It is for this reason that some authors have argued for the inclusion of all groups in society in peacemaking efforts. Some commentators have argued that the participation of women in peace talks is important as they are more likely to raise

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[31] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' Annex C - Summary of Discussion Papers, (FAO), available at http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage [Accessed on 5/7/2020].

[32] Ibid.

[33] Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process. (Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' Land Use Policy, Vol. 23, Issue 1, January 2006, pp. 10–17.

[34] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

[35] FAO, 'Negotiation and mediation techniques for natural resource management,' available at http://www.fao.org/3/a-a0032e/a0032e05.htm [Accessed on 5/7/2020].

[36] 'Why Women Should Have a Greater Role in Peacebuilding' (World Economic Forum) <*https://www.weforum.org/agenda/2015/05/why-women-should-have-a-greater-role-in-peacebuilding/*> accessed 5 July 2020.

[37] 'African Approaches to Building Peace and Social Solidarity' (ACCORD) <*https://www.accord.org.za/ajcr-issues/african-approaches-to-building-peace-and-social-solidarity/*> accessed 5 July 2020.

[38] Marie O'Reilly and Thania Paffenholz, 'Reimagining Peacemaking: Women's Roles in Peace Processes' (International Peace Institute (IPI): The Gaduate Institute of International … 2015) < *https://cve-kenya.org/media/library/Reilly_et_al_2015_Reimagining_Peacemaking_Womens_Roles_in_Peace_Processes.pdf*> Accessed 28 June 2020.

day-to-day issues such as human rights, citizen security, employment, and health care, which make peace and security plans more relevant and more durable.[39]

Women are seen as 'more peaceful' compared to men and argument used to call for their greater participation in peace efforts. Indeed, some authors have gone as far as arguing that 'men are more likely to engage in aggression and war; in contrast ''a world run by women'' would be ''less aggressive, adventurous, competitive, and violent'', and ''less prone to conflict and more conciliatory and cooperative than the one we inhabit now''.[40] Others argue that conflict ''accentuates existing differences of power and access to resources, weakening the position of those who are already without power, whether they are men, women or children''.[41]

While the former suggestion that women may be more peaceful is highly contentious, the latter argument solidifies the argument that women also have much to lose where there is conflict and hence creates the need to include them in peace processes.

Some authors have authoritatively explored women's participation in five important areas of international peace and security namely: (1) conflict prevention, (2) peace negotiations, (3) post-conflict disarmament, demobilization, and reintegration, (4) governance, and (5) transitional justice.[42] Arguably, active inclusion of women in environmental management as part of the peacemaking efforts would go a long way in achieving lasting peace in any society.

Some scholars have observed that a key challenge to greater inclusion of women's issues and concerns in peace agreements and in peacemaking [and statebuilding] efforts is that women are not seen as central to 'making or breaking' a peace agreement and other forms of identity, such as ethnicity, are considered to be a more fundamental fault line for conflict.[43]

According to some commentators, the trauma of the conflict experience may provide an opportunity for women to come together with a common agenda. In some contexts, these

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[39] 'Women on the Frontlines of Peace and Security' <*https://ndupress.ndu.edu/Publications/Books/Women-on-the-Frontlines-of-Peace-and-Security/*> accessed 5 July 2020.

[40] See Hilary Charlesworth, 'Are Women Peaceful? Reflections on the Role of Women in Peace-Building' (2008) 16 Feminist Legal Studies 347.

[41] See Hilary Charlesworth, 'Are Women Peaceful? Reflections on the Role of Women in Peace-Building' (2008) 16 Feminist Legal Studies 347, at 358.

[42] Donna Ramsey-Marshall, 'Review of Women Building Peace: What They Do, Why It Matters' (2008) 25 International Journal on World Peace 112.

[43] 'Gender-Sensitive Peacebuilding and Statebuilding' (GSDRC) <https://gsdrc.org/topic-guides/gender-and-conflict/approaches-tools-and-interventions/gender-sensitive-peacebuilding-and-statebuilding/> accessed 4 July 2020.

changes have led women to become activists, advocating for peace and long-term transformation in their societies.[44] In some parts of Northern Kenya especially among the pastoralist communities, women have been as agents of both conflicts and peace. For instance, it has been observed that among the communities of Nawuiyapong in West Pokot County and Lorengippi in Turkana County, Northern Kenya, women have now taken an initiative to attend meetings between the community elders, so as to exert pressure on the elders towards making peaceful resolutions. Furthermore, in contrast to the practice among pastoralist communities where women have in the past motivated young men to participate in raids, the women crusaders are now acting as change agents and discouraging their young men from such activities.[45] In these two communities, there are a group of women popularly referred to as the women crusaders, and they have been instrumental in pushing men (elders and youth-warriors) into committing themselves to resolutions reached during peace dialogues.[46]

The inclusion of women in peace efforts is not alien to Africa as women elders in traditional African societies often played a key role in resolving conflicts.[47] For instance, it is said that among the traditional Igbo society in Eastern Nigeria, women are the sustainers and healers of human relationships.[48] Chinua Achebe buttresses this point further in his renowned novel, *Things Fall Part,* where he asserts as follows:

> *"…when a father beats his child, it seeks sympathy in its mother's hut. A man belongs to his father when things are good and life is sweet. But when there is sorrow and bitterness, he finds refuge in his motherland. Your mother is there to protect you".*[49]

This is true in virtually all the other African communities. The role of the Luo women, for instance, is also well documented in various stages of peace processes in their community. They could directly or indirectly intervene through elders and women networks within the warring factions to bring peace.[50]

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[44] Julie Arostegui, 'Gender, Conflict, and Peace-Building: How Conflict Can Catalyse Positive Change for Women' (2013) 21 Gender & Development 533.

[45] 'Peace by All Means: Women Crusaders in Northern Kenya Make the Search for Peace Personal | International Organization for Migration - Nairobi' </article/peace-all-means-women-crusaders-northern-kenya-make-search-peace-personal> accessed 5 July 2020.

[46] Ibid.

[47] See generally, Boege, V., Potential and limits of traditional approaches in peacebuilding. Berghof Handbook II: Advancing Conflict Transformation, 2011, pp.431-457.

[48] Brock-Utne, B., "Indigenous conflict resolution in Africa," In A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Educational Research, 2001, p. 13.

[49] Achebe, C., Things Fall Apart, (William Heinemann Ltd, London, 1958) (As quoted in Brock-Utne, B., "Indigenous conflict resolution in Africa," op cit., p.13).

[50]Brock-Utne, B., Indigenous Conflict Resolution in Africa, op cit.

Despite this, a critical look at the cultures of most of the other African communities reveals that the role of women as compared to men in conflict management activities was and is still negligible.[51] For instance, among the Pokot and the Marakwet, women traditionally act as reference resource people but cannot challenge or influence decisions adopted by the male-dominated council of elders, the *Kokwo*. Among the Samburu, women are supposed to merely convey their suggestions through their male relatives. Such information may or may not be conveyed at all to the council of elders.[52] Consequently, traditions, cultural norms and practices that may be considered repugnant and contrary to written laws and that hinder the participation of women in conflict management, should be discarded. Women empowerment is essential to enable them participate in the various conflict resolution fora as they are the majority of the victims of conflicts.

Their role as carriers of life and agents of peace has not changed in modern society. As such their participation in conflict resolution activities should not be curtailed by the adoption of formal dispute resolution mechanisms or adherence to traditions hindering their role on the same. Women have the capacity to negotiate and bring about peace, either directly or through creation of peace networks, among warring communities.[53] Their participation in conflict resolution should thus be enhanced.

As already pointed out, peace building generally goes beyond conflict management measures, as it involves developing institutional capacities that alter the situations that lead to violent conflicts.[54] In traditional African societies, people engaged in activities that promoted peace through the various activities they engaged in. Resort to courts searching for justice when peace is what is needed may thus destroy relationships rather than build and foster them in the Kenyan case. In such cases, reconciliation, negotiation, mediation

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[51] See Alaga, E., Challenges for women in peacebuilding in West Africa, (Africa Institute of South Africa (AISA), 2010); Cf. Ibewuike, V. O., African Women and Religious Change: A study of the Western Igbo of Nigeria with a special focus on Asaba town, (Uppsala, 2006). Available at https://uu.diva-portal.org/smash/get/diva2:167448/FULLTEXT01.pdf [Accessed on 5/7/2020].

[52] See generally, Rabar, B. & Karimi, M. (Eds), Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities, , (ITDG, Nairobi, 2004), p.96.

[53] See generally, De la Rey, C., & McKay, S., Peacebuilding as a gendered process. Journal of Social Issues, Vol.62, No.1, 2006, pp.141-153; See also Paffenholz, T., et al, "Making Women Count - Not Just Counting Women: Assessing Women's Inclusion and Influence on Peace Negotiations," (Geneva: Inclusive Peace and Transition Initiative (The Graduate Institute of International and Development Studies) and UN Women, April 2016).Available at *http://www.inclusivepeace.org/sites/default/files/IPTI-UN-Women-Report-Making-Women-Count-60-Pages.pdf* [Accessed on 5/7/2020].

[54] See Maiese, M., 'Peacebuilding,' September 2003. Available at *http://www.beyondintractability.org/essay/peacebuilding [Accessed on 5/7/2020].*

and other traditional mechanisms would be the better option.[55] There is a need to ensure that these processes include women as active players. Thus, women are still subjugated when it comes to peacemaking efforts due to poverty, discriminatory cultural norms and traditions and lack of education. This is despite the ongoing national and international efforts geared towards empowering women.

4. Role of Women in Environmental Management

The role of most women at the household level is not unique to Kenya as in many other African countries, they are charged with fresh water collection and use, the tedious search and use of energy resources, land use and its security, the marketing of farm produce, domestic chores and other household undertakings which they carry out so as to sustain each individual in the household.[56] Despite this, these women have no rights over the land on which they perform, hence no access to credit facilities for desired farm inputs and other farm improvement facilities, receive inadequate education and training, due some times to culture and religious factors, and they are thus forced by such circumstances to negotiate for or rent and cultivate small isolated patches of land which in most cases are separated by considerable distances.[57] The indirect effect of this scenario on the environment is that these women become frustrated and have no incentive for long term investments to upkeep positively the rural environmental management.[58]

In her acceptance speech, Nobel Laureate, the late Prof. Wangari Maathai, summarised the importance of environmental resources to livelihood sustenance and the central role that citizenry can play in solving environmental problems, especially women, by stating that: "…….*So, together, we have planted over 30 million trees that provide fuel, food, shelter, and income to support their children's education and household needs. The activity also creates employment and improves soils and watersheds. Through their involvement, women gain some degree of power over their lives, especially their social and economic position and relevance in the family….Initially, the work was difficult because historically our people have been persuaded to believe that because they are poor, they lack not only capital, but also knowledge and skills to address their challenges. Instead they are conditioned to believe that solutions to their problems must come from 'outside'. Further, women did not realize that meeting their needs depended on their environment being healthy and well managed. They were also unaware that a degraded*

[55] See generally, Huyse, L., "Tradition-based Justice and Reconciliation after Violent Conflict: Learning from African Experiences." (2008). Available at *174.129.218.71/resources/analysis/upload/paper_060208_bis.pdf* [Accessed on 5/7/2020]; See also Bar-Tal, D., "From Intractable Conflict through Conflict Resolution to Reconciliation: Psychological Analysis." Political Psychology, Vol.21, No. 2 (2000); see also Bloomfield, D., et al, (eds.), Reconciliation after violent conflict: A handbook, (International Idea, 2003).

[56] Emmanuel Ngwa Nebasina, 'The Role of Women in Environmental Management: An Overview of the Rural Cameroonian Situation' (1995) 35 GeoJournal 515.

[57] Ibid, p. 515.

[58] Ibid, p.515.

environment leads to a scramble for scarce resources and may culminate in poverty and even conflict….In order to assist communities to understand these linkages, we developed a citizen education program, during which people identify their problems, the causes and possible solutions. They then make connections between their own personal actions and the problems they witness in the environment and in society…. (Emphasis added)."[59]

This speech aptly captures the place of women in environmental management and the need to include them in achieving effective environmental management for elimination of environmental based conflicts to achieve lasting peace.

5. Mainstreaming the Role of Women in Peacemaking and Effective Environmental Management in Kenya

Kenya has on several occasions witnessed violence erupting in the Rift valley as a result of pastoralists and farmers competing over the same land use or for vastly different uses.[60] Increasingly, stakeholders and leaders world over have agreed that 'women's participation in peace negotiations contributes to the quality and durability of peace after civil war'.[61] This assertion holds true especially in relation to environmental and natural resource related conflicts. This is because of the important role that women play as far as nurturing and providing for their families is concerned.

The women, peace, and security agenda first gained a foothold in 1995 at the Fourth World Conference on Women in Beijing.[62] In the year 2000, the United Nations Security Council adopted *Resolution 1325 on Women, peace and Security*[63] where they *inter alia* urged Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict.[64] The Council also called on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia: (a) the special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction; (b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements; (c) Measures that ensure the protection of and respect for human

[59] The Norwegian Nobel Institute, 'Wangari Maathai: The Nobel Lecture (Oslo, December 10, 2004),' available at *http://nobelpeaceprize.org/en_GB/laureates/laureates-2004/maathai-lecture/* [Accessed on 26/06/2020].
[60] Ibid, p. 10.
[61] Jana Krause, Werner Krause and Piia Bränfors, 'Women's Participation in Peace Negotiations and the Durability of Peace' (2018) 44 International Interactions 985.
[62] Princeton Lyman, 'Women's Role in Bringing Peace to Sudan and South Sudan' [2013] unpublished article submitted to State Department.
[63] Adopted by the Security Council at its 4213th meeting, on31 October 2000, S/RES/1325 (2000).
[64] Ibid, para. 1.

rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary.[65]

It has however been observed that despite the adoption of UN Security Council Resolution 1325, which called for strengthening women and girls' protection from conflict-related sexual violence and women's equal participation in all stages of the prevention and resolution of conflict, women's participation in peace negotiations with voice and influence remains exceptional rather than the norm.[66] Women's traditional societal role as caretakers and mothers of family leaves them at a precarious position when natural resource related conflicts arise.[67]

Peacemaking is done collaboratively, at local, national, regional and international levels. Individuals, communities, civil society organisations, governments, regional bodies and the private sector all play a role in making peace. Peacemaking is also a long-term process, as it involves changes in attitudes and behaviour, and institutional norms.[68] It has been observed that shared natural resources can provide the basis for dialogue between warring parties, as can common environmental threats that extend across human boundaries and borders.[69] Failure to promote such sharing of available natural resources for harmonious existence is a recipe for resource fueled environmental conflicts.[70] Indeed, it has been documented that the current of wealth from the world's abundant natural resources is too often diverted away from populations in need, instead feeding conflicts and corruption, and leading to human rights abuses and environmental damage.[71]

Some authors have observed that the pervasiveness of women's responsibility for environmental management hinges on a gendered division of labour, in which women are often disproportionately responsible for providing 'subsistence' products such as

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[65] Ibid, para. 8.

[66] Jana Krause, Werner Krause and Piia Bränfors, 'Women's Participation in Peace Negotiations and the Durability of Peace' (2018) 44 International Interactions 985.

[67] 'Roles Of Women, Families, And Communities In Preventing Illnesses And Providing Health Services In Developing Countries | The Epidemiological Transition: Policy and Planning Implications for Developing Countries | The National Academies Press' <https://www.nap.edu/read/2225/chapter/14> accessed 5 July 2020.

[68] International Alert, "What is Peace Building?" Available at https://www.international-alert.org/what-we-do/what-is-peaceb uilding [27/6/2020].

[69] 'How Does War Damage the Environment?' (CEOBS, 4 June 2020) <https://ceobs.org/how-does-war-damage-the-environment/> accessed 2 July 2020.

[70] 'Natural Resource Wealth Fails to Translate into "Equivalent" Benefits for People, Fuelling Conflict, Instability, Deputy Secretary-General Tells Security Council | Meetings Coverage and Press Releases' <https://www.un.org/press/en/2013/sc11037.doc.htm> accessed 2 July 2020.

[71] 'Natural Resource Wealth Fails to Translate into "Equivalent" Benefits for People, Fuelling Conflict, Instability, Deputy Secretary-General Tells Security Council | Meetings Coverage and Press Releases' <https://www.un.org/press/en/2013/sc11037.doc.htm> accessed 2 July 2020.

food, water and fuel.[72] For instance, women's roles mean that the well-being of whole households and communities frequently depends on their ability to access resources, including during conflict. In addition, even where daily life is disrupted by armed conflict, women's responsibilities tend to remain the same in spite of additional environmental pressures which may include degradation directly and indirectly connected to armed conflict.[73] The roles of women are said to alter and expand during conflict as they participate in the struggles and take on more economic responsibilities and duties as heads of households.[74]

The place of women in peacemaking as far as environmental resources are concerned has been rightly summarized as follows:

> *"….Harnessing these positive environmental dividends requires policymakers to think about gender and the way social roles shape everyday interactions with the environment in conflict affected areas. Where women are identified as the primary managers of local resources, effective management and reform will remain incomplete and ineffective if a gendered lens is not considered…."*[75]

Some authors have argued that the linkages between women signatories and women civil society groups explain the observed positive impact of women's direct participation in peace negotiations. In addition, collaboration and knowledge building among diverse women groups contributes to better content of peace agreements and higher implementation rates of agreement provisions.[76] The participatory processes such as negotiation, mediation and conciliation should also include women as they may better understand the underlying issues in the conflict due to their close interactions with the natural resources. It has been noted that women have generally been under-represented in peace negotiations, both in numbers and status (where they often constitute 'informal' participants).[77] There is a need for the stakeholders involved in peacemaking to acknowledge the important role that women can and should play in not only management of environmental and natural resources but also ensuring that they actively participate in peacemaking efforts.

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[72] 'Understanding Gender, Conflict and the Environment' (CEOBS, 5 June 2017) <*https://ceobs.org/understanding-gender-conflict-and-the-environment/*> accessed 2 July 2020.
[73] Ibid.
[74] Julie Arostegui, 'Gender, Conflict, and Peace-Building: How Conflict Can Catalyse Positive Change for Women' (2013) 21 Gender & Development 533.
[75] 'Understanding Gender, Conflict and the Environment' (CEOBS, 5 June 2017) <*https://ceobs.org/understanding-gender-conflict-and-the-environment/*> accessed 4 July 2020.
[76] Jana Krause, Werner Krause and Piia Bränfors, 'Women's Participation in Peace Negotiations and the Durability of Peace' (2018) 44 International Interactions 985.
[77] 'Gender-Sensitive Peacebuilding and Statebuilding' (GSDRC) <*https://gsdrc.org/topic-guides/gender-and-conflict/approaches-tools-and-interventions/gender-sensitive-peacebuilding-and-statebuilding/*> accessed 4 July 2020.

Women should also be included in dispute management committees, both formal and informal, as a way of not only ensuring that they actively participate but also as a way of encouraging attitude change among communities that women can and should indeed participate in brokering peace within their communities. The participation of women in peace processes improves their outcome, leading to more stable communities that are less likely to revert into conflict.[78]

5.1 Empowerment of Women through Elimination of Poverty

One of the ways of addressing poverty is focusing on human development which empowers people, both men and women, to contribute positively towards eradication of poverty without solely relying on the Government to do so. It has been observed that the view that poverty is a shortage of income ought to be changed to one that perceives poverty as 'unfreedoms' of various sorts: the lack of freedom to achieve even minimally satisfactory living conditions. Low income can contribute to that, but other factors such as the lack of schooling facilities, absence of health facilities, unavailability of medicines, the suppression of women, hazardous environmental features and lack of jobs do also play a major role. He opines that poverty can be reduced through addressing all these issues.[79]
It has been observed that poverty and the urgent desire to satisfy the basic needs of growing human populations are some of the root causes of the extensive exploitation and inherent depletion of natural resources especially within rural environment.[80] Thus, poverty exerts undue pressure on environmental resources leading to environmental degradation. When women, who are the main caregivers in the Kenyan society especially within the rural communities, cannot comfortably meet the needs of their families, they turn to the environment to exert pressure on the small parcels of agricultural land as well as engaging in economic activities such as charcoal burning and timber harvesting to meet their needs. The unsustainable means of agricultural production adversely affects the environment.[81] Economic empowerment of women would enable them diversify their sources of livelihood thus easing the pressure on the environment.

The United Nations observe that Women's economic empowerment includes women's ability to participate equally in existing markets; their access to and control over

[78] 'United Nations Gender Equality Chief, Briefing Security Council, Points Out "Systemic Failure" to Integrate Women in Peacekeeping, Mediation | Meetings Coverage and Press Releases' <*https://www.un.org/press/en/2018/sc13554.doc.htm*> accessed 5 July 2020.

[79] Green, D., From Poverty to Power: How active citizens and effective states can change the world , (2nd ed., 2012), pg. IX (Foreword by Amartya Sen), Rugby, UK: Practical Action Publishing and Oxford: Oxfam International, Available at *http://www.oxfamamerica.org/static/media/files/From_Poverty_to_Power_2nd_Edition.pdf* [Accessed on 4/7/2020].

[80] Emmanuel Ngwa Nebasina, 'The Role of Women in Environmental Management: An Overview of the Rural Cameroonian Situation' (1995) 35 GeoJournal 520.

[81] Elizabeth Rodriguez, Ryan Sultan and Amy Hilliker, 'Negative Effects of Agriculture on Our Environment' (2004) 3 Ef. Agric. Trap.

productive resources, access to decent work, control over their own time, lives and bodies; and increased voice, agency and meaningful participation in economic decision-making at all levels from the household to international institutions.[82] As far as realisation of sustainable development goals is concerned, the United Nations observes that 'empowering women in the economy and closing gender gaps in the world of work are key to achieving the 2030 Agenda for Sustainable Development and achieving the Sustainable Development Goals, particularly Goal 5, to achieve gender equality, and Goal 8, to promote full and productive employment and decent work for all; also Goal 1 on ending poverty, Goal 2 on food security, Goal 3 on ensuring health and Goal 10 on reducing inequalities'.[83]

As already pointed out, most natural resource related conflicts emanate from competition for access and control of natural resources. Economically empowered women can objectively engage in negotiations geared towards achieving peace or avoiding conflicts without them being disadvantaged.[84] They can also contribute to the empowerment of households through ensuring that children go to school. For instance, it has been observed that youths from Northern Kenyan communities partake in cattle raids against neighboring communities, which vice has been attributed to various factors such as lack of education, unemployment and the cultural obligation for young men to partake in the cattle raids. Acquiring cattle during such raids has for long been considered a sure way of enhancing the young men's status in society.[85] Women would not only be able to take their children to school but would also discourage these youths from engaging in cattle raids.[86]

5.2 Formal and Non-Formal Education for Meaningful Participation of Women

It has been observed that promoting women's capacities to participate in peace processes is crucial for their advancement and ability to contribute to peace, development and security.[87] One way of building such capacity is through empowering women and girls through education. Education is seen as a key enabler of economic growth and indeed a part of sustainable development discourse. As such, increasing women's and girls' educational attainment contributes to women's economic empowerment and more

[82] 'Facts and Figures: Economic Empowerment' (UN Women) <*https://www.unwomen.org/what-we-do/economic-empowerment/facts-and-figures*> accessed 5 July 2020.
[83] Ibid.
[84] 'United Nations Gender Equality Chief, Briefing Security Council, Points Out "Systemic Failure" to Integrate Women in Peacekeeping, Mediation | Meetings Coverage and Press Releases' <*https://www.un.org/press/en/2018/sc13554.doc.htm*> accessed 5 July 2020.
[85] 'Peace by All Means: Women Crusaders in Northern Kenya Make the Search for Peace Personal | International Organization for Migration - Nairobi' <*/article/peace-all-means-women-crusaders-northern-kenya-make-search-peace-personal*> accessed 5 July 2020.
[86] Ibid.
[87] 'Mediating Peace in Africa' (ACCORD) <*https://www.accord.org.za/publication/mediating-peace-in-africa/*> accessed 5 July 2020.

inclusive economic growth.[88] This is because education is critical for women's and girl's health and wellbeing, as well as their income-generation opportunities and participation in the formal labour market.[89] Education will not only enable them diversify their sources of income and ease pressure on the environment but will also give them the voice to meaningfully participate in negotiations geared towards management of conflicts.

Empowering women and girls through education is important in ensuring that they actively and meaningfully participate in community peace efforts. It is noteworthy that adopting a community-based approach to empowerment of women does not automatically translate into greater participation and inclusion. This is because some of the traditional practices have negative impacts such as discrimination of women and disabled persons.[90] In fact, it is against this fact that the Constitution retains the test of non-repugnancy while applying traditional justice systems.[91] This is where the Courts come in as the legal guardians of the Bill of human rights as envisaged in the Constitution.[92]

5.3 Encouraging Active Participation of Women in Peace Negotiation and Mediation Processes

Under Article 31 of the *RIO+20 Report*, state parties emphasized that sustainable development must be inclusive and people-centred, benefiting and involving all people, including youth and children. They also recognized that gender equality and women's empowerment are important for sustainable development and our common future. They therefore reaffirmed their commitments to ensure women's equal rights, access and opportunities for participation and leadership in the economy, society and political decision-making.

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[88] 'Facts and Figures: Economic Empowerment' (UN Women) <*https://www.unwomen.org/what-we-do/economic-empowerment/facts-and-figures*> accessed 5 July 2020.

[89] 'Facts and Figures: Economic Empowerment' (UN Women) <*https://www.unwomen.org/what-we-do/economic-empowerment/facts-and-figures*> accessed 5 July 2020.

[90] See generally, Muigua, K., ―Securing the Realization of Environmental and Social Rights for Persons with Disabilities in Kenya‖. Available at http://www.kmco.co.ke/attachments/article/117/Securing%20the%20Realization%20of%20Environmental%20and%20Social%20Rights%20for%20Persons%20with%20Disabilities%20in%20Kenya.pdf; See also generally Human Rights Watch, World Report 2013, available at http://www.hrw.org/sites/default/files/wr2013_web.pdf < accessed 5 July 2020.

[91] Constitution of Kenya 2010, Art. 159(3).

[92] Constitution of Kenya 2010, Art.23. Article 23 of Constitution of Kenya deals with Authority of courts to uphold and enforce the Bill of Rights.

> (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

Although the need to engage women in peace processes is widely acknowledged, it has been observed that in many parts of the world especially where conflicts persist, most mediation teams do not include or encourage the voices and representation of women.[93] This is despite evidence that women have demonstrated that they can be adept at mobilising diverse groups for a common purpose, working across ethnic, religious, political and cultural divides to promote peace.[94]

The role of women in negotiation and mediation of conflicts should be institutionalized. The place of women in our society puts them in the most proximate contact with the wellbeing of communities. Conflicts affect them and they should therefore be involved in any efforts geared towards reaching lasting peace solutions. Women traditionally played a primary role in resolving conflicts as negotiators, albeit informally. Conflict negotiation and mediation systems should require specifically that gender issues are given adequate weight and should include some requirement for inclusion of female negotiators and mediators when appropriate, like when land rights are involved.[95] The constitution now requires gender parity in almost all commissions or organs of government.[96]

Elimination of social injustices entails promoting gender equity as a way of ensuring that both men and women get fair opportunities for the realisation of their right to self-determination and contribution towards national development. The *UN Conference on Environment and Development, Agenda 21*[97] under chapter 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making.

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[93] 'Mediating Peace in Africa' (ACCORD) <https://www.accord.org.za/publication/mediating-peace-in-africa/> accessed 5 July 2020.

[94] Ibid; see also Helen Kezie-Nwoha and Juliet Were, 'Women's Informal Peace Efforts: Grassroots Activism in South Sudan' (2018) 2018 CMI Brief; Esther Soma, 'Our Search for Peace: Women in South Sudan's National Peace Processes, 2005–2018'.

[95] Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", in AusAID's Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific, (2008), Case Study No. 9, p. 196. <http://www.ausaid.gov.au/publications/pdf> accessed 5 July 2020.

[96] See Articles 97 (1)(b); 98 (1)(b); 98(1)(c) of the Constitution.

The Constitution of Kenya readily recognizes women by way of creation of special seats for women that resulted in the election of forty-seven (47) women into the National Assembly, nomination of sixteen women by political parties and one woman representing the youth and persons with disabilities into the Senate and County Governments and appointment of women into other decision-making bodies. ('Actualization and Implementation of the "Two-Thirds Gender Principle" in Kenya | Www.Sidint.Net' <https://www.sidint.net/content/actualization-and-implementation-two-thirds-gender-principle-kenya> accessed 5 July 2020.).

[97] United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

6. Conclusion

It has been contended that a gendered approach can improve not only the lives of men and women in conflict and post-conflict situations, but it can also reap significant environmental dividends.[98] Specifically, women's participation in peace negotiations is believed to increase the durability and the quality of peace.[99] There is a need to ensure that peacemaking efforts take into consideration the gender aspect and an acknowledgement that both men and women are affected differently by natural resource based conflicts and there is therefore a need to ensure that both are included if Kenya is to not only ensure peace across the country but also achieve effective environmental management.

The Sustainable Development Goals (SDGs) acknowledge the link between peace and development and thus provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.[100] The SDGs Agenda also recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right of women to participate in community affairs), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda. The aim is to redouble the efforts to resolve or prevent conflict and to support post-conflict countries, including through ensuring that women have a role in peace building and state building.[101] The significant daily interaction of women with environmental resources makes them critical players in peacemaking efforts especially where natural resource based conflicts arise. 'Mainstreaming the role of women in peacemaking efforts during environmental and natural resource related conflicts is a necessary step that should be taken; and the time to do is now.

[98] 'Understanding Gender, Conflict and the Environment' (CEOBS, 5 June 2017) <https://ceobs.org/understanding-gender-conflict-and-the-environment/> accessed 4 July 2020.
[99] Jana Krause, Werner Krause and Piia Bränfors, 'Women's Participation in Peace Negotiations and the Durability of Peace' (2018) 44 International Interactions 985.
[100] United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, para. 35.
[101] Ibid.

The Place of Environmental, Social and Governance (ESG) in Arbitration

Abstract

The paper critically discusses the relationship between Environmental, Social and Governance (ESG) and arbitration. The paper argues that arbitration represents a viable mechanism for managing ESG related disputes while simultaneously promoting ESG tenets. It addresses some of the current concerns in ESG and the ability of arbitration to deal with these concerns. The paper further proposes recommendations towards embracing arbitration in management of ESG disputes for Sustainable Development.

1. Introduction

Environment, Social and Governance (ESG) is a concept that seeks to promote sustainable, responsible and ethical corporate behavior by incorporating Environmental, Social and Governance concerns in corporate decision making[1]. The growing threat of climate change and climate crisis has forced many investors to embrace sustainability as a key factor in investment decision-making[2]. Further, social concerns touching on issues such as human rights, diversity, consumer protection and welfare and protection of animals especially endangered species have led to many companies taking their social responsibilities and especially impact of their commercial activities on the local communities where they operate more seriously than ever[3]. In addition, there has been growing corporate governance awareness since the 2008 global economic recession which has led to increase shareholder and stakeholder activism in demanding more responsive management structure, better employee relations, and reasonable executive compensation in companies[4].

Consequently, how corporations handle environmental, social and governance issues is increasingly becoming a major concern especially for investors and other key stakeholders. Most investment decisions including assessment and valuation are incorporating ESG criteria with companies that are rated as having strong sustainability programs enjoying more preference from investors[5]. Matters touching on climate change

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[1] Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR research in corporate finance.' Journal of Corporate Finance 66 (2021): 101889.

[2] De Francesco. A.J., 'The impact of sustainability on the investment environment.' Journal of European Real Estate Research (2008)

[3] Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses." Utrecht Law Review 14.2 (2018): 1-5.'

[4] Martin.C et al., 'Corporate governance and the 2008–09 Financial Crisis." Corporate Governance: An International Review 19.5 (2011): 399-404; See also Erkens. D.H, et al Corporate governance in the 2007–2008 financial crisis: Evidence from financial institutions worldwide." Journal of corporate finance 18.2 (2012): 389-411.

[5] Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Available at http://kmco.co.ke/wp-content/uploads/2022/07/Embracing-ESG-Principles-for-Sustainable-Development-in-Kenya.pdf (accessed on 28/09/2022)

and sustainability dominate current ESG focus[6]. In addition, human rights and especially the rights of indigenous peoples and governance structures of companies are enjoying prominent attention[7]. Many projects, investors and sponsors are also demanding more detailed identification and mitigation of environmental and social impacts of investment projects before making commitment or funding[8]. The importance of ESG tenets is evidenced by the change in the legal and regulatory landscape to reflect the expectations of investors, customers, employees and other stakeholders[9].

The public scrutiny of corporations and the need to operate within socially acceptable standards have resulted in many corporations incorporating ESG commitments in commercial contracts[10]. These commitments can take various forms including respect for the environment, human rights and labour laws.[11] ESG related disputes can arise where corporations violate such commitments. Such disputes can be managed through various mechanisms including arbitration.

The paper seeks to discuss the place of Environmental, Social and Governance (ESG) in arbitration. It brings out the nexus between ESG and arbitration. The paper further highlights and discusses the viability of arbitration in management of ESG related disputes. It also proposes interventions towards embracing arbitration in management of ESG disputes for Sustainable Development.

2. The Nexus between Environmental Social and Governance (ESG) and Arbitration

Arbitration is form of Alternative Dispute Resolution (ADR) mechanisms. ADR refers to a set of mechanisms that are applied in management of disputes without resort to adversarial litigation[12]. It has been described as a private and consensual process where parties to a dispute agree to present their grievances to a third party for resolution[13]. In Kenya, arbitration alongside other ADR mechanisms has been recognized under the Constitution[14].

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[6] Ibid

[7] Ibid

[8] Muigua. K., 'Realising Environmental, Social and Governance Tenets for Sustainable Development' available at http://kmco.co.ke/wp-content/uploads/2022/07/Realising-Environmental-Social-and-Governance-Tenets-of-Sustainable-Development-Kariuki-Muigua-July-2022.pdf (accessed on 28/09/2022)

[9] Ibid

[10] Von Wobeser., 'The Role of Arbitration in ESG Disputes' available at https://www.vonwobeser.com/index.php/publication?p_id=1650 (accessed on 28/09/2022)

[11] Ibid

[12] Muigua. K., 'Settling Disputes Through Arbitration in Kenya' Glenwood Publishers Limited, 4th Edition, 2022

[13] Ibid

[14] Constitution of Kenya, 2010, Article 159 (2) (c)

It is argued that ESG principles have become a model for sustainable business development through which a corporations' goal for solving environmental, social and governance problems is achieved[15]. Consequently, ESG considerations have an increasing impact in international business as evidenced by the incorporation of sustainability clauses in investment contracts[16]. In such contracts, investors are required to adhere to the concept of sustainable development as envisaged under the contracts and failure to do so may result in ESG related disputes.

In the wake of the climate change debate, there have been calls for responsible business practice towards climate change mitigation through measures such as reduction of carbon emissions[17]. The Paris Agreement on Climate Change has raised the awareness of the need for global efforts to combat climate change and the role of responsible and ethical corporate behavior towards achieving this goal[18]. Further, corporations are increasingly required to safeguard human rights as envisaged by 'S' pillar of ESG[19].

However, some corporations have been accused of violating these ESG concerns as a result of their business practices. Some corporations have been accused of failing to promote climate change mitigation through reduction of carbon emissions and transitioning to cleaner energy production[20]. Further, some corporations have been accused of violating fundamental human rights such as the right to a clean and healthy environment especially in the investment sphere in Africa[21]. These instances have resulted in an increasing number of ESG-related disputes.

The growth of ESG concerns has seen corporations being increasingly required to embrace ESG principles in their business practices. Consequently, ESG clauses are being adopted in commercial and investment contracts[22]. In case of violation of such clauses, ESG related disputes are bound to occur. It has been asserted that adoption of ESG-related practices into pre-existing social and governance models adopted by corporations

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[15] Mazhorina. M.V., 'ESG Principles in International Business and Sustainable Contracts' available at https://aprp.msal.ru/jour/article/view/3223?locale=en_US (accessed on 28/09/2022)
[16] Ibid
[17] International Arbitration in 2022., 'The Rising Significance of ESG and the Role of International Arbitration' available at https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2022/the-rising-significance-of-esg-and-the-role-of-international-arbitration/ (accessed on 28/09/2022)
[18] Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit
[19] Ibid
[20] Ibid
[21] Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' available at http://kmco.co.ke/wp-content/uploads/2018/11/International-Investment-Law-and-Policy-in-Africa-AILA-Conference-Paper-5-11-2018.pdf (accessed on 28/09/2022)
[22] International Arbitration in 2022., 'The Rising Significance of ESG and the Role of International Arbitration' Op Cit

would be disruptive[23]. The inclusion of ESG clauses in commercial contracts not only points to the importance of ESG concerns to companies but it also serves as potential source of disputes where such considerations are not complied with[24]. ESG issues are not only reshaping corporate behavior across the globe but can also be a potential battleground in international disputes[25]. This creates the need for an effective mechanism of management of such disputes in order to enhance ESG principles in the quest for Sustainable Development.

Arbitration has for a long time been the most viable mechanism for management of international commercial and investment disputes. It offers a neutral forum for the management of disputes and addresses some of the concerns that parties may have in relation to the other parties' legal system[26]. In international commercial and investment arbitration, parties are reluctant to submit to the jurisdiction of the other party due to the likelihood of favoritism by the host judicial system[27]. Further, arbitration has the potential of facilitating expeditious management of disputes[28]. In international commercial and investment arbitration, there is need to manage disputes expeditiously in order to preserve the commercial interests of parties.[29] The viability of arbitration in management of international commercial disputes is further enhanced by the availability of a legal framework for the recognition and enforcement of foreign arbitral awards. The *New York*[30] Convention provides the legal framework for the recognition and enforcement of foreign arbitral awards across different jurisdictions.

Consequently, the adoption of ESG elements in international commercial and investment agreements has resulted in the use of arbitration to manage disputes arising from such agreements[31]. ESG concerns have become prominent in investor-state arbitration with arbitral tribunals having to determine issues relating to climate change, corruption and

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[23] The ALP Review., 'The Importance of ESG and its effect on International Arbitration' available at *https://www.alp.company/sites/default/files/ALP%20Review%20-%20The%20Importance%20of%20ESG%20and%20its%20effect%20on%20International%20Arbitration.pdf* (accessed on 28/09/2022)

[24] Ibid

[25] Hamilton. J & Coulet-Diaz. M., 'Arbitration & the ESG Era' available at https://www.whitecase.com/news/media/arbitration-esg-era (accessed on 28/09/2022)

[26] Moses. L.M, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

[27] Ibid

[28]Muigua. K., 'Promoting International Commercial Arbitration in Africa' available at http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA.pdf

[29] Ibid

[30] United Nations Conference on International Commercial Arbitration, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' United Nations, 1958

[31] Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

human rights[32]. It has been asserted that the growth of ESG will redefine the practice of arbitration as it seeks to adapt to the new concerns created by ESG[33]. However, the flexibility of arbitration and its ability to adapt to emerging concerns means that it is well positioned to manage ESG disputes[34]. However, there is need for reform in order to enhance the role of arbitration in managing ESG disputes.

3. Enhancing the Role of Arbitration in Management of Environmental Social and Governance (ESG) Disputes

Arbitration represents a viable mechanism for management of ESG disputes. The following can be done towards enhancing the use of arbitration in ESG disputes:

3.1 Knowledge in ESG Concerns

Statistics show that many ESG related disputes are being managed through arbitration[35]. According to the International Chamber of Commerce, engineering, construction and energy disputes represent the highest number of cases handled representing 38% of all cases registered in 2021[36]. Such disputes entail ESG components such as renewable energy projects, environmental protection and human rights concerns[37]. This demonstrates that ESG and arbitration are inextricably linked. Arbitration practitioners thus need to equip themselves with knowledge in ESG related matters in order to be better placed to manage ESG related disputes.

3.2 Promoting Sustainable Development

Sustainable Development has been defined as development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs[38]. This concept entails a combination of elements including environmental protection, economic development and social issues[39]. The importance of Sustainable Development has seen the adoption of the Sustainable Development Goals as the global blueprint of development[40]. Most of the Sustainable Development Goals entail aspects of ESG such as clean water and sanitation, affordable and clean energy, industry,

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[32] Ross. A., 'We need talk about ESG' available at https://globalarbitrationreview.com/we-need-talk-about-esg (accessed on 28/09/2022)
[33] Hamilton. J & Coulet-Diaz. M., 'Arbitration & the ESG Era' Op Cit
[34] Ibid
[35] Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit
[36] International Chamber of Commerce., 'ICC Dispute Resolution Statistics: 2020' available at https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/ (accessed on 28/09/2022)
[37] Ibid
[38] World Commission on Environment and Development, Our Common future. Oxford, (Oxford University Press, 1987).
[39] Fitzmaurice, M., 'The Principle of Sustainable Development in International Development Law' International Sustainable Development Law, Vol. 1
[40] United Nations., 'Sustainable Development Goals' available at https://sdgs.un.org/goals (accessed on 28/09/2022)

innovation and infrastructure and climate action[41]. Arbitration practitioners should therefore promote the principles of sustainable development when managing ESG related disputes. This could entail requiring investors to comply with the host country environmental laws and ESG standards in mining, energy and construction disputes which have an ESG bearing[42].

3.3 Upholding Human Rights

The 'S' pillar in ESG seeks to promote responsible and ethical corporate behavior through aspects such as respect for human rights[43]. However, corporate behavior especially in the investment sphere in Africa has resulted in gross violation of human rights[44]. Some corporations which have invested in oil exploration have been accused of human right abuses, environmental degradation and unsustainable peace due to their business culture[45]. In Kenya, a multinational corporation that has invested in the agricultural sector has been accused of human right abuses such as killings, rape, and other forms of sexual and gender-based violence allegedly committed by its guards, bad labour practices and land injustices against the neighbouring communities[46].

Some of these disputes have ended up in arbitration where tribunals are called upon to adjudicate on human rights issues[47]. Arbitrators should thus seek to uphold human rights in such disputes by rendering awards that are in line with human rights standards[48]. By promoting human rights, arbitrators will be embracing the 'S' pillar that is fundamental in the ESG debate.

3.4 Promoting Good Governance

The Governance pillar in ESG seeks to achieve good financial and accounting standards as well as legal and regulatory compliance, such as transparency, corporate structures

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[41] Ibid, Goals 6, 7, 9 and 13.

[42] The ALP Review., 'The Importance of ESG and its effect on International Arbitration' available at https://www.alp.company/sites/default/files/ALP%20Review%20-%20The%20Importance%20of%20ESG%20and%20its%20effect%20on%20International%20Arbitration.pdf

[43] Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Op Cit

[44] Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' Op Cit

[45] Maiangwa.B & Agbiboa.D., 'Oil Multinational Corporations, Environmental Irresponsibility and Turbulent Peace in the Niger Delta' Africa Spectrum 2/2013: 71-83

[46] Kenya Human Rights Commission., 'Heavy price for… egregious human rights violations' available at https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html (accessed on 29/09/2022)

[47] Amao. O., 'Corporate Social Responsibility, Human Rights and the Law: Multinational corporations in Developing Countries.' Routledge, 2011.

[48] Krajewski, M. 'Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice.' Available at SSRN 3133529 (2018).

and ethics in corporate conduct[49]. It also seeks to align Governance with the Sustainable Development Goals where governance issues include industry, innovation and infrastructure (Goal 9); peace, justice and strong institutions (Goal 16); and partnerships with public and private institutions (Goal 17)[50]. Good governance can be promoted through arbitration by rendering awards that adhere to good governance practices such as transparency, accountability, reporting and disclosure.

3.5 Seeking Expert Assistance in Complex ESG Matters

Arbitration has a significant role in promoting ESG tenets in areas such as climate change. Arbitrators play a significant role in shaping and adapting international law to respond to the climate crisis[51]. However, in some instances, arbitration has been slow to act to act in response to the climate crisis[52]. Some climate change concerns such as determining adherence to climate change commitments through low carbon transition requires arbitrators to be fully informed and engaged in such concepts[53]. This may require expert analysis and guidance from persons with requisite knowledge in environmental matters[54]. Arbitrators should therefore seek expert assistance in such issues in order to be fully informed and render awards that promote ESG principles.

4. Conclusion

The relationship between Environmental, Social and Governance (ESG) and arbitration continues to grow. Adoption of ESG by corporations as a means of promoting responsible and ethical business practices and the wide use of arbitration in management of international commercial and investment disputes points to increased use of arbitration in management of ESG related disputes[55]. In managing such disputes, arbitrators should promote ESG considerations whilst balancing the needs and interests of parties involved in issues such as climate change[56]. Arbitration represents a viable mechanism for managing ESG disputes while simultaneously promoting Sustainable Development.

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[49] RL360, "Governance-The G in ESG," Available at: https://www.rl360.com/row/funds/investment-definitions/g-in-esg.htm (accessed on 29/09/2022)

[50] Sustainable Development' available at https://sdgs.un.org/goals (accessed on 29/09/2022)

[51] Greenwood. L., 'The Canary is Dead: Arbitration and Climate Change' Journal of International Arbitration, Volume 38, Issue 3 (2021)

[52] Ibid

[53] Miles. W., 'BVI: A Frontline Focus for Resolving Future Climate Change Related Disputes' available at *https://www.bviiac.org/Portals/0/Files/Publications/Wendy%20Miles%20QC_BVI_A%20Frontline%20Focus%20for%20Resolving%20Future%20Climate%20Change%20Related%20Disputes.pdf* (accessed on 29/09/2022)

[54] Cummins. T et al., 'ESG Litigation – How Companies Can Get Ready, Respond and Resolve Claims' available at https://www.emerald.com/insight/content/doi/10.1108/JOIC-07-2021-0032/full/html (accessed on 29/09/2022)

[55] Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

[56] Ibid

There is need to enhance the viability of arbitration in management of ESG related disputes.

Investment-Related Dispute Settlement under the African Continental Free Trade Agreement-Promises and Challenges

1. Introduction

Calls for the unity of African states have been the centre of development discourses as advanced by many African scholars and political leaders.[1] The African continent has for the longest time sought unity of purpose among the African countries especially in matters relating to trade and investments, by coming up with agreements that will facilitate the same through the principle of free movement of people and goods within the continent.[2] The first real steps towards creation of an African economic community were first crystalized through the *Abuja Declaration of 1991*[3].

The agreements are meant to promote regional integration aimed at eliminating tariff and non-tariff barriers across different African regions for ease of regional trading. In addition, the agreements are meant to also to give it bargaining power when it comes to intercontinental trading.[4] For instance, since its inception, the European Union has acted with a single external voice in international trade negotiations.[5]

One such Agreement that is meant to promote intra-African trade and investment is the *African Continental Free Trade Agreement*[6] (AfCFTA) whose main objectives are to create a single continental market for goods and services, with free movement of business persons and investments, and thus pave the way for accelerating the establishment of the Customs Union; expand intra-African trade through better harmonization and coordination of trade liberalization and facilitation and instruments across the Regional Economic Communities (RECs) and across Africa in general; and also expected to enhance

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[1] Nkrumah, Kwame, Roberta Arrigoni, and Giorgio Napolitano. Africa must unite. London: Heinemann, 1963 < *http://feintandmargin.com/wp-content/uploads/2015/04/Africa-Must-Unite.pdf*> accessed 9 June 2020.

[2] 'How to Boost Trade within Africa | Africa Renewal' <*https://www.un.org/africarenewal/magazine/september-2002/how-boost-trade-within-africa*> accessed 9 June 2020; 'Africa Set for a Massive Free Trade Area | Africa Renewal' <*https://www.un.org/africarenewal/magazine/august-november-2018/africa-set-massive-free-trade-area*> accessed 9 June 2020.

[3] Declaration A/DCL.1/7/91 of the Authority of Heads of State and Government.

[4] 'Time to Reset African Union-European Union Relations' (Crisis Group, 17 October 2017) <*https://www.crisisgroup.org/africa/255-time-reset-african-union-european-union-relations*> accessed 9 June 2020.

[5] 'Free Trade Agreements: Corporate Law Powers of the EU and Member States, and a Way Forward' *(Oxford Law Faculty, 10 October 2019)* <*https://www.law.ox.ac.uk/business-law-blog/blog/2019/10/free-trade-agreements-corporate-law-powers-eu-and-member-states-and*> accessed 11 June 2020.

[6] African Union, Agreement Establishing the African Continental Free Trade Area. March 21, 2018. (entered into force May 30, 2019) < *https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf* > accessed 9 June 2020.

competitiveness at the industry and enterprise level through exploitation of opportunities for scale production, continental market access and better reallocation of resources.[7] Currently, the African countries trade in terms of blocks, with States forming RECs such as the East African Community (EAC), Economic Community of West African States (ECOWAS) and Southern African Development Community (SADC). All these are geared towards promoting regional markets integration but the AfCFTA is meant to work towards achieving economic integration of major African markets with the smaller markets and enhance competitiveness at the industry and enterprise level by exploiting opportunities for scale production, continental market access and better reallocation of resources.[8]

All these trading and investment activities are expected to come with disputes which, if not well handled, would derail the above listed objectives of AfCFTA. While the Agreement provides for a dispute settlement body and the procedures to be followed, it presents a potential challenge where dealing with an investment dispute that is intercontinental. Normally, when investors and regional unions from out of Africa such as the European Union have disputes, they may prefer to use investment-related dispute settlement mechanisms such as investor-state dispute arbitration, which they may perceive as neutral. Notably, the African Union does not currently have a specialized forum to hear trade related disputes.[9]

The Agreement provides that each State Party shall promptly publish or make publicly available through accessible mediums its laws, regulations, procedures and administrative rulings of general application as well as any other commitments under an international agreement relating to any trade matter covered by this Agreement.[10]
It is also worth pointing out that AfCFTA provides that laws, regulations, procedures and administrative rulings of general application as well as any other commitments under an

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[7] TRALAC Trade Law Centre, 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' (tralac) <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html> accessed 9 June 2020.

[8] 'Preparing for Trade under the AfCFTA Agreement' (ECDPM) <*https://ecdpm.org/great-insights/african-continental-free-trade-area-agreement-impact/preparing-trade-afcfta-agreement/*> accessed 15 June 2020; Gayathri Iyer and Gayathri Iyer, 'AfCFTA: Need for Integrating the African Continental Infrastructure Framework' (ORF) <https://www.orfonline.org/expert-speak/afcfta-need-for-integrating-the-african-continental-infrastructure-framework-51507/> accessed 15 June 2020; Marcia Tavares, 'The African Continental Free Trade Area Agreement – What Is Expected of LDCs in Terms of Trade Liberalisation? By Trudi Hartzenberg, Executive Director, Trade Law Centre (Tralac) and Member of the Committee for Development Policy (CDP) | LDC Portal' <https://www.un.org/ldcportal/afcfta-what-is-expected-of-ldcs-in-terms-of-trade-liberalisation-by-trudi-hartzenberg/> accessed 15 June 2020.

[9] TRALAC Trade Law Centre, 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' (tralac), p. 1.

[10] Article 16 (1), African Continental Free Trade Area Agreement.

international agreement relating to any trade matter covered by this Agreement adopted after the entry into force of this Agreement shall be notified by State Parties in one (1) of the African Union working languages to other State Parties through the Secretariat.[11] AfCFTA however provides that the Agreement shall not nullify, modify or revoke rights and obligations under pre-existing trade agreements that State Parties have with Third Parties.[12] This provision raises the question of the place of dealings of two member states that are also bound by international legal instruments especially in dispute settlement. This raises the question whether such countries can freely pick such a foreign mechanism if they both agree to the same.

In the event of any conflict and inconsistency between the afCFTA and any regional agreement, the Agreement provides that its provisions shall prevail to the extent of the specific inconsistency, except as otherwise provided in the Agreement.[13] In addition, notwithstanding the provisions of Paragraph 1 of Article 19, State Parties that are members of other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under the Agreement, shall maintain such higher levels among themselves.[14]

This paper offers a critical discussion on the African Continental Free Trade Agreement and evaluates the effectiveness of investment dispute settlement provisions under the Agreement.

2. Overview of the African Continental Free Trade Agreement: Scope, Objectives and Principles

The *African Continental Free Trade Area Agreement* ("the AfCFTA"), unveiled in March, 2018 in Kigali, Rwanda, was put in place to establish the African Continental Free Trade Area Agreement,[15] and so far is considered the world's largest free trade area: 55 countries merging into a single market of 1.2 billion people with a combined GDP of $2.5 trillion.[16] Generally, the Agreement is expected to: create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan African Vision of "An integrated, prosperous and peaceful Africa" enshrined in Agenda 2063; create a liberalised market for goods and services through successive rounds of negotiations; contribute to the

[11] Ibid, Article 17 (1).
[12] Ibid, Article 18 (3).
[13] Ibid, Article 19 (1).
[14] Ibid, Article 19 (2).
[15] Article 2, African Continental Free Trade Area Agreement.
[16] 'Africa Set for a Massive Free Trade Area | Africa Renewal' <*https://www.un.org/africarenewal/magazine/august-november-2018/africa-set-massive-free-trade-area*> accessed 9 June 2020.

movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and RECs; lay the foundation for the establishment of a Continental Customs Union at a later stage; promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties; enhance the competitiveness of the economies of State Parties within the continent and the global market; promote industrial development through diversification and regional value chain development, agricultural development and food security; and resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.[17]

In order to achieve the foregoing general objectives, AfCFTA is expected to specifically achieve the following objectives: progressively eliminate tariffs and non-tariff barriers to trade in goods; progressively liberalise trade in services; cooperate on investment, intellectual property rights and competition policy; cooperate on all trade-related areas; cooperate on customs matters and the implementation of trade facilitation measures; establish a mechanism for the settlement of disputes concerning their rights and obligations; and establish and maintain an institutional framework for the implementation and administration of the AfCFTA.[18]

The implementation of AfCFTA is to be governed by the following principles: driven by Member States of the African Union; RECs' Free Trade Areas (FTAs) as building blocs for the AfCFTA; variable geometry; flexibility and special and differential treatment; transparency and disclosure of information; preservation of the acquis; Most-Favoured-Nation (MFN) Treatment; National Treatment; reciprocity; substantial liberalisation; consensus in decision-making; and best practices in the RECs, in the State Parties and International Conventions binding the African Union.[19]

Notably, the scope of AfCFTA shall cover trade in goods, trade in services, investment, intellectual property rights and competition policy.[20] Member States were to enter into Phase II negotiations in the following areas: intellectual property rights; investment; and competition policy, which negotiations were to commence after the adoption of the Agreement by the Assembly and were to be undertaken in successive rounds.[21] The Agreement is designed to work hand in hand with the Protocols on Trade in Goods, Trade in Services, Investment, Intellectual Property Rights, Competition Policy, Rules and

[17] Article 3, African Continental Free Trade Area Agreement.
[18] Article 4, African Continental Free Trade Area Agreement.
[19] Article 5, African Continental Free Trade Area Agreement.
[20] Article 6, African Continental Free Trade Area Agreement.
[21] Article 7, African Continental Free Trade Area Agreement.

Procedures on the Settlement of Disputes and their associated Annexes and Appendices, upon adoption, and shall form an integral part of the Agreement.[22]

The institutional framework for the implementation, administration, facilitation, monitoring and evaluation of the AfCFTA consists of the following: the Assembly; the Council of Ministers; the Committee of Senior Trade Officials; and the Secretariat,[23] with the Assembly, as the highest decision-making organ of the AU, providing oversight and strategic guidance on the AfCFTA, including the Action Plan for Boosting Intra-African Trade (BIAT).[24] Decisions of the AfCFTA institutions (namely the Assembly, the Council of Ministers and the Committee of Senior Trade Officials) on substantive issues are to be taken by consensus.[25] The Agreement and the Protocols on Trade in Goods, Trade in Services, and Protocol on Rules and Procedures on the Settlement of Disputes were to enter into force thirty (30) days after the deposit of the twenty second (22nd) instrument of ratification.[26] It is worth mentioning that AfCFTA entered into force on 30th May, 2019 after achieving the required minimum number of ratifications, that is, 22 countries ratifying the same.[27]The Agreement is also categorical that no reservations shall be made to the Agreement.[28]

2.1 Disputes Settlement Provisions under AfCFTA

As highlighted above, the scope of AfCFTA includes goods, trade in services, investment, intellectual property rights and competition policy. This also comes with the need for provision for settlement of disputes relating to these areas. Notably, the Agreement provides for establishment of a Dispute Settlement Mechanism which shall apply to the settlement of disputes arising between State Parties.[29] The Dispute Settlement Mechanism shall be administered in accordance with the Protocol on Rules and Procedures on the

[22] Article 8, African Continental Free Trade Area Agreement.
[23] Article 9, African Continental Free Trade Area Agreement.
[24] Article 10 (1), African Continental Free Trade Area Agreement.
[25] Article 14 (1), African Continental Free Trade Area Agreement.
[26] Article 23 (1), African Continental Free Trade Area Agreement; Hogan Lovells, 'Report on the African
Continental Free Trade Agreement 2019: Implications for the continent,' November 2019 <https://www.hoganlovells.com/en/knowledge/topic-centers/~/media/2e3f5059b0c44b3c84d8e5bc375abbf8.ashx> 15 June 2020.
[27] 'AfCFTA Agreement Secures Minimum Threshold of 22 Ratification as Sierra Leone and the Saharawi Republic Deposit Instruments. | African Union' <https://au.int/en/pressreleases/20190429/afcfta-agreement-secures-minimum-threshold-22-ratification-sierra-leone-and> accessed 15 June 2020.
[28] Article 25, African Continental Free Trade Area Agreement.
[29] Article 20 (1), African Continental Free Trade Area Agreement.

Settlement of Disputes.[30] In addition, the Protocol on Rules and Procedures on the Settlement of Disputes is to establish, inter alia, a Dispute Settlement Body.[31]

The *Protocol on Rules and Procedures on the Settlement of Disputes* (the Protocol) applies to disputes arising between State Parties concerning their rights and obligations under the provisions of the Agreement.[32] The Protocol provides that a State Party which has invoked the rules and procedures of this Protocol with regards to a specific matter shall not invoke another forum for dispute settlement on the same matter.[33]

The Protocol provides for the use of consultations, mediation, Dispute Settlement Board (DSB) and arbitration to settle disputes arising from the Agreement.[34] Notably, the Protocol provides that the DSB will only hear disputes from State Parties to the AfCFTA Agreement.[35]Despite the foregoing provisions, the Protocol provides for arbitration as an elective process that State Parties may opt for. It specifically provides that 'where the parties to a dispute consider it expedient to have recourse to arbitration as the first dispute Settlement Avenue, the parties to a dispute may proceed with arbitration as provided for in Article 27 of this Protocol.[36] Article 27 of the Protocol provides that Parties to a dispute may resort to arbitration subject to their mutual agreement and shall agree on the procedures to be used in the arbitration proceedings.[37] Such referral of a dispute for arbitration pursuant to this Article shall bar Parties from simultaneously referring the same matter to the Dispute Settlement Mechanism.[38] The Parties to an arbitration proceeding shall abide by the arbitration award and the award shall be notified to the DSM for enforcement.[39] However, such arbitration seems to be only on trial basis since the Protocol provides that in the event of a Party to a dispute refusing to cooperate, the Complaining Party shall refer the matter to the DSB for determination.[40]

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[30] Article 20 (2), African Continental Free Trade Area Agreement.
[31] Article 20 (3), African Continental Free Trade Area Agreement; TRALAC TRADE LAW CENTRE, 'The Dispute Settlement Mechanism under the African Continental Free Trade Area' (tralac) <https://www.tralac.org/blog/article/13529-the-dispute-settlement-mechanism-under-the-african-continental-free-trade-area.html> accessed 15 June 2020.
[32] Article 3 (1), Protocol on Rules and Procedures on the Settlement of Disputes.
[33] Article 3 (4), Protocol on Rules and Procedures on the Settlement of Disputes.
[34] Articles 4-27, Protocol On Rules And Procedures On The Settlement Of Disputes.
[35] Article 3 (1), Protocol on Rules and Procedures on the Settlement of Disputes; TRALAC Trade Law Centre, 'The Dispute Settlement Mechanism under the African Continental Free Trade Area' (tralac) <https://www.tralac.org/blog/article/13529-the-dispute-settlement-mechanism-under-the-african-continental-free-trade-area.html> accessed 15 June 2020.
[36] Article 6(6), Protocol on Rules and Procedures on the Settlement of Disputes.
[37] Article 27(1), Protocol on Rules and Procedures on the Settlement of Disputes.
[38] Article 27(2), Protocol on Rules and Procedures on the Settlement of Disputes
[39] Article 27(5), Protocol on Rules and Procedures on the Settlement of Disputes
[40] Article 27(6), Protocol on Rules and Procedures on the Settlement of Disputes

Where arbitration awards are not contested, the same shall be enforced in accordance with the provisions of Articles 24 and 25 of this Protocol mutatis mutandis.[41]

3. Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges

Notably, neither the Agreement nor the Protocol defines what is meant by the use of the term 'arbitration' therein. It has rightly been pointed out that while investment disputes can sometimes be resolved in local courts, or through state-state dispute settlement, the most common way in which breaches of an investment treaty are enforced is via investor-state arbitration.[42]

It is therefore unclear if the same would entail state-state arbitration under international arbitration panels as well. The question is whether a party may choose an international arbitral body or expert to carry out arbitration. In addition there is a question as to whether, where two states agree on an international body, Dispute Settlement Board under the Agreement can overrule this parties' agreement in favour of regional expertise. This is important because where Parties elect to use arbitration and opt to use state-state arbitration before international arbitration bodies in cases involving investments, with binding procedural rules from bodies being used, and one Party opts out, the question that would arise is whether by seeking audience before international arbitration bodies, the jurisdiction of the DSB is ousted so that Parties would not go back for the determination of their dispute by the DSM. This would especially be important where two African States had included a state-state arbitration clause in their investment agreement. The other scenario where a challenge would arise would be where an investor from African Country A, in the spirit of the AfCFTA, invests in African Country B and they agree to refer any investment disputes to investor-state arbitration, on the strength of the fact that Countries A and B are State parties to an international investor-state arbitration agreement or against the background of a Bilateral Investment Treaty between the two countries. It is not yet clear what would happen if Government of Country B responds by invoking the State-State arbitration procedure of the same treaty or the implied broad interpretation of AfCFTA.[43] The difficulty in determining the above potential disputes is

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[41] Article 27(7), Protocol on Rules and Procedures on the Settlement of Disputes

[42] 'How International Investment Dispute Settlement Works' (WHO FCTC Secretariat's Knowledge Hub on legal challenges, 20 March 2017) <*https://untobaccocontrol.org/kh/legal-challenges/investment/dispute-settlement/*> accessed 11 June 2020.

[43] For instance, see, J Seifi, 'Investor-State Arbitration v State-State Arbitration in Bilateral Investment Treaties' (2004) 1 Transnational Dispute Management (TDM) <*https://www.transnational-dispute-management.com/article.asp?key=112*> accessed 11 June 2020.
"…following the decision by a Chilean firm, Lucchetti, to institute investor-State arbitral proceedings against the Peruvian Government under the terms of the Chile-Peru Bilateral Investment Treaty, the Peruvian Government responded by invoking the State-State arbitration procedure of the same treaty. Both the investor-State dispute and the State-State dispute were officially registered with the Secretariat of the ICSID."

further aggravated by the fact that whereas state–state dispute settlement predates investor–state arbitration, and was the norm in the early Friendship, Commerce and Navigation (FCN) treaties and some early investment treaties, today, most investment treaties include both state–state and investor–state dispute settlement mechanisms.[44] AfCFTA notably defines "Member States" to mean the Member States of the African Union. The implication of this is that the Agreement and the related Protocols only envisage that it is for the states to bring disputes before the dispute settlement body either on behalf of their governments or the individual investors. It may therefore be assumed that it only provides for state-state dispute settlement and not investor-state dispute settlement.

Investor-State arbitration and state-state arbitration have traditionally been carried out by international arbitral tribunals such as the International Centre for the settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce (ICC), the International Court of Arbitration (ICA), the Permanent Court of Arbitration (PCA), the International Court of Justice (ICC), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), or the London Court of International Arbitration (LCIA).[45] However, most African countries and indeed many countries in the developing world the world over have complained about lack of legitimacy and transparency, exorbitant costs of arbitration proceedings and arbitral awards as well as inconsistent and flawed decisions, with developing countries that are mostly dragged before these bodies also getting concerned about the violation of their sovereignty.[46]

With African countries alive to these concerns, there is a need to streamline the dispute settlement mechanisms under AfCFTA in order to enhance their effectiveness.

4. Streamlining Investment Disputes Settlement under AfCFTA

Some commentators have observed that the AfCFTA Agreement will hopefully include an investment protocol, which is likely to include substantive investment protections and a separate set of rules for the resolution of investment disputes, during African Union's

[44] Bernasconi-Osterwalder, N., "State-state dispute settlement in investment treaties." Rethinking Bilateral Investment Treaties (2014): 253, p.1 <*https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf* > accessed 11 June 2020.

[45] 'Arbitration Centres | United Nations Commission on International *Trade Law'* <*https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration/centres*> accessed 15 June 2020.

[46] TRALAC Trade Law Centre, 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol' (tralac) <*https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html*> accessed 13 June 2020.

Phase II negotiations.[47] It is recommended that such an investment protocol will consider the issues discussed under this section.

4.1 Clarification of Definition of Arbitration and the Arbitration Body under AfCFTA

It is necessary for the AfCFTA to be reviewed and clarify whether arbitration as provided for under the Agreement and the relevant protocol covers state-state arbitration, investor-state arbitration or both. It is also necessary to make it clear as to which body would be charged with conducting the arbitration process whose decision is then adopted as the decision of the Dispute Settlement Board. This is especially important considering that the Agreement and the Protocol on dispute settlement omitted any reference to the international arbitration bodies such as the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration.

Defining the body charged with arbitration may save parties considerable time and resources as opposed to the current position where parties have the right to appoint such arbitrator (s), failing which the Board would appoint them on the parties' behalf.

4.2 Inclusion of Judicial Mechanisms to Settle State–State Disputes?

Notably, a number of African states subscribe to the ICSID system as a way of attracting foreign investments. This is because most of the foreign investors do not have confidence in the local frameworks on investment disputes settlement.[48] For instance, the Investment Agreement for the COMESA Common Investment Area requires that its Member States should, where they have not done so, endeavour to accede to: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; the International Convention on Settlement of Investment Disputes between States and Nationals of Other States; the Convention Establishing the Multilateral Investment Guarantee Agency; the Agreement Establishing the African Trade Insurance Agency; and any other multilateral agreement designed to promote or protect investment.[49]

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[47] Hogan Lovells, 'Report on the African
Continental Free Trade Agreement 2019: Implications for the continent,' November 2019, p.9.

[48] 'The Evolution of Investment Arbitration in Africa' <*https://globalarbitrationreview.com/print_article/gar/editorial/1169359/the-evolution-of-investment-arbitration-in-africa?print=true*> accessed 15 June 2020; Engela C Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31 ICSID Review - Foreign Investment Law Journal 167; Charles N. Brower and Michael P. Daly, 'A Study of Foreign Investment Law in Africa: Opportunity Awaits,' *https://www.arbitration-icca.org/media/7/82088225980224/brower__daly_a_study_of_foreign_investment_law_in_africa.pdf 15 June 2020.*

[49] Article 6, Investment Agreement for the COMESA Common Investment Area < *https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf*> accessed 13 June 2020.

The creation of a new dispute settlement system under AfCFTA creates new challenges as to how disputes with foreigners on matters falling under this Agreement will be dealt with. This is because the AfCFTA is an agreement among African Union member states and cannot therefore create any rights or obligations for foreign (non-African) investors.[50] However, most African national courts have been associated with lack of impartiality and independence from their governments and may also not have expertise investment-related arbitrations.[51] This may therefore not be viable as at now and will take time to equip them properly and also have them shed the notions of lack of impartiality and independence. There is however a need for national courts to work towards enhancing their independence and impartiality.

4.3 Use of Regional Courts for State-State Arbitration?

Currently, the place of regional courts in settlement of disputes especially through arbitration as far as disputes arising under the AfCFTA Investment Protocol are concerned is not clear. The courts, such as the East African Court of Justice (EACJ) have not been expressly mentioned in the Agreement. This is unlike the provisions in the *Investment Agreement for the COMESA Common Investment Area* which expressly provides that 'any dispute between Member States as to the interpretation or application of this Agreement not satisfactorily settled through negotiation within 6 months, may be referred for decision to either: (i) an arbitral tribunal constituted under the COMESA Court of Justice in accordance with Article 28(b) of the COMESA Treaty; or (ii) an independent arbitral tribunal; or (iii) the COMESA Court of Justice sitting as a court'.[52] As for Investor-State disputes, the *Investment Agreement for the COMESA Common Investment Area* provides that 'in the event that a dispute between a COMESA investor and a Member State has not been resolved pursuant to good faith efforts in accordance with Article 26, a COMESA investor may submit to arbitration under this Agreement a claim that the Member State in whose territory it has made an investment has breached an obligation under Part Two of this Agreement and that the investment has incurred loss or damage by reason of, or arising out of that breach by submitting that claim to any one of the following fora at a time: to the competent court of the Member State in whose territory the investment has been made; to the COMESA Court of Justice in accordance with Article 28(b) of the COMESA Treaty; or to international arbitration: (i) under the International Centre for the Settlement of Investment Disputes (ICSID) Convention, provided that both the home state of an investor and Member State in whose territory the investment has been made are parties to the ICSID Convention; (ii) under the ICSID Additional Facility Rules,

[50] TRALAC Trade Law Centre, 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol' (tralac) <https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html> accessed 13 June 2020.

[51] Ibid.

[52] Article 27 (1), Investment Agreement for the COMESA Common Investment Area.

provided that either the non-disputing Party or the respondent is a party to the ICSID Convention; (ii) under the UNCITRAL Arbitration Rules; or (iv) under any other arbitration institution or under any other arbitration rules, if the both parties to the dispute agree.[53]

Such clarity is needed under AfCFTA. While the Agreement may leave out the inclusion of international arbitral bodies, there is a need for clarity on the place of local national courts and regional courts/dispute settlement bodies in the implementation of AfCFTA. There is also a need to clearly differentiate between state-state disputes and investor-state disputes and how they are to be settled.

There may be a need to consider having such courts working closely with the inter-state disputes settlement body provided for under the AfCFTA Investment Protocol especially in handling the state-state arbitrations. This would not only build the capacity of these regional courts but would also enhance the efficiency of arbitration as provided for under AfCFTA Protocol.

5. Conclusion

While the African Continental Free Trade Agreement is well meaning in its objectives, the provisions on dispute settlement are unclear. It is not clear as to what type of disputes would be submitted to particular dispute settlement settlements and whether the arbitral process provided for under the Agreement would allow parties to go for international arbitrators or arbitral bodies. This is especially important when it comes to investment disputes which may prove challenging to some of the regional dispute settlement bodies in Africa. There is a need to clarify the issues raised in this paper as they may determine the success of the implementation of AfCFTA. Africa must acknowledge that while economic integration is an idea whose time has come, the potential disputes must be settled in a clear and unambiguous manner that creates confidence for the member states and other investors dealing with matters provided for under the Agreement. For African countries to achieve their economic independence as envisaged under AfCFTA, they must be willing to invest in local expertise in dispute settlement by not only encouraging and supporting individual local dispute settlement experts but also strengthening the national and regional dispute settlement bodies in order for them to win the confidence of local investors, state parties and international investors as well. Investment-related dispute settlement is an area that requires attention. It has its challenges but holds a future promise of free trade within Africa and beyond.

[53] Article 28(1), Investment Agreement for the COMESA Common Investment Area.

Enhancing The Court Annexed Mediation Environment in Kenya

Abstract

The paper explores the workings of court annexed mediation in Kenya. With the recent entry in force of the Singapore Mediation Convention, the place of mediation has been elevated. Consequently, some of the shortcomings previously associated with mediation such as recognition and enforcement of settlement agreements have now been catered for under the Convention. This has created a conducive environment for the growth of mediation. In Kenya, court annexed mediation was introduced by the judiciary in 2015 and has witnessed notable success. The paper argues that if court annexed mediation is well actualised, it can enhance access to justice in Kenya and enable the country reap the benefits of mediation as a form of Alternative Dispute Resolution (ADR). The paper highlights some of the successes of court annexed mediation. It also pinpoints some concerns and challenges facing court annexed mediation and suggests solutions aimed at enhancing the mediation environment in Kenya in line with the spirit of ADR embraced under the Constitution of Kenya, 2010.

1. Introduction

Mediation is a form of alternative dispute resolution where an acceptable, impartial and neutral third party, who has no authoritative decision-making power, assists disputing parties in voluntarily reaching their own mutually acceptable settlement of the issues in dispute.[1] It has also been defined as a voluntary, informal, consensual and strictly confidential and non-binding dispute resolution process in which a neutral third party helps parties reach a negotiated solution. [2] Mediation flows from negotiation. It arises where parties to a dispute have attempted negotiations but have reached a deadlock.[3] As a result, parties agree to involve a third party to assist them continue with the negotiation process with the aim of breaking the deadlock.[4] This demonstrates the voluntariness of the mediation process since parties have to agree to the mediation process and the mediator.

Mediation is recognised as one of the international conflict management mechanisms by the Charter of the United Nations.[5] The Constitution of Kenya, 2010, also recognises mediation as one of the guiding principles that is to be promoted by courts and tribunals.[6]

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[1] Moore, C., The Mediation Process: Practical Strategies for Resolving Conflict, (Jossey-Bass Publishers, San Francisco, 1996, p. 14

[2] Muigua. K., 'Resolving Conflicts Through Mediation in Kenya' Glenwood Publishers, 2nd Ed., 2017

[3] Ibid

[4] Ibid

[5] Article 33 of the Charter of the United Nations provides that 'The 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'

[6] Constitution of Kenya, 2010, Article 159 (2) 'In exercising judicial authority, the courts and tribunals shall be guided by the following principles- (c) alternative forms of dispute resolution

Mediation has several advantages which include, *inter alia*, cost-effectiveness, flexibility, confidentiality, ability to preserve relationships and promoting expeditious resolution of disputes.[7] Mediation plays an important role in conflict management. The underlying idea behind mediation and other forms of ADR is to promote efficient, effective and expeditious management of disputes in order to provide a conducive environment for human growth and development.[8]

However, whereas mediation and other Alternative Dispute Resolution (ADR) mechanisms have been lauded due to the above advantages, there is still a school of thought that is completely against them. Critics of ADR mechanisms have argued *inter alia* that; there is imbalance of power between the parties, there is absence of authority to consent (especially when dealing with aggrieved groups of people), that ADR presupposes the lack of a foundation for continuing judicial involvement and that Adjudication promotes justice rather than peace, which is a key goal in ADR.[9] It has further been argued that a settlement will thereby deprive a court of the occasion and, perhaps, even the ability to render an interpretation.[10] Thus, when parties settle, society gets less than what appears and for a price it does not know; parties might settle while leaving justice undone.[11]

Such views reflect the shortcomings of mediation and other ADR mechanisms. These include: lack of checks and balances through public scrutiny to determine whether justice was done; surrender of legal rights due to insistence on fairness at the expense of justice; lack of precedents due to the confidential nature of mediation; unequal bargaining power and difficulty in enforcing mediation agreements.[12] Several measures have been adopted nationally and globally in order to address the challenges related to mediation while promoting the spirit of ADR. In Kenya, Court Annexed Mediation was introduced in 2015 and is conducted under the umbrella of the judiciary. Further, to deal with the problem

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including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

[7] Muigua. K., 'Resolving Conflicts Through Mediation in Kenya' Op Cit

[8] Muigua.K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers Limited, 2015

[9] Owen Fiss, "Against Settlement", 93Yale Law Journal 1073(1984)

[10] Ibid

[11] Ibid

[12] Clarke. G.R., & Davies. I.T., 'ADR-Argument For and Against Use of the Mediation Process Particularly in Family and Neighbourhood Disputes' QLD. University of Technology Law Journal, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=18&ved=2ahUKEwjUqc7M88vnAhVHT8AKHXK5Bl8QFjARegQICRAB&url=https%3A%2F%2Flr.law.qut.edu.au%2Farticle%2Fdownload%2F343%2F335&usg=AOvVaw0ZDgE91blBjnzwXPAdtHFZ (Accessed on 12/02/2020)

of enforceability of mediation agreements, the Singapore Convention on International Settlement Agreements Resulting from Mediation came into force in August 2019.[13]
The paper briefly analyses salient provisions of the Singapore Convention and how it will change the mediation landscape both nationally and globally. Further, it seeks to examine the workings of court annexed mediation in Kenya and suggest necessary interventions that will ensure that the country reaps full benefits from the programme while promoting the spirit of mediation and Alternative Dispute Resolution in general.

2. The Singapore Convention on International Settlement Agreements Resulting from Mediation

Drafting of the Singapore Convention was informed by a number of factors within the sphere of international trade. There was the recognition by states of the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably.[14]Further, it was noted that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation, and that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.[15]

Further, the trend has been that the outcome of a mediation is treated as a *contractual agreement enforced as such* and not as an award as in the case of arbitration (emphasis added).[16] This created a problem in many states in that one party may pull out of such an agreement and seek court intervention as if the mediation never took place. These factors necessitated the drafting of the Singapore Convention in a bid to address this challenge.[17]
The convention defines "mediation" as a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") *lacking the authority to impose a solution* upon the parties to the dispute

[13] United Nations Convention on International Settlement Agreements Resulting from Mediation, available at *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf* (Accessed on 14/02/2020)
[14] Ibid, Preamble
[15] Ibid, Preamble
[16] Muigua. K., 'The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States' available at *http://kmco.co.ke/wp-content/uploads/2019/12/The-Singapore-Convention-on-International-Settlement-Agreements-Resulting-from-Mediation-Kariuki-Muigua-December-2019.pdf* (Accessed on 10/02/2020
[17] Ibid

(emphasis added).[18] The convention sets out certain general principles to guide the practice of international mediation. Under the convention, each party shall enforce a settlement agreement in accordance with its *rules of procedure* and under the conditions laid down in the convention (emphasis added).[19] It applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international .[20]

The convention also lays down certain requirements for reliance on settlement agreements. It requires that a party relying on a settlement agreement under the Convention should supply to the competent authority of the Party to the Convention where relief is sought: the settlement agreement signed by the parties; evidence that the settlement agreement resulted from mediation, such as: the mediator's signature on the settlement agreement; a document signed by the mediator indicating that the mediation was carried out; an attestation by the institution that administered the mediation; or in the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.[21]

It also highlights grounds upon which relief being sought in relation to enforcement of a settlement agreement may not be granted. These include where: a party to the settlement agreement was under some incapacity; the settlement agreement being relied upon is null and void, not binding or is not final according to its terms or has been subsequently modified; obligations in the settlement agreement have not been performed or are not clear or comprehensible; granting relief would be contrary to the terms of the settlement agreement; there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement and there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.[22] Grant of relief may also be refused by the Competent Authority on grounds of public policy and where the subject matter of the dispute is not capable of settlement by mediation under the law of that Party.[23]

The convention allows for reservations where a party to the Convention may declare that: it shall not apply the Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental

[18] United Nations Convention on International Settlement Agreements Resulting from Mediation, 'Singapore Convention' Article 2 (3)
[19] Ibid, Article 3 (1)
[20] Ibid, Article 1 (1)
[21] Ibid, Article 4(1).
[22] Ibid, Article 5 (1)
[23] Ibid, Article 5 (2)

agency is a party, to the extent specified in the declaration; or it shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.[24]

The Singapore Convention can play an important role in enhancing the mediation environment in Kenya beyond court annexed mediation. With the numerous investment and commercial activities being undertaken in Kenya, commercial and trade disputes are unavoidable.[25] Efficient mechanisms for management of such disputes are essential in order to preserve commercial relationships and promote economic growth.[26] Mediation is one of the mechanisms that have been used universally in management of such disputes.[27] However, the foregoing discussion has shown that mediation suffers from several shortcomings such as enforceability of settlement agreements. Adoption of the Singapore Convention will enhance the mediation environment in Kenya by providing a framework for enforcement of international settlement agreements.

3. Unctral Model Law on Mediation

The Singapore Convention is consistent with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (Model Law). This is intended to provide parties with the flexibility to adopt either the Singapore Convention or the Model Law as stand-alone legal instruments or both as complementary instruments in order to facilitate a comprehensive legal framework on mediation.[28] The Model Law, 2018, amends the Model Law on International Commercial Conciliation, 2002 and applies to international commercial mediation and international settlement agreements.[29] It covers procedural aspects of international commercial mediation including *inter alia* appointment of mediators, conduct of mediation, disclosure of information, termination of proceedings and resort to arbitral or

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[24] Ibid, Article 8 (1)

[25] Muigua. K., 'Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes' available at http://kmco.co.ke/wp-content/uploads/2018/09/Utilising-Alternative-Dispute-Resolution-Mechanisms-to-Manage-Commercial-Disputes-Kariuki-Muigua-7th-September-2018.pdf (Accessed on 14/02/2020)

[26] Ibid

[27] Africa ADR –a new African Arbitration Institution", available at *http://www.lexafrica.com/news*-africa-adr-a-new-african-arbitration-institution (Accessed on 14/02/2020)

[28] United Nations Commission on International on International Trade Law , "United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation") Available at *https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements* (Accessed on 10/02/2020)

[29] United Nations Commission on International Trade Law, "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation 200) Available at *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf* (Accessed on 14/02/2020)

judicial proceedings.[30] Further, it provides uniform rules on enforcement of settlement agreements and also addresses the right of a party to invoke a settlement agreement in a procedure.[31] It has been argued that creation of a uniform enforcement process for settlement agreements achieved through international mediation, the Singapore Convention and Model Law will begin to place mediation on an equal footing with arbitration and litigation as a method of international dispute resolution.[32] With the increasing commercial and investment activities being undertaken in the country some of which involve multinational corporations, there is need to enhance the international commercial mediation environment in the country. In addition to the Singapore Convention which mainly deals with enforcement of settlement agreements, Kenya can adopt the Model Law to cover procedural aspects of international commercial mediation such as appointment of mediators and conduct of mediation. Adoption of this framework will create an assurance on the enforcement of settlement agreements and will boost the practice of international commercial mediation in Kenya.

4. Mediation in the African Context

African communities have since time immemorial had their own mechanisms of resolving conflicts as they arose amongst them.[33] These mechanisms were designed to ensure that there was continued co-existence of the communities and that conflicts were fully addressed to prevent their re-emergence in future.[34] These mechanisms were designed along principles such as common humanity/communal living, reciprocity and respect.[35] The mechanisms employed by indigenous African Communities reflect the present day ADR mechanisms. These included negotiation and mediation where people would sit down informally and agree to resolve their differences on their own or in some instances, with the aid of institutions such as elders or riika (age-sets).[36] Mediation is therefore not a novel concept in Kenya since it has been practiced for many centuries.

Thus, while promoting mediation and other ADR mechanisms, it is important that these mechanisms promote the values and cultures that have been embedded in African communities for ages. Conflict management in the African context was designed to promote peace, harmony, co-existence and maintain the social fabric that held

[30] Ibid, S 2
[31] Ibid,, S 3
[32] Hioureas. C, "The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?" Available at *https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1567&context=bjil* (Accessed on 10/02/2020)
[33] Muigua.K., Alternative Dispute Resolution and Access to Justice in Kenya, Op Cit
[34] Ibid
[35] Muigua. K., 'Resolving Conflicts Through Mediation in Kenya' Op Cit
[36] Ibid

communities together.[37] It has been argued that culture is an essential part of conflict and conflict resolution.[38] Cultures are embedded in every conflict since conflicts arise in human relationships. Further, cultures affect the way we name, blame, frame, and attempt to tame conflicts.[39] The mediation environment in Kenya therefore needs to reflect the culture of African communities.

5. Court Annexed Mediation In Kenya

Court-annexed mediation arises where parties in litigation engage in mediation outside the court process and then move the court to record a consent judgment.[40] It has also been defined as the mediation of matters which a judicial officer has ordered to go to mediation or which are mediated pursuant to a general court direction (e.g. a procedural rule which states that parties to a matter make an attempt to settle the matter by way of mediation before the first case management conference).[41]

In Kenya, Court Annexed Mediation is conducted under the umbrella of the court.[42] The project commenced in 2015 through legislative and policy reforms to accommodate mediation in the formal court process.[43] These included amendment to the Civil Procedure Act to provide for reference of cases to mediation. Under the Act, the court may direct that any dispute presented before it be referred to mediation: on the request of the parties concerned; where it deems it appropriate to do so; or where the law so requires.[44] Where a dispute has been referred to mediation by the court, parties are required to select a mediator for that purpose whose name appears in the mediation register maintained by the Mediation Accreditation Committee.[45] Such mediation is conducted in accordance with the mediation rules. An agreement between the parties shall be recorded in writing and registered with the court which referred the dispute to mediation; such an agreement

[37]Kariuki. F., African Traditional Justice Systems, available at *http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf* (Accessed on 14/02/2020)

[38]LeBaron.M., Culture and Conflict: Beyond Intractability, available at *http://sociologycultures.pbworks.com/w/file/fetch/101971144/Culture%20and%20Conflict%20print%20friendly%20%20Beyond%20Intractability.pdf* (Accessed on 14/02/2020)

[39] Ibid

[40]Muigua. K., 'Court Sanctioned Mediation in Kenya-An Appraisal' available at *http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf* (Accessed on 10/02/2020)

[41] Ibid

[42] The Judiciary, 'Court Annexed Mediation: A Solution for You' available at *http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf* (Accessed on 10/02/2020)

[43] The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' available at https://www.judiciary.go.ke/resources/reports/ (Accessed on 10/02/2020)

[44] Civil Procedure Act, Cap 21, S 59B (1), Government Printer, Nairobi

[45] Ibid, S 59B (2)

is enforceable as a judgment of the court. [46] No appeal lies against such an agreement.[47] The Act also establishes the Mediation Accreditation Committee whose functions include *inter alia* maintaining a register of qualified mediators and setting up appropriate training programmes for mediators.[48]

The Civil Procedure Rules also allows the court to adopt and implement, on its own motion or at the request of the parties, *appropriate means of dispute resolution* such as mediation for the attainment of the overriding objective envisaged under sections 1A and 1B of the Civil Procedure Act (emphasis added).[49] Where a court mandated mediation adopted pursuant to the rule fails, the court is mandated to forthwith set the matter down for hearing and determination in accordance with the Rules.[50]

The Mediation (Pilot Project) Rules, 2015 were enacted to give effect to the amendments made to the Civil Procedure Act and provide a legal framework on Court Annexed Mediation in Kenya. The Rules provide that every civil action instituted in court after their commencement shall be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable may be referred to mediation.[51] Where a case has been referred to mediation after screening, the mediation Deputy Registrar is required to notify the parties of the decision within seven (7) days.[52] Seven days after receipt of such notification, parties are required to file a case summary in the prescribed form.[53] Such mediation is conducted by a person registered as a mediator by the Mediation Accreditation Committee who is selected by the parties from a list of three qualified mediators nominated by the mediation Deputy Registrar.[54] The rules further prescribe a time limit of sixty (60) days from the date of referral to mediation within which the proceedings should be concluded.[55]

Since the inception of Court Annexed Mediation in 2015 via the pilot phase in the Commercial and Family Divisions of the High Court in Nairobi, the program has expanded to 12 other counties.[56] According to statistics from the judiciary, as at 30th June 2019, 3517 matters have been referred to mediation, 2593 concluded, with 1279 matters

[46] Ibid, S 59B (4)
[47] Ibid, S 59B (5)
[48] Ibid, S 59A (4)
[49] Civil Procedure Rules, Order 46, rule 20 (1)
[50] Ibid, Order 46, rule 20 (3)
[51] Legal Notice No. 197, The Civil Procedure Act (Cap 21), The Mediation (Pilot Project) Rules, 2015, Rule 4 (1), Government Printer, Nairobi
[52] Ibid, Rule 5
[53] Ibid
[54] Ibid, Rule 6
[55] Ibid, Rule 7
[56] The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit

settled successfully representing a settlement rate of 50 per cent.[57] Further, Kshs. 7.2 billion that had been held in litigation has ended up being released through court annexed mediation.[58] The Mediation Accreditation Committee has also accredited 645 mediators in order to facilitate court annexed mediation.[59]

Court Annexed Mediation has so far played an important role in enhancing access to justice in Kenya. The judiciary acknowledges that for cases that have been referred to mediation, the average time for their conclusion is less in comparison to the time taken under the normal court process.[60] This reflects the expeditious nature of mediation and the need to enhance its environment in Kenya. Court annexed mediation can be a game changer in the access to justice discourse in the country. By combining the attributes of mediation such as voluntariness, party autonomy and expeditious disposal of disputes with the powers of courts to enforce agreements, court annexed mediation can be an important asset in conflict management in the country. It is therefore imperative to ensure efficiency of the process to enable the country reap from its benefits.

6. Court Annexed Mediation In Kenya: Challenges

While court annexed mediation in Kenya is well underway, it faces several challenges that needs to be addressed in order to enhance its efficiency. Further, various concerns have been raised with regards to the working of court annexed mediation in Kenya. Addressing such challenges and concerns can enable the country achieve the ideal environment for court annexed mediation. Some of these challenges and concerns are discussed below.

a) Voluntariness and Autonomy

Voluntariness and party autonomy are essential characteristics of mediation. It is non-coercive in that parties have autonomy over the forum, the process, and the outcome.[61] However, these aspects are to a large extent defeated in court annexed mediation. The voluntariness and the autonomy over the process and the outcome may be diminished since it is pursuant to an order of the court where the settlement has to be returned back to court for ratification.[62] To this extent, it has been argued that court annexed mediation does not fully capture the attributes of mediation such as: *voluntariness*; *autonomy over the forum*; *choice of the mediator*; *control over the process and the outcome* (emphasis added).[63] Court annexed mediation therefore raises concerns related to the aspects of mediation

[57] Ibid
[58] Ibid
[59] Ibid
[60] Ibid
[61] Muigua. K., 'Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict Through Mediation' available at http://kmco.co.ke/wp-content/uploads/2018/08/Addressing-the-Psychological-Aspects-of-Conflict-Through-Mediation-3RD-AUGUST-2018-1.pdf (Accessed on 12/02/2020)
[62] Muigua. K., 'Court Sanctioned Mediation in Kenya-An Appraisal, Op Cit
[63] Ibid

since the court order referring a matter to mediation interferes with an essential characteristic of mediation being its voluntary nature.

However, coercion into mediation does not deprive the process of its capacity to ensure parties reach a resolution to the dispute. In fact, it is arguable that court annexed mediation brings parties to the table since there are parties who would otherwise be unwilling to negotiate or mediate. It is however imperative to ensure that the voluntariness and autonomy of the process is guaranteed.

b) Non-Settlement of Matters Through Court Annexed Mediation

Nearly half of the matters that have been referred to court annexed mediation have ended up not being settled. According to the judiciary, in the financial year 2018/2019, 933 out of the 1879 matters processed through mediation were not settled.[64] This is attributed to various factors such as parties failing to reach an agreement, non-compliance of parties and termination of matters by the parties.[65] In some instances, such matters have ended up being referred back to courts for litigation thus defeating the entire purpose of court annexed mediation. This raises concerns as to the efficacy of court annexed mediation.

c) Costs of Mediation

While ADR mechanisms have generally been hailed as being cost effective, this characteristic may be defeated in court annexed mediation. In court annexed mediation, referral of a case to mediation may happen after parties have incurred costs such as legal fees through drafting pleadings and filing the same.[66] Currently, there is no framework for recovery of costs where a case has been referred to mediation. Thus, parties may end up incurring further costs in the process. Further, where parties fail to reach a settlement agreement and such case reverts back to the court, the costs of the entire process ends up being higher than what parties had intended. There is need to ensure efficiency of court annexed mediation to enable parties benefit from the attributes of mediation.

d) Lack of Awareness of Court Annexed Mediation

Since its roll out in 2015 at Nairobi, court annexed mediation has expanded to 12 other counties in Kenya.[67] It can therefore be argued that more than half of the country is not aware of the process. Further, most court users are not aware or are yet to fully embrace mediation and other ADR mechanisms. This demonstrates the reason why a high number

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[64] The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit

[65] Ibid

[66] Muigua. K., 'Court Sanctioned Mediation in Kenya-An Appraisal, Op Cit

[67] The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit

of matters are still being filed in courts necessitating screening and referral of some of them to mediation. There is need to create public awareness on the presence and operation of court annexed mediation and other ADR mechanisms to enable Kenyans embrace these mechanisms and reduce backlog in courts.

e) Lack of Efficient Negotiation Skills by the Parties

Mediation flows from negotiation since the mediator merely facilitates discussions between the disputing parties.[68] Negotiation skills are thus of utmost importance in the process. Statistics from the judiciary show that nearly half of the matters that have been referred to court annexed mediation have ended up not being settled.[69] This can be attributed to among other factors, the lack of efficient negotiation skills by the parties. There may be need to provide basic negotiation skills to parties before they set down for court annexed mediation.

f) Capacity of Mediators

Court annexed mediation deals with various disputes including commercial matters. Some of the mediators may not have the necessary skills and expertise in such areas making them ill equipped to facilitate the process. There is need for capacity building through training programmes for mediators to ensure that they are well informed and able to efficiently discharge their duties.

7. Enhancing Access to Justice in Kenya through Court Annexed Mediation: Way Forward

a. Early Referral of Disputes to Mediation

The Mediation (Pilot Project) Rules, 2015 provide for a system of screening of civil actions and referral to mediation for those cases that are found suitable.[70] The judiciary through the Office of the Mediation Deputy Registrar should ensure that this process is done early enough to avoid instances where cases are referred to mediation after significant steps have already been taken by parties in the litigation process. This would enable parties minimise costs of the process while contributing to expeditious disposal of disputes.

b. Implementing the Ideals of the ADR Policy

The ADR policy is intended to strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) in the Country in order to achieve optimal delivery of access

[68] Muigua. K., 'Resolving Conflicts Through Mediation in Kenya' Op Cit

[69] The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit

[70] Legal Notice No. 197, The Civil Procedure Act (Cap 21), The Mediation (Pilot Project) Rules, 2015, Rule 4, Government Printer, Nairobi

to justice for all Kenyans.[71] The policy proposes a number of recommendations aimed at enhancing the practice of ADR in Kenya which include *inter alia* enactment of an Alternative Dispute Resolution Act and establishment of an ADR division of the High Court to be the focal point for linkage and coordination of the ADR sector.[72] The policy recognises the importance of ADR mechanisms and their role in promoting access to justice.[73] Implementing the ideals of the policy will be mark an important milestone in enhancing the ADR environment in Kenya including mediation.

c. Maintaining of Quality Standards in Mediation

While mediation is generally understood to be an informal process, there is need to maintain quality standards in court annexed mediation. This relates to the fact that since the process is conducted under the auspices of the court, there may be *perception on the part of the parties that the court in some way exercises control over the process (emphasis added)*. Thus, if a mediator is incompetent or if the process falters, the reputation of the court and the entire judicial system stands to suffer.[74] The Civil Procedure Act establishes the Mediation Accreditation Committee whose functions include *inter alia* enforcing a code of ethics for mediators as may be prescribed and setting up appropriate training programmes for mediators.[75] The Committee needs to step up its mandate in order to promote quality of the practice of court annexed mediation in Kenya.

d. Enhanced Support for Court Annexed Mediation

While there has been notable success with court annexed mediation since its roll out in the country, there are notable challenges such as non-compliance by advocates and parties and resistance from legal practitioners.[76] The judiciary has proposed measures to curb these challenges such as streamlining and integration of court annexed mediation into the justice system.[77] It also plans to establish mediation rooms in courts under construction.[78] Sensitisation exercises should also be conducted targeting the public, advocates and other stakeholders. The challenge on non-compliance with directions of mediators needs to be addressed through measures such as summons, citation for contempt and injunctions which can only be enforced by courts. There should also be sustainable funding by the

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[71] Alternative Dispute Resolution Policy (Zero Draft), available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf (accessed on 14/02/2020)

[72] Ibid

[73] Ibid

[74] F. Kirkham, "Judicial Support for Arbitration and ADR in the Courts in England and Wales", 72 (1) Arbitration 53, (2006).

[75] Civil Procedure Act, Cap 21, S 59 A (4)

[76] The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit

[77] Ibid

[78] Ibid

judiciary to support the process. The programme also needs to be rolled out to the rest of the country in a progressive manner in order to enhance its impact.

e. Capacity Building

There is need to enhance capacity building through training new mediators and enhancing the efficiency of those already accredited by the Mediation Accreditation Committee. Under the Civil Procedure Act, the functions of the Committee include setting up appropriate training programmes for mediators.[79] The committee needs to further this function to enhance capacity building that will facilitate court annexed mediation. Mediators need also to learn some basic principles of law such as commercial law principles of 'liability' and 'quantum' in addition to understanding mediation. This will in turn enhance their capacity to facilitate the mediation process.

f. Embracing the Spirit of Mediation in Court Annexed Mediation

Court annexed mediation needs to reflect the true attributes of mediation which include voluntariness, privacy, confidentiality and party autonomy. Thus, the courts through the Mediation Deputy Registrar should not coerce parties into mediation. The process should be voluntary and where parties intend to litigate their dispute, they should not be forced to undertake court annexed mediation through mandatory screening of their cases. As a suggestion, the consent of parties should be sought before their matter is referred to mediation. Further, the mediator in charge of the proceedings should not impose his/her decision on the parties in the name of reaching a settlement and enhancing expeditious disposal of the parties. The mediator should merely facilitate the process and any decision or agreement should come from the parties themselves. Where parties fail to agree, the mediator should file a report to that effect rather than suggesting or imposing solutions to the parties. Through this, the true spirit of mediation can be reflected in court annexed mediation.

8. Conclusion

The importance of mediation continues to be realised across the globe. With the recent enactment of the Singapore Convention, the future of mediation looks bright. Kenya can borrow from the Model Law on Mediation to create a legal and institutional framework that supports mediation. However, it should be borne in mind that conflict management is culture specific. The best practices from the African culture can be distilled and incorporated into a mediation and ADR framework. In Kenya, entrenchment of mediation in the judicial system through court annexed mediation offers viable opportunities for the country to benefit from the positive aspects of the process. The programme has so far witnessed significant success and promises a brighter future for the country in its journey towards enhancing access to justice for all. However more needs to be done to enhance

[79] Civil Procedure Act, Cap 21, S 59 A (4) (e)

the court annexed mediation environment in Kenya and ensure the country fully benefits from such a noble idea.

Promoting Sports Arbitration in Africa

Sports are considered as an essential part of the social and cultural aspect of most societies across the world. With the emergence of professional sports and subsequent commercialisation of the industry, the traditional understanding of sports as merely being occasions for recreational purposes is no longer tenable. Sports have now become important in not only the social and cultural but also the economic discourse around the globe with sports personalities being among the most highly paid individuals. Further, a lot of resources are invested by both governments and private entities to sponsor sporting activities. Consequently the growth and success of sports has also led to emergence of sports disputes. These disputes mainly revolve around issues such termination of contract, non -payment and suspension.

The paper explores the suitability of Alternative Dispute Resolution (ADR) mechanisms in management of such disputes. The author argues that despite the advantages of these mechanisms, there are several shortcomings in both the legal and institutional framework governing settlement of sports dispute through arbitration. The paper finally proposes reforms to enhance sports management.

1. Introduction

The role of sports in any given society can hardly be overemphasized. It has been argued that participating in sports can improve the quality of life of individuals and communities through promoting social inclusion, improving health, countering anti-social behavior and raising individual self-esteem and confidence.[1] Sports are essential to both developing and non-developing nations, through economic incentives, improving health, happiness, and inculcating values.[2] Sports are more than just a game.[3]

Sports are important to the culture of Africa societies and most people in the continent are passionate about football in particular. [4]The euphoria witnessed across the continent during the 2010 FIFA World Cup is a perfect illustration of this fact. Further, sporting events such as the Olympic Games and English Premier League attract huge audiences across the continent. In Kenya, athletics hold a sacred place in the sports fraternity and athletes have brought much pride to the country through their impressive performances in athletic competitions such as World Marathons, World Athletic Championships the Olympics and other competitions.

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[1] Coalter Fred, 'The Social Benefits of Sport: An Overview to Inform the Community Planning Process' Sportscotland Research Report no. 98, available at (Accessed on 27/11/2019)

[2] Develop Africa, 'The Benefits of Sports in Africa' available at *https://www.developafrica.org/blog/benefits-sports-africa* (Accessed on 27/11/2019)

[3] Ibid

[4] Federal Ministry for Economic Cooperation and Development, 'More Space for Sport-1,000 Chances for Africa' available at *https://www.bmz.de/en/publications/type_of_publication/information_flyer/flyer/booklet_sport.pdf* (Accessed on 27/11/2019)

Sports traditionally emphasized participation over winning. [5] However, this view of sports is no longer tenable since politics and economic incentives continue to encroach the sports arena. [6] The rise of professional sports has seen the focus shift from participation with emphasis now placed on winning to serve the economic incentives at stake. To cater for the training, travel, accommodation needs in sports, the concept of sponsorship has grown with individuals and corporations injecting money for these purposes.[7] Athletes in both individual and team sports now need to enter into contracts with their respective managers, teams or sponsors to govern their affairs. The best athletes or teams in respective sports fields end up being sought by companies to market their products in lucrative endorsement contracts.[8]

With all these factors, it is not surprising that sports disputes have emerged. Such disputes take various forms including employment disputes due to termination of employment contracts of athletes or coaches, anti-doping rule violations and match fixing.[9] While disputes are inherent in every human interaction, the nature of sports disputes and the underlying needs are peculiar. Sports disputes are unique in nature since there is need for efficient and expeditious management of such disputes to ensure that the value of sports are maintained and the athletes and teams involved continue to pursue their sporting activities. It has been argued that for the management of sports disputes to be effective, it should be concluded before a particular competition takes place. For example, a finding by an arbitral tribunal that a particular athlete may compete at the Olympic Games would be of limited value if the arbitral award was issued after the competition in question has already finished.[10]

It is out of this unique feature of sports disputes that the field of sports arbitration has emerged at both the global and national level. This paper seeks to critically examine the efficacy of arbitration in management of sports disputes. The paper further attempts to analyse the role of Sports Tribunals in management of sports disputes and the extent to which this role has been facilitated. Finally, the paper proposes reforms for efficient management of sports disputes in Africa.

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[5] McLaren Richard, 'The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes' Valparaiso University Law Review, Volume 35 no. 2, p 379-405

[6] Ibid

[7]Kumar R., 'Commercialization of Sports and Competition Law' available at *https://www.researchgate.net/profile/Dr_Raj_Yadav2/publication/311912413_Commercialization_of_Sports_and_Competition_Law_ISBN_No-978-9381771532/links/58621b3408ae329d61ffc5fc/Commercialization-of-Sports-and-Competition-Law-ISBN-No-978-9381771532.pdf* (Accessed on 27/11/2019)

[8] Ibid

[9] Rigozzi Antonio et al, 'International Sports Arbitration' *http://lk-k.com/wp-content/uploads/rigozzi-besson-mcauliffe-international-sports-arbitration-GAR-2016.pdf* (Accessed on 27/11/2019)

[10] Ibid

2. Framework for Management of Sports Disputes

2.1 International Legal and Institutional Framework

2.1.1 The Olympic Charter

The Charter is a codification of the fundamental principles of olympism and contains rules and by laws adopted by the International Olympic Committee (IOC) to regulate the operation and actions of the Olympic movement.[11] Chapter six of the Charter sets out a disciplinary mechanism framework in case of violation of the charter, the World Anti-Doping Code, the Olympic Code on the Prevention of Manipulation of Competition or any other regulation.[12] The charter gives jurisdiction to the Court of Arbitration for Sport to handle exclusively any dispute arising in connection with the Olympic Games.[13]

2.1.2 Fédération Internationale de Football Association (FIFA) Statute

The statute establishes FIFA as an association governing the sport of football. It recognises the importance of integrity in sports and seeks to promote fair play and ethics in order to prevent practices such as corruption, doping or match manipulation, that may jeopardise the integrity of matches, competitions, players, officials and member associations or give rise to abuse of association football.[14] FIFA recognizes the jurisdiction of the Court of Arbitration for Sport (CAS) to settle disputes involving players, clubs, confederations and member associations.[15] An appeal against final decisions by FIFA's legal bodies, member association or confederations shall be lodged with CAS within 21 days from the date of such a decision. However such appeals are subject to exhaustion of all internal dispute management mechanisms.[16]

The statute obligates member associations, confederations and leagues to recognise CAS as an independent judicial authority and comply with its decisions. It further prohibits recourse to ordinary courts unless specifically provided for by regulations.[17]

2.1.3 International Association of Athletics Federation (IAAF) Constitution, 2019

IAAF is established under a constitution to develop, promote and govern the sport of athletics in the world. The constitution sets out an internal dispute resolution mechanism for athletic related disputes. Such disputes are managed by the IAAF Disciplinary

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[11] Olympic Charter, 'International Olympic Committee' available at https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf (Accessed on 27/11/2019)
[12] Ibid, chapter six
[13] Ibid, Article 61 (2)
[14] FIFA Statute, August 2018 Edition, Article 2 (g)
[15] Ibid, Article 57 (1)
[16] Ibid, Article 58 (1 and 2)
[17] Ibid, Article 59

Tribunal in the first instance.[18] Appeals against final decisions made by IAAF lie exclusively with the Court of Arbitration for Sport which is mandated to settle such disputes mandatorily in accordance with its code of Sports–related Arbitration.[19] Such appeals must be lodged within twenty one (21) days upon receipt of the decision by IAAF.[20]

2.1.4 World Anti-Doping Code, 2015

It is the fundamental universal document upon which the World Anti-Doping Program in sport is based. The code is a globally recognized commitment against doping in sports and has been adopted by numerous sports federations, national Olympic committees and anti-doping organizations. [21]It is aimed at protecting the athletes' fundamental right to participate in doping free sport and enhancing equality and fairness in sports worldwide.[22] The code defines doping and sets out anti-doping rule violations and a list of prohibited substances. Further, it entails a disciplinary mechanism and disciplinary measures that may be imposed in case of violation of the code.

Decisions made under the code may be appealed to the Court of Arbitration for Sport. Such appeals lie exclusively to CAS where the decision involves international events or international level athletes.[23] The code also allows appeals to independent and impartial bodies in accordance with rules established by the National Anti-Doping Organization where the decisions do not involve international events or international level athletes.[24]

2.1.5 Court of Arbitration for Sport (CAS)

The Court of Arbitration for Sport (CAS) is an independent institution whose role is to facilitate management of sports related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world.[25] The institution was established in 1984 and comprises of nearly 300 arbitrators from 87 countries who are selected for their specialist knowledge of arbitration and sports law. According to the CAS around 300 cases are registered with it every year.[26] CAS has three divisions; *ordinary arbitration division* that settles disputes submitted to the ordinary

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[18] International Association of Athletics Federations (IAAF) Constitution, 2019, Article 76
[19] Ibid, Article 84.3
[20] Ibid, Article 84.4
[21] James Nafziger and Stephen Ross, 'Handbook on International Sports Law' *https://books.google.co.ke/books?id=fnLIOA0JtgC&pg=PA61&lpg=PA61&dq=international+sports+code&source (Accessed on 27/11/2019)*
[22] World Anti-Doping Code, available at *https://www.wada-ama.org/sites/default/files/resources/files/wada_anti-doping_code_2018_english_final.pd*f (Accessed on 27/11/2019)
[23] Ibid, Article 13.2.1
[24] Ibid, Article 13.2.2
[25] General Information on the Court of Arbitration for Sport, available at https://www.tas-cas.org/en/general-information/frequently-asked-questions.html (Accessed on 27/11/2019)
[26] Ibid

procedure; *anti-doping division* that settles dispute related to anti-doping and *appeals arbitration division* which reviews decisions by sports organizations such as FIFA and IAAF (emphasis added).[27]

The operation of CAS is governed by the Code of Sports-Related Arbitration. The code sets out the procedural rules on the *seat, language, representation, time limits, costs and awards.* An award rendered by CAS is *final and binding on the parties* and is *enforceable internationally under the New York Convention* on the Recognition and Enforcement of Foreign Arbitral Awards to the extent that it binds a state where enforcement is sought (emphasis ours).[28]Awards rendered by CAS do not constitute precedent but important in providing guidance in future disputes.

2.1.6 International Council of Arbitration for Sport (ICAS)

The purpose of ICAS is to facilitate settlement of sport related disputes through mediation or arbitration and to safeguard the rights of parties to a dispute and the independence of CAS.[29] ICAS is responsible for the administration and financing of CAS.[30] The body plays supervisory functions over CAS and has the powers to appoint arbitrators and mediators to CAS and remove such arbitrators or mediators through its Challenge Commission.[31] This also extends to the CAS Secretary General who is appointed and may be removed from power by ICAS upon proposal of the president. It plays an important role in promoting sports arbitration by overseeing the administration and financing of CAS.

2.2 Legal and Institutional Framework for Management of Sports Disputes in Africa

Unlike the CAS, there is no central institution for management of sports disputes in Africa. Such disputes are managed by institutional mechanisms established by the various continental sports federations in Africa. However, the statutes establishing these federations *recognize the jurisdiction of the CAS as the global institution for management of sports disputes* (emphasis ours). The Confederation of African Football statute authorises appeals to the CAS to manage any dispute between the Confederation of African Football (CAF), national associations, clubs, players and officials.[32] These appeals relate to any decision or disciplinary sanctions given in the last instance by any legal body of CAF or FIFA, a national association, league, or club. [33] Such appeals must be lodged with CAS within ten (10) days following the notification of the decision.[34]

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[27] Code of Sports-Related Arbitration, Part 3 (S 20)
[28] McLaren Richard, 'The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes' Op cit
[29] Statutes of ICAS and CAS, 'Joint Dispositions' S 2
[30] Ibid
[31] Ibid, s 6
[32] Confederation of African Football (CAF) Statute, Article 55 (1)
[33] Ibid, Article 55 (3)
[34] Ibid

Further, some African countries such as Kenya have made strides in the establishment of national sports tribunals. However, other countries such as Nigeria and South Africa are yet to establish such institutions. Sports disputes in these countries are managed in the first instance by the internal mechanisms established by the various sports federations.[35]

2.3 Legal and Institutional Framework for Management of Sports Disputes in Kenya

2.3 1 Sports Disputes Tribunal

The Sports Act[36] which is the principal legal instrument on sports in Kenya establishes the Sports Disputes Tribunal.[37] The jurisdiction of the Tribunal is set out under section 58 of the Act. The Tribunal is mandated to determine appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue, such appeals include those against disciplinary decision and not being selected for a Kenyan team or squad. The jurisdiction of the Tribunal also extends to other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear and appeals from decisions of the Registrar under this Act.[38]

While granting jurisdiction to the Tribunal, the Sports Act has taken cognizant of provisions of the Constitution of Kenya that requires Tribunals including the Sports Disputes Tribunal to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.[39] To this extent, the Act provides that the Tribunal may, in determining disputes apply alternative dispute resolution methods for sports disputes and provide expertise and assistance regarding alternative dispute resolution to the parties to a dispute.[40] While this provision is not construed in mandatory terms, it nevertheless *demonstrates an intention to promote alternative dispute resolution in sports disputes* (emphasis added).

Appeals against decisions of the Tribunal lie with the Court of Arbitration for Sport and the same cannot be challenged in national courts. However, they are subject to the judicial review jurisdiction of the High Court pursuant to the provisions of articles 47 and 165 (6) of the Constitution of Kenya, 2010.

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[35] Omuojine. K, 'Dispute Resolution in Nigeria Football: The Need for a National Dispute Resolution Chamber' African Sports Law and Business Bulletin 2/2014
[36] No. 25 of 2013, Government Printer, Nairobi
[37] Ibid, S 55
[38] Ibid, S 58
[39] Constitution of Kenya, 2010, Article 159 (2) (c)
[40] Sports Act, No. 25 of 2013, S 59

2.3.2 Athletics Kenya Arbitration Panel

The panel is established under article 40 of the constitution and Rules of Athletics Kenya which is the governing body for the sport of athletics in Kenya.

The panel is mandated to settle disputes or differences between the Executive and any member, or between one or more members. [41] Disputes settled by the panel are non-disciplinary in nature and this excludes any dispute arising in the field of competition.[42]

2.3.3 Football Kenya Federation (FKF) Constitution

The Constitution of Football Kenya Federation, which is the governing body for the sport of football in Kenya, contains provisions pertinent to arbitration. The Constitution seeks to give *priority to arbitration and limits involvement of ordinary courts in management of disputes related to the sport of football* (emphasis ours). To this effect, it provides that disputes within the football association in Kenya or disputes affecting football leagues, members of leagues, clubs, members of clubs, players, officials and other Association Officials shall not be submitted to ordinary courts, unless the FIFA regulations, the FKF Constitution or binding legal provisions specifically provide for or stipulate recourse to Ordinary Courts.[43] The constitution of FKF requires such entities to give priority to arbitration as a means of dispute settlement.[44]

To give effect to this provision, the constitution of FKF provides that such disputes shall be taken to an independent Arbitration Tribunal recognised by Football Kenya Federation (FKF) or the Confederation of African Football (CAF) or to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. [45]

3. Challenges in Sports Management

3.1 Doping

Doping is one of the most contentious issues in the sports arena across the globe. The World Anti-Doping Code defines doping as the occurrence of one or more of the anti-doping rule violations set out in the code.[46] These include presence of a prohibited substance in an athlete's sample, use or attempted use by an athlete of a prohibited substance, possession of a prohibited substance, evading or failing to submit to sample collection among other things.[47] In Kenya, the Anti-Doping Act defines doping as the use

[41] Constitution and Rules of Athletics Kenya, Article 40.3
[42] Ibid
[43] FKF Constitution, Article 69 (1)
[44] Ibid, Article 69 (2)
[45] Ibid, Article 69 (3)
[46] World Anti-Doping Code, Article 1, available at *https://www.wada-ama.org/en/what-we-do/the-code* (Accessed on 27/11/2019)
[47] Ibid

of prohibited substances and methods in any sporting activity whether competitive or recreational in order to artificially enhance performance.[48]

Violation of anti-doping rules has serious consequences which include automatic disqualification of results and forfeiture of any prize, points or medals obtained in the competition.[49] A prominent case is that of Marion Jones an American athlete who won three gold medals and two bronze medals at the 2000 Olympic Games in Sydney, Australia but was stripped off the medals for admitting to doping violation.[50] Recently, one of Kenya's most celebrated athletes Asbel Kiprop who won a gold medal at the 2008 Olympic Games in Beijing, China in the 1,500 m category was banned for four years for a doping related offence.[51]

Doping continues to be a challenge since it affects the integrity of sports. However, some critics have questioned the severity of punishment imposed upon athletes found guilty of doping and the investigation process to curb this vice. Others have alluded to violation of the right to fair hearing in such investigations.[52] Doping therefore constitutes a major dispute area in sports.

3.2 Taxation

Tax related disputes have been on the rise in the sports arena. This issue arises since an athlete may be plying his trade in an overseas country thus subject to two tax regimes, one in the overseas country and the other in his/her home country. Lionel Messi and Cristiano Ronaldo, two elite footballers, from Argentina and Portugal respectively have been embroiled in tax evasion cases with Spanish authorities during their football career in Spain.[53] These cases are common across the globe.

In Kenya, sports personalities are not exempted from tax and are subject to taxation pursuant to the provisions of the Income Tax Act. Where sports income is earned overseas by a sportsperson who is a resident of Kenya for tax purposes, such income is considered to have accrued in or to have been derived from Kenya and is therefore taxable in Kenya.[54]

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[48] Anti-Doping Act, No. 5 of 2016, S 2

[49] World Anti-Doping Code, Article 9

[50] Douglas D.D, 'Forget Me…..Not: Marion Jones and the Politics of Punishment' Journal of Sport & Social Issues, Volume 38 (No. 1), February, 2014, p 3-22

[51] 'Asbel Kiprop: Former Olympic 1,500 m champion banned for four years for doping' available at *https://www.independent.co.uk/sport/general/athletics/asbel-kiprop-doping-ban-olympic-champion-1500m-a8879691.html* (Accessed on 27/11/2019)

[52] Douglas D.D, Op cit

[53] Robert W. W, 'Tax Lesson's from Soccer's Messi & Ronaldo Tax Evasion Cases' Forbes available at *http://www.woodllp.com/Publications/Articles/pdf/Tax_Lessons_From_Soccer.pdf* (Accessed on 27/11/2019)

[54] Income Tax Act, Cap 470, S 3; See also Ohaga J.M and Kosgei F. C, 'Organisation of Sports Clubs and Sports Governing Bodies' The Sports Law Review, Edition 4, January 2019, available at

Under section 39 (2) of the Act, the tax paid overseas is offset against the tax computed locally on the income earned overseas. The sportsperson should however furnish evidence of tax paid overseas in order to be allowed to offset it against tax computed locally.[55] A clear understanding of the tax regime is thus necessary among sports personalities since it has been a major dispute area.

3.3 Employment Disputes

Under Kenyan law, an employee is defined as a person who is employed for wages or a salary.[56] Athletes especially those involved in team sports such as football and rugby fit in this category since they are under a contract with a specific club. The relationship between the athlete and the club is governed by the Employment Act which sets out principles on the employment relationship, rights and duties in employment, termination and dismissal. Consequently employment related disputes such as unfair dismissal and non-payment of wages are common in the Sports Disputes Tribunal in Kenya.[57] It is thus imperative to have an efficient mechanism for handling such sports related issues in order to promote the growth of sports.

4. Use of ADR Mechanisms in Management of Sports Disputes

Alternative Dispute Resolution (ADR) mechanisms including arbitration have now become the mainstream form of dispute management in sport related disputes across the world as evidenced by the sporting codes, rules and regulations that provide for these mechanisms. The foregoing discussion has demonstrated that the Court of Arbitration for Sport is granted jurisdiction by several international sports organisations such as FIFA and IAAF to settle sports related disputes. The main reasons that make ADR mechanisms preferable over the courts in resolution of sports disputes is that such mechanisms can be expeditious, flexible, cost effective, confidential, result in a win - win situation in some instances as parties compromise, maintain and preserve business relations; and are conducted by people with expertise and experience in the relevant field of sport.[58]

One of the advantages of Alternative Dispute Resolution mechanisms is confidentiality. In sports, there is the need by sportspersons and sports federations to avoid washing their dirty linen in public due to the publicity involved with sports. [59] This can be well cured by the use of ADR mechanisms which ensure that disputes are resolved within the

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https://thelawreviews.co.uk/edition/the-sports-law-review-edition-4/1177318/kenya (Accessed on 27/11/2019)

[55] Ibid

[56] Employment Act, No. 11 of 2007, S 2

[57] Ohaga J.M and Kosgei F. C, Op Cit

[58] Farai Razano, 'Keeping Sport Out of the Courts: The National Soccer League Dispute Resolution Chamber- A Model for Sport Dispute Resolution in South Africa and Africa' African Sports Law and Business Bulletin, No. 2 of 2014

[59] Cloete R (ed). 2005. Introduction to Sports Law in South Africa. LexisNexis Butterworths, Durban p205.

sporting family.[60] ADR mechanisms and in particular arbitration have been heralded as mostly private and confidential.[61] Parties are thus able preserve their secrets during and after the dispute resolution process. At the global level, the issue of confidentiality has been succinctly addressed by the Court of Arbitration for Sport (CAS) whose arbitration rules provide that the arbitrators and CAS undertake *not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of CAS* (emphasis ours).[62] Awards shall not be made public unless all parties agree or the Division President so decides.[63] This is unlike court proceedings which are open to the public thus negating the concept of confidentiality.

However, ADR mechanisms including arbitration suffer from several drawbacks that could affect their suitability in management of sports disputes. It has been argued that these mechanisms lack vigorous enforcement measures that are sometimes needed in dispute management. [64] Unlike ADR mechanisms, courts have powers to summon witnesses, grant orders and injunctions and execute its decisions. The remedy of contempt is available for violations of a court's decisions. These measures are essential in facilitating efficient dispute management by ensuring that orders and decisions of the courts are adhered to.[65] Further, through injunctions, a court is able to grant temporary reliefs pending the final determination of the dispute which may be necessary in preserving the subject matter of the dispute. ADR mechanisms such as mediation are not suitable when a party needs urgent protection like an injunction.[66]

Further, there are no precedents in ADR and decisions made are not based on prior disputes.[67] However, at the global stage, sports dispute management benefits from *lex sportiva* which is the jurisprudence developed by CAS and acts as a guide in subsequent matters. On the other hand, courts rely on precedents where prior decisions by higher ranking courts are considered in deciding a dispute. This has the advantage of creating certainty in dispute resolution and it is *possible to predict the outcome of a dispute by looking at previous court decisions on disputes with the same facts* (emphasis ours). This advantage could be defeated in ADR which has the likelihood of creating uncertainty in dispute resolution since it is possible to have differing decisions on the same issues.

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[60] Ibid

[61] Kariuki Muigua, 'Alternative Dispute Resolution and Access to Justice in Kenya', Glenwood Publishers Ltd (2015)

[62] *Court of Arbitration for Sport, 'Code of Sports-related Arbitration' Rule 43, available at https://www.tas-cas.org/fileadmin/user_upload/Code_2019__en_.pdf* (Accessed on 27/11/2019)

[63] Ibid

[64] Owen M. Fiss, 'Against Settlement' Yale Law Journal, Volume 93, Issue 6 (1984)

[65] Ibid

[66] Kariuki Muigua, Op Cit

[67] Ibid

Finally, expeditious management of sports disputes through ADR mechanisms such as arbitration may be defeated where such disputes end up in court due to appeals. In Kenya, decisions of the Sports Disputes Tribunal may be appealed to the High Court. Where this happens, then usual ills facing the judicial process especially delays emerge and this affects sports disputes management. It is thus evident that despite of their unique advantages, ADR mechanisms suffer from several setbacks that could pose a challenge in sports dispute management.

5. Efficacy of Arbitral Institutions in Facilitating Management of Sports Disputes

The Court of Arbitration for Sport (CAS) plays an important role in setting global standards on settlement of sports disputes. In the absence of such an independent sports Tribunal, sports disputes would be managed by domestic courts or institutions where such disputes arose. This would likely result in conflicting decisions across jurisdictions owing to the differences in legal systems, culture and policy.[68] Further, where disputes relate to athletes, sports organisations or federations belonging to different nationalities, there a likelihood of bias and favoritism for those litigating in their home countries. [69] It has been argued that handing these disputes over to the CAS minimizes the potential for bias.[70] The process also guarantees fairness since CAS has no personal interest in the outcome of disputes giving parties to the dispute the benefit of having a neutral arbitrator that will administer fair results. Further, the CAS has the potential of facilitating efficient outcomes due to the skill and expertise of its arbitrators.[71]

In making its decisions, the CAS has the duty of interpreting and applying rules and regulations established by sports governing bodies since disputes submitted to CAS would normally involve an athlete and such bodies. Consequently, CAS has over the years developed a rich jurisprudence in sports disputes which has been coined as *lex sportiva.*[72] It has been argued that owing to the contractual principle of party autonomy, *lex sportiva* is the governing law in certain sports contracts.[73] To this extent, CAS has contributed in ensuring certainty and consistency in sports disputes management.

However, there are several concerns which may hinder the effectiveness of CAS in management of sports disputes. The location of CAS could impose huge costs on athletes or sports organisations during dispute settlement. Where a dispute has been lodged or

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[68] See Ian Blackshaw, The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively Within the Family of Sport, 2 ENT. L. 61, 61-62 (2003)

[69] Melissa Hewitt, 'An Unbalanced Act: A Criticism of How the Court of Arbitration for Sport Issues Unjustly Harsh Sanctions by Attempting to Regulate Doping in Sport' Indiana Journal of Global Legal Studies, Volume 22, Issue 2 (2015)

[70] Ibid

[71] Ibid

[72] De Oliveira. L , 'Lex Sportiva as the Contractual Governing Law' The International Sports Law Journal , Volume. 17, issue 1-2, December 2017

[73] Ibid

referred to CAS, the parties will be expected to attend the proceedings in Lausanne, Switzerland where the CAS is located unless an ad hoc tribunal is formed in the area where such dispute arose. This creates the challenge of *accessibility and costs especially where attendance of witnesses is required.* Athletes and sports organisations may thus find themselves overburdened by costs. (emphasis ours)

Further, it has been suggested that there is a danger that some CAS actions and decisions could erode core national values. In rendering its decisions, there is a possibility that CAS will disagree with, rule against, or render interpretations that run counter to what athletes or sports organisations might have wanted, and what the democratic majority might prefer based on the concept of justice in their countries.[74] This is especially true in Africa where the traditional concept of justice was understood differently from the rest of the world. Justice processes were aimed at *restoration of relationships as opposed to punishment peace-building and parties' interests and not the allocation of rights between disputants* (emphasis ours).[75] Sports have always played an integral part in African societies. Games such as traditional wrestling, camel races and water games such as canoe and boat racing were deeply entrenched into the culture of African societies and provided occasions that brought the whole community together.[76] These games emphasized participation over competition.[77] This is partly true with modern sports due to commercialization of the sports. However, it can be argued that sports in Africa still play a crucial role in social cohesion and promote the value of inclusivity. An arbitral award rendered by CAS may not fully consider these issues.

A challenge also arises in respect of appeals against decisions by CAS. These decisions can only be appealed before the Swiss Supreme Court. Under Swiss law, only lawyers admitted to the Swiss Bar or lawyers authorized by an international treaty to practice in Switzerland may represent parties in actions to set aside arbitral awards.[78] Thus, where an athlete was represented before the CAS by a lawyer from his/her jurisdiction and decides to challenge the decision before the Swiss Supreme Court, the athlete will be required to seek the services of lawyer admitted to the Swiss Bar. This requirement is likely to erode the confidence of the athlete in the process due to difficulties that could arise in dealing with a lawyer from a different jurisdiction.

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[74] Karen J. Alter, 'Delegating to International Courts: Self-Binding us. Other-Binding Delegation', 71 Law & Contemp. Probs. 37, 39 (2008)

[75] Francis Kariuki, 'African Traditional Justice Systems' available at *http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf* (Accessed on 27/11/2019)

[76] Michael Hirth, 'Games, Sport and Tradition in West Africa' Available at *https://pdfs.semanticscholar.org/34c4/92af4481fe81512f71c9a06bb77fe1c08cda.pdf* (Accessed on 27/11/2019)

[77] Ibid

[78] Antonio Rigozzi, 'Challenging Awards of the Court of Arbitration for Sport' Journal of International Dispute Settlement, Vol. 1, No. 1 (2010), pp. 217–265

6. The Sports Disputes Tribunal and Management of Sports Disputes in Kenya

The enactment of the Sports Act, 2013 and the establishment of the Sports Dispute Tribunal marked an important step towards promoting sports arbitration in Kenya. The Tribunal has been operationalized and has heard and determined various appeals and disputes lodged before it in relation to several sports organizations such as *Kenya National Paralympic Committee*, *Kenya Rowing & Canoe Federation*, *Kenya Rugby Union* and *National Olympic Committee of Kenya* among others.[79] The Tribunal has contributed towards streamlining the operations of sports federations in the country through measures such as cancelling elections not held in accordance with the requisite rules and guidelines. [80]However, the operation of the Tribunal may be hindered by several challenges.

The wording of section 58 of the Sports Act raises several issues on the jurisdiction of the Sports Dispute Tribunal. The Tribunal derives jurisdiction from the statute but this is limited to rules by national sports organizations allowing appeals to the Tribunal and agreement between the parties.[81]As framed, this provision poses a jurisdictional challenge since Sports organizations can avoid the jurisdiction of the tribunal within their rules.[82] Further, section 58 (b) of the Sports Act poses a challenge in that parties have the power to determine the jurisdiction of the Tribunal. Where there is no such agreement, challenges on jurisdiction may be raised by either party in court. This was the issue in the case of *Dennis Kadito v Office of The Sports Disputes Tribunal & another [2017] eKLR.* In the case, the petitioner filed a claim before the Sports Disputes Tribunal seeking a commission of USD, 17500/= from Sofapaka Football Club in relation to transfer of players. Despite serving the football club with the claim, it did not enter appearance or file a defence. The Tribunal heard the dispute in the absence of the football club but made a decision determining that it had no jurisdiction to hear that particular dispute by virtue of section 58(b) of the Sports Act, 2013 on account of the football club's failure to enter appearance and file a defence or submitting to the Tribunal's jurisdiction.

The petitioner challenged the decision in court on the basis that section 58(b) of the Sports Act is unconstitutional for violating Article 48 of the Constitution on access to justice. In dismissing the petition, the court decided that:

> *'In the case of the category of disputes falling under section 58(b), these are any other disputes that may be sports related but which parties agree to refer to the tribunal and even after agreeing to refer them, it is not automatic that the tribunal has to hear them. The tribunal has the option to decide whether to take over the dispute and hear it or decline*

[79] Sports Dispute Tribunal decisions, available at *http://kenyalaw.org/kl/index.php?id=9711* (Accessed on 27/11/2019)

[80] See for example Kwalimwa. D, 'Sports Tribunal Cancels FKF Polls' Daily Nation, Wednesday, December 4, 2019

[81] Sports Act, S 58 (a) and (b)

[82] 'Growth of Sports Arbitration in Kenya and Globally' Sports Monthly, Issue 143, November 2019

> *jurisdiction… the words of the statute in section 58(b) are clear and unambiguous that parties must agree to refer any other dispute of a sports nature to the tribunal and the tribunal after examining the sort of the dispute has to agree to hear it.'*

There is need to revisit section 58 (b) of the Sports Act to provide certainty on the jurisdiction of the Tribunal and avoid instances where a party to a dispute may be denied access to justice by failure of the other party to submit to the jurisdiction of the Sports Disputes Tribunal.

Another issue that emerges from the wording of section 58 of the Sports Act is that the Tribunal only enjoys appellate jurisdiction. It can only exercise original jurisdiction upon agreement of parties to a dispute.[83] It would have been prudent to at least confer original jurisdiction on specific matters to the Tribunal.[84] The Act creates a challenge by giving wide discretion to parties to determine which disputes can be determined by the Tribunal.[85]

Another notable shortcoming in the Sports Act, 2013 is that the Act does not specify the remedies that can be granted by the Tribunal upon hearing a dispute. The upshot of this shortcoming is that a decision of the Tribunal can be challenged on the basis of the remedy granted. There is thus need to revisit the Sports Act, 2013 to clarify these issues and make the Tribunal more vibrant and effective.

7. Way Forward on Sports Disputes in Africa

The foregoing discussion has demonstrated the nature of sports disputes and the need for efficient management of such disputes. The discussion has also examined the efficacy of arbitration in management of such disputes by analyzing its advantages and disadvantages. With the increasing commercialisation of sports, disputes are bound to increase due to the growing need to re-evaluate and clarify sports relationships.[86] However, as demonstrated, there are several shortcomings in both the legal and institutional framework on sports arbitration which may hinder the efficacy of the process of sports dispute management. The paper proposes reforms on the issues raised as discussed hereunder.

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[83] Ibid, S 58 (b)

[84] 'Growth of Sports Arbitration in Kenya and Globally' Op Cit

[85] Akech B, 'Public Regulation of Sports in Kenya' available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423247#references-widget* (Accessed on 27/11/2019)

[86] Farai Razano, 'Keeping Sport Out of the Courts: The National Soccer League Dispute Resolution Chamber- A Model for Sport Dispute Resolution in South Africa and Africa' Op Cit

7.1 Efficient Management of Sports

Sports disputes in Africa are majorly as a result of mismanagement by the various stakeholders involved such as clubs, sports organisations, players and governments. Sports in Africa have suffered several setbacks as a result of poor management and interference by movement officials.[87] There have been numerous cases of countries in Africa being banned from international competitions by federations such as FIFA due to government interference such as Kenya in 2006 and Nigeria in 2010.[88] Further, cases of mismanagement of sports resources have also been documented such the case of the Kenyan team at the 2016 Olympic Games in Rio de Janeiro, Brazil.[89] There have also been instances of clubs mistreating their players through instances such as non-payment of wages and summary dismissal.[90]

Such issues ultimately contribute to sport related disputes. Efficient management of sports becomes necessary to prevent some of these disputes. African sports organisations should enhance sports administration in their respective countries and promote the value of sports. National governments should also promote sports through allocation of sufficient resources to avoid instances where sports teams have often found themselves stranded while on national duties abroad due to insufficient resources. Corruption which is also a contributing factor in some of these disputes especially among sports federations should be curbed through prosecution of those involved in such vices.[91]

Further, there is need for efficient post retirement measures for professional sports persons in Kenya. It has been argued that for many athletes, retirement is an idea that is not thought about in great detail.[92] The process induces dramatic changes in social, personal and occupational lives of sportspersons which could have negative impacts on them.[93] In some instances, the athletes go through poverty and substance abuse.[94] Support

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[87] Majan E, and Osoro N, 'Sports Management and Government Interference in Africa' African Sports Law and Business Bulletin 1/2013

[88] Ibid

[89] The Standard, 'Two Kenyan Athletics Officials in Court over Rio Games fiasco' available at *https://www.standardmedia.co.ke/article/2000213873/two-kenyan-athletics-officials-in-court-over-rio-games-fiasco* (Accessed on 27/11/2019)

[90] Africa Centre for Open Governance (africog), 'The crisis of football management in Kenya' available at*https://africog.org/wpcontent/uploads/2010/07/The20crisis20of20football20management20in20Kenya1.pdf* **(**accessed on 27/11/2019)

[91] Liwewe P, 'The Challenges Facing African Football' The Africa Report available at *https://www.theafricareport.com/9084/the-challenges-facing-african-football/* (accessed on 27/11/2019)

[92] 'Post Retirement for Professional Sports Persons in Kenya' Sports Monthly, Issue 143, November 2019

[93] Rintaugu. E et al, 'From Grace to Grass: Kenyan Soccer Players' Career Transition and Experiences in Retirement' African Journal of Physical and Health Sciences (AJPHES), Volume. 22 (1:1), March 2016, p 163-175

[94] See the example of Henry Rono; Namunwa. K, 'Stranded abroad, legendary Henry Rono appeals for help to return home' Business Today, January 23, 2019, available at

can be given to athletes through career and financial advice upon retirement. Retired athletes should also be supported through measures such as appointments in sports federations and teams. Further, professional sports persons should consider establishing and joining associations that can protect their welfare. A good example can be drawn from FIFPRO which represents professional footballers at the global stage.[95]This will enhance the image of sports in the country and encourage other people to take up the profession.

7.2 Adherence to Sports Rules by Athletes

One of the major causes of sports disputes discussed relates to the violation of sports rules by athletes such as anti-doping rules and tax rules. Athletes should be encouraged to abide by such rules in order to enhance integrity in sports. However, some athletes found themselves engaging in such acts of violation due to being misled by their agents or coaches for their selfish gains.[96] However, it is the athletes who bear the heaviest burden in form of sanctions while some of the agents walk away scot free.[97] There is need for the CAS, WADA and other sports tribunals to consider such cases and protect innocent athletes who might have been exploited by third parties by preferably imposing lesser sanctions than those prescribed.

7.3 Strengthening National Sports Dispute Management Mechanisms

Since disputes are bound to occur even where sufficient measures have been implemented to curb them, it is imperative to have efficient mechanisms to deal with them. Thus, national sports disputes management mechanisms in Africa need to be strengthened in both the legal and institutional dimension. The example of the Sports Disputes Tribunal in Kenya highlights that the operation of such institutions may be hindered by loopholes in the legal instruments establishing them. It is essential for such laws to have the input of sports experts. Further, it is important to strengthen the capacity of sports tribunals through allocation of resources and efficient manpower.[98]

National sports federations should endevour to effectively utilize their internal dispute management procedures which recognise ADR mechanisms such as negotiation and mediation. This is to prevent such disputes from escalating to the CAS. African countries should strengthen However, unlike Kenya which has made progress through the establishment of a Sports Tribunal, not all countries in Africa have done so. In South Africa, proposals have been made for the establishment of an ad-hoc Sport Arbitration Tribunal. Proponents of this idea have argued that such a Tribunal will be able to manage

https://businesstoday.co.ke/stranded-abroad-legendary-henry-rono-appeals-help-return-home/ (Accessed on 04/12/2019)

[95] See the Activities of FIFPRO at https://www.fifpro.org/en (Accessed on 27/11/2019)

[96] Douglas D.D, 'Forget Me…..Not: Marion Jones and the Politics of Punishment' Journal of Sport & Social Issues, Volume 38 (No. 1), February, 2014, p 3-22

[97] Ibid

[98] Mehrotra A 'The need for better dispute resolution systems in Indian sport and the Government's new Guidelines' Law in Sport, November 2016

disputes in the sports industry expeditiously and promote the growth of sports in South Africa.[99] This argument has also been advanced in Nigeria where suggestions have also been made for the establishment of a sports tribunal to help athletes and sports practitioners get a fast and professional judgment on sports-related issues. [100] It has been argued that the conventional court in the land cannot address sports related issues like a sports tribunal.[101] Establishment of sports tribunal can go a long way in facilitating management of sports disputes in Africa.

African countries should also consider establishment of sports courts due to the advantages which have been discussed including availability of efficient enforcement mechanisms and temporary remedies. It has also been asserted that courts can play an oversight role in terms of public law and maintain checks and balances in sport through review of decisions of sports organisations and bodies.[102] However, this could be problematic due to the shortcomings associated with litigations such as delays and costs.

7.4 Setting up a CAS Platform in Africa

CAS has previously set up ad hoc divisions for specific sporting occasions in various parts of the world. CAS can further enhance its operation by decentralizing its activities to Africa. This is to cure against the challenges of accessibility and costs that face the current set up. This can be implemented by setting up basis infrastructure such as registries in pilot countries. Further, CAS can embrace the use of technology such as video conferencing when conducting hearing sessions to limit the requirement of sportspersons and other parties having to travel all the way to Switzerland to attend such hearings.

7.5 Capacity Building in Sports Law

The field of sports law is yet to be fully embraced by most legal practitioners in Africa. With the important role that sports play in a society and the increasing commercialisation of sports, there is need for experts in the field of sports law to aid in the management of legal issues that continue to emerge from this field. Emerging legal issues in sports such as termination of sports contracts, disputes between teams over transfer of players and violation of rules e.g doping rules will be better handled by experts on such matters.[103] Appointments to the various sports tribunals should be based on knowledge and

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[99] Lombard F, 'Committee Told That Sport Arbitration Tribunal is much Needed' Parliament of the Republic of South Africa, available at *https://www.parliament.gov.za/news/committee-told-sport-arbitration-tribunal-much-needed* (Accessed on 27/11/2019)

[100] Agbakoba calls for Sports Tribunal in Nigeria,'The Guardian, 19/11/2019' available at *https://guardian.ng/sport/agbakoba-calls-for-sports-tribunal-in-nigeria/* (Accessed on 27/11/2019)

[101] Ibid

[102] Razano F, 'Judicial Review in South Africa-How Local Courts Approach Sports Disciplinary Decisions' Law in Sport, 05 February 2019

[103] Mitten M, and Opie H, 'Sports Law": Implications For The Development Of International, Comparative, And National Law And Global Dispute Resolution' Marquette University Law School Legal Studies Research Paper Series Research Paper No.10-31, June 2010

experience on issues related to sports. A good example is the Court of Arbitration for Sports (CAS) whose arbitrators are chosen for their specialist knowledge of arbitration and sports law. There is need to enhance training of legal professionals across Africa in sports law. This can be achieved by making Sports law part of the curriculum in legal institutions across the continent. Further CAS can provide tailor made courses in sports arbitration in collaboration with various arbitral institutions such as the Chartered Institute of Arbitrators (Kenya) Branch and Nairobi Centre for International Arbitration.

7.6 Creating Awareness among Sports Personnel on Sports Related Issues

Some of the sports related issues such as the issue of tax evasion and doping are partly due to lack of awareness on such issues by athletes. There is need for sensitization on these issues by sports federations, the government, clubs and stakeholders to enhance awareness among athletes. With such information, it would be easier for athletes to deal with the issues and avoid sports disputes.

8. Conclusion

Sports are essential and form part of culture in African societies. There is need to create an enabling environment for the growth of sports. With the rise of sports disputes, it is important to have such disputes settled expeditiously and minimise their impact on development of sports. It is therefore vital that conflict management mechanisms be put in place to ensure that sports go on smoothly and the rights and interests of all parties are upheld. It is also necessary to take into account specific and deferring cultural variances in dealing with sports disputes. Africa is a major contributor to global sporting activities. Promotion of sports arbitration in Africa is thus timely. It is an ideal that is worth pursuing now.

Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management

Abstract

Tribunals play an important role within the justice system in Kenya by not only reducing pressure on courts but also assisting the mainly commercial class of people access justice in an expeditious way. However, the ever growing of cases with the relatively fewer number of members in these tribunals means that they can remain effective only for so long. Eventually the challenges of backlog and delayed justice as a result may arise. This paper makes a case for the use of ADR in proceedings before tribunals as one of the ways of easing pressure on the tribunals.

1. Introduction

The Judiciary, comprising of courts and independent tribunals, is the main formal institution in Kenya that is charged with conflict management and the formal administration of justice. The Constitution of Kenya 2010 provides that 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.[1]

In exercising judicial authority, the courts and tribunals are to be guided by the following principles—justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of this Constitution shall be protected and promoted.[2]

In order to achieve this constitutional mandate, the Judiciary has been concentrating on capacity building as evidenced by setting up more courts across the country, as well as promoting the use of Alternative Dispute Resolution (ADR) mechanisms in order to ease the pressure on courts and enhance expeditious access to justice for all.[3]

It is against this background that this paper discusses the place of ADR mechanisms in conflict management especially in the context of tribunals, which are in the process of transition to the Judiciary, and how these mechanisms can enhance the tribunals' effectiveness in administration of justice through the active use of ADR mechanisms in conflict management.

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[1] Article 159(1), Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).
[2] Ibid, Article 159 (2).
[3] The Judiciary of Kenya, State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018, March 2019. Available at *https://www.judiciary.go.ke/wp-content/uploads/sojar20172018.pdf [Accessed on 26/4/2019].*

2. Conflict Management and Alternative Dispute Resolution Mechanisms in Kenya

There are two main approaches to conflict management.[4] Traditional theory considers people involved in conflict situations as trouble makers while the modern theory considers conflict as a natural and inevitable outcome of human interaction.[5] Conflict management is used to refer to the various processes required for stopping or preventing overt conflicts, and aiding the parties involved to reach durable peaceful settlement of their differences.[6] This definition conceives 'conflict management' as an 'umbrella term' that refers to all the stages of conflict as well as all the mechanisms that are used to deal with conflict.[7] "Management" in this context is used in a wider meaning than the strict sense of "to manage" or "to cope with" to include the meaning of "to administer".[8]

The discussion herein adopts the term in this context and as such, this section highlights all the approaches employed in dealing with conflict. This is against the narrow view by some scholars that conflict management, as a concept, refers to conflict containment, a view that is based on the belief that violent conflicts are ineradicable consequence of differences of values and interests within and between communities.[9] According to this school of thought, resolving such conflicts is unrealistic: the best that can be done is to manage and contain them, and occasionally to reach a historic compromise in which violence may be laid aside and normal politics resume.[10]It has been argued that if the basic human needs are unfulfilled because the state fails to properly address them, or if a group feels that these needs are unmet, or perceives a threat to these needs, violence can emerge.[11]It is against the foregoing background that the author explores the various mechanisms that can be employed in conflict situations especially social conflicts in Kenya.

2.1 Conflict Management Mechanisms

Generally, conflict management mechanisms include any process which can bring about the conclusion of a dispute or conflict, ranging from the most informal negotiations between the parties themselves, through increasing formality and more directive

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[4] Della, V.E. & Cerizza, LD, Management of agricultural research: A training manual, ('Session 5' FAO), available at *http://www.fao.org/docrep/w7504e/w7504e07.htm#reading%20note:%20conflict%20management* [accessed 26/4/2019].

[5] Ibid.

[6] Leeds, C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners,' International Journal of Peace Studies, Vol. 2, No. 2, 1997.

[7]Hamad, AA, 'The Reconceptualisation of Conflict Management' (2005) 7 Peace, Conflict and Development: An Interdisciplinary Journal 1, pp. 6-7.

[8] Ibid, p. 11.

[9] Ibid.

[10] Ibid, p. 4.

[11]Doucey M, 'Understanding the Root Causes of Conflicts: Why It Matters for International Crisis Management,' International Affairs Review, Vol. 20, No. 2, Fall2011, p. 4.

intervention from external sources, to a full court hearing with strict rules of procedure.[12]There is a range of conflict management mechanisms available to parties in conflict or dispute. For instance, Article 33 of the *Charter of the United Nations*[13]outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to.[14] It provides that *the parties to any dispute should, 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].[15]

Litigation or judicial settlement is a coercive dispute settlement mechanism that is adversarial in nature, where parties in the dispute take their claims to a court of law to be adjudicated upon by a judge or a magistrate. The judge or magistrate gives a judgment which is binding on the parties, subject only to statutory right of appeal. In litigation, the parties to the dispute have minimum or no control at all over the forum, the process and outcome of the process and as such the outcome may not satisfy both parties.

The judicial authority in Kenya is exercised by the courts and tribunals.[16]Litigation has its advantages in that precedent is created and issues of law are interpreted.[17] It is also useful where the contract between the parties does not stipulate for a consensual process and the parties cannot agree on one, the only alternative is litigation. Through litigation, it is possible to bring an unwilling party into the process and the result of the process be enforceable without further agreement.[18] Litigation has its advantages as it comes in handy, for instance, where an expeditious remedy in the form of an injunction is necessary.

The Constitution provides that the national courts and tribunals should do justice to all irrespective of status; justice should not be delayed; alternative forms of dispute resolution should be promoted; and justice should be administered without undue regard

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[12] Sourced from, <*http://www.buildingdisputestribunal.co.nz/.html*> [accessed on 26/4/2019].

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

[14] See generally Eunice R. Oddiri, Alternative Dispute Resolution, paper presented by author at the Annual Delegates Conference of the Nigerian Bar Association, 22nd - 27th August 2004, Abuja, Nigeria. Available at http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.htm *Accessed on 26/4/2019; See 'The Role of Private International Law and Alternative Dispute Resolution',* Available at http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap4.html [Accessed on 26/4/2019].

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

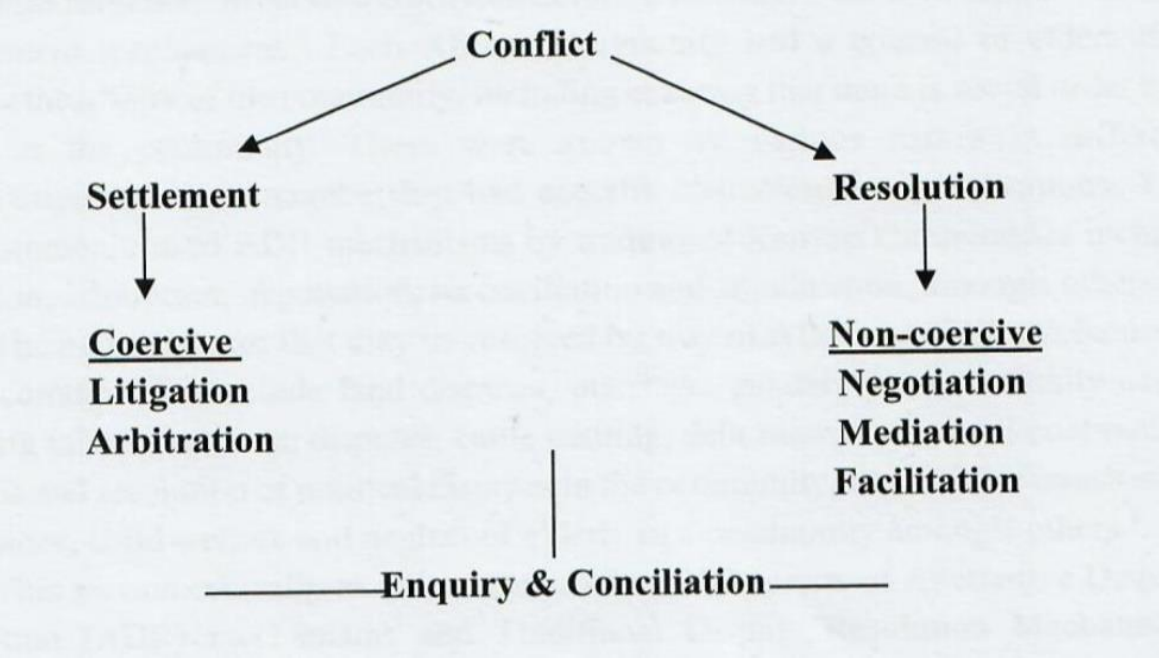
[16] See Art. 159 of the Constitution of Kenya, [Government Printer, Nairobi, 2010].

[17] See the argument by Calkins, R.M., 'Mediation: A Revolutionary Process That Is Replacing the American Judicial System,' Cardoza Journal of Conflict Resolution, Vol. 13, No. 1, 2011; cf. Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases,' Utah Law Review, No. 3, 2009, pp. 797-843, p. 799.

[18] See generally, Dispute Resolution Guidance, available at *http://www.ogc.gov.uk/documents/dispute resolution.pdf, [*accessed on 26/4/2019].

to procedural technicalities.[19] Courts in Kenya, however, have encountered many problems related to access to justice, for instance, high court fees, geographical location, complexity of rules and procedure and the use of legalese.[20] The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves.'[21] Dispute settlement through litigation can take years before the parties get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice, litigation is so slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world. It is against this backdrop that this paper explores how litigation can be complemented with the effective use of ADR mechanisms in facilitating access to justice especially within tribunals. The diagram below offers a general introduction to conflict management, clarifying issues and concepts that inform various conflict management mechanisms.

Figure 1 Methods of Conflict Management Conflict



*__Source:__ The author

Figure 1 shows that there are certain methods of conflict management that can only lead to a settlement. Those that lead to a settlement fall into the category of coercive methods

[19] See Art. 48 &159 (2) of the Constitution of Kenya.

[20]Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol. III, May, 2002.

[21] Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Kenya Law Review Journal, Vol. 1, No. 19, 2007, pp. 19-29 at p.29.

where parties have little or no autonomy over the forum, choice of the judges and the outcome. The coercive methods are litigation or judicial settlement and arbitration. It also shows the non-coercive methods (negotiation, mediation and facilitation) which lead to resolution. In the non-coercive conflict management methods the parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome. Conciliation and enquiry can be classified as coercive (when the reports emanating from them are enforced) and non-coercive, for example, when the reports are used as the basis for negotiation between the parties.

As Fig. 1 illustrates, there are certain conflict management mechanisms that can lead to a settlement[22] only, while others have been effective in bringing about a resolution. A *settlement* is attained when the parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. On the other hand a *resolution* prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship.[23] The Conflict resolution methods that lead to a settlement fall into the category of *coercive methods* where parties have little or no autonomy over the forum, choice of the judges and the outcome. The coercive methods are litigation or judicial settlement and arbitration. The *non-coercive methods* (negotiation, mediation and facilitation) lead to resolution. In the non-coercive conflict management methods the parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome.

3. Tracing the Place of Tribunals within Kenya's Justice System

As a way of enhancing the capacity of the formal conflict management institutions in the country, there has been transition of tribunals to the Judiciary. This, it is expected, will streamline their administration and enhance their capacity as important players within the administration of justice. Indeed, the Constitution of Kenya recognises subordinate courts as including the Magistrates courts; the Kadhis' courts; the Courts Martial; and any other court or *local tribunal* as may be established by an Act of Parliament, other than the courts established as required by Article 162(2) (emphasis added). The Constitution thus recognises tribunals as important players in the administration of justice and places them under the Judiciary. Previously, the different tribunals were under the respective ministries.[24] The purpose of transitioning tribunals is to ensure they are delinked from the

[22] Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", Journal of Peace Research, Vol.32, No. 2 (May, 1995), p. 153. Bloomfield argues that a settlement is temporal and does not eliminate the underlying causes of the inter-disputant relationship whereas a resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based out-comes.

[23] Ibid.

[24] The Judiciary of Kenya, State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018, March 2019, op. cit., p. 66.

executive and integrated in the court system. The transition is still ongoing, and the Judiciary, in the fullness of time, shall therefore, have an obligation to manage tribunals including their staff in order to effectively and efficiently render services to users.[25] Tribunals are now coordinated through the office of Registrar Tribunals established by the Judicial Service Commission.[26]

Tribunals are established by different Acts of Parliament, with about 60 of them in existence, and are mandated to resolve disputes in a fast, simple and speedy manner.[27] The *State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018* indicates that during the period under review, 5,615 cases were filed while 2,530 cases were resolved.[28] These statistics not only demonstrate the important role that these tribunals play but also show that these tribunals also require case management lest they find themselves under the case backlog challenge that is currently facing the courts. This is why there is a need for enhancing the use of ADR mechanisms by these tribunals where circumstances so allow. It is worth mentioning that many of these tribunals in Kenya play a pivotal role in administering commercial justice, an area where ADR is readily acceptable worldwide.

The next section looks at why and how the tribunals can make more use of ADR mechanisms in order to *boost their effectiveness and achieve a better case turnover which will in turn win them the public confidence* (emphasis added). The ripple effect may not necessarily be fewer appeals to courts but more cases getting the important preliminary determination by the tribunals.

4. Integrating the Use of Alternative Dispute Resolution in Conflict Management through Tribunals

As already pointed out, the Constitution of Kenya, 2010 recognizes the application of Traditional Dispute Resolution (TDR) and ADR mechanisms in conflict management for efficient dispensation of justice since their merits outweigh any disadvantages thereof.[29] It is noteworthy that a high percentage of disputes in Kenya are resolved outside courts or even before they reach courts by use of TDR or ADR mechanisms. TDR and other community justice mechanisms are widely used by communities to resolve conflicts owing to their legitimacy and accessibility. Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms that are utilized to manage disputes without resort to the often costly adversarial litigation.

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[25] Ibid.
[26] *http://kenyalaw.org/kl/index.php?id=9050* [Accessed on 26/4/2019].
[27] For the full list of the tribunals and their mandate, see Judiciary of Kenya, State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018, March 2019, op. cit., Chapter Three.
[28] Ibid, p.73.
[29] See Art. 159 (2) (c) of the Constitution of Kenya 2010.

The main disputes that may be resolved by way of ADR and Traditional Dispute Resolution Mechanisms (TDR) mechanisms in the communities include land disputes, marriage, gender violence, family cases including inheritance, clan disputes, cattle rustling, debt recovery, overall community conflicts and resolution of political disputes in the community, and welfare issues such as nuisance, child welfare and neglect of elderly in a community amongst others.[30]

The main aspects of TDR and other ADR mechanisms which make them unique and community oriented is that they focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by formal common law and statutory regimes.[31] The main objective of TDR in African societies is to resolve emerging disputes and foster harmony and cohesion among the people.[32] ADR is mainly concerned with enabling parties take charge of their situations and relationships.

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.[33] Increased application of ADR is considered as one of the measures that will lead to faster dispensation of cases, particularly in tribunals.

The Kenyan populace is still a believer in getting their day in court. Many people would rather have an order of the court or a decision of an administrative tribunal to enforce,

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[30] Kenyatta, J., Facing Mount Kenya: The Tribal life of the Gikuyu, op cit; See also Lenkinski, E.L. & Mehra, M., Are 'We Counsel or Counsellors? Alternative Dispute Resolution & the Evolving Role of Family Law Lawyers in Canada,' available at *https://www.iaml.org/cms_media/files/are_we_counsel_or_counsellors.pdf*[Accessed on 26/4/2019].

[31] Muigua, K., 'Effective Justice for Kenyans: Is ADR Really Alternative?' pp. 12-13. Available at http://www.kmco.co.ke/attachments/article/125/Alternative%20Dispute%20Resolution%20or%20Appropriate%20Dispute%20Resolution.pdf [Accessed on 26/4/2019].

[32] Hwedie, K. O. & Rankopo, M. J., "Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana," available at http://home.hiroshima-u.ac.jp/heiwa/Pub/E29/e29-3.pdf [Accessed on 26/4/2019], p. 33.

[33] See 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.

rather than a negotiated agreement that is wholly dependent of parties' goodwill. Even where the law has put in place enforcement mechanisms for negotiated settlements, people still desire the coercive nature of courts and other tribunals, as opposed to all the cordial talks that are ADR. This should however not discourage tribunals.

With adequate legal and policy framework on the application of ADR in Kenya, it is possible to create awareness on ADR mechanisms for everyone, including the poor who may well be aware of their right of access to justice but lacking means of realizing the same. Continued sensitization of the key players in the Government, the judiciary, legal practitioners, business community and the public at large will also boost support for ADR mechanisms in all possible aspects as contemplated under the Constitution and various statutes. A full appreciation of the workings of ADR mechanisms is key in achieving widespread yet effective use of ADR and TDR mechanisms for access to justice especially in matters within the jurisdiction of tribunals.

While carrying out their administrative or quasi-judicial functions, tribunals should strive to encourage parties to make more use of ADR mechanisms. Article 47(1) of the Constitution of Kenya guarantees the right of every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In addition, Article 48 provides for State's obligation to ensure access to justice for all persons and, if any fee is required, it should be reasonable and should not impede access to justice.

The Fair Administrative Action Act, 2015[34] interprets "administrative action" to include- the powers, functions and duties exercised by authorities or quasi-judicial tribunals.[35] While this Act has no express provision requiring tribunals to use ADR within their procedures, Article 159 (2) (c) of the Constitution obliges courts and tribunals, in the exercise of judicial authority, to encourage parties to endeavor to resolve their disputes through ADR. It is on the basis of this provision that tribunals can competently employ the use of ADR mechanisms in discharging their constitutional and statutory mandate.

The major selling point of the ADR approaches of conflict management is their attributes of flexibility, low cost and lack of complex procedures. These attributes are no longer tenable in arbitration as it is gradually becoming as expensive as litigation, especially when the arbitral process is challenged in court. When the matter goes to court, it is back to the same old technicalities that are present in civil proceedings. There is thus a need for an increased use of ADR mechanisms in matters before tribunals in order to fully enjoy the main objective of tribunals: expeditious, efficient, lawful, reasonable and procedurally fair proceedings.

[34] Fair Administrative Action Act, No. 4 of 2015, Laws of Kenya.
[35] Ibid, sec. 2.

Even as the Judiciary seeks to entrench the use of ADR mechanisms within the country's justice system, it should not treat the transition process as a separate process and then later embark on streamlining the ways these tribunals operate. As they get absorbed into the judiciary, the tribunals should be reminded to encourage those who seek justice before them to explore ADR not only to fulfil the constitutional requirements but also to enjoy the potential benefits of ADR.

It must however be appreciated that the tribunals' jurisdiction is as varied as the statutes that donate such jurisdictions. Admittedly, some matters may not be ideal for management through ADR processes. However, this is a matter that can be decided on a case to case basis depending on the issues that arise from the case. Any legal and institutional framework to facilitate the use of ADR before tribunals should therefore consider the possibility of such differences arising and should thus be broad enough to distinguish between the matters.

Encouraging a higher uptake of ADR before tribunals will be a step in the right direction in a bid to enhance access to justice in Kenya and creating a culture of using ADR in the country. This will streamline the judicial system by minimising appeals from these tribunals to the Courts, eventually aiding in reduction or elimination of the backlog.

5. Conclusion

Tribunals are an important part of the justice system in Kenya. This is not only because of their potential to facilitate faster management and settlement of disputes but also their ability to deal with specialized matters under different statutes. This puts them at a better place to decide which specialized matters would ideally be resolved using ADR. These tribunals are however at a high risk of suffering from the challenges bedeviling the formal courts, such as high caseload leading to backlog and consequently delayed justice. Even as their oversight is transited to judiciary, there is a need to rethink their modes of operation by, inter alia, encouraging greater use of ADR mechanisms. This will go a long way in reducing the pressure on the tribunals and make them more accessible to a greater number of people. There is a need to integrate ADR in conflict management especially within the tribunals so as to enhance access to justice.

The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States

Abstract

With the anticipated the Singapore Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) coming into force in August 2019, this paper reflects on what the Convention holds for the African States. It offers some thoughts on how best these states can take advantage of the Convention to not only be at par with the rest of the world but also benefit from the same as far as trade and investments are concerned. The Paper makes some practical recommendations that countries can draw from as they embrace the Singapore Convention.

1. Introduction

This paper is inspired by the international trade and investment community's desire to come up with a formal legal framework meant to enhance recognition and enforcement of international mediation outcomes through the enforcement of the Singapore Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention[1]). While the Convention is set to come into force from August 2019[2], it raises some weighty issues especially in relation to the practice of mediation in Kenya and Africa in general. Notably, mediation is one of the Alternative Dispute Resolution (ADR) mechanisms that have global recognition due to its ability to resolve conflicts. Article 33 of the Charter of the United Nations outlines 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).[3] However, while these mechanisms are universally accepted, their practice generally varies from one society or jurisdiction to the other.[4]

International mediation involves different states or parties from different states, hence the international aspect. The trend has been that the outcome of a mediation is treated as a contractual agreement enforced as such and not as an award as in the case of arbitration.

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[1] Ministry of Law, Singapore, "Singapore clinches bid for UN Convention on Mediation to be named after Singapore," 21 Dec 2018. Available at *https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/UN-convention-on-mediation-to-be-named-after-Singapore.html* [Accessed on 3/4/2019].

[2] This Convention is open for signature by all States in Singapore, on 1 August 2019, and thereafter at United Nations Headquarters in New York (Article 10(1).

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

[4] Lindgren, M., Wallensteen, P., & Grusell, H., Meeting the New Challenges to International Mediation: Report from an International Symposium at the Department of Peace and Conflict Research, Uppsala University, Uppsala, Sweden, June 14-16, 2010, Department of Peace and Conflict Research, Uppsala University, 2010. Available at *https://www.pcr.uu.se/digitalAssets/667/c_667482-l_1-k_ucdp_paper_6.pdf* [Accessed on 3/4/2019].

This has always been a problem in many states in that one party may pull out of such an agreement and seek court intervention as if the mediation never took place. This thus necessitated the drafting of the Singapore Convention in a bid to address this challenge. The mechanism has also not been very popular in many countries, especially in Africa, as a reliable platform for management of international commercial disputes due to the uncertain nature of its outcomes.

It is on this basis that this paper analyses the Singapore Convention and the prospects and challenges that it holds for Kenya and the African continent.

2. Recognition and Enforcement of International Mediation Outcomes: Singapore Convention on International Settlement Agreements Resulting from Mediation

The need for the Singapore Convention was informed by the Parties' acknowledgement of a number of issues within the international sphere. To begin with, there was the recognition of the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably.[5] They also noted that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation, and that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.[6] These factors that created the need for the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations.[7]

The Convention is to apply to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that: at least two parties to the settlement agreement have their places of business in different States; or the State in which the parties to the settlement agreement have their places of business is different from either: the State in which a substantial part of the obligations under the settlement agreement is performed; or the State with which the subject matter of the settlement agreement is most closely connected.[8]

[5] Preamble, United Nations Convention on International Settlement Agreements Resulting from Mediation.
[6] Ibid, Preamble.
[7] Preamble, Convention on International Settlement Agreements Resulting from Mediation.
[8] Ibid, Article 1(1).

The applicability of the Convention however excludes settlement agreements: concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes; relating to family, inheritance or employment law.[9] It is also not apply to: settlement agreements: that have been approved by a court or concluded in the course of proceedings before a court; and that are enforceable as a judgment in the State of that court; and settlement agreements that have been recorded and are enforceable as an arbitral award.[10] The Singapore Convention defines "mediation" to mean a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.[11]

The Convention sets out some general principles meant to govern mediation settlements as follows: each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention; and if a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.[12]

The Convention also sets out the requirements for reliance on settlement agreements. The Convention requires that a party relying on a settlement agreement under this Convention should supply to the competent authority of the Party to the Convention where relief is sought: the settlement agreement signed by the parties; evidence that the settlement agreement resulted from mediation, such as: the mediator's signature on the settlement agreement; a document signed by the mediator indicating that the mediation was carried out; an attestation by the institution that administered the mediation; or in the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.[13]

However, the competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that: a party to the settlement agreement was under some incapacity; the settlement agreement sought to be relied upon: is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the

[9] Ibid, Article 1(2).
[10] Ibid, Article 1(3).
[11] Ibid, Article 2(3).
[12] Article 3, Convention on International Settlement Agreements Resulting from Mediation.
[13] Ibid, Article 4(1).

law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4; is not binding, or is not final, according to its terms; or has been subsequently modified; the obligations in the settlement agreement: have been performed; or are not clear or comprehensible; granting relief would be contrary to the terms of the settlement agreement; there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.[14]

In addition to the foregoing, the competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that: granting relief would be contrary to the public policy of that Party; or the subject matter of the dispute is not capable of settlement by mediation under the law of that Party.[15] Notably, under the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)*[16] public policy and arbitrability of certain matters are some of the grounds that recognition and enforcement of arbitral awards may be refused. Just like in arbitration, the Singapore convention will thus give state parties a huge leeway in determining the two grounds according to the domestic laws and policies.

The applicability of the Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.[17]

The Convention however allows a Party to the Convention to declare that: it shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration; it shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.[18]

Also noteworthy is the provision that a regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this

[14] Ibid, Article 5(1).
[15] Article 5(2), Convention on International Settlement Agreements Resulting from Mediation.
[16] United Nations, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).
[17] Article 7, Convention on International Settlement Agreements Resulting from Mediation.
[18] Ibid, Article 8.

Convention may similarly sign, ratify, accept, approve or accede to this Convention.[19] If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.[20]

The Convention is consistent with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (Model Law). This is intended to provide parties with the flexibility to adopt either the Singapore Convention or the Model Law as stand-alone legal instruments or both as complementary instruments in order to facilitate a comprehensive legal framework on mediation.[21] The Model Law, 2018, amends the Model Law on International Commercial Conciliation, 2002 and applies to international commercial mediation and international settlement agreements.[22] It covers procedural aspects of international commercial mediation including *inter alia* appointment of mediators, conduct of mediation, disclosure of information, termination of proceedings and resort to arbitral or judicial proceedings.[23] Further, it provides uniform rules on enforcement of settlement agreements and also addresses the right of a party to invoke a settlement agreement in a procedure.[24] It has been argued that creation of a uniform enforcement process for settlement agreements achieved through international mediation, the Singapore Convention and Model Law will begin to place mediation on an equal footing with arbitration and litigation as a method of international dispute resolution.[25] Adoption of this framework creates an assurance on the enforcement of settlement agreements and will boost the practice of international commercial mediation.

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[19] Ibid, Article 12(1).

[20] Article 13(1), Convention on International Settlement Agreements Resulting from Mediation.

[21] United Nations Commission on International on International Trade Law , "United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation") Available at *https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements* (Accessed on 06/12/2019)

[22] United Nations Commission on International Trade Law, "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation 200) Available *athttps://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation* (Accessed on 06/12/2019)

[23] Ibid, S 2

[24] Ibid,, S 3

[25] Hioureas. C, "The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?" Available at *https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1567&context=bjil* (Accessed on 06/12/2019)

In light of the ever growing international recognition of the place of ADR mechanisms, the Singapore Convention will potentially change the way international mediation will be carried out and enforced across the world especially in the areas of trade, commerce and investment. The Singapore Convention is meant to allow the party seeking to enforce a mediated settlement agreement to skip the step of litigation and go right to the enforcement. The convention provides a method for settling parties to directly enforce their mediated settlement agreements.[26] It is meant to be the equivalent of the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)* as far as mediation is concerned. The next section looks at some of the concerns that may arise in the course of implementation of this Convention especially in the context of the African countries.

3. Singapore Convention on International Settlement Agreements Resulting from Mediation: Prospects and Challenges for African States

Most of the jurisdictions in Africa have been doing a lot to promote ADR mechanisms. However, much of the efforts however, have been focusing on arbitration with the other ADR mechanisms getting less than important attention. Mediation law and practice in most jurisdictions in such jurisdictions such as Kenya is still at its infant stage and still more or less informal, with parties getting a wide scope of autonomy in either accepting or rejecting the outcome of mediation processes. Domestic mediation still suffers from the litigious nature of the commercial community in African countries and mediation is yet to be considered mainstream. In fact, Kenya is among the countries that have made attempts at mainstreaming mediation in the commercial world by setting up such frameworks as the court annexed mediation, which is mandatory for certain cases.[27] The debate has not only been on the approach to be adopted in referring cases to mediation but also on whether there should be formal legislation on mediation. Despite this, there is a policy on mediation that is being prepared in Kenya as a way of mainstreaming the use of mediation in the country. However, there is still no institution that is exclusively dedicated to mediation as may be found in other jurisdictions such as Singapore. Institutions such as Strathmore Dispute Resolution Centre[28] and Nairobi Centre for International Arbitration Centre[29] offer mediation services alongside arbitration. There is therefore inadequacy of an efficient and harmonised framework for cross-border enforcement of settlement agreements resulting from mediation which is a major

[26] Patrick R. Kingsley, "The Singapore Convention on Mediation: Good News for Businesses," January 09, 2019. Available at *https://www.law.com/thelegalintelligencer/2019/01/09/the-singapore-convention-on-mediation-good-news-for-businesses/* [Accessed on 10/4/2019].

[27] The Pilot Project on Court Annexed Mediation in Kenya commenced on 4th April, 2016 at the Family Division and Commercial and Admiralty Division of the High Court in Nairobi. The Project has since been extended to cover other stations around the country.

[28] *https://strathmore.edu/sdrc/*

[29] Established under Nairobi Centre for International Arbitration Centre Act, No. 26 of 2013, Laws of Kenya.

challenge to the use of mediation within the commercial community within the African continent. However, while these developments are good for the domestic mediation, there is still need for setting up infrastructure that promotes international mediation as mediation resulting from or capable of enforcement as court decisions are excluded from the Singapore Convention's scope.

Various jurisdictions such as Singapore have done a lot to set up various institutions to promote arbitration and other ADR mechanisms, including the Singapore International Arbitration Centre (SIAC), Singapore International Mediation Centre (SIMC), and Singapore International Commercial Court (SICC) and Maxwell Chambers to provide a full suite of dispute resolution services for international commercial parties to resolve their disputes in Singapore.[30] Singapore has also enacted the Mediation Act 2017, which provides, among other things, for the recording of mediated settlement agreements as orders of court, and facilitates the enforcement of mediated settlement agreements.[31]

Thus, while many jurisdictions outside Africa have shown great strides in promoting mediation as a means to resolve cross-border commercial disputes, there is not much evidence of the same happening in the African continent. This may be attributed to many factors. However, one of the major factors may be the fact that mediation in Africa has always been considered to be an informal mechanism. This has not only affected efforts to absorb it as a formal mechanism but has also made it difficult to document how and where it is practised. For instance, mediation in the customary, communal and informal setting has operated and functioned within the wider societal context in which case it is influenced by factors such as the *actor*s, *their communication*, *expectation*s, *experience*, *resource*s, *interest*s, and *the situation in which they all find themselves* (emphasis added).[32] It is thus not a linear cause-and-effect interaction but a reciprocal give-and-take process.[33]

There is not enough data to rely on in marketing African countries as a preferred venue for international mediation. As already pointed out, much of the efforts have been directed at promoting arbitration. The question therefore is whether the Singapore Convention on mediation holds any benefits for the African continent in general. While

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[30] Ministry of Law, Singapore, "Singapore clinches bid for UN Convention on Mediation to be named after Singapore," 21 Dec 2018. Available at *https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/UN-convention-on-mediation-to-be-named-after-Singapore.html* [Accessed on 3/4/2019].

[31] Ibid.

[32] United Nations Development Programme, et al, 'Informal Justice Systems: Charting A Course For Human Rights-Based Engagement,' 2012; see also Albrecht, P., et al (eds), 'Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform,' (International Development Law Organization, 2011).

[33] See Eilerman, D., 'Give and Take - The Accommodating Style in Managing Conflict,' August 2006, available at *http://www.mediate.com/articles/eilermanD5.cfm* [Accessed on 10/04/2019].

the Convention is meant to address the lack of an effective means to enforce cross-border commercial mediated settlement agreements across the globe, the uncertainty on the state of international mediation practice across the African continent makes it difficult for the businesses community in Africa to incorporate international mediation in their agreements to settle their cross-border commercial disputes. Mediated settlement agreements thus face a hurdle when it comes to enforcement.

The Singapore Conventional on Mediation is expected to be widely endorsed, and in turn will create significant momentum in favour of the use and recognition of the mediation of international disputes just as the New York Convention led to a rise in the use and recognition of arbitration.[34] However, if African countries are to benefit from this Convention and avoid a situation where they have to run after the rest of the world to catch up as has been the case with international mediation, there is need to put in place structures that not only support informal mediation, but also promote international mediation. Just like in arbitration where national laws are required in recognition and enforcement of international arbitration awards, the courts of a contracting party under the Singapore Convention will be expected to handle applications either to enforce an international settlement agreement which falls within the scope of the Convention or to allow a party to invoke the settlement agreement in order to prove that the matter has already been resolved, in accordance with its rules of procedure, and under the conditions laid down in the Convention. It is thus important that African states consider putting in place some framework to support the application and implementation of the Singapore Convention.

This is the only way that they will take advantage of the Singapore Convention on Mediation to not only enforce international mediation outcomes within their territories but also offer venues for carrying out mediations that may stand the test of time and be enforced in other jurisdictions around the world on the basis of the Singapore convention. It is the high time that African States not only acceded to the Singapore Convention but also promote the growth of international mediation practice alongside international arbitration as part of opening up Africa as a suitable option to the global business community when seeking venues for management of international commercial disputes through mediation as well as qualified international mediators in Africa.

Embracing Singapore Convention may therefore facilitate the growth of international commerce and promote the use of international mediation around the world without excluding Africa as evidenced in international arbitration[35]. A lot more needs to be done

[34] Patrick R. Kingsley, "The Singapore Convention on Mediation: Good News for Businesses," January 09, 2019.

[35] Muigua, K., 'Promoting International Commercial Arbitration in Africa,' Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution, Volume 5, No 2, (2017), pp. 1-27.

because the use of international commercial mediation within the business community in the African continent is currently still relatively rare compared with international commercial arbitration.

4. Getting the Best out of the Singapore Convention on International Settlement Agreements Resulting from Mediation

As already pointed out, if African countries are to avoid a situation where they struggle to set up a framework too late in the day as has been the case with international arbitration, they should take some conscious steps to enable them to effectively utilise the Convention.

There is a need to set up legal and institutional frameworks at the state level in order to facilitate the uptake and practice of mediation. The legal framework should among other things, provide for who should act as the competent authority for the purposes of the Convention. It is worth mentioning that while the Convention provides for a 'competent authority's' mandate under the Convention, there is no definition of who entails such authority. As such, it seems like state parties are given the discretion to define such authority. Under the New York Convention on arbitration, it is the national courts that perform similar functions as those of the competent authority (in Singapore Convention) as far as arbitration is concerned. There may therefore be a need to clearly define under the national laws who will play the role of the competent authority. Even where it is the national courts that will take up this mandate, this should be clearly defined in a legal instrument for clarity and certainty especially to the international community. One thing that must however be very clear in the national framework is that the competent authority should be independent and self-sustaining.

In the Kenyan context, this role may either be given to the Nairobi Centre for International Arbitration which envisages the practice of international mediation in its framework or, at the risk of multiplicity of institutions in the country, have it working closely with another independent institution solely dedicated to mediation practice as is the case in Singapore.

There is also a need to recognise and mainstream informal mediation. At the moment, it is arguable that a lot of mediators (who mostly deal with informal mediation) are left out. The Preamble to the Convention states that one of its objectives is "the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, *social and economic systems* would contribute to the development of harmonious economic relations (emphasis added)." It is therefore possible that African states can still retain the practice of traditional mediation especially for domestic mediation while still making itself appealing to the global business community with respect to international mediation. This is especially important

considering that the Singapore Convention will not apply to settlement agreements concluded for personal, family or household purposes by one of the parties (a consumer), as well as settlement agreements relating to family, inheritance or employment law.

The national structure should therefore take into account the role of culture in conflict management. Mediation is culture specific. Mediation may not be globalized at the local level.[36] In order to fully capture the spirit of mediation at the local level, there may be a need for public awareness and participation in the making of a national framework for mediation. The National framework can borrow from the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 with or without amendments. The procedural aspects of the Model Law covering the appointment of mediators, conduct of mediation and resort to judicial proceedings can be adopted. There is need to ensure that the language used in mediation is acceptable to the parties. In Kenya, this could be English, Kiswahili and other local languages with translations provided.

As a way of ensuring a higher rate of success, there is a need to rally support from the business community and collaborate with such institutions as the International Chamber of Commerce, Kenya Private Sector Alliance (KEPSA), Central Organization of Trade Unions (COTU-K) and Kenya Association of Manufacturers (KAM), among others. Its success depends on not only the legal fraternity but also ensuring that everyone buys the idea and runs with it.

5. Conclusion

The drafting of the Singapore Convention is a step in the right direction: actualising Article 33 of the United Nations Charter. Africa should fully embrace and participate as a way of boosting trade and investments. Signing up for the Convention may be a good way of bypassing and ultimately setting standards of recognition and enforcement of mediation outcomes in the face of potential multiplicity of mediation laws in different states, just as is the case with international arbitration. African Countries can use the mediation Model Law as a basis for implementation of the Singapore Convention.

There are prospects-these should be harnessed. Challenges should be identified and dealt with to ensure a smooth uptake and operation of the Convention. The Singapore

[36] Agulanna, C., "Community and Human Well-Being in an African Culture," Trames: A Journal of the Humanities & Social Sciences, Vol.14, No. 3, 2010; Nussbaum, B., "African culture and Ubuntu," Perspectives, Vol.17, No. 1, 2003, pp.1-12; Tarayia, G. N., "The Legal Perspectives of the Maasai Culture, Customs, and Traditions," Arizona Journal of International & Comparative Law, Vol. 21, No. 1, 2004, pp.183-913; Idang, G.E., 'African culture and values,' Phronimon, Vol.16, No.2, 2015, pp.97-111; Kassa, G.N., "The Role of Culture and Traditional Institutions in Peace and Conflict: Gada System of Conflict Prevention and Resolution among the Oromo-Borana." Master's thesis, 2006. Available at http://urn.nb.no/URN:NBN:no-17988 [Accessed on 13/04/2019].

Convention represents an idea whose time has come. It can work to advance mediation as a facilitator of trade and business relations.

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

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 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

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

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 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]

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[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.

[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.

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]

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]

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[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.

[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.

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]

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

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[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

[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.

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. 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.

[21] Muigua, K., Resolving Conflicts through Mediation in Kenya, (Glenwood Publishers, 2012). pp. 27-28.

[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]

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 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]

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

[27] Ibid, at p. 150.

[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.

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 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:

> *"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.*

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

> *(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:

6. 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.

7. 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 including* ***reconciliation****, mediation, arbitration and tradition dispute resolution mechanism. He urged the court to consider the case as sui generis as the parties have*

[32] Criminal Miscellaneous Application 79 of 2017.

> *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] 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

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

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

[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*

> *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.*

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

[39] Article 259(1), Constitution of Kenya 2010.
[40] Criminal Application No. 271 of 1985 (1986).

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 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)*".

[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

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 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

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[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.
[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.

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 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

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[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.

[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.

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 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*

[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.

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

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.*

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 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

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[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.

[58] Article 159 (3), Constitution of Kenya.

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 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

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[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.

[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.

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, 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

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

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.

Management of Disputes at the Domestic and International Levels through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

1. Introduction

This paper critically discusses the opportunities that come with using Alternative Dispute Resolution (ADR) Mechanisms as well as the challenges that also arise in the context of domestic and international disputes management. Notably, the paper goes beyond the legal and institutional issues surrounding the practice of ADR to look at the contemporary issues that arise therefrom.

2. Need for Effective Management of International Commercial Disputes

International commercial disputes can escalate into major trade conflicts with serious political and economic repercussions, hence the increased need for fast and efficient dispute resolution through extra judicial means rather than litigation in national courts.[1] Globalization has made the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions not only desirable but also invaluable.[2]

3. Spectrum of ADR Mechanisms at the International Level: Merits and Demerits

ADR mechanisms have been associated with a number of advantages over litigation, and are generally hailed as expeditious, cost effective and lenient on procedural rules. While it is to be acknowledged that in some jurisdictions such as the United Kingdom ADR is purely alternative to litigation, ADR mechanisms form an important part of conflict management mechanisms in Kenya and Africa in general.[3] At an international level, the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they states or individuals is Article 33 of the Charter of the United Nations[4] which outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to.[5] It provides that *the parties to any dispute shall, first of all*

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[1] Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," Ohio St. J. on Disp. Resol. 13 (1997): 675, at p. 675.

[2] Alternative Dispute Resolution Methods, Document Series No. 14, page 2, Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000). Available at *http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf*

[3] See generally, Muigua, K., 'Effective Justice for Kenyans: is ADR Really Alternative**?'** The Law Society of Kenya Journal, Vol. II, 2015, No. 1, pp. 49-62.

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

[5] See generally Eunice R. Oddiri, Alternative Dispute Resolution, paper presented by author at the Annual Delegates Conference of the Nigerian Bar Association, 22nd - 27th August 2004, Abuja, Nigeria. Available at http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESO

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).[6] ADR in this era of the 21st Century seeks to find domestically and internationally, a faster, economical and more efficient system that contrasts with litigation which is time consuming and expensive.[7] Concerned about efficiency of national court system in cross border disputes, foreign investors normally prefer mediation or arbitration. Dispute settlement through Arbitration/ADR is not only domestic but also an increasingly growing international phenomenon in the context of cross border transactions.[8]

The ADR mechanisms are mainly intended for conflict resolution and have, as their major selling point, their attributes of flexibility, low cost, lack of complex procedures, mutual problem solving, salvaging relationships and their familiarity to the common people.[9] For instance, negotiation allows parties to fully control both the process and the outcome through a mechanism which will not impose any outcome which is not mutually acceptable.[10] 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.[11] 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.[12] If parties in a negotiation hit a deadlock, then they invite a third party of choice to help them resolve their matter and this becomes mediation.[13] Mediation is associated with same advantages as negotiation. However, it suffers from its

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LUTION.htm; See 'The Role of Private International Law and Alternative Dispute Resolution', Available at *http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap4.html*

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

[7] Muigua, K., "Heralding A New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya", Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution, Vol. 1, No 1, (2013), pp. 43-78 at p.55.

[8] Surridge & Beecheno, Arbitration/ADR Versus Litigation, September 4, 2006, Available at *http://www.hg.org/articles/article_1530.html*

[9] Muigua, K., 'ADR: The Road to Justice in Kenya' Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution, Vol. 2, No 1, (2014), pp. 28-95.

[10] See generally, Muigua, K., Resolving Conflicts through Mediation in Kenya (Nairobi: Glenwood Publishers, 2017).

[11] 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, pp. 773-780, ACM, 2003.

[12] Muigua, K., 'ADR: The Road to Justice in Kenya' Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution, Vol. 2, No 1, (2014), pp. 28-95.

[13] Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management (Nairobi: Centre for Conflict Research, 2006), p. 115.

non-binding nature so that where compliance is required, one would have to resort to courts to obtain the same since mediation does not have enforcement mechanism but relies on parties' goodwill.[14] Conciliation on the other hand involves a third party , called a conciliator, who restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions.[15] Conciliation is useful in reducing tension, opening channels of communication and facilitating continued negotiations.[16] It therefore follows that where there are already severed relationships which need restoration, conciliation would work best instead of litigation or any other mechanism such as arbitration which would exacerbate the situation.[17]

3.1 International Commercial Arbitration

Arbitration has gained popularity over time as the choice approach to conflict management especially by the business community due to its obvious advantages over litigation.[18] Perhaps the most outstanding advantage of arbitration over litigation is its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties confidence of realizing justice in the best way achievable. Countries and various regions around the world have thus embarked on promoting international arbitration as the best dispute settlement approach in international disputes.[19]

The business and investment community stands to benefit from international commercial arbitration in Africa as the same provides a viable system offering a proper mechanism for the settlement of international and regional disputes.[20] The system is cost efficient with venues in close proximity thus offering convenience. The existence of such a system has the capacity to boost cross-border trade and investment.[21] Effective and reliable application of international commercial arbitration has the capacity to encourage

[14] See generally, Muigua, K., 'Effective Justice for Kenyans: is ADR Really Alternative?' The Law Society of Kenya Journal, Vol. II, 2015, No. 1, pp. 49-62.

[15] Hajdú, J., The methods of alternative dispute resolution (ADR) in the sphere of Labour law. na, 1998. Available at *http://acta.bibl.u-szeged.hu/6976/1/juridpol_054_fasc_008_001-078.pdf*

[16] Hajdú, J., The methods of alternative dispute resolution (ADR) in the sphere of Labour law. na, 1998, op cit., p.16.

[17] Muigua, K., 'Effective Justice for Kenyans: is ADR Really Alternative?' op cit.

[18] See Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," Ohio St. J. on Disp. Resol. 13 (1997): 675 at p.678.

[19] Karl P. S. and Federico O., Improving the international investment law and policy regime: Options for the future, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at *http://www.formin.finland.fi/public/download.aspx?ID=113259&GUIDE*

[20] Muigua, K., 'Promoting International Commercial Arbitration in Africa,' Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution, Volume 5, No 2, (2017), pp. 1-27.

[21] Africa ADR – a new African Arbitration Institution, Op. Cit.

investors to carry on business with confidence knowing their disputes will be settled expeditiously.[22]

3.2 Conciliation

This process is similar to mediation except for the fact that the third party can propose a solution. Its advantages are similar to those of negotiation. It has all the advantages and disadvantages of negotiation except that the conciliator can propose solutions making parties lose some control over the process. Conciliation works best in trade disputes.[23] Conciliation is different from mediation in that the third party takes a more interventionist role in bringing the two parties together.[24] In the event of the parties are unable to reach a mutually acceptable settlement, the conciliator issues a recommendation which is binding on the parties unless it is rejected by one of them. While the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, it is not a determinative role. A conciliator does not have the power to impose a settlement.[25] This is a reflection of the *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law*.[26]

4. Management of International Commercial Disputes: Challenges and Opportunities

Commercial and international trade disputes are unavoidable. Because of this, efficient mechanisms for their management are essential. The mechanisms now universally used for their management are negotiation, mediation, arbitration and conciliation. These mechanisms work best when a well-resourced, neutral and credible body administers the process.[27] However, there are a number of potential hurdles that the dispute resolvers

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[22] Suvanpanich, T., "International commercial arbitration in Laos, Thailand and Vietnam: comparative perspectives in the light of the UNCITRAL model law, and the reference to the arbitration laws of England and People's Republic of China," PhD diss., 2001. Available at *https://qmro.qmul.ac.uk/jspui/handle/123456789/1608*

[23] Sgubini, A., Prieditis, M. and Marighetto, A., "Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective," Bridge Mediation LCC (2004). Available at *https://www.mediate.com/articles/sgubinia2.cfm*

[24] Sgubini, A., Prieditis, M. and Marighetto, A., "Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective," op cit.

[25] Law Reform Commission, Consultation Paper on Alternative Dispute Resolution, July 2008, Op cit. p. 49; See also Office of the Information Commissioner, "Understanding the conciliation process: External review guide for parties", Understanding the conciliation process – External review guide (Jan 2018), available at *https://www.oic.wa.gov.au/Materials/ExternalReviewGuides/Understanding%20the%20conciliation%20process.pdf*

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

[27] "Africa ADR – a new African Arbitration Institution", available at *http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution*

should be aware of to ensure successful management of these disputes, as discussed herein.

4.1 Overcoming Cultural Barriers

It has been argued that international commercial disputes occur for a number of reasons, most of which stem from difficulties in communication especially when parties come from different countries due to cultural differences.[28] The more dissimilar their cultures of origin, the greater the potential for inaccurate perceptions, strong emotions and misunderstandings between parties when they attempt to form a relationship or negotiate a dispute.[29] In addition, business people new to international commerce are at an enormous disadvantage if they are unaware of the cultural sensitivities of those with whom they conduct business, since cultural mistakes can affect profitability and competitiveness.[30]

Culture, including language, is the acquired knowledge that members of a given community use to subconsciously interpret their surroundings and guide their interaction with others. Individuals from the same culture use their shared background to decipher each other's statements and actions.[31] This may thus affect the choice or appointment of dispute resolvers since, despite there being individuals with the relevant knowledge, skill and experience needed for international dispute resolution and the institutions, which specialize in, or are devoted to, facilitating alternative dispute resolution (ADR), there has been a general tendency by parties to a dispute doing business in Africa to go back to their home turfs to appoint arbitrators or other dispute resolvers. This is so because parties are given the autonomy to appoint their arbitrators, conciliators or representatives and cannot be forced to accept the choice of arbitrator involuntarily unless under very limited and special circumstances. Arbitration is intended to be a voluntary process.[32]

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[28] Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," Ohio St. J. on Disp. Resol. 13 (1997): 675, at p. 676; See also Mills, K., "Cultural Differences & Ethnic Bias in International Dispute Resolution an Arbitrator/Mediator's Perspective," Transnational Dispute Management (TDM) 3, no. 4 (2006).

[29] Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," op cit., at p. 676; see also Gray, S., "A study of Negotiation Styles: Between business managers from UK and Indian cultural backgrounds." (2012). Available at *https://www.theseus.fi/bitstream/handle/10024/48611/Culture%20Dissertation%20by%20Sasha%20Gray.pdf?sequence=1&isAllowed=y*

[30] Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," op cit., at pp. 676-677; See also Deari, H., Kimmel, V. and Lopez, P., "Effects of cultural differences in international business and price negotiation." (2008). Available at *http://www.diva-portal.org/smash/get/diva2:206119/fulltext01*

[31] Ibid, at p. 676.

[32] Lew, J., 'Comparative International Commercial Arbitration', 237, [London: Kluwer Law International, 2003]; See also generally, Fagbemi, Sunday A. "The doctrine of party autonomy in international commercial arbitration: myth or reality?" Journal of Sustainable Development Law and Policy (The) 6, no. 1 (2015): 202-246.

Non-African disputants have always been wary of the African international commercial arbitrators especially where one of the disputants is African due to cultural differences.[33] These differences may be in reference to economic, political and/or legal developments thus creating varying opinion of issues, prejudices and conflicts of interests especially in international economic relations. Some may seek to subject their dispute to another arbitrator who may not share a culture with either of the disputants but one aware of international best practices in arbitration.[34]

Some scholars have argued that international commercial disputes are best resolved through use of Alternative Dispute Resolution (ADR) methods that are compatible with the cultural backgrounds of the disputants, and secondly, that, no matter which ADR method- negotiation, conciliation, arbitration or a hybrid process-is ultimately selected, a third-party facilitator well socialized in the cultures of the disputants can best help the disputants quickly reach an amicable agreement.[35] However, there is a need for the careful consideration of ADR methods and choice of facilitator to fit the cultural backgrounds of the parties.[36] The efficacy of a particular method of dispute resolution largely depends upon the cultural backgrounds of the disputants.[37]

4.2 Need For Regulation of Cost?

There have not been very clear guidelines on the remuneration of arbitrators and other dispute resolvers especially in Africa 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. This is because the issue is more often than not left to the particular institutional guidelines, which institution may not be favorable to the parties. For instance, the Kenyan branch of Chartered Institute of Arbitrators has its own rules and guidelines on the remuneration of its arbitrators. However, these are only applicable to those who practice arbitration under the Institute and thus have limited applicability.[38]

The major selling point of the ADR approaches of dispute resolution is their attributes of flexibility, low cost and lack of complex procedures. These attributes may no longer be

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[33] Muigua, K., 'Promoting International Commercial Arbitration in Africa,' Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution, Volume 5, No 2, (2017), pp. 1-27.

[34] See Russell J. Leng and Patrick Regan, 'Social and Political Cultural Effects on the Outcome of Mediation in Militarized Interstate Disputes', Available at *http://cdp.binghamton.edu/papers/socialeffects-full.pdf*

[35] Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture without Going to Court," Ohio St. J. on Disp. Resol. 13 (1997): 675, at p. 675.

[36] Ibid, at p.675.

[37] Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture without Going to Court," Ohio St. J. on Disp. Resol. 13 (1997): 675, at p. 677.

[38] See CIArb Kenya Website Available at *www.ciarbkenya.org*

tenable in arbitration as it is gradually becoming as expensive as litigation, especially when the arbitral process is challenged in court.[39] When the matter goes to court, it is back to the same old technicalities that are present in civil proceedings.

This challenge also brings in the other factor that is changing the face of arbitration; interference by courts. Ordinarily, courts are not supposed to inquire into the arena of the arbitral proceedings, even where the same are court mandated. Courts are entertaining all manner of applications by parties' intent on derailing the arbitral proceedings and thus delaying justice for all concerned.[40] This means then that parties are slowly losing confidence in the arbitral process at it makes no sense to engage in arbitration for years only for the dispute to end up in courts of law for determination. Different countries have different attitudes to the place of courts in ADR practice.[41]

4.3 ADR and its Applicability in Protection of Human Rights

The modern concept of human rights is based on various instruments considered as the international Bill of Rights, including: *Universal Declaration of Human Rights* (UDHR, 1948)[42]; *International Covenant on Civil and Political Rights (ICCPR, 1966)*[43] and its two Optional Protocols; and *International Covenant on Economic, Social and Cultural Rights*[44] *(ICESCR, 1966)*. Scholars have rightly observed 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

[39] Muigua, K., "Overview of Arbitration and Mediation in Kenya", A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations In Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6th May, 2011, p.11, Available at *http://www.chuitech.com/kmco/attachments/article/83/Overview%20of%20Mediation Kenya.pdf*

[40] Muigua, K., "Overview of Arbitration and Mediation in Kenya,"
Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations in Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6th May, 2011. (Available at *http://www.kmco.co.ke/index.php/publications*); cf. Republic v Architectural Association of Kenya & 3 others Ex Parte Paragon Ltd [2017] eKLR, Miscellaneous Application 466 of 2016.

[41] Aliment, R.J., "Alternative Dispute Resolution in International Business Transactions," Brief 38 (2008): 12; See also Kathy M.B. A., "Court referral to ADR: Criteria and research." (NADRAC, 2003); See also Nosyreva, E., "Alternative Dispute Resolution in the United States and Russia: A Comparative Evaluation," Ann. Surv. Int'l & Comp. L. 7 (2001): 7; Bathurst, TF., "The role of the courts in the changing dispute resolution landscape," UNSWLJ 35 (2012): 870.

[42] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

[43] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

[44] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

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

Also of importance in this discourse is the fact that family law practitioners have frowned upon the use of ADR in resolving domestic violence for a number of reasons, perhaps with the exception of mediation.[48] Mediation, with its focus on communication and private resolutions that are specially tailored to the needs of individual parties, is considered closer to a therapeutic model than the method of adversarial dispute resolution embraced by the courts.[49] However, even mediating in the shadow of violence may well be impossible.[50] Those who oppose the use of ADR to resolve disputes involving spousal abuse do so based on the following potential problems: the power imbalance between men and women; the mediators' inability to provide to abused women (or men) the type of relief they need most, such as protection from violence, compensation, possession of home without the batterer, and security for children; and (3) ADR's more general societal consequences.[51]

It is perhaps in recognition of these reasons that Kenya's *Protection against Domestic Violence Act, 2015*[52] makes no provision for the use of ADR in resolving the matters falling within its scope, despite its enactment after the Constitution of Kenya 2010 which encourages the use of ADR and TDR in easing access to justice for all. The use of ADR in human rights issues that may emerge in some commercial disputes is thus not well established and may face legal hurdles in different jurisdictions.[53] However, if ADR

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[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*

[46] Ibid.

[47] Ibid.

[48] Cf. Wendy K., "It's Arbitration, But Not As We Know It: Reflections on Family Law Dispute Resolution," International Journal of Law, Policy and the Family, Volume 30, Issue 1, 1 April 2016, Pages 1–31, *https://doi.org/10.1093/lawfam/ebv017*

[49] Imgrogno, A.R., "Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression," Ohio St. J. on Disp. Resol. 14 (1998): 855 at p. 858.

[50] Ibid, p. 864.

[51] Imgrogno, A.R., "Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression," p. 860; 865.

[52] Protection against Domestic Violence Act, Act No. 2 of 2015, Laws of Kenya. The Act was enacted to provide for the protection and relief of victims of domestic violence; to provide for the protection of a spouse and any children or other dependent persons, and to provide for matters connected therewith or incidental thereto.

[53] "Alternative Dispute Resolution In Rights-Based Disputes: Mediation In Britain Today," available at *http://www.equineteurope.org/IMG/pdf/Mediation_White.pdf*

mechanisms could be applied in a way that conforms to International Human Rights standards they can play a major role in the management of disputes. ADR mechanisms focus on the interests and needs of the parties to the conflict as opposed to positions, which approach is contrary to the formal common law and statutory law practices.[54] These are capable of ensuring that justice is done to all by addressing the concerns of the poor and vulnerable in the society through legally recognized but more effective means.

4.4 The Challenge of Arbitrability

Arbitrability is used to refer to the determination of the type of disputes that can be resolved through arbitration and those which are the domain of the national courts. It deals with the question of whether specific classes of disputes are barred from arbitration because of the subject matter of the dispute.[55] Courts often refer to "public policy" as the basis of the bar.[56] The challenge arises when a matter that is arbitrable in one jurisdiction fails the test of arbitrability in a different jurisdiction.[57]

Arbitrability may either be subjective or objective.[58] National laws often restrict or limit the matters, which can be resolved by arbitration. Subjective arbitrability refers to a situation where states or state entities may not be allowed to enter into arbitration agreements at all or may require a special authorization.[59] Objective arbitrability refers to restrictions based on the subject matter of the dispute.[60] Certain disputes may involve such sensitive public policy or national interest issues that it is accepted that they may be dealt only by the courts, for instance criminal law.[61]

5. Code of Ethics

There is likelihood that there is going to be a flood of mediators, arbitrators and conciliators if training efforts are enhanced. The major problem will be regulating Independent practitioners unless it is made compulsory that every practitioner must

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[54] See Roger Fisher, William Ury & Bruce Patton, Getting to Yes-Negotiating Agreement Without Giving in, (3rd Ed. (Penguin Books, United States of America, 2011) p.42.

[55] Laurence S., "Defining 'Arbitrability'-The United States vs. the rest of the world", New York Law Journal, 2009, available at *http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf*

[56] Ibid, p. 1.

[57] Baron, P.M. and Liniger, S., "A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany," Arbitration International 19, no. 1 (2003): 27-54.

[58] Sajko, K., "On arbitrability in comparative arbitration-an outline," Zbornik Pravnog fakulteta u Zagrebu 60, no. 5 (2010): 961-969.

[59] Hanotiau, B., "The law applicable to arbitrability," SAcLJ 26 (2014): 874.

[60] Ibid.

[61] Buchanan, M.A., "Public policy and international commercial arbitration," American Business Law Journal 26, no. 3 (1988): 511-531; Mourre, A., "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator." Arbitration International 22, no. 1 (2006): 95-118.

belong to a professional body. This way it will be easier to come up with an effective code of ethics and with better mechanisms of enforcement for their regulation.[62]
Unlike legal practice that is usually regulated by a professional body and generally locks out foreigners, ADR practice may not enjoy such protection and direct regulation thus presenting a challenge on how practitioners should be regulated to maintain high quality and protect parties from malpractice.[63]

6. Way Forward

ADR mechanisms such as negotiation, conciliation and mediation bear certain attributes that can be tapped and lead to justice and fairness especially in commercial disputes. These attributes include party autonomy, flexibility of the process, non-complex procedures and low cost.[64]

There is a need to employ mechanisms that will help promote and encourage higher uptake of ADR mechanisms in management of disputes at both national and international levels, especially in the management of international commercial disputes. While there is a need to put in place adequate legal regimes and infrastructure for the efficient and effective management of international commercial disputes, ADR practitioners and institutions should be aware of the aforementioned potential pitfalls as they may affect the effectiveness of the different processes both at the national and international levels.

The Law Commission in Dublin observes that 'Alternative dispute resolution must be seen as an integral part of any modern civil justice system. It must become such a well-established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as

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[62] See Gislason, A.F., "Demystifying ADR neutral regulation in Minnesota: the need for uniformity and public trust in the twenty-first century ADR system," Minn. L. Rev. 83 (1998): 1839; See also Clapshaw, D. and Freeman-Greene, S., "Do we need a mediation Act? Part 1," ADR Bulletin 6, no. 4 (2003): 1; Haertling, J., "Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads," European Business Organization Law Review 13, no. 4 (2012): 639-642; See also Sourdin, T.M., "Legislating for Alternative Dispute Resolution: A Guide for Government Policy Makers and Legal Drafters," (NADRAC, 2006). Available at *https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Legislating%20for%20Alternative%20Dispute%20Resolution.PDF ; Menkel-Meadow*, C., "Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-formal'." (2013). Available at *https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=2300&context=facpub*

[63] See Nolan-Haley, J.M., "Lawyers, non-lawyers and mediation: rethinking the professional monopoly from a problem-solving perspective," Harv. Negot. L. Rev. 7 (2002): 235.

[64]What is Alternative Dispute Resolution (ADR)? - African Mediation And Community Service. *Available at http://www.metros.ca/amcs/international.htm;* See also Muigua, K., Reflections on ADR and Environmental Justice in Kenya, p.1.
Available at http://www.chuitech.com/kmco/attachments/article/97/Reflections.pdf

standard considerations like what, if any, expert evidence is required.'[65] They go on to state that while litigation must always remain available for clients, this can be a very stressful undertaking and should be seen as the final place for resolving a dispute.[66]

It is essential that in the application of ADR and to achieve a just and expeditious resolution of disputes, the Bill of rights as enshrined in the constitution must at all times be kept in mind and upheld.[67]

7. Conclusion

Domestic and international commercial disputes ought to be resolved expeditiously in order to ensure that the business community and investors can smoothly carry on business. However, while there are legal and institutional issues relating to ADR practice that must be streamlined to ensure effective management of commercial disputes through ADR, there are always other indirect factors that must be taken care of, as highlighted in this paper. This paper has highlighted and examined some of these factors that come with the use of ADR mechanisms in managing domestic and international commercial disputes. There is a need for ADR practitioners as well as the ADR institutions to pay attention to these potential pitfalls as they may affect the effectiveness of ADR processes and outcomes despite the existence of efficient infrastructural and legal frameworks.

ADR mechanisms can rightly be referred to as Appropriate Dispute resolution mechanisms instead of alternative as the use of the word 'alternative' makes them appear inferior to litigation while this is not the case. The reality is that these mechanisms should at least be treated as equal if not better mechanisms when compared to litigation. These have the potential for being made applicable in all walks of life wherever there exist possibilities of any dispute, a potential only waiting to be tapped. This is the time to recognize that alternative dispute resolution mechanisms stand independently and not as an alternative to any adjudicatory process.[68] Management of disputes at the domestic and international levels through ADR mechanisms despite its challenges is an exercise worth pursuing.

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[65] Law Reform Commission, Consultation Paper on Alternative Dispute Resolution, July 2008, P. 34. Available at *http://www.lawreform.ie 20papers/cpADR.pdf.*

[66] Ibid.

[67] Articles 19-51, Constitution of Kenya, 2010

[68] Laxmi Kant Gaur, Why I Hate 'Alternative' in "Alternative Dispute Resolution", p. 4. Available at *http://delhicourts.nic.in/Why_I_Hat1.pdf*

Towards an Overarching Policy: Understanding Kenya's Alternative Dispute Resolution Mechanisms Landscape and Culture

Abstract

Commercial disputes are considered as part and parcel of doing business the world over. While parties to contracts attempt and rely on the other side's commitment in delivering on their part of the bargain, there is always the likelihood of emergence of disputes and thus, there is always a need to have in place a dispute settlement procedure to address such disputes. The use of wrong forums or mechanisms in dealing with such disputes has nearly as adverse effects on the business relations as failure to settle the disputes at all. As such, parties and states are always seeking the best available alternatives to handle arising commercial disputes. This paper discusses the place of ADR in effective management of commercial disputes in Kenya and the need for a responsive and adaptive policy, legal and institutional framework that addresses the unique needs and characteristics of the business community and related disputes.

1. Introduction

This paper discusses the practical challenges that hinder the growth of commercial disputes settlement sector in the country by assessing Kenya's legal system's responsiveness, adaptability and effectiveness in managing commercial disputes using Alternative Dispute Resolution mechanisms (ADR). The discourse is based on the need for a system that appreciates the unique characteristics and needs of the business community, both domestic and international, as far as management of commercial disputes is concerned. In order to achieve this, the paper discusses the nature and management of commercial disputes in the international arena and the main elements that make ADR the most appropriate mechanisms in dealing with these disputes across different jurisdictions. It then deals with Kenya's ADR landscape and culture and examines the need for an overarching policy, legal and institutional framework to govern the same and make it efficacious.

2. The Nature of Commercial Disputes: The Practical Challenges in Management of Commercial Disputes

Commercial disputes have been defined as disputes arising in connection with trading contracts between enterprises or disputes commercial concerns and ultimate consumers.[1] Commercial disputes may also be international or domestic in nature, or between business entities or between business entities and consumers.[2]

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[1] Ferguson, R.B., "The Adjudication of Commercial Disputes and the Legal System in Modern England,"
British Journal of Law and Society, Vol. 7, No. 2 (winter, 1980), pp. 141-157 at p.141.

[2] See generally, Perritt Jr, H.H., "Dispute Resolution in Cyberspace: Demand for New Forms of ADR," Ohio State Journal on Dispute Resolution, 15, 2000, p.675; Oddiri, E.R., Alternative Dispute Resolution, Presentation at the Annual Delegates Conference of the Nigerian Bar Association, 22ND - 27TH AUGUST 2004, Le Meridien Hotel – Abuja, available at

At the international level, commercial disputes may be dealt with using either ADR mechanisms such as international commercial arbitration, conciliation and mediation, or be settled through international commercial litigation before either tribunals or specialized courts for commercial and trade law.[3] International commercial arbitration is defined as a system of private commercial law that enables firms to more effectively enforce contracts by allowing them to avoid inefficiencies that arise from domestic courts.[4] Use of specialized courts has been the practice in a number of countries where commercial law disputes have long since been decided by specialized courts, in jurisdictions such as England, France and in various German-speaking countries.[5] Notably, judicial proceedings as a means of settling commercial disputes are commonly used in litigation involving parties of the same nationality.[6] Disputes are submitted before the courts of the country in which the parties are nationals.[7] However, if parties are not residing at the same place, it then becomes necessary to determine at the outset the proper local seat of the court, where the parties can resolve this issue by including of a choice of forum clause in their contract.[8] Where parties fail to stipulate any provision regarding settling disputes,

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http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.htm [Accessed on 29/05/2018]; Schreuer, C., "The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes. unpublished paper) < *www. univie. ac. at/intlaw/wordpress/pdf/81_csunpublpaper_, 1, 2006; Durosaro, W.O., "The Role of Arbitration in International Commercial Disputes," International Journal of Humanities Social Sciences and Education (IJHSSE), Vol. 1, Issue 3, March 2014, pp.1-8; Emery, C., "International Commercial Contracts,"* March 2016, available at
http://www.nyulawglobal.org/globalex/International_commercial_contracts.html [Accessed on *29/05/2018]; Wolski, B., "Using dispute systems design to identify, explain and predict trends in the settlement of international commercial disputes: the UNCITRAL and ICC ADR initiatives," International Journal of Private Law, Vol.6, No.2, 2013, pp.132-149; Houzhi, T., "Mediation is developing around the world," Asia Pacific Law Review, 17(sup1), 2009, pp.31-37; Sanders, P.,* "UNCITRAL's Model Law on International Commercial Conciliation" Arbitration International, Vol. 23, No.1, 2007, pp.105-142.

[3] See generally, Wolski, B., "Recent Developments in International Commercial Dispute Resolution: Expanding the Options," Bond Law Review, Vol. 13, No.2, 2001, p.2.

[4] Myburgh, A. and Paniagua, J., "Does International Commercial Arbitration Promote Foreign Direct Investment?" The Journal of Law and Economics, Vol. 59, No. 3 (August 2016), pp. 597-627 at p.597.

[5] Jeloschek, C., "The Netherlands Commercial Court: The Future of Litigation in International Commercial Disputes," Magna Charta, June 2016, pp. 100-105 at p.101.

[6] International Trade Centre (ITC), Settling Business Disputes: Arbitration and Alternative Dispute Resolution, (2nd ed. Geneva: ITC, 2016), p.17. Available at *http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Arbitration_English_Full%20A4_Low-res.pdf* [Accessed on 27/05/2018].

[7] Ibid., p.17.

[8] Ibid., p.17; See The Hague Convention on Choice of Courts Agreement, 44 I.L.M. 1294 (2005), which is to apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters. For the purposes of Chapter II, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State. (3) For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought (Article 1).

when a dispute arises, courts are called upon to determine which tribunal has the jurisdiction either using conflict of law rules or by examining bilateral or multilateral treaties, a process that may result in considerable delay and in significant increased costs.[9] Despite the availability of litigation, it is noteworthy that around the globe and throughout history, the commercial community has often shunned litigation before courts and preferred specialized tribunals as a result of businessmen's demands for three things: *a quicker and cheaper administration of justice; a less capricious decision-making procedure; and the ascription of priority in adjudication to norms based on commercial usage* (emphasis added).[10]

It has been argued that 'merchants and traders were deterred from going before courts in many instances ... a variety of disputed cases is not pursued because the cost would be very much greater than the amount involved.[11] Tribunals of commerce were also preferred to the national courts on the basis that such courts or juries tended to lack the commercial acumen and experience which would enable them to understand the evidence: as a result, verdicts contrary to the weight of the evidence were not unusual. [12]

Notably, (1) this Convention is to apply to exclusive choice of court agreements - a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party; b) relating to contracts of employment, including collective agreements. (2) This Convention shall not apply to the following matters - a) the status and legal capacity of natural persons; b) maintenance obligations; c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; d) wills and succession; e) insolvency, composition and analogous matters; f) the carriage of passengers and goods; g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; h) anti-trust (competition) matters; i) liability for nuclear damage; j) claims for personal injury brought by or on behalf of natural persons; k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship; l) rights in rem in immovable property, and tenancies of immovable property; m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs; n) the validity of intellectual property rights other than copyright and related rights; o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract; p) the validity of entries in public registers (Article 2).

[9] See generally, the Convention On the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971 (Entry into force: 20-VIII-1979). This Convention applies to all decisions given by the courts of a Contracting State, irrespective of the name given by that State to the proceedings which gave rise to the decision or of the name given to the decision itself such as judgment, order or writ of execution. However, it shall apply neither to decisions which order provisional or protective measures nor to decisions rendered by administrative tribunals; See also Convention On the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965; See also Supplementary Protocol to The Hague Convention On the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971.

[10] Ferguson, R.B., "The Adjudication of Commercial Disputes and the Legal System in Modern England," op cit. at p.142.

[11] Ibid., at p.143.

[12] Ibid., p.143.

In addition to the foregoing, it has rightly been argued that the costs of commercial litigation are not limited to financial expenses borne in the first instance by the parties, but also include the social costs resulting from the paralysis of a judicial system.[13] As a direct consequence of that paralysis, citizens are also confronted by delays and costs in obtaining redress of their own grievances, particularly those of limited means.[14]

From a business point of view, business dealings can always give rise to disagreements and disputes, which makes dispute prevention and effective dispute resolution vital components of risk management for any company.[15] Notably, in the international context, there are additional difficulties involving various jurisdictions, different legal traditions, laws and procedures, and sometimes multiple languages. International trade disputes also entail high costs, which particularly affect small firms trading across borders.[16]

It has rightly been observed that commercial disputes that end in courts of law are always costly and usually bitter.[17] In addition, cases frequently drag through the courts for many years, and the ultimate winner of the lawsuit finds that he is out of pocket more than the amount of the judgment in their favor.[18] Courts also tend to favour their own nationals and thereby further animosity is created between peoples of different countries who grow suspicious of the kind of deal that they will get from foreign nationals.[19] Also noteworthy is the fact that courts of different countries have interpreted the rights and liabilities of buyers and sellers differently.[20] Public attention resulting from cases being aired in courts has also frequently added to the friction between disputants and has thereby created enough animosity to end business relationships.[21]

As a result of the foregoing circumstances, it is noteworthy that the commercial community's search for the most reliable, least capricious fact-finding procedure led it to by-pass the courts as a trial forum. Consequently, in this sense the legal system failed to meet commercial needs. In modern times, however, it has atoned for this failure by

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[13] Perlman, L. and Nelson, S.C., "New Approaches to the Resolution of International Commercial Disputes," The International Lawyer, 1983, pp.215-255 at p.218.
[14] Ibid., at p.218.
[15] International Trade Centre (ITC), Settling Business Disputes: Arbitration and Alternative Dispute Resolution, (2nd ed. Geneva: ITC, 2016), p.iii. Available at *http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Arbitration_English_Full%20A4_Low-res.pdf* [Accessed on 27/05/2018].
[16] Ibid, p.iii.
[17] Rosenthal, M.S., "Arbitration in the Settlement of International Trade Disputes," op cit., at p.809.
[18] Ibid., p.809.
[19] Ibid., p.809.
[20] Ibid., p.809.
[21] Ibid., p.809.

making formal provision for its own circumvention.[22] This is evidenced by the statutory requirements in many jurisdictions for parties to try out of court settlements before filing matters or even for the courts to refer matters to Alternative dispute resolution (ADR) mechanisms before hearing the parties. This requirement was even captured in the *Scott v Avery* Clause[23] which upheld a contract between two parties that they will submit any dispute between them to arbitration before taking any court action. *Scott v. Avery clauses* became standard in commercial contracts in and out of England from the 1850s.[24]

3. ADR and Access to Justice in Commercial Disputes: Nature, Merits and Demerits of Alternative Dispute Resolution Mechanisms

The foregoing section has highlighted some of the problems that have over time led to the use of ADR mechanisms such as arbitration in dealing with commercial disputes instead of litigation. ADR mechanisms refer to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.[25] The need for inclusion of ADR mechanisms under the current Constitution of Kenya 2010 was informed by the fact that in the past, litigation

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[22] Ferguson, R.B., "The Adjudication of Commercial Disputes and the Legal System in Modern England," op cit. at p.147.

[23] Scott v Avery 10 ER 1121 (1856); or 25 LJ Ex 308; or 5 HLC 811; See also Article ii (3) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards - The New York Convention, which provides that "the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed"; See also section 6, Arbitration Act, No. 4 of 1995 (No. 11 of 2009), Laws of Kenya, which provides as follows:

> 6. Stay of legal proceedings
> (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—
> (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
> (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
> (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
> (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

[24] Ferguson, R.B., "The Adjudication of Commercial Disputes and the Legal System in Modern England," op cit. at p.148.

[25] See also Alternative Dispute Resolution, Available at *http://www.law.cornell.edu/wex/alternative_dispute_resolution* [accessed on 23/05/2018]

has been the major conflict management channel widely recognised under our laws as a means to accessing justice. Litigation however did not and still does not guarantee fair administration of justice due to a number of challenges related to access to justice. These include high court fees, geographical location, complexity of rules and procedure and the use of legalese.[26] The court's role is also considered 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.[27] For the right of access to justice in commercial disputes to be realized, there has to be a framework based on the principles of: *expedition*; *proportionality*; *equality of opportunity*; *fairness of process*; *party autonomy*; *cost-effectiveness*; *party satisfaction* and *effectiveness of remedies* (emphasis added).[28] Recognition of ADR and traditional dispute resolution mechanisms is predicated on these cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system.[29]

In a report on access to justice in Malawi, the authors appropriately noted that *'access to justice* does not mean merely access to the institutions, but *also means access to fair laws, procedures, affordable, implementable and appropriate remedies in terms of values that are in conformity to constitutional values and directives*' (emphasis ours).[30] Based on such an argument, litigation cannot score highly especially in terms of speed and affordability. On a positive note, ADR mechanisms can be flexible, cost-effective, expeditious; may foster relationships; are non-coercive and result in mutually satisfying outcomes. They are thus more appropriate in enhancing access to justice by the poor in society as they are closer to them. They may also help in reducing backlog of cases in courts.[31] The net benefit to the

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[26]Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, Avoiding Litigation through the Employment of Alternative Dispute Resolution, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012.
Available at *http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf [15/05/2018].*

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

[28] See Maiese, M., "Principles of Justice and Fairness," in Burgess, G. and Heidi Burgess, H. (Eds.) "Conflict Information Consortium", Beyond Intractability, University of Colorado, Boulder (July 2003).

[29] Muigua, K., Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010, p. 6. Available at
http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf [21/4/2018]

[30] Schärf, W., et al., Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to The Poor of Malawi by The Lower Subordinate Courts and The Customary Justice Forums, p. 4,
Available at *http://www.gsdrc.org/docs/open/SSAJ99.pdf* [Accessed on 21/4/2018]

[31] See Khadka, S.S., et al., Promoting Alternate Dispute Resolution to reduce backlog cases and enhance access to justice of the poor and disadvantaged people through organizing Settlement Fairs

court system would be a lower case load as the courts' attention would be focused on more serious matters which warrant the attention of the court and the resources of the State.[32] Case backlog is arguably one of the indicators used to assess the quality of a country's judicial system.[33]

Courts have also been depicted as being capable of delivering justice according to law and not what may be considered to be fair by the judge or any other person, especially if such conception would depart from statutes or any other established legal principles.[34] It has been observed that the perceived legitimacy of law may depend more upon the fact that it has been enacted through democratic process than because people think it is a good law. Further, the idea of justice for most people is said to be larger than "justice according to law"-going beyond allocation of rights, duties, liabilities and punishments and the award of legal remedies.[35] It is remarkable that litigation aims at promoting and achieving all these for the people but justice requires more than that in that it also entails a psychological aspect that needs to be addressed for full satisfaction.

To ensure that the constitutionally guaranteed right of access to justice is fully achieved and enjoyed by all especially in commercial disputes, it is therefore important to explore the potential and the extent to which ADR mechanisms serve this purpose, as most of them have been applied to achieve even the psychological aspect of justice. Generally, proponents of ADR submit that its methods address many systemic problems in litigation and offer several benefits not available through traditional litigation. ADR could relieve congested court dockets while also offering expedited resolution to parties. Second, ADR techniques such as negotiation, mediation and party conciliation could give parties to disputes more control over the resolution process. The flexibility of ADR is also said to create opportunities for creative remedies that could more appropriately address underlying concerns in a dispute than could traditional remedies in litigation.

ADR mechanisms are likely and do often achieve party satisfaction in terms facilitating achievement of psychologically satisfying outcomes. By offering the opportunity for consensus-based resolution, ADR also is arguably better suited than litigation to

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in Nepal, Case Studies on Access to Justice by the Poor and Disadvantaged, (July 2003) Asia-Pacific Rights and Justice Initiative,
Available at *http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/Nepal-SettlementFair* [Accessed on 21/4/2018].

[32] Ibid.

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

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

[35] Ibid, pp. 19-20.

preserving long-term relationships and solving community-based disputes.[36] Most of the ADR mechanisms offer resolution[37] of conflicts as against settlement[38], with the exception of a few such as arbitration. It is noteworthy that although ADR generally promotes access to justice, not all of the mechanisms achieve this by resolution; others, like arbitration, are dispute settlement mechanisms, much the same way as litigation. As such, ADR mechanisms are seen as viable for conflicts management because of their focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by common law and statutory measures on disputes and conflicts management.[39]

Commercial preference for arbitration over trial in a court of law is attributable to some extent to its speed and cost effectiveness.[40] While the average arbitration costs may be higher than in litigation, on the whole, arbitration is still considered potentially quicker and less expensive.[41] Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations. Litigation is often so slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world.[42]

It has been observed that neutrality and flexibility are basic reasons why arbitration and ADR processes such as mediation have been developed, with the support and cooperation

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[36]Ray,B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases' Utah Law Review, (2009) [NO. 3] PP. 801-802, Available at *http://epubs.utah.edu/index.php/ulr/article/viewFile/244/216* [Accessed on 21/4/2018].

[37] Resolution of conflicts gives rise to an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes (K. Cloke, The Culture of Mediation: Settlement vs. Resolution, The Conflict Resolution Information Source, Version IV, December 2005). A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power (M. Mwagiru, Conflict in Africa: Theory, Processes and Institutions of Management (Nairobi: Centre for Conflict Research, 2006), p. 42). Resolution is based on the belief that the causes of conflicts in the society are needs of the parties which are non-negotiable and inherent to all human beings (J. Bercovitch, Mediation Success or Failure: A Search for the Elusive Criteria, Cardozo Journal of Conflict Resolution, Vol.7.289, p.296).

[38] Settlement is an agreement over the issue(s) of the conflict which often involves a compromise (D. Bloomfield, Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, Journal of Peace Research, vol. 32 no. 2 May 1995, pp. 151-164).

[39] Idornigie, P.O., "Overview of ADR in Nigeria", 73 (1) Arbitration 73, (2007), p. 73.D.

[40] Ferguson, R.B., "The Adjudication of Commercial Disputes and the Legal System in Modern England," op cit. at p.146.

[41] Ibid., at p.147.

[42] Muigua, K., Avoiding Litigation through the Employment of Alternative Dispute Resolution, op cit., p. 7; See also Mbote, P.K., et al., Kenya: Justice Sector and the Rule of Law, Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011, Available at *http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-2011* [Accessed on 27th May, 2018].

of courts.[43] In addition, there are other considerations as well for using arbitration or ADR: time constraints, the need for specialized knowledge, confidentiality and, with arbitration, international enforceability.[44] Perhaps the most outstanding advantage of arbitration (and other applicable ADR mechanisms) over litigation is its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties confidence of realizing justice in the best way achievable. Countries and various regions around the world have thus embarked on promoting international arbitration as the best dispute settlement approach in international commercial disputes.[45] There have been arguments that indeed, commercial mediation – which is different from arbitration – can give rise to quicker solutions and more tangible results than the more "legalistic" arbitration or court processes.[46] Indeed, mediation is argued to be so effective that it has become compulsory in some jurisdictions before starting a court procedure.[47]

The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship.[48] In conflict resolution processes like mediation, the goal, then, is not to get parties to accept formal rules to govern their relationship, but to help them to free themselves from the encumbrance of rules and to accept a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.[49] This is a demonstration of the importance of the various ADR mechanisms in addressing commercial disputes, based on the nature of each dispute.

On the other hand, while the ADR mechanisms have their advantages over litigation, litigation should not be entirely condemned as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary. Criminal justice (a commercial dispute may involve criminal offences such as fraud) in some of the very serious cases may also be achieved through litigation. Litigation is associated with the

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[43] International Trade Centre (ITC), Settling Business Disputes: Arbitration and Alternative Dispute Resolution, op. cit., p.ix.
[44] Ibid., p.ix.
[45] Sauvant, K.P. and Ortino,F., Improving the international investment law and policy regime: Options for the future, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at
http://www.formin.finland.fi/public/download.aspx?ID=113259&GUIDE
[46] International Trade Centre (ITC), Settling Business Disputes: Arbitration and Alternative Dispute Resolution, op. cit., p.26.
[47] Ibid., p.26.
[48] Fuller, L.L., Mediation—Its Forms and Functions, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., 'Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms In Socio-economic Rights Cases' Utah Law Review, (2009) [NO. 3] op. cit. pp. 802-803].
[49] Ibid.

following advantages: the process is open, transparent and public; it is based on the strict, uniform compliance with the law of the land; determination is final and binding (subject possibly to appeal to a higher court).[50] However, the many shortcomings associated with litigation means that it should not be the only means of access to justice especially where parties wish for expeditious results and at times continued working relations Litigation is not a process of solving problems; it is a process of winning arguments.[51]

In addition, it is worth noting that parties involved in court litigation generally have the possibility to seek conservatory or provisional measures with one or more of the following objectives: ensure that the subject matter of the dispute does not suffer damages before a final decision is rendered and enforced; regulate the parties' conduct and the relations between them during the proceedings; or preserve evidence and organize administration of the proceedings.[52] On the other hand, arbitrators lack the powers to enforce provisional measures such as seizing property and assets or ordering third parties to attend a hearing and thus, in a majority of countries, courts cooperate with arbitral tribunals and parties involved in arbitral proceedings by ordering such provisional measures that an arbitrator would not have the power to order.[53]

With regard to other ADR mechanisms such as mediation and conciliation in commercial disputes, their efficiency depends on the goodwill of the parties, who are free to participate in the process or not, and to agree or not with the recommendations of a conciliator or mediator. However, if a party fails to comply, settlement agreements reached through conciliation and mediation may be enforced by a court based on the nature of the parties' agreement.[54] However, it is possible for parties to agree on a two-tier approach where disputes may first be submitted to mediation and if mediation is not successful, arbitration proceedings may be commenced. Such an agreement may tacitly be made by the parties in an attempt to resolve their dispute amicably prior to recourse to judicial or arbitral proceedings or formally in contract or when a dispute arises. For contracting parties involved in a long-term venture, combining arbitration and mediation is considered crucial to maintain a healthy, on-going relationship even when a dispute arises.[55]

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[50]Chartered Institute of Arbitrators, Litigation: Dispute Resolution, Available at *http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation* Accessed on 27th May, 2018

[51] Advantages & Disadvantages of Traditional Adversarial Litigation, Available at *http://www.beckerlegalgroup.com/a-d-traditional-litigation* [Accessed on 27th May, 2018].

[52] International Trade Centre (ITC), Settling Business Disputes: Arbitration and Alternative Dispute Resolution, op. cit., p.18.

[53] Ibid., p.18.

[54] International Trade Centre (ITC), Settling Business Disputes: Arbitration and Alternative Dispute Resolution, op. cit., p.22.

[55] Ibid., p.22.

As such, despite the merits of ADR mechanisms, it is noteworthy that Arbitration and all ADR processes, which are generally out-of-court processes, do not compete with court proceedings.[56] Indeed, it has been argued that arbitration could not have flourished without court cooperation and ultimate control.[57] Thus, court proceedings, arbitration and ADR are considered *complementary processes* (emphasis added).[58] Based on the fact that numerous business disputes are resolved daily through litigation and are more suited to be resolved by courts, choices should be made according to the circumstances surrounding each contract.[59]

4. Understanding the Basics: Kenya's Framework on Management of Commercial Disputes

A number of statutes covering a wide range of sectors govern commercial activities in Kenya. There are disputes governed by the national laws on commercial matters especially in domestic business matters, and others fall within the purview of regional and international framework on settlement of commercial disputes. For instance, Kenya has ratified *the Treaty Establishing Common Market for Eastern and Sothern Africa*, 1994[60], which creates an additional obligation for all Member States to commit themselves to take necessary measures to accede to multilateral agreements on investment dispute resolution and guarantee arrangements as a means of creating a conducive climate for investment promotion by acceding to: the *International Convention on Settlement of Investment Disputes Between States and Nationals of Other States, 1965*[61]; the Convention Establishing the

[56] Ibid., p.ix.
[57] Ibid., p.ix.
[58] International Trade Centre (ITC), Settling Business Disputes: Arbitration and Alternative Dispute Resolution, op. cit., p.ix.
[59] Ibid., p.ix.
[60] Treaty Establishing Common Market for Eastern and Sothern Africa, 1994, 33 ILM 1067 (1994).
[61] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159. March 18, 1965, 4 I.L.M. 524 (1965), art. 63. Kenya ratified ICSID Convention in May 1966 and it came into force in February 1967. The Convention established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre) whose purpose is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Convention.

Multilateral Investment Guarantee *Agency*[62]; and any other multilateral agreements designed to promote or protect investment.[63]

Notably, most of the regional integration legal instruments such as the Treaty Establishing East African Community, Protocol On the Establishment of East African Customs Union and Treaty Establishing the African Economic Community, amongst others, establish or rely on regional Courts of Justice to deal with any disputes related to their application. However, even those courts often get their mandate extended to offer ADR services such as mediation, conciliation or arbitration.

Kenya has also ratified the *United Nations Commission on International Trade Law (UNCITRAL Model Law on International Commercial Arbitration (1985)*[64] which obligates courts to uphold the principle of party autonomy in resolving commercial disputes. The *Foreign Investments Protection Act*[65]was enacted to give protection to certain approved foreign investments and for matters incidental thereto. While this statute mainly concerns itself with investments, it is notably quiet on settlement of disputes. The lacuna is however addressed by the *Investment Disputes Convention Act*[66], which was enacted to give legal sanction to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States.

The *Arbitration Act*[67] was enacted to repeal and re-enact with amendments the Arbitration Act and to provide for connected purposes. It provides the main framework and substantive law on arbitration and applies to both domestic arbitration and international arbitration. It makes attempts to place Kenya at par with global best practices by reducing court interventions with minimal role of the court and providing for the process of recognition and enforcement of arbitral awards.

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[62] The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) was submitted to the Board of Governors of the International Bank for Reconstruction and Development on October 11, 1985, and went into effect on April 12, 1988. The Convention was amended by the Council of Governors of MIGA effective November 14, 2010. *(https://www.miga.org/who-we-are/miga-convention).* Article 1: The Convention established the Multilateral Investment Guarantee Agency. Article 2: The objective of the Agency shall be to encourage the flow of investments for productive purposes among member countries, and in particular to developing member countries, thus supplementing the activities of the International Bank for Reconstruction and Development (hereinafter referred to as the Bank), the International Finance Corporation and other international development finance institutions. Notably, the Convention encourages use of ADR mechanisms in settlement of arising disputes beginning negotiation before seeking conciliation or arbitration. Kenya is a Member State to this Convention (*https://www.miga.org/who-we-are/member-countries/).*

[63] Treaty Establishing Common Market for Eastern and Sothern Africa, Article 162.

[64] UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985).

[65] Foreign Investments Protection Act, Cap. 518, Revised Edition 2016 [2012], Laws of Kenya.

[66] Investment Disputes Convention Act, Cap. 522, Act No. 31 of 1966, Laws of Kenya.

[67] Arbitration Act, Act No. 4 of 1995 (2009), Revised Edition 2012 [2010], Laws of Kenya.

The *Consumer Protection Act*, 2012[68] was enacted to provide for the protection of the consumer prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto. The purposes of the Act are to promote and advance the social and economic welfare of consumers in Kenya by, *inter alia*, providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions.[69]

The *Consumer Protection Act 2012* also provides that any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the High Court given under this Act.[70] Despite the foregoing, after a dispute over which a consumer may commence an action in the High Court arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law.[71]

While the foregoing legal instruments demonstrate a degree of Kenya's willingness to satisfactorily address commercial disputes using the best international practices and forums, it is arguable that this is yet to be achieved. The Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.[72] The traditions, customs and norms of a particular community have always played a pivotal role in conflict resolution and they were highly valued and adhered to by the members of the community.[73] These mechanisms have often applied to an array of disputes both commercial and non-commercial.

Regionally most African countries still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common. It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.[74]

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[68] Consumer Protection Act, No. 46 of 2012, Laws of Kenya.
[69] Ibid., sec. 3(4)(g).
[70] Ibid., sec. 88(1).
[71] Ibid., sec. 88(2).
[72] Art. 11(1).
[73] Muigua, K., Resolving Conflicts through Mediation in Kenya, op. cit., p. 35.
[74] Mkangi K, Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contexualised Paradigm for Examining Conflict in Africa, Available at *www.payson.tulane.edu; Ikenga K. E.* Oraegbunam, "The Principles and Practice of Justice in Traditional Igbo Jurisprudence," African Journal Online, p. 53, Available at

As recognition of the above challenges associated with litigation, and as part of the trend around the world in addressing conflicts, the Constitution of Kenya 2010 under article 159 provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and Traditional Dispute Resolution Mechanisms should be promoted as long as that they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.[75]

The Constitution of Kenya guarantees the right of every person access justice.[76] Access to justice could also include the use of informal conflict management mechanisms such as ADR and traditional dispute resolution mechanisms, to bring justice closer to the people and make it more affordable.[77] To facilitate this, it provides that in exercising judicial authority, the courts and tribunals are to be guided by the principles of *inter alia*: justice is to be done to all, irrespective of status; justice is not to be delayed; alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms* are to be promoted, subject to clause(3)[78] (emphasis added); justice is to be administered without undue regard to procedural technicalities; and the purpose and principles of this Constitution are to be protected and promoted.[79]

As seen from the foregoing sections, courts act or are at least expected to complement ADR mechanisms in realisation of access to justice especially because most of the outcomes of these processes rely on courts for recognition and enforcement. The supportive role of Kenya's courts in ADR and especially arbitration has been demonstrated in a number of decisions, such *Nyutu Agrovet Limited v Airtel Networks Limited*,[80] where the Court, in supporting limited role of national courts, stated*:* "*Our courts must therefore endeavor to remain steadfast with the rest of the international community we trade with that have embraced the international trade practices espoused in the UNICITRAL Model. If we fail to do so, we may become what Nyamu J. (as he then was) in Prof. Lawrence Gumbe & Anor –v - Hon. Mwai Kibaki & Others, High Court Misc. Application No. 1025/2004 referred to as; "A Pariah state and could be isolated internationally* (emphasis added)." Kenyan Courts have also affirmed that the essence of the principle of party autonomy is that, where parties to a contract have consensually and in unequivocal terms provided for the forum through

http://www.ajol.info/index.php/og/article/download/52335/40960 [Accessed on 26th April, 2018].

[75] Article 159(3).

[76] Art. 48.

[77] See Muigua, K. and Kariuki F., 'ADR, Access to Justice and Development in Kenya'. Paper Presented at Strathmore Annual Law Conference 2014 held on 3rd& 4th July, 2014 at Strathmore University Law School, Nairobi.

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

[79] Art. 159(2).

[80] Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR, Civil Appeal (Application) No 61of 2012.

which to resolve their disputes, the courts are obligated to give effect to that choice of forum of dispute resolution.[81] This has also been captured in the Court of Appeal case of *Nyutu Agrovet Ltd Vs Airtel Networks Limited (2015) eKLR* where the Court reaffirmed the supremacy of the principle of party autonomy in the resolution of commercial disputes in the following words:-

> *"Our Section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognize this autonomy, we would become a pariah state and would be isolated internationally."*

It is worth pointing out that the Commercial and Tax Division of the High Court mainly deals with matters of commercial nature as a way of promoting commerce in the country. Notably, it is under the wings of the Judiciary that the pilot project on the Court Annexed mediation was hatched and nurtured, demonstrating their willingness to support the use of ADR in management of commercial and non-commercial disputes. Court Annexed Mediation and Court-Annexed Arbitration are taking root in the country, 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)[82]; Alternative Dispute Operationalization Committee (AOC)[83]; and the Secretariat (Technical Working Group (TWG)[84]). The pilot project was mainly introduced as a mechanism to help address the backlog of cases in Kenyan court.

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[81] See Mungai Ngaruiya & 8 others v Maha Properties Limited [2018] eKLR, ELC CIVIL SUIT NO. 634 OF 2017, para. 14.

[82] 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).

[83] 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.

[84] 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.

The active involvement of the Judiciary in settlement of commercial disputes is a demonstration of good will and what is thus required is an effective framework in place promoting complementary application of formal and informal mechanisms in addressing commercial disputes for economic growth of the country.

5. Effective Management of Commercial Disputes in Kenya: The Disconnect

While it is clear that Kenya as the regional commercial hub supports the use of ADR in addressing commercial disputes, there is little evidence on any major success in attracting disputants and practitioners, either wishing to settle disputes around here. This may be attributed to the fact that despite various statutory provisions recognising or seeking to promote the use of ADR mechanisms in commercial and non-commercial disputes there is still lacking an overall policy, legal and institutional framework to guide the utilisation of these mechanisms. Thus, even with supportive judiciary and fairly knowledgeable citizenry on the benefits of using ADR mechanisms, the absence of a framework on their utilisation presents a challenge to both practitioners and intended consumers of ADR services.

A lot has been done to demonstrate the country's conducive environment for investments and business opportunities, for both locals and foreigners, but little has been done to boost the dispute settlement climate for change of attitude by the business community. Stakeholders could start with small steps towards creating a robust culture of use of ADR in managing commercial disputes. For instance, the Business Premises Rent Tribunal (established in 1965 through an Act of Parliament known as '*The Landlord and Tenant (Shops, Hotels and Catering Establishments Act) Cap.301, Laws of Kenya*') is one among many tribunals established under various laws enacted by Parliament to deal with disputes that arise in the course of the regulation and administration of certain matters.[85] There is minimal evidence of ADR proceedings before the Tribunal despite it being one of the most prominent small businesses dispute settlement forums.

Most of the laws still governing the mandates of these tribunals seem stuck in the culture of adversarial proceedings without creating room for out of court settlement for parties. Thus, as courts work towards reducing the number of matters filed for determination, the tribunals and other quasi-judicial bodies have not demonstrated reasonable efforts towards supporting the Judiciary's move.

[85] Ministry of Industry, Trade and Cooperatives, State Department for Trade, Business Premises Rent Tribunal, available at *http://www.industrialization.go.ke/index.php/departments/state-department-of-trade/432-business-premises-rent-tribunal* Accessed on 26th April, 2018.

6. Towards a Policy, Legal and Institutional Framework on Management of Commercial Disputers Through ADR mechanisms in Kenya

In the face of globalization, the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions has not only become desirable but also invaluable.[86] With time there has been and there will inevitably be an increasing number of disputes between sellers and buyers as the number of entrepreneurs grows and the volume of international trade expands.[87] It has also been rightly pointed out that those businessmen, who, in ever growing number, turn to arbitration for the settlement of their disagreements with each other, must know something, of the laws of different countries of the world and of the procedures necessary to fulfill legal requirements and make arbitration awards enforceable at law.[88]

Scholars have argued that where the integrity of both parties to the contract is beyond reproach, where both parties even under the stresses generated by a controversy, will deal in absolute good faith, the legal and technical requirements of arbitration procedures are of subordinate importance.[89] However, the well-advised businessman must be prepared to deal effectively with the "fringe" group which, faced with the possibility of a weak or non-existent defense, will avidly exploit any deficiency in the proposed arbitration, either to circumvent it completely or to delay it inordinately.[90]

It has been pointed out that in the field of international trade, since it is customary for parties who wish to use arbitration as a method of settling their disagreements to include an arbitration clause in their contract, it is also important that they also understand the laws of the countries with which they trade pertaining to the validity of arbitration clauses.[91] This is because, when a dispute arises, there is the danger that the party with a weak case may refuse to abide by the agreement to arbitrate, and instead, may prefer to go to court where he or she can drag out the case and perhaps even obtain a favourable decision on a legal technicality quite remote from the merits of the case.[92]

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[86] Alternative Dispute Resolution Methods, Document Series No. 14, page 2, Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000), Available at *http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf* [21/4/2018]

[87] Rosenthal, M.S., "Arbitration in the Settlement of International Trade Disputes," op cit., at p.808.

[88] Ibid., at p.809.

[89] Ibid., at p.810.

[90] Ibid., at p.810.

[91] Ibid., at p.810.

[92] Rosenthal, M.S., "Arbitration in the Settlement of International Trade Disputes," op cit., at p.810.

Also relevant to this discourse is the argument that generally speaking, arbitrators do not and should not ignore the commercial law, both statutory and decisional, of the countries in which they conduct arbitrations.[93] This is important to enable them appreciate the dynamics that may affect the procedure or outcome of the process. There is thus a need to clearly define the policy, legal and institutional framework on settlement of commercial disputes in the country to make it easier for the business community as well as practitioners to understand and appreciate Kenya's position compared to other jurisdictions around the world.[94]

The referral of African disputes to the European and Asian arbitral institutions for settlement is prohibitively expensive and unsatisfactory. Such referral also points to an explicit admission that the structure of arbitration in Africa has failed. However, it is imperative to note at the earliest that the importance of international commercial arbitration as the most viable approach to international disputes has been recognized and basic structures/institutions for arbitration are being established across the continent.[95] The business and investment community stands to benefit from international commercial arbitration in Africa as the same provides a viable system offering a proper mechanism for the settlement of international and regional disputes. The system would be cost efficient with venues in close proximity thus offering convenience. The existence of such a system has the capacity to boost cross-border trade and investment.[96]

All stakeholders must realize that to achieve a culture of expedient settlement of commercial disputes, there must be demonstrated efforts to strengthen the framework and submission of domestic disputes to the local ADR platforms and institutions. This may be one of the ways of winning the trust of foreigners into submitting their disputes to local ADR institutions. There is need for Kenya to invest in a policy and legal framework that makes it attractive to the domestic business community as well as investors looking for conducive jurisdictions to settle their commercial disputes. Existing institutions and practitioners should collaborate with the policy and law makers to come

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[93] Ibid., at p.819.

[94] Wakim, M., "Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in The Middle East," New York International Law Review, vol. 21, No. 1, 2008, pp.1-51; OECD, Policy Framework for Investment User's Toolkit, 2011, available at *http://www.oecd.org/investment/toolkit/policyareas/investmentpolicy/41246110.pdf* [Accessed on 29/05/2018].

[95] See generally, Onyema, E., "Effective Utilization of Arbitrators and Arbitration Institutions in Africa by Appointors." (2008); Onyema, E., "Enforcement of Arbitral Awards in Sub-Sahara Africa," Arbitration International, Vol. 26, No.1, 2010, pp.115-138; Onyema, E., "Selection of arbitrators in international commercial arbitration," International Arbitration Law Review, Vol.8, no. 2 (2005), pp. 45-54; Georgetown University Law Library, International Investment Law Research Guide, available at *http://guides.ll.georgetown.edu/c.php?g=371540&p=2511836* [Accessed on 29/05/2018].

[96] Africa ADR – a new African Arbitration Institution, Op. Cit.

up with market responsive policy, legal and institutional frameworks. For instance, the Nairobi Centre for International Arbitration (NCIA) as established under the *Nairobi Centre for International Arbitration Act*, 2013,[97] is mandated to, *inter alia* to: promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act; administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; ensure that arbitration is reserved as the dispute resolution process of choice; develop rules encompassing conciliation and mediation processes; to organize international conferences, seminars and training programs for arbitrators and scholars; and coordinate and facilitate, in collaboration with other lead agencies and non-state actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation.[98] Effective and timely execution of this mandate can go a long way in entrenching arbitration and other ADR mechanisms as choice platforms for management of commercial disputes in Kenya.

7. Conclusion

Commercial disputes between traders are considered as one of the barriers to growth of international trade. This is because, a great many medium-sized and small companies find themselves in trouble when they have disagreements with their customers or their sources of supply in other countries of the world and must think in terms of law suits or losses or both.[99] Furthermore, authors argue that larger companies are not as adversely affected by the expenses resulting from disputes with companies in other countries of the world as they can better afford to prosecute in courts of law and go through the series of appeals until a decision comes down from the highest court of the land, or, because of their great prestige, position and wealth they can frequently compel favourable settlement of a dispute.[100]

This paper has made a case for use of ADR as one of the most viable means of dealing with commercial disputes, both domestic and international. Inasmuch as there is evidence of a general legal and institutional framework on settlement of disputes, there is still lacking a highly developed and specialized policy and legal framework on the use of ADR mechanisms in dealing with commercial disputes, which by their nature, may not be viable for settlement through domestic courts. This therefore calls for all stakeholders to work closely in order to come up with a framework that not only responds to the needs of the business community but also works as an incentive to the foreign and domestic

[97] Nairobi Centre for International Arbitration Act, No. 26 of 2013, Laws of Kenya (Government Printer, 2013, Nairobi, Kenya).
[98] Ibid., sec. 5.
[99] Rosenthal, M.S., "Arbitration in the Settlement of International Trade Disputes," Law and Contemporary Problems, Vol. 11, no. 4 (1946), pp. 808-834 at p.808.
[100] Ibid., p.808.

commercial community to seek the services of the local institutions and practitioners to deal with their disputes. There is a need for an overarching policy, legal and institutional framework to govern ADR within the Kenyan social, cultural and economic landscape.

Current Status of Alternative Dispute Resolution Justice Systems in Kenya

Abstract

This paper is informed by the current ongoing efforts by the Judiciary in Kenya and other stakeholders in the Alternative Dispute Resolution (ADR) sector to entrench these mechanisms as part of the access to justice. The paper adopts a sectoral approach in discussing the current status of the use of ADR in Kenya and offers suggestions on ways through which access to justice through ADR can be enhanced. The recommendations are thus cross cutting, based on the different needs of users in different sectors.

1. Introduction

The current Constitution of Kenya 2010 has seen amendment and enactment of new legislation, in order align them with the Constitution, which introduces the notion of use of alternative forms of dispute management including reconciliation, mediation and traditional conflict resolution mechanisms as part of the legal framework on access to justice across various sectors in Kenya.[1] Notably, the use of Alternative Dispute Resolution Mechanisms (ADR)[2] in dealing with disputes across different sectors is also captured under different laws as captured in this section. There are however no guidelines or policy in place on how these mechanisms should be utilised in enhancing access to justice. As such, the implementation of the various sectoral law provisions on ADR is left to the concerned stakeholders thus presenting uncertainty on procedures or extent of application.

This paper highlights successes, challenges, gaps and opportunities for businesses and investors to better utilize ADR mechanisms for commercial dispute management in the various sectors by offering a review of the existing policies, legislation and administrative procedures relating to access to justice in Kenya, with a view to making clear recommendations for action, including necessary legal and policy reforms and strategic roadmap for interventions.

1. Sectoral Approach to the Use of ADR in Kenya

1.1 Electoral Justice and ADR

The Elections Act 2011 envisages Independent Electoral and Boundaries Commission (IEBC) peace committees using mediation to manage disputes between political parties.[3] The Supreme Court Rules 2011 allows the Supreme Court to refer any matter for hearing and determination by alternative dispute resolution mechanisms.[4] These provisions were

[1] Article 159 of the Constitution of Kenya 2010.
[2] Also referred to as Appropriate Dispute Resolution.
[3] Section 17 (3) of the Elections Act 2011.
[4] Rule 11 of the Supreme Court Rules 2011.

necessitated by past research in Kenya which shows that election-related violence has claimed many lives and displaced many more.[5]

2.2 ADR in Family Law, Children's Matters and Juvenile Justice

2.1 ADR in Family Law

Family law in Kenya is mainly governed by the Marriage Act 2014 which recognizes the following marriages; Christian marriages, Civil marriages, customary marriages, Islamic marriages and Hindu marriages. The Act provides for resolution of matrimonial disputes and specifies the relevant laws to be applied depending on the type of marriage. The Act provides for mediation of disputes in customary marriages. It stipulates that parties to a customary marriage may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of marriage.[6]

The Act is however silent on how the process of ADR under the Act should be carried out or even who should carry out the same. The Act assumes that the parties have access to such forums to attempt and resolve their marital dispute. Regarding matrimonial property, section 11 of the Matrimonial Property Act provides that during the division of matrimonial property between and among spouses, the customary law of the communities in question should, subject to the values and principles of the Constitution, be taken into account including (a) the customary law relating to divorce or dissolution of marriage; (b) the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife/wives. Again, while this provision is commendable, there are no clear guidelines on how the application of customary law should be undertaken. The Act also makes an assumption that there exist elders or persons who can competently advise the Court on the relevant and applicable customary law.

a) Children's Matters and Juvenile Justice System

The *Children Act, 2001*[7] empowers the Director to mediate, in so far as permitted under this Act, in family disputes involving children, and their parents, guardians or other persons who have parental responsibility in respect of the children, and promote family reconciliation.[8] The Children Bill, 2017 has notably made provision for diversion and if passed into law, it will impact the juvenile system positively. Through diversion, the Children courts seeks to encourage symbolic restitution by the offending child as

[5] Melody Hood, Kenya's National Action Plan: "To Involve Women is to Sustain Peace" (Inclusive Security, August 27, 2015). Available at *https://www.inclusivesecurity.org/2015/08/27/kenyas-national-action-plan-to-involve-women-is-to-sustain-peace/*

[6] S. 68, Marriage Act, 2014.

[7] No. 8 of 2001, Laws of Kenya.

[8] Sec. 38(2)(m), Children Act, 2001.

compensation for the harm caused to the aggrieved person or victim and also promote reconciliation between the child and the victims affected by the delinquent conduct of the child.

The National Council on Administration of Justice (*NCAJ*) Special Taskforce on children matters was gazetted in January 2016[9] to review and report on the status of children in the administration of justice; Examine the operative policy and legal regimes as well as the emerging case law to identify the challenges and make appropriate recommendations; Assess, review, report and recommend on the service standards of each of the justice sector institutions with respect to children matters; and Prepare draft rules of procedure for enforcement of fundamental rights of children, among other terms of reference.[10] The Taskforce has been carrying out sensitisation campaigns and awareness creation through such activities as the Annual Judicial Service Week on Children matters aimed at promoting the use of ADR in children matters across the country.[11]

According to the NCAJ Special Taskforce on children matters, there are a number of challenges affecting access to justice through ADR in children matters, and these include but not limited to: lack of proper training of Court User Committees (CUCs) members on plea bargaining agreements; lack of pro bono lawyers; most of the Court Annexed Mediation program accredited ADR practitioners are currently mostly found in Nairobi and Mombasa areas only.[12] Lawyers have a role to play in enhancing access to justice in children matters and they should continually be sensitised on the need to promote reconciliation in family and children matters and use ADR as the first port of call in order to uphold and protect the rights and best interests of the children.[13]

2.2 ADR in Commerce and Finance

The *Investment Disputes Convention Act*[14] was enacted to give legal sanction to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States. Section 1 of the Act adopts *Article* 1 of the International Centre for Settlement of Investment Disputes (ICSID) Convention which established the International Centre for Settlement of Investment Disputes whose purpose is provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Convention.

[9] The Kenya Gazette Notice, Vol. CXVII-No. 8, Gazette Notice No. 369, 29th January, 2016, p. 154.
[10] The Kenya Gazette Notice, Vol. CXVII-No. 8, Gazette Notice No. 369, 29th January, 2016, p. 154.
[11] 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.
[12] Ibid.
[13] Ibid.
[14] Investment Disputes Convention Act, Cap 522, No. 31 of 1966, Laws of Kenya.

The *Arbitration Act, 1995* also provides for domestic arbitration and international arbitration of mainly commercial nature.[15] The Court Annexed Mediation pilot project of the Judiciary was set up within the Family and Commercial and Tax Division of the High Court (Milimani Law Courts) to deal with commercial and tax matters to enhance efficiency of the courts in promoting commerce in the country.

The *Consumer Protection Act, 2012*[16] was enacted to promote and advance the social and economic welfare of consumers in Kenya by providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions.[17] The Consumer Protection Act also provides for class proceedings and states that when a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any procedure that is available in law.[18] A settlement or decision that results from the procedure agreed to under subsection (2) shall be binding on the parties.[19]

The Consumer Protection Act 2012 however has a caveat on limitation of arbitration. It provides that 'any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the High Court given under this Act.'[20] The Act also established[21] the Kenya Consumers Protection Advisory Committee whose functions include, *inter alia:* creating or facilitating the establishment of conflict resolution mechanisms on consumer issues, investigation of any complaints received regarding consumer issues, and where appropriate, referring the complaint to the appropriate competent authority and ensuring that action has been taken by the competent authority to whom the complaint has been referred; and working in consultation with the Chief Justice, County governors and other relevant institutions on the establishment of dispute resolution mechanisms[22].

The *Tax Procedures Act, 2015*[23] allows out of court or tribunal settlement of tax disputes.[24] Where parties fail to settle the dispute within the period specified in subsection (1), the dispute should be referred back to the Court or the Tribunal that permitted the

[15] Arbitration Act, 1995, sec. 3(2)(3).
[16] No. 46 of 2012, Laws of Kenya.
[17] Sec. 3(4) (g), Consumer Protection Act, 2012.
[18] Ibid, Sec. 4(2).
[19] Ibid, Sec. 4(3).
[20] Ibid, Sec. 88(1).
[21] Ibid, Sec. 89(1).
[22] Sec. 90(f)(g), Consumer Protection Act, 2012.
[23] No. 29 of 2015, Laws of Kenya.
[24] Sec. 55(1), Tax Procedures Act, 2015.

settlement.[25] The *Tax Appeals Tribunal Act,* 2013[26] provides that 'the parties may, at any stage during proceedings, apply to the Tribunal to be allowed to settle the matter out of the Tribunal, and the Tribunal should grant the request under such conditions as it may impose.[27] However, the parties to the appeal should report to the Tribunal the outcome of settlement of the matter outside the Tribunal.[28] The Kenya Revenue Authority (KRA) has been settling tax disputes, based on the aforementioned Tax Procedures Act, 2015 and Tax Appeals Tribunal Act, 2013.

2.3 Environment and Land Based Conflicts

The Environment and Land Court Act 2011[29] establishes the Environment and Land Court, as a superior court of record with the status of the High Court.[30] The Court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.[31] The Environment and Land Court Act 2011 allows the court to adopt and implement on its own motion with the agreement or at the request of the parties any other appropriate means of alternative dispute resolution including conciliation, mediation, and traditional conflict resolution mechanisms in accordance with Article 159 (2) (c) of the Constitution.[32]

It is worth pointing out that traditional conflict resolution mechanisms have always been employed in resolving environmental conflicts where the council of elders, peace committees, land adjudication committees and local environmental committees play a pivotal role in managing conflicts.[33]

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[25] Ibid, Sec. 55(2).
[26] No. 40 of 2013, Laws of Kenya.
[27] Sec., 28(1), Tax Appeals Tribunal Act, 2013.
[28] Ibid, Sec., 28(2).
[29] Act No. 19 of 2011, Laws of Kenya. Preamble: An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.
[30] Sec. 4.
[31] Sec. 13(1).
[32] Section 20 of the Environment and Land Court Act, 2011; See Kennedy Moseti Momanyi v Gilta Investment Co. Ltd & another [2017] eKLR, Case No. 16 of 2015:

> Para. 4. I have considered the entire pleadings and the written consent signed by the plaintiff's counsel and defendant's counsel. I am conscious of Article 159 (2) (c) of the Constitution of Kenya 2010 and Section 20 of the Environment and Land Court Act, 2012 on the promotion of alternative forms of dispute resolution. I note that the consent is relevant thereto.
> Para. 5. I accordingly adopt the consent dated 25th February 2015 as the Judgment of this court. The dispute is hereby marked as fully settled. Per G. M. A. Ongondo, J.

[33] Castro, Alfonso Peter, and Kreg Ettenger, "Indigenous knowledge and conflict management: exploring local perspectives and mechanisms for dealing with community forestry disputes" (2000);

Natural resource-based conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.[34] Conflict resolution mechanisms such as negotiation and mediation afford the parties an opportunity to negotiate and reach a compromise agreement, where all sides get satisfactory outcome.[35] This is particularly important in ensuring that there will be no future flare-up of conflict due to unaddressed underlying issues.[36]

In order to realize sustainable, equitable, efficient and productive management of land, the Constitution requires encouragement of communities to settle land disputes through recognized local community initiatives consistent with the constitution.[37] Further, one of the functions of the National Land Commission established under Article 67 of the constitution is to encourage the application of traditional conflict resolution mechanisms in land conflicts.[38]

The Land Act 2012 also encourages communities to settle land disputes through recognized local community initiatives and using alternative dispute resolution mechanisms.[39] It promotes the application of ADR mechanisms which include traditional dispute resolution mechanisms within the framework of providing access to justice especially in disputes involving communal land. The Community Land Act 2016[40] provides for mechanisms for settlement of community land disputes, in accordance with the constitutional provisions.[41] Section 39(1) of the Community Land Act provides that a registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land.

Adan, Mohamud, and Ruto Pkalya, "Conflict Management in Kenya-Towards Policy and Strategy Formulation" (2014); Edossa, Desalegn Chemeda, Seleshi Bekele Awulachew, Regassa Ensermu Namara, Mukand Singh Babel, and Ashim Das Gupta, "Indigenous systems of conflict resolution in Oromia, Ethiopia," Community-Based Water Law and Water Resource Management Reform in Developing Countries (2007): 146.

[34] FAO, 'Negotiation and mediation techniques for natural resource management,' available at http://www.fao.org/3/a-a0032e/a0032e05.htm [Accessed on 07/02/2016].

[35] Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' Working Paper No. 135, (Overseas Development Institute, April, 2000), p. 16.

[36] See generally Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management, op. cit.

[37] Ibid., Article 60 (1) (g).

[38] Ibid., Article 67 (2) (f).

[39] Section 4 of the Land Act 2012.

[40] No. 27 of 2016, Laws of Kenya.

[41] Ibid.

Natural resource-based conflicts in Kenya are still prevalent and a cause of much concern.[42] The issues of the use of environmental resources underlie the numerous conflicts that have occurred in Kenya.[43] Giving voice to communities and explaining the details of these conflicts helps them regain power in decision-making process and create a model of active democracy enabling them to help protecting their own territory and environment.[44] It is against this background that ADR mechanisms and particularly negotiation and mediation should be explored as they present in realising the goal of effectively managing natural resource-based conflicts in Kenya.

Mediation is applied to the resolution of environmental conflicts, like land boundary conflicts, at a very informal level. Parties with such a conflict will bring it, for instance, to a panel of elders who are respected members of the society. They will listen to the parties and encourage them to come to a consensus on those issues. This ensures access to justice for the aggrieved parties, as the consensus reached is binding and the society has widely accepted internal enforcement mechanisms. This process has been widely applied by many communities in Kenya.

2.4 Civil Justice and ADR Mechanisms

The High Court (Organization and Administration) Act, 2015[45] provides that 'in civil proceedings before the Court, the Court may promote reconciliation amongst the parties thereto and shall encourage and permit the amicable settlement of any dispute'.[46] The Court is to, in relation to alternative dispute resolution be guided by the Rules developed for that purpose.[47] Furthermore, 'nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution'.[48] 'Where an alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court should by order, stay the proceedings until the condition is fulfilled'.[49]

The *Magistrates' Courts Act*, 2015[50] was enacted to enable magistrate courts to facilitate just, expeditious, proportionate and accessible judicial services in exercise of the criminal and

[42] Government of Kenya, et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.
[43] See Machel, G. & Mkapa, B., Back from the Brink: the 2008 mediation process and reforms in Kenya, (African Union Commission, 2014).
[44] CDCA, 'Why environmental conflicts?' op cit.
[45] High Court (Organization and Administration) Act, No. 27 of 2015, Laws of Kenya.
[46] Sec. 26(1), High Court (Organization and Administration) Act, 2015.
[47] Ibid, Sec. 26(2).
[48] Ibid, Sec. 26(3).
[49] Ibid, Sec. 26(4).
[50] Magistrates' Courts Act, No. 26 of 2015, Laws of Kenya.

civil jurisdiction in this Act or any other written law.[51] In exercise of its judicial authority, a magistrate's court is to be guided by the principles specified under Articles 10, 159 (2) and 232 of the Constitution.[52] Reference of matters for ADR mechanisms as contemplated under the Constitution can go a long way in realizing this objective.

Tribunals are bodies established by Acts of Parliament to exercise judicial or quasi-judicial functions. They supplement ordinary courts in the administration of justice. Tribunals, however, do not have penal jurisdiction. Tribunals, like the courts, have to respect the Bill of Rights in their decisions and not be repugnant to justice and morality or be inconsistent with the Constitution or other laws of the land. Most tribunals are subject to the supervision of the High Court.[53] Although this paper highlights the use of ADR by select tribunals, there are many other tribunals operating under the auspices of Judiciary.[54]

Tribunals such as the Sports Dispute Tribunal established under the Sports Act[55] and the Transport Licensing Appeals Board (TLAB) established under the National Transport and Safety Authority Act, 2012[56], in resolving disputes, may employ alternative dispute resolution methods (ADR) as well as expertise and assistance where necessary.

2.5 Criminal Justice and ADR Mechanisms

The *United Nations Principles on Access to Legal Aid in Criminal Justice Systems*[57] provides for principles and guidelines that are based on the recognition that States should undertake a series of measures that, even if not strictly related to legal aid, can maximize the positive impact that the establishment and/or reinforcement of a properly working legal aid system may have on the proper functioning of the criminal justice system and on access to justice.[58] Notably, the current law on criminal justice in Kenya has always promoted reconciliation in smaller matters. Arguably, the only challenge was lack of an implementation framework, which lacuna brought about the Criminal Procedure (Plea Bargaining) Rules 2018. The courts have also been using reparation and reconciliation, amongst other forms of ADR, with the only challenge being that parties do not at times understand at what point they should approach the courts for referral to ADR or stay of proceedings to allow for ADR.[59]

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[51] Ibid, sec. 4.
[52] Ibid, sec. 3.
[53] https://www.judiciary.go.ke/courts/tribunals/
[54] https://www.judiciary.go.ke/courts/tribunals/#tribunals
[55] No. 25 of 2013, Laws of Kenya.
[56] The National Transport and Safety Authority Act, No. 33 of 2012, Laws of Kenya.
[57] Resolution A/RES/67/187, December 2012.
[58] Ibid.
[59] See Republic v Abdulahi Noor Mohamed (alias Arab) [2016] eKLR. This case captured the two challenges of using ADR in criminal matters, namely, prohibition of ADR in some matters and failure of parties to understand the stage at which they should seek ADR in criminal matters.

Section 176 of the Criminal Procedure Code[60] provides for the promotion of reconciliation. It encourages and facilitates the settlement of criminal disputes in an amicable way. Reconciliation is promoted in proceedings for common assault, 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. However, such reconciliation efforts must be initiated before the court makes its final decision or discharged its duty in the matter. However, it should be noted that the use of ADR in criminal justice for serious cases involving capital offences is still a matter in contention especially with decision of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, where a murder suspect was set free on the request of the victims' Counsel citing grounds that an out of Court agreement had ensued. The decision has also been cited[61] in the more recent decision of *Republic v Ishad Abdi Abdullahi [2016] eKLR*[62]. These two cases have set the ball rolling and the jury is still out there on the suitability of ADR in serious criminal cases involving capital offences.

The foregoing notwithstanding, the criminal justice system also promotes the use of mediation in the plea-bargaining process. Section 137A of the Criminal Procedure Code provides for, an encourages the prosecutor and an accused person or his representative to negotiate and enter into an agreement in respect of the reduction of a charge to a lesser included offence or the withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges. Also, the parties may negotiate the payment by an accused person of any restitution or compensation to the victim or complainant.

The Criminal Procedure (Plea Bargaining) Rules 2018 gazetted in February 2018 set out the circumstances in which plea-bargaining negotiation can be conducted. However, these rules are yet to be fully adopted within the criminal justice system as they are yet to achieve wide acceptance among the participants within this justice system due to allegations of lack of wider participation by stakeholders. The system also encourages reparations of the victims of crimes through compensation from the offenders.[63] There have also been some concerns that some of the provisions therein may not be applicable to the local setup.

[60] Criminal Procedure Code, Cap 75, Laws of Kenya.
[61] The Prosecuting Counsel urged the court in determining this matter to consider a ruling delivered in Nairobi High Court Criminal Case No. 86 of 2011, Republic -vs- Mohamed Abdow Mohamed, in which the court allowed the discontinuance of criminal proceedings.
[62] Criminal Case No. 32 of 2012.
[63] See also, Section 3 of the Victim Protection Act, 2014.

2.6 Employment and Labour

The *Industrial Court Act*[64] contains provisions allowing the court to stay proceedings and refer the matter to conciliation, mediation or arbitration.[65] The court may adopt alternative dispute resolution and traditional conflict resolution mechanisms as envisaged in Article 159 of the constitution.[66]

2.7 Energy and Mining Sectors Disputes Settlement

The Energy Regulatory Commission (ERC) was established as the main regulatory body under the Energy Act, 2006, with the objectives and functions of, inter alia, protecting the interests of consumer, investor and other stakeholder interests. The *Energy (Complaints and Dispute Resolution) Regulations, 2012*[67] provide the means by which the Commission can help resolve complaints and disputes between a licensee and its customers where any party remains dissatisfied after exhausting the licensee's complaints resolution procedures.[68] Where a dispute has been referred to the Commission under the Rules, the Commission is required to appoint a mediator who shall assist the parties to reach a settlement within thirty days from the date of such appointment.[69] Regulation 15 thereof requires the Commission to identify and maintain a database of persons who are skilled in alternative dispute resolution techniques and who are experts in various fields relevant to energy matters, from among whom the Commission may from time to time select an expert or constitute a Dispute Resolution Panel on such terms and conditions as the Commission may determine, to assist it in the resolution of disputes. Under Regulation 16, the Commission may refer the dispute filed with it by experts, expert or to a Dispute Resolution Panel, appointed from among persons in the database maintained pursuant to regulation 15 in the manner described in paragraph (2).

The costs of the dispute resolution process are, unless the Commission decides otherwise, to be borne equally by, the parties.[70] Under Regulation 21, any party aggrieved by a decision or order of the Commission may, within thirty days from the date of the order or decision appeal to the Energy Tribunal established under section 107 of the Energy Act 2006. The First Schedule to the *Energy (Complaints and Dispute Resolution) Regulations*, 2012 provides for Guidelines for Complaints Handling Procedures. They provide that procedures for dealing with complaints relating to an) undertaking or activity performed pursuant to a licence or permit under the Act must explain: how other persons can gain

[64] No. 20 of 2011, Laws of Kenya.
[65] Section 15 (4) of the Industrial Court Act, 2011.
[66] Ibid, Section 15 (3).
[67] published as Legal Notice No. 42, Kenya Gazette Supplement No.49 (Legislative Supplement No. 15) on May 25, 2012.
[68] Energy Regulatory Commission, 'Electricity Regulations,' available at *https://www.erc.go.ke/images/docs/Energy-Complaints%20and%20Disputes%20Resolution-Regulations%202012.pdf*
[69] Energy (Complaints and Dispute Resolution) Regulations, 2012, Regulation 7(3).
[70] Regulation 16(3), Energy (Complaints and Dispute Resolution) Regulations, 2012.

access to the procedures; how the procedures work; the timeframes within which the procedures may he carried out; the complainant's right to access the Commission if dissatisfied with the respondent's decision or the way it has been reached; and any other matter of relevant importance.[71] The procedures contemplated should- be simple, quick and inexpensive; preserve or enhance the relationship between the parties; take account of the skills and knowledge that are required for the relevant procedures; observe the rules of natural justice; place emphasis on conflict avoidance: and encourage resolution of complaints without formal legal representation or reliance on legal procedures.[72]

The *Mining Act 2016*[73] provides that 'a mineral agreement shall include terms and conditions relating to, inter alia: the procedure for settlement of disputes; and resolution of disputes through an international arbitration or a sole expert.[74] It also provides that 'any dispute arising as a result of a mineral right issued under this Act, may be determined in any of the following manners: by the Cabinet Secretary in the manner prescribed in this Act; through a mediation or arbitration process as may be agreed upon by the disputing parties or as may be stated in an agreement; or through a court of competent jurisdiction'.[75]

2.8 Public Administration and Intergovernmental Disputes

Article 189 (4) of the Constitution of Kenya provides for the use of alternative dispute resolution mechanisms in settling intergovernmental disputes. Similarly, the commissions and independent offices established under Chapter 15 of the constitution have been clothed with the necessary powers for reconciliation, negotiation and mediation.[76] The *Commission on Administrative Justice Act, 2011*[77] (CAJ Act) provides for the functions of the Commission to include, inter alia, to— facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs; work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration; and promote public awareness of policies and administrative procedures on matters relating to administrative justice.[78]
The *Intergovernmental Relations Act, 2012*[79] provides for resolution of disputes arising: between the national government and a county government; or amongst county governments.[80]

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[71] Para.1, First Schedule to the Energy (Complaints and Dispute Resolution) Regulations, 2012.
[72] Ibid, Para.4.
[73] No. 12 of 2016, Laws of Kenya.
[74] Mining Act 2016, Sec. 117(2).
[75] Mining Act 2016, Sec. 154.
[76] Ibid., Article 252.
[77] No. 23 of 2011, Laws of Kenya.
[78] Commission on Administrative Justice Act, 2011, section 8.
[79] No.2 of 2012, Laws of Kenya.
[80] Sec. 30(2), Intergovernmental relations Act, 2012.

The national and county governments are required to take all reasonable measures to: resolve disputes amicably; and apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution.[81] Any agreement between the national government and a county government or amongst county governments should: include a dispute resolution mechanism that is appropriate to the nature of the agreement; and provide for an alternative dispute resolution mechanism with judicial proceedings as the last resort.[82]

2.9 Initiatives on National Peacebuilding through ADR Mechanisms

The National Steering Committee on Peace Building and Conflict Management was established in 2001 by the Government of Kenya as part of the framework on addressing threats and challenges to national unity which have become increasingly sophisticated and complex over time. The same was informed by the need for meaningful responses to conflict, particularly at a structural level and a viable institutional policy framework to mobilize, coordinate and consolidate various initiatives into a more cohesive and action-oriented mechanism to strategically drive peace-building activities in Kenya.[83] The establishment of this multi-agency peace architecture to coordinate peacebuilding and conflict management in the country was borne out of the need to incorporate traditional justice resolution mechanisms into the formal legal-judicial system of conflict mitigation and partner with Government and Civil Society Organizations (CSOs) in order to engender conflict sensitivity to development as it has been largely accepted that a peaceful, stable and secure society is a prerequisite for sustainable development.[84]

The *National Cohesion and Integration Act*, 2008[85] established the National Cohesion and Integration Commission[86] whose object and purpose 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.[87] One of the ways of achieving this is through promoting arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace.[88]

The main objectives of the National Policy on Peacebuilding and Conflict Management, 2012 were to, inter alia: promote and establish an institutional framework for peace-

[81] Ibid, Sec. 31.
[82] Sec. 32(1), Intergovernmental relations Act, 2012.
[83] National Steering Committee on Peace Building and Conflict Management: Background, available at *http://www.nscpeace.go.ke/about-us/background.html*
[84] Ibid.
[85] No. 12 of 2008, Laws of Kenya.
[86] Sec. 15, National Cohesion and Integration Commission Act, 2008.
[87] Ibid, Sec. 25(1).
[88] Sec. 25(2) (g), National Cohesion and Integration Commission Act, 2008.

building and conflict management that fosters strong collaborative partnerships between the government, the private sector, the civil society, development partners, grass roots communities and regional organizations for sustainable Peace, Conflict transformation and national development. The policy framework contextualised conflict with regard to its generalities, social, economic, political and environmental dimensions.[89] Social, economic, political and cultural contexts have over time determined the nature of peace-building and conflict management approaches and interventions. These interventions often depend on the availability of external funding.[90]

Some of the civil society interventions focused on reconciliation and building new relationships amongst the warring communities. Such activities include dialogue, negotiations, and problem-solving workshops, information, education and communication.[91] The Peace Policy also acknowledged that Article 159 (2) of the Constitution also provides for the promotion of Alternative Dispute Resolution (ADR) Mechanism. It thus envisaged that the various community peace agreements formulated from time to time will be anchored on the ADR Mechanism and provide communities with space for dialogue and amicable resolution of conflicts.

The Policy recommended that there is a need to harmonize the operation of the various Acts of Parliament that relate to peace-building and conflict management. There is also need to institute an enduring rather than an ad hoc or time bound legislative framework for addressing issues of conflict. This is particularly so because conflict is recognized as a social justice and human development issue that is best addressed through focused and comprehensive legislation and equitable development.[92]

3. Field study on ADR Use among Communities

The Constitution of Kenya, 2010 provides for application of Traditional Dispute Resolution Mechanisms (TDRMs) and ADR mechanisms in dispute resolution.[93] This in turn enhances access to justice.[94] A huge percentage of disputes in Kenya are resolved outside courts or before they reach courts by use of TDRMs or ADR mechanisms. Communities utilize TDRMs systems since they are easily accessible and legitimately relevant. A field study on ADR was done among select communities in Kenya including the Luhya, Meru, Kikuyu and Kamba community. The main objective of the field research was to carry out the ADR situational analysis in the selected communities and come up

[89] Para. 45, National Policy on Peacebuilding and Conflict Management, 2012.
[90] Ibid, Para. 68.
[91] Ibid, Para. 86.
[92] Para. 138, National Policy on Peacebuilding and Conflict Management, 2012.
[93]Art 159 (2) (c).
[94]Article 48

with recommendations for legal and policy reforms that would result in the alignment of ADR into a robust component of dispute resolution in the Kenyan justice system.[95]

The study found that men and women generally consider ADR and TDR accessible, affordable and fair. However, as far as outcomes are concerned many women perceive some TDRs biased against women due to the negative perceptions of women as inferior o men in some respects. The field research revealed that the participants were aware of the existing ADR mechanisms that are available within their communities especially negotiation, mediation, conciliation and traditional dispute resolution mechanisms. The communities also relied on chiefs and other administrative personnel and the police to resolve their disputes.

The gaps identified by the participants while using these ADR mechanisms include the lack of inclusion of women within the council of elders. The female participants did not particularly express interest in being members of the council as they consider and accept this to be a male role within the cultural heritage. The challenges facing ADR mechanisms within the communities are the cultural erosion within the community due to urbanization and the non-coercive nature of these mechanisms.

In most of the foregoing communities, the enforcement of decisions is usually carried out with the backing and reinforcement of the family institution, and the clan system. The fear of spiritual sanctions fosters compliance to the decisions of the elders and there are few cases of people deviating from the decisions of the elders. These spiritual sanctions such as curses, ill luck and pestilence have the effect of making the decisions of elders a communal responsibility among this community.

4. Institutional Framework on Provision of ADR Services in Kenya

Kenya, like other jurisdictions, has seen an explosion of the number of private firms, institutions and outfits offering ADR services. Globally ADR is viewed as a commercial necessity that provides a range of advantages over litigation in resolving both domestic and international commercial disputes. Due to the costs and time involved in utilizing the formal justice system, there is increased preference to divert cases from the Court to other methods of dispute resolution, including arbitration or mediation. Often though, there is lack of consistency and standardization of practices and qualifications across ADR mechanisms that instil confidence in the private sector when engaging these actors.

The Judiciary in partnership with the Kenya Law Reform Commission (KLRC) developed a Bill to help bring all tribunals under one administrative regime and streamline their

[95] 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.

operations in 2015. To this end, Tribunals will be administered by a body to be known as a Council of Tribunals which shall be chaired by the Chief Justice. This will be instrumental in reducing duplication efforts by the tribunals in the area of formulation of ADR rules and the dispensation of justice. The legislature has the role to see that this bill is passed into law. There remains a strong need to revisit these issues and assist in finalizing necessary legislative and policy interventions.

There are a number of institutions dealing with mediation and arbitration in Kenya, some of the institutions are as listed below: The Chartered Institute of Arbitrators (Kenya Branch), Dispute Resolution Centre (DRC), Nairobi Centre for International Arbitration (NCIA), Strathmore Dispute Resolution Centre (SDRC), Tatua Centre, FIDA and Kituo Cha Sheria.[96]

5. Addressing the Challenges, Gaps and Opportunities

The key guiding principles for successful application of TDRMs among traditional African communities was that the tribunal (chiefs, councils of elders, priests or kings) should be properly constituted. The disputants ought to have confidence in them and submit to their jurisdiction.[97]

The main aspects of TDRMs and other ADR mechanisms which make them unique and community oriented are that they focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by formal common law and statutory regimes.[98] The main objective of TDRMs in African societies is to resolve emerging disputes and foster harmony and cohesion among the people. TDRMs derive their validity from customs and traditions of the community in which they operate. The diversities notwithstanding, the overall objective of all TDRMs is to foster peace, cohesion and resolve disputes in the community.[99]

The use of TDRMs in access to justice and conflict management in Africa is still relevant especially due to the fact that they are closer to the people, flexible, expeditious, foster relationships, voluntary-based and cost-effective. For this reason, most communities in

[96] 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.

[97]Anjayi, Adenka Theresa, "Methods of Conflict Resolution in African Traditional Society" An International Multidisplinary Journal, Ethiopia, Vol. (8) Serial No.33, April, 2014, p.142.

[98] Muigua, K., 'Effective Justice for Kenyans: Is ADR Really Alternative?' pp. 12-13. Available at http://www.kmco.co.ke/attachments/article/125/Alternative%20Dispute%20Resolution%20or%20Appropriate%20D
ispute%20Resolution.pd

[99] Ajayi, A.T. and Buhari, L.O., "Methods of Conflict Resolution in African Traditional Society," op cit., at p. 154.

Africa still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.[100]

6. Legal and Policy Recommendations

It is suggested that there is a need to clarify the various systems and their relationships as it pertains to commercial justice in Kenya and, establish clear standards for the accreditation and training regarding mediation and arbitration in Kenya.[101] There is need to cascade formal ADR dispute resolution mechanisms to the magistrate courts too, rather than leave it within the purview of the High Court's jurisdiction.[102] There is need to enhance and promote the continual use of ADR in the dispensation of justice across the justice sector. This can be achieved through the following manner: Documentation and lobbying e.g. monitoring government commitment in ensuring the realization of constitutional provisions on ADR by institutions and civil society; Community justice system campaigns, training and collaborative networking; Lobbying for full implementation of provisions of civil procedure Act 2012 on mediation (ADR), promoting awareness and linkages with existing justice mechanisms e.g. tribunals; there is need to revisit and consider the roll out of court counsel desks in law courts to provide legal aid and mediation services; ADR pilots through Court User Committees; Collaborative partnerships and strategic networking; and Staff training and certification as mediators to meet demand.[103]

In addition, there is need to change the attitudes of practitioners within the ADR dispute resolution systems. The practitioners need to view ADR as complementary to litigation and not an avenue for loss of revenue. They need to be sensitized and made aware of the ADR process and where is its true end; resolving conflict.[104] This could also be addressed through inclusion in curriculum detailed training of young lawyers on ADR, possibly while in Kenya School of Law and other institutions of higher learning offering legal education in Kenya.

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[100] Ntuli, N.N., 'Policy and Government's Role in Constructive ADR Developments in Africa,' Presented at a conference "ADR and Arbitration in Africa; Cape Town 28th and 29th November 2013. pp. 2-3. Available at http://capechamber.co.za/wp-content/uploads/2013/11/POLICY-IN-AFRICA-AND-GOVERNMENT.pdf [Accessed on 30/09/2018].

[101] 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, op cit.

[102] See Magistrates' Courts Act, No. 26 of 2015, Laws of Kenya.

[103] 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, op cit.

[104] NADRAC, The Resolve To Resolve — Embracing ADR To Improve Access To Justice In The Federal Jurisdiction, A Report to the Attorney–General, Commonwealth of Australia, 2009. Available at *https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/the-resolve-to-resolve-embracing-adr-improve-access-to-justice-september2009.pdf*

Advocates involved with mediation within the legal process ought to receive remuneration in order to promote legal practice within these areas of dispute resolution. Referral to mediation may happen after parties have incurred legal fees in drafting pleadings and filing the same. There is need for a reimbursement system for legal fees and other expenses to ensure that litigants are not resistant to mediation for fear of the extra costs. There could also provision for taxation of costs even where a mediated agreement is reached. There is also a possibility where parties could be allowed to reclaim court fees or part of it. This can be achieved through cooperation amongst Judiciary, LSK and professional ADR training institutions. A harmonised fees scale can also be extended to arbitration since it 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.[105]

There is a need for close working relations between the commercial sector stakeholders such as the government ministries and departments responsible and the Kenya Association of Manufacturers (KAM) and Kenya Private Sector Alliance (KEPSA), amongst others, to work closely with Nairobi Centre for International Arbitration (NCIA) in sensitising both consumers and service providers on the merits of ADR in resolving commercial disputes. They can achieve this through continuous seminars, workshops and other forums. They could also help institutions set up ADR friendly conflict management mechanisms through such measures as training the personnel responsible for running such dispute management forums in ADR.[106]

There is also need to have synergies across the sectors that will enhance the access to justice, peace building, development and poverty eradication. There is need to involve the different sectors within the Kenyan economy in deepening and advancing ADR dispute resolution mechanisms.[107] The mediation Taskforce should work closely with the National Legal Aid Service and possibly petition the Parliament to consider funding the mediation programme and even other ADR services carried out under the auspices of the Judiciary perhaps with the exception of arbitration. Such special fund may be channeled through the National Legal Aid Service.

The communities select their AJS agents using criteria such as experience, power, gender, age and stature within the society. The AJS Taskforce ought to come up with a selection criterion of selecting and appointing AJS agents in the future of ADR. There is need to

[105] 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.
[106] Ibid.
[107] 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.

develop a clear legal and policy framework for the application of AJS and TDRMs that that has to guarantee the human rights and interests of the disputants, the victims, offenders, communities with regard to the African customary practices and institutions of the communities. This recommendation can be implemented by the Alternative Justice Systems (AJS) taskforce working in collaboration with the stakeholders and interest groups.[108]

The ADR taskforce as well as the Judiciary ought to continually address the identified gaps within the court annexed mediation pilot scheme through regulation and practice directions. This will ensure efficient and effective justice dispensation once the pilot program is adopted within the court system[109]. There is also a need to set up an overarching body for ADR practitioners to oversee the training and accreditation of mediators, arbitrators, adjudicators, conciliators, facilitators and conveners, amongst other ADR practitioners. Currently, there are different institutions offering the training and accreditation of ADR practitioners. These institutions offer different forms of training to their mediators using different curriculum material in mediation practice. There is also a need for continued training of CUCs members on plea bargaining agreements.

There should be a framework that recognises traditional norms, laws, customs and institutions that deal with mediation and grants them an equal place in line with the constitution. The way to go is institutionalisation of ADR mechanisms for resolution of all conflicts, to ensure an element of effectiveness in enforcement of the agreed decisions.
By coming up with an Alternative Dispute Resolution Act to provide for the setting up of an institutional framework within which mediation and the other ADR processes would be carried out, the right of access to justice can be actualized. However, caution should be taken to ensure that parties engage in mediation and other ADR mechanisms voluntarily, the autonomy of the process is respected and the solutions reached are acceptable and enduring. Reforms to the current system of conflict resolution would effectively address weaknesses such as delays, costs, backlog of cases and bureaucracy[110]. There is a need for the Mediation Taskforce to work closely with other stakeholders to come up with the code of conduct for mediators and other ADR practitioners. The code should set out principles relating to competence, appointment, independence, neutrality and impartiality, mediation agreements, fairness of the process, the end of the process, fees and confidentiality, which the practitioners should commit to.

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[108] Ibid.
[109] 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.
[110] Muigua, K., Resolving Conflicts through Mediation in Kenya, Glenwood Publishers Limited 2017, pp 173.

The Mediation forums and community ADR practitioners as well, should have a feedback mechanism on the measures they take to support respect for the code through training, evaluation and monitoring of the mediators. Standards of training, practice and codes of ethics should be set and ADR practitioners should be trained through a strategy of participation. Capacity-building requires the transfer of quality skills and knowledge tailored to the needs of a specific group, which is adapted to local practice and benefits from existing capacity, for instance, an established NGO network of community-based paralegals.

The jurisdiction of AJS and TDRMs remain vague due to the different and ununiformed customary laws that are in application within the African communities: The AJS and the Judiciary needs to come up with a policy that identifies, defines and categorizes the kinds of cases that ought to be resolved using AJS and TDRMs and those that should be resolved through different dispute resolution mechanisms.

While caution should be taken not to incorporate AJS and TDRM within the formal justice systems, there is need to map out collaboration and opportunities between the courts and these alternative systems: For instance, the courts and the AJS and TDRMS can collaborate in referrals of matters; The AJS may refer matters to the chiefs or police, for instance, serious criminal cases such as homicides or robberies; In cases of appeals or referrals, the file opened for a case at the TJS will be used by the chief, religious leaders or formal court.[111]

Currently, there are no known means of dealing with cases of the different cultures and communities. This has posed great challenges in the past where the court has to in cases that are otherwise suited to be settled through the AJS and TDRM justice systems.[112] The AJS should come up with robust and clear guidelines of dealing with the conflicts involving different cultures and communities in matters of common interest. The AJS taskforce should map out and identify the nature and extent of the involvement and participation of lawyers and paralegals with the AJS and TDRMs sessions. The lawyers have a strong influence on their client's willingness to submit and participate in these alternative justice systems. There should be a clear guideline on the extent to which these players in the justice system should be involved so as not to formalize, avoid legalities and technicalities of the systems while taking into account their valuable input.[113]

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[111] 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, op cit.

[112] Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another (1987) eKLR: The case of the prominent Nairobi criminal lawyer, Silvano Melea Otieno, popularly known as S M Otieno Case which had a long and twirling history in the Kenyan customary law jurisprudence.

[113] 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, op cit.

The AJS Taskforce ought to come up with means to strengthen and enhance the enforcements of the AJS decisions. There is need to establish what kind and to what extent the legal tools can be used to enforce punishment. This enforcement may require input from the ministry for interior and internal coordination whose role should be clearly defined through directives and initiatives. For example, the cases of a party's non-compliance with the decision of an AJS, the matter may also be referred to the chief. For instance, in South Africa, if a person fails to obey the decision of a traditional elder, the person is reported to a magistrate who gives the person 48 hours to show cause and if he fails to, he is punished.[114]

There is need to introduce some form of documentation in these sessions for record purposes. This might pose a unique challenge as some community's value confidentiality in these proceedings that make the recording of the sessions a taboo. This is founded in the values of dignity, cohesion and forgiveness within these dispute resolution mechanisms. The AJS ought to come up with guidelines to set out the documentation guidelines for these mechanisms.[115]

There is need to establish and enquire on the possible means of promoting the inclusion of women and other marginalized groups within these alternative justice systems. In most TJS membership is open to men only, and women are therefore excluded. In the instances where they are included, their participation is limited to issues involving women's sexuality and social issues such as HIV/AIDS, FGM.[116]

There is a need for the Business Court User Committee to work closely with the other stakeholders such as the AJS Taskforce to create awareness on the need for active and meaningful participation of men and women, as well as children, in the administration of justice. ADR should be entrenched in all the administration activities of the two levels of government to enable the state to reduce litigation costs that is incurred in the formal court processes. This has been achieved to some extent within the national government but the devolved governments could benefit from a deeper reliance on mediation to resolve conflict. This also solves the problem of lack of capacity to grant the remedies sought by disputants.[117]

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[114] Kariuki, F.,'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities,' Alternative
Dispute Resolution,' Vol. 3, No. 2 (2015), pp.30-53 at p.53.

[115] 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, op cit.

[116] FIDA – Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya.'

[117] 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, op cit.

This can be effected and enhanced through the Council of Governors through formal adoption in the disputes settlement framework within in the county governments. The draft *Intergovernmental Relations (Alternative Dispute Resolution) Regulations, 2018*[118] which are still at the drafting stage is a step in the right direction and will go a long way in enhancing the use of ADR in managing public administration disputes.

It is suggested that there is a need to harness information technology to facilitate expedition and efficient records management relating to judicial services. There is additional need to train ICT staff to be able to operate Information and communications technology or (ICT) equipment effectively. In addition, there is a need for continuous equipping of judges, magistrates and other judicial officers with knowledge and skills in discharging their responsibilities more efficiently. This would include skills and knowledge in emerging areas of law such as ICT and ADR and traditional dispute resolution mechanisms. The Judiciary Training Institute was established towards the realization of this goal, and, working closely with other stakeholders can ensure that this is achieved, working with the ministry incharge of ICT. The training should be preceded by a needs assessment of individual officers, paralegals and the judiciary as an institution. Such training should always be synchronized with the court calendar to avoid disruption of judicial services.[119]

Marriage Act, 2014, should be reviewed to ensure that mediation of disputes in customary marriages and the customary dispute resolution mechanisms provided for in the Act conform to the principles of the Constitution. There is also need to provide special guidelines on the stages at which disputes in customary and indeed other forms of marriages can formally be submitted for mediation before going to Court. Rigorous awareness campaigns should be carried out sensitise the community leaders on the need to uphold and respect gender equity and equality as envisaged by the Constitution of Kenya 2010.[120] There is need for fast tracking training and accreditation of more ADR practitioners especially under the Court Annexed Mediation program across the country. This can be done by NCAJ Special Taskforce on children matters working closely with ADR training institutions and family law and children law Non-governmental

[118] These Regulations are to apply to the resolution of disputes arising —(a)between the national government and a county government; or (b)amongst county governments; (c)
out of an agreement between the national government and a county government or amongst county governments where- (i)no dispute resolution mechanism is provided in the agreement; or (ii)the agreement provides for a dispute resolution mechanism that does not accord with the provisions of section 32(2) of the Act.

[119] "Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution", A Report by the Kenya Civil Society Strengthening Program, 2011.

[120] 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.

organizations (NGOs) and practitioners.[121] Lawyers have a role to play in access to justice in juvenile justice system and they should continually be sensitised on the need to promote reconciliation in family and children matters and use ADR as the first port of call in order to uphold and protect the rights and best interests of the children.[122]

There is a need for the Kenya Revenue Authority and the Tax Appeals Tribunal to ensure that there are no negative perception issues on neutrality/independence of ADR Facilitators/mediators while resolving tax disputes.[123] In addition, there is also a need for them to organize forums for civil education in order to create awareness on the use of ADR to resolve tax disputes by the taxpayers and the general public. There is a need to set up more regional centres for training of international commercial arbitrators in Africa and Kenya. The Kenyan Chapter of Chartered Institute of Arbitrators trains arbitrators across Africa and has trained arbitrators in countries like Nigeria, Zambia, Uganda and even Malawi. Kenya can indeed play a pivotal role in nurturing international commercial arbitration, not only in Kenya but also across the African continent.[124] NCIA is well placed within its statutory mandate to promote training of ADR practitioners as well as cooperation with other arbitral institutions.[125]

To attract foreign parties to arbitration within Kenya, there is need to enhance the institution structures, facilities, staff and amities in order to enhance their capacity to able to host international arbitrations. Currently, there is a challenge on the capacity of existing institutions to meet the demands for international commercial arbitration matters. The arbitration centres in Kenya should invest in ultra-modern facilities and amenities to attract disputants to the centres. NCIA, being an international commercial arbitration centre, should benchmark with other regional and international centres and continually invest in modern facilities and amenities.[126]

Enhancing foreigners' confidence in Kenyan arbitration institutions will subsequently boost the confidence of foreigners in the African Arbitration institutions as well as the role of courts. Effective and reliable application of international commercial arbitration in Kenya has the capacity to encourage investors to carry on business with confidence

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[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] See CIArb Kenya Website, Op. Cit.
[125] Muigua, K. and Maina, N., "Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration." (2016). Available at *https://s3.amazonaws.com/academia.edu.documents/44254108/Opportunities_for_the_Nairobi_Centre_for_International_Arbitration.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1538357666&Signature=NPqKzSL6jzO66UZQUJGKDJsDVsk%3D&response-content-disposition=inline%3B%20filename%3DEffective_Management_of_Commercial_Dispu.pdf*
[126] Muigua, K., "Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration," Alternative Dispute Resolution 3, no. 1 (2015).

knowing their disputes will be settled expeditiously. NCIA can work with other stakeholders to market Kenya as a conducive and friendly seat of arbitration.[127]

With increase in globalization, it is important that international trade and investment take place with minimal interference by territorial barriers such as unnecessary domestic courts' intervention. [128] There is need to address the perception of corruption within the arbitration mechanism in Kenya. This can be achieved through rendering professional services and giving awards based on law by the arbitration practitioners. Environment and Land Court should work closely with National Land Commission and community elders to realise and enhance management of community land disputes through ADR and TDRMs and subsequently adopt the outcomes of such processes as court orders to enhance enforcement and compliance.[129]

Courts and judicial tribunals should be obligated by policy and legislation to interpret laws in a manner that promotes substantive justice rather than the dictates of procedural technicalities. The use of Alternative Dispute Resolution (ADR) mechanisms in conflict management and dispute resolution should be encouraged by all relevant stakeholders. The various administrative authorities mandated to promote access to justice need to work on a consultative and co-operative basis. This is imperative in resolving emerging institutional conflicts due to overlapping mandate and multiplicity of institutions. They need to consult and agree on how to execute the shared mandate in a way that minimizes conflicts.

The establishment of the National Council on the Administration of Justice (NCAJ) under the Judicial Service Act, 2011 goes a long way in facilitating such cooperation and consultation among state and non-state agencies in the administration of justice. However, there is need to strengthen the Council by conferring on it corporate status with defined linkages with court user committees in all judicial stations. This will facilitate effective response to the needs and concerns of all court users by the Council in consultation with the relevant state departments. It is unlikely that this would be achieved for as long as NCAJ remains as a consultative forum, whose recommendations are left to the discretion of various bodies represented in the Council.[130]

Regarding the Use of Alternative Dispute Resolution in Tribunals, there is need for the following: Appointment of more members with arbitration/ mediation qualifications and experience; The ADR in the tribunals should be incorporated in the main ADR frame work

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[127] Ibid.
[128] Ibid.
[129] 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, op cit.
[130] Ibid.

of the Judiciary and arbitrators compensated adequately to entrench the practice; There should be public awareness creation so as to exploit the use of ADR in matters taken before tribunals; Training is required for Boards/Tribunals on ADR mechanisms.[131] Judiciary should work closely with other stakeholders to roll out awareness creation campaigns aimed at educating parties to understand at what point they should approach the courts for referral to ADR or stay of proceedings to allow for ADR. Sometimes, the parties approach the courts with the request too late in the process.[132] The Criminal Procedure (Plea Bargaining) Rules 2018 should be reviewed and revisited to ensure wider acceptance and also ensure that the same are fully applicable to the local scenario.[133]

7. Conclusion

The Constitution of Kenya 2010 specifies the fundamental rights and freedoms to which every Kenyan is entitled. It empowers courts to enforce human rights and interpret the law in a way that gives effect to a right of a fundamental freedom. To ensure full enjoyment of rights, the Constitution guarantees the right of access to justice under Article 48. Further, the Constitution widens the doors of access to justice by promoting the access through formal and informal processes. To this end, Article 159 (2) (c) and (3) brings on board other justice mechanisms such as ADR and TDR to ensure wide access to justice. For TDRs to be applicable, they must not be inconsistent with the Constitution, justice or morality or any other written law.

Although the Constitution guarantees the right of access to justice and goes further to recognize ADR and TDRs, there is no elaborate legal or policy framework for their effective application. This is the situation despite the fact that a great percentage of disputes in Kenya are resolved through mediation, conciliation, negotiation and traditional processes. Currently, the legal framework does not provide for linkage of TDRs with the formal court process. In most instances, courts have undermined the awards reached through TDRs terming them as informal and not founded on any law. This has further frustrated the utilization of TDRs in Kenya.

Kenya's Vision 2030 seeks to ensure that Kenya achieves and sustains an average economic growth rate of over 10% per annum over the next 12 years; build a just and cohesive society with equitable social development, clean and secure environment; and, ensure a democratic political system that nurtures issue-based politics, the rule of law, and protects all the rights and freedoms of every individual and society. Alternative justice systems and other alternative community justice systems have an inherent traditional value which is part of the cultural heritage of the local communities in Kenya.

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[131] 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, Op cit.

[132] Ibid.

[133] Ibid.

These systems have potential to deepen the access to justice due to their proximity to the people, their affordability, their legitimacy entrenched in the cultural heritage that enables them to promote cohesion and harmony within their communities. These can be achieved through the foregoing related recommendations.

Mediation has unlimited potential in the promotion of the right to access to justice, this is because this mechanism is speedy, cost effective, confidential and takes into the account the interests of the parties over their rights. It also has the ability to mend the pre-existing relationships between the parties. The Sustainable Development Goals (SDGs) have linked the peace with development, thus, Kenya cannot achieve developmental goals without peace. These SDGs also opine that in order to obtain peace, there must be access to justice and respect the human rights for all citizens. Mediation is one of the dispute resolution mechanisms that promote both peacekeeping and access to justice which makes it a potent tool in the hands of the judicial systems to achieve these goals.

From the findings of the research and study conducted in a Baseline Survey by the IDLO, there is a need for enactment and implementation of a sound legal and policy framework for effective utilization of TDRMs and ADR to ensure full access to justice for Kenyans. The study has revealed that ADR and TDRMs are widely used by communities to resolve a myriad of disputes and therefore cannot be wished away. Therefore, it is imperative that the ADR and TDR mechanisms be anchored in the legal and policy framework. The framework should harness the recommendations made in this report for effective incorporation of TDRs and other community-based process into the justice system. An integrated approach to ADR legal and institutional framework with synergies across different sectors will go a long way in deepening access to justice for commercial and non-commercial disputes in Kenya.

There is thus a need for continuous evaluation of the law and practice of ADR in enhancing access to justice in Kenya to ensure continued improvement and appreciation of the same. A continuous monitoring and evaluation programme should be undertaken to appraise the implementation of the law, policy and administrative procedures and programmes on access to justice.

Making Mediation Work for all: Understanding the Mediation Process

Abstract

This paper offers a general discussion on the process of mediation as a continuation of negotiation. The author critically discusses mediation process as consisting essentially of three phases: the preliminary/pre-negotiation, actual negotiation and post-negotiation phases, with a general outline of what parties and mediators should expect in each of the phases. This paper is meant to ensure that those not familiar with the process of mediation and the nascent practitioners get to understand the general outline of the mediation process, the specific roles and obligations of each of the players, as well as recommendations on the snares to avoid when seeking to conduct and achieve a successful mediation with acceptable outcome. Some of the issues in mediation are however as varied as the types of mediations, based on the different types of disputes and parties, as well as the training of the mediator in charge.

1. Introduction

This paper generally looks at the mediation process. Since the process of mediation is a continuation of negotiation, the phases of mediation resemble those of the negotiation process. Seminal writers on negotiation and mediation have discussed the respective processes as consisting essentially of three phases: the preliminary/pre-negotiation, actual negotiation and post-negotiation phases.[1] In this paper the writer discusses the mediation process as a three phase process.

This paper was informed by the desire to ensure that those not familiar with the process of mediation and the nascent practitioners get to understand the general outline of the mediation process, the specific roles and obligations of each of the players, as well as recommendations on the snares to avoid in order to conduct and achieve a successful mediation with acceptable outcome. It must, however, be pointed out that this paper does not by any means purport to address all the practice matters that may be encountered by a mediator since the problems may be as varied as the types of mediations, based on the different types of disputes and parties.

It should be noted that the negotiation and mediation processes are, to a large extent, similar. The main difference between negotiation and mediation is with the additional resources and expanded relationships and communication possibilities that a mediator brings to the conflict management forum. The entry of a mediator into a conflict transforms the structure of the conflict from a dyad into a triad and in this sense he

[1] See generally, Mwagiru, M., Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006); Mwagiru, M., The Water's Edge: Mediation of Violent Electoral Conflict in Kenya, (Institute of Diplomacy and International Studies, Nairobi, 2008).

becomes one of the parties to the conflict pursuing his own interests just as the other parties to the conflict.[2]

In discussing the mediation process, the writer takes cognisance of the fact that mediation is not a new concept in the conflict management discourse in this country. It is contended that it has been practiced since time immemorial.[3] The discussion of the various phases of both negotiation and mediation as generally practiced will reveal that the two mechanisms are immensely informal. It is this informality that makes the two mechanisms expeditious, flexible, cost effective and autonomous. That is why most Kenyan communities could use these mechanisms in resolving their conflicts before the introduction of formal legal systems. Consequently and as contended in this paper, mediation can potentially be distorted by legalism out of a misapprehension of the fact that it is not a new concept in Kenya and that it yields better results in the informal perspective.[4]

2. The Negotiation Process

Negotiation is a voluntary process that allows party autonomy to come up with creative solutions, where two or more people of either equal or unequal power meet to discuss shared and/or opposed interests in relation to a particular area of mutual concern.[5] Negotiation is considered to be part of mediation in that 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.[6] Negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.[7]

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[2]Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", Cardozo Journal of Conflict Resolution, Vol.7.289, p.290; See also Meschievitz, C.S., "Mediation and Medical Malpractice: Problems with Definition and Implementation", Law and Contemporary Problems, Vol. 54, No. 1 in, Medical Malpractice: Lessons for Reform, (The Medical Malpractice System and Existing Reforms), (Duke University School of Law, Winter, 1991), pp. 195-215.

[3] Mkangi, K., Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa, available at *www.payson.tulane.edu*. [Accessed on 9/08/2018].

[4] See Amendments to the Civil Procedure Act (Cap. 21) Laws of Kenya; See also Mediation (Pilot Project) Rules, 2015, Legal Notice No. 197 of 2015, Kenya Gazette Supplement No. 170, 9th October, 2015, (Government Printer, Nairobi, 2015).

[5] See generally, "Negotiations in Debt and Financial Management", United Nations Institute of Training and Research, (UNITAR), (December 1994); Fischer, R. & Ury, W., Getting to Yes: Negotiating Agreement without Giving In, (Penguin Books, New York, 1981), p.4.

[6]Mwagiru, M., Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), p. 115.

[7] Ibid.

2.1 Preliminary/Pre-negotiation Stage

The preliminary/preparation stage refers to all those activities that take place before the around-the-table negotiations. It is helpful to state right at the outset that the negotiation process predates the around-the-table negotiations and does not end there. Many writers on conflict management normally by-pass the preliminary/preparation and post-negotiation/implementation processes despite their importance in the conflict resolution discourse. It is important since it ensures that all the necessary preparations are done before the parties come to the table for negotiations. Parties will thus determine why they want to negotiate. They will determine what the conflict or dispute is. What do they want to negotiate about?[8]

The preparation/preliminary stage or the 'pre-negotiation phase' begins when the parties in conflict consider that their dispute can be resolved by negotiation and as such communicate their intention to negotiate to one another. This is the "diagnostic phase where the nature of the conflict is thoroughly examined before remedies can be essayed." This phase ends when parties agree to around-the-table negotiations or formal negotiations or when one party considers that negotiation is not the best option for the resolution of their dispute. Quintessentially, therefore, pre-negotiation is the span of time and activity in which the parties move from conflicting unilateral solutions for a mutual problem to a joint search for co-operative multilateral or joint solutions.[9]

It is also at this stage that the parties formulate the agenda and discuss it before beginning the talks. The constituents and all others who will be involved in the negotiation process and their functions and authority are also identified at this stage. Each party or side of the negotiations have to obtain as much information about the other party and the constituents so as to get a picture of the other side and thus be in a position to assess their needs, interests, motivations and their goals. This stage thus reveals the positions of the parties, levels of divergence and matters over which the parties are in agreement. Parties' autonomy over the process is also evident at this phase, as it is at this stage that parties agree on how to set up a venue for the meeting. In an attempt to foster relations and ensure effective communications between the parties the mediator must establish direct contacts so as to aid in setting up the agenda.[10]

There are other important aspects of the pre-negotiation stage. For example, there are two functional needs that it addresses. First it ensures that the parties give their commitment

[8] Craver, C.B., "The Negotiation Process", available at www.negotiatormagazine.com, [Accessed on 9/08/2018].; See also Fischer, R., & Ury, W., Getting to Yes: Negotiating Agreement without Giving In, (Penguin Books, New York, 1981), pp. 13-20.

[9] Zartman, I. W., "Pre-negotiation: Phases and Functions", in International Journal, Vol. 44, No. 2, Getting to the Table: Process of International Pre-negotiation (Spring, 1989), pp. 237-253.

[10] Sourced fromwww.negotiations.com, [Accessed on 9/08/2018].; See also Mwagiru, M., Conflict in Africa; Theory, Processes and Institutions of Management, op.cit, pp.113-115.

to negotiating their differences and secondly it helps in identifying the problem in that parties identify and remove obstacles to negotiation. During this phase parties agree to negotiate and to arrange on how those negotiations are to be held.[11] The pre-negotiation stage does not address the design of an outcome as that will be discussed at the around-the-table talks, but focuses on process. It is, in effect, negotiation over process. Its subject matter will concern procedures, structures, roles, and agendas. One aim of pre-negotiation is to reach a joint definition of the problems and subject matter that will have to be addressed - but it does not tackle those issues beyond defining them for future reference. Pre-negotiation can shade into negotiation if it goes extremely well, or substantive negotiation may need to recede back to procedural pre-negotiation temporarily. Pre-negotiation can take place even if there is no intention to move on to full negotiations.[12]

In summary, therefore, the major elements to be pre-negotiated from the hugely complex to the straightforward ones are: agreeing on the basic rules and procedures; participation in the process, and methods of representation; dealing with preconditions for negotiation and barriers to dialogue; creating a level playing-field for the parties; resourcing the negotiations; the form of negotiations; venue and location; communication and information exchange; discussing and agreeing upon some broad principles with regard to outcomes; managing the proceedings; timeframes; decision-making procedures; process tools to facilitate negotiations and break deadlocks; and the possible assistance of a third party.[13]

In the traditional African context, the pre-negotiation phase is best exemplified by the negotiation preceding marriage negotiations where beer could be brewed and food shared in preparations of the actual negotiations. In case of disputes, rituals could be performed to appease the spirits such as beer brewing and slaughtering of goats. The disputants could then eat together as a sign of their willingness to have the matter resolved amicably.[14]

2.2. Negotiation Stage/Actual Negotiations/Across-the-table Negotiations

This is the stage at which parties discuss and make bargains over the issues they may have framed. Parties discuss the issues in their conflict to either agree or disagree. Parties develop the foundation of their agreement by framing the issues. The core issues of the conflict are put together so as to understand the basic concept of the agreement parties are seeking. Parties consider creative solutions or options and discuss concessions. They

[11] Saunders, H.H., "We Need a Larger Theory of Negotiation: The Importance of Pre-negotiating Phases." Negotiation Journal, Vol.1, No. 3 (1985), pp. 249-262.

[12]Available at *www.cibera.de*, [Accessed on 9/08/2018].

[13] Ibid.

[14] Kenyatta, J., Facing Mount Kenya: The Tribal Life of the Gikuyu, (Vintage Books, A Division of Random House, New York), pp. 179-221.

advance proposals and counter-proposals, back and forth, until some manner of tentative agreement is reached.[15]

2.3 The Post-Negotiation/Implementation Stage

At this level, the parties discuss on how they can codify the agreement arrived at by formulating an action plan with specific timelines for effective implementation of the agreement and is thus a very important phase. It is aimed at making the agreement realistic so that it is not only viable but also workable. The commitment of the parties towards the negotiated agreement is tested at this phase. If the agreement cannot be acceptable to the constituents in the negotiation process then the agreement becomes impossible to implement. In diplomatic negotiations, the implementation stage involves crucial processes such as ratification of agreements and treaties signifying the parties' intention to be fully bound by the treaty they have negotiated over.[16]

3. The Mediation Process

As already stated in the foregoing discussions, mediation is a continuation of negotiation and its phases resemble those of the negotiation process. Consequently, this section looks at what tasks are done in the various stages that is in the pre-negotiation, negotiation and post-negotiation stages in mediation.

3.1 Pre-Negotiation Stage

In this stage, the following tasks must be looked into by the parties: they must decide whether to engage in negotiation or mediation; mediator's identity should be floated and accepted or rejected; the mediator gives the background of the conflict; mediator decides whether to act as mediator in the conflict; the mediator must ascertain that the conflict is ripe for resolution. The role played by the USA in the Israeli-Lebanese conflict outlines clearly the role of a mediator in the pre-negotiation phase in that conflict.[17]

The pre-mediation preparation for the mediation sessions should be treated as a joint responsibility to be undertaken by the parties, their lawyers, if any, and the mediator, since the successful conduct of the same relies on all of them.[18] It has also been suggested

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[15] Horst, P.R., "Cross-Cultural Negotiations," A Research Report Submitted to the Faculty In Partial Fulfillment of the Graduation Requirements (2007), available at www.au.af.mil, [Accessed on 9/08/2018]; See also *www.negotiations.com*, [Accessed on 9/08/2018].

[16] Zartman, I. W. & Berman, M. R., The Practical Negotiator, (New Haven, CT: Yale University Press, 1982), pp. 42-87; Mwagiru, M., Conflict in Africa; Theory, Processes and Institutions of Management, op. cit, pp.113-114.

[17] Inbar, E., Great Power Mediation: The USA and the May 1983 Israeli-Lebanese Agreement, Journal of Peace Research, *Vol. 28, No. 1, Special Issue on International Mediation(Feb., 1991), pp. 71-84; see also, www.colorado.edu,* [Accessed on 9/08/2018].; See also www.negotiations.com, [Accessed on 9/08/2018].

[18] Cobb, C., 'Reflections on the Mediation Process: Ensuring a Successful Mediation,' June 13, 2017. Available at *http://milesmediation.com/reflections-on-the-mediation-process-ensuring-a-successful-mediation/* [Accessed on 9/08/2018].

that since in mediation the dispute resolution practitioner determines the phases of the process to be conducted, the process may be sequential, starting with a series of private meetings, such as a pre-mediation and intake interview to establish if the case is suitable for such a process and to assess the willingness of the parties to negotiate in a constructive way.[19] Apart from court annexed/mandated mediation[20], it is generally agreed that the number of sessions, their duration and the purpose of each session can be tailored to the requirements of the case and the approach favoured by the mediator and the parties.[21]

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[19] Brandon, M. & Stodulka, T., 'A Comparative Analysis of The Practice Of Mediation And Conciliation In Family Dispute Resolution In Australia: How Practitioners Practice Across Both Processes,' Queensland University of Technology Law and Justice Journal, Vol. 8, No. 1, 2008, pp. 194-212, at p. 199.

[20] The Mediation Accreditation Committee (MAC) developed a Code of Ethics that is to apply to all mediators taking part in the pilot program of the the court annexed mediation, and the same is expected to remain in force even after the program was rolled out to the rest of the country in May 2018. The mediation (Pilot Project) Rules, 2015 lays out the procedures and timelines for guiding the process under the Court Annexed Mediation. (Mediation (Pilot Project) Rules, 2015, Legal Notice No. 197 of 2015, Kenya Gazette Supplement No. 170, 9th October, 2015, (Government Printer, Nairobi, 2015)). The Mediation (Pilot Project) Rules, 2015, also provide that every civil action instituted in court after commencement of these Rules, must be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable and may be referred to mediation.

The mediation process within Court Annexed Mediation

Screening of Files: In this stage, the file is presented before the Mediation Deputy Registrar (MDR) who determines which cases are to be referred for Mediation. The matters referred to mediation are those with disputes relating to facts and not of law, few disputed facts and those that are not complex in nature.

Parties Notified of the Decision: When the Mediation Deputy Registrar (MDR) makes a decision for a case to be referred to mediation, the MDR notifies the parties of this decision within seven (7) days.

Case Summaries: The parties are, within 7 days of receipt of notification to file Case Summaries.

Nomination of Accredited Mediators: The MDR will then nominate three (3) mediators from the Mediation Accreditation Committee Register and notify the parties of the names.

Parties Respond: Parties respond by stating their preferred mediators in writing. The MDR will appoint a mediator to handle the case. Parties are notified about mediation.

Notification of Appointed Mediators: The MDR shall within 7 days of receipt of notice of preference of mediators appoint a mediator and notify the parties.

Appointed Mediator responds: Upon receipt of the notification, the mediators are expected to file their response.

Mediation Begins: The appointed mediator will schedule a date for initial mediation and notify the parties of the date, time and place. The mediation proceedings will be concluded within sixty (60) days from the date it is referred for mediation. However, this period may be extended for a further ten (10) days.

Filing of report: Upon completion of mediation, the mediator is expected to file a report which indicates whether or not a Mediation Settlement agreement was reached.

The mediator shall file a certificate of non- compliance where a party fails to comply with any of the mediator's directions or constantly fails to attend mediation sessions.

[21] ICC Commission on Arbitration and ADR, Mediation Guidance Notes, ICC Publication 870-1 ENG, (International Chamber of Commerce, France, 2015), p.6.

3.2 Negotiation Stage

At this stage, the possible strategies to use in the negotiations are discussed. Unlike in courts and in arbitration where the judges and arbitrators give orders and directions to be followed, a mediator's role in mediation is non-directive. This is so because in mediation party autonomy implies that, parties have a say over the process and outcome of the process. Therefore, where a mediator imposes his or her views upon the parties, the outcome may not be acceptable and enduring. A mediator's role at this stage should thus be essentially one of aiding the parties to negotiate and come to agreeable, creative and acceptable solutions that they are happy to live with. This is the essence of autonomy and voluntariness in mediation process.[22]

There are several *active listening techniques* at the disposal of a mediator that can be employed to help the parties come up with a solution to the conflict. These include: paying attention, listening attentively, listening to the voice of silence/what is not said, encouraging parties, clarifying /paraphrasing/backtracking/restating, reframing[23], reflecting, summarizing and validating. To be an active listener the mediator must ensure that he does not pay attention to his own emotions; should react to ideas and not a person; must recognize own prejudices; must avoid assumptions/judgments; use non-verbal behavior to show understanding and acceptance; show empathy; rephrase/ restate/reframe key thoughts and feelings and must conduct caucuses[24].

It is also recommended that mediators should have very well-developed communication skills. Some of the *non-verbal communication techniques* that a mediator must display in the mediation process are: maintaining frequent eye contact with the parties; body movements such as nodding and positioning; voice tone; keeping body oriented towards the speaker and showing a genuine curiosity to whatever is being said. Mediators are encouraged to have the ability to get the parties to talk to each other, as well as 'understanding when it may be necessary to allow the parties to save face and walk away with the settlement and their pride intact'.[25]

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[22] See article by Federation of Women Lawyers, 'Mediation in Kenya', published in the Daily Nation newspaper at page 42 on 20/06/2012. FIDA has successfully mediated in many family conflicts in Kenya where parties do not want to go to court. Parties result to mediation since it is informal, flexible, confidential (especially in family disputes), voluntary, fosters relationships and gives the parties autonomy over the process.

[23] The mediator uses this technique as a way of reciting back or neutrally paraphrasing the statements of the parties in order to demonstrate understanding of whatever they are saying.

[24] Caucuses are private sessions that the mediator may have with a party to the dispute so as to get more information or clarity on a particular issue.

[25] Smith, C.R., 'Mediation: The Process and the Issues,' Current Issues Series, (IRC Press, Industrial Relations Centre, Queen's University, Ontario, 1998), p. 6. Available at *http://irc.queensu.ca/sites/default/files/articles/mediation-the-process-and-the-issues.pdf* [Accessed on 9/08/2018].

As a way of management of interruptions during mediation process, it has been suggested that during the mediator's opening statement, the mediator should insure that the parties understand and agree to the guideline that each party lets the other speak without interruption during the mediation.[26]

This may be achieved through various ways which include but not limited to: the use non-verbal cues to indicate the interrupter should cease; ignore the interruption; stop the process and address the interrupter; or where it is difficult to proceed, the mediator needs to consider whether the parties need to be separated so that the process can continue or whether the mediation untenable.[27] These techniques allow the mediator to know and meet the parties' needs; make proposals which allow both parties to save face and enter an agreement that neither is willing to propose and come up with creative solutions to the conflict.

3.3. Post-Negotiation Stage

In the negotiation process, we have seen that the post-negotiation phase is the most important in the whole process. Similarly, in the mediation process this is the case too. It is during this stage that what was negotiated is implemented. After parties have arrived at an acceptable, enduring outcome or solution the negotiators and the mediator have to come up with a method or strategy for effectuating that outcome. The criteria could, for instance, include assigning roles to the parties and a timeframe within which certain roles are to be carried out. And it is at this stage that parties find out if the negotiations were done in good faith and whether the other party will deliver on the promises it made during the negotiation stage. This is possible through monitoring. This stage also creates a forum for building and mending broken relationships, since mediation is a mechanism geared towards fostering relationships rather than creating tensions.[28]

3.4 Mediation Approaches and Techniques

It has rightly been pointed out that there is considerable diversity in the practice of mediation internationally and within countries. Furthermore, mediation is used for various purposes and operates in a variety of social and legal contexts. As such, the

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[26] Carbone, M.P., 'Mediation Strategies: A Lawyer's Guide to Successful Negotiation.' Available at http://www.mediate.com/articles/carbone7.cfm#comments [Accessed on 9/08/2018]; 'Module 4: Issues In Mediation,' available at *http://www.ama.asn.au/wp-content/uploads/2012/07/MODULE-4.pdf* [Accessed on 9/08/2018].

[27] Knight, R., 'How to Refocus a Meeting after Someone Interrupts,' Havard Business Review, 16 April, 2015. Available at *https://hbr.org/2015/04/how-to-refocus-a-meeting-after-someone-interrupts [Accessed on 9/08/2018];* See also generally, Macmillan, R., A Practical Guide for Mediators, (Macmillan Keck Attorneys & Solicitors, Geneva). Available at *http://www.macmillankeck.pro/media/pdf/*A%20Practical%20Guide%20for%20Mediators.pdf [Accessed on 9/08/2018].

[28] Zartman, I. W. & Berman, M. R.,The Practical Negotiator, op. cit; See generally, Horst, P.R., "Cross-Cultural Negotiations," A Research Report Submitted to the Faculty In Partial Fulfillment of the Graduation Requirements (2007), available at www.au.af.mil, [Accessed on 9/08/2018].

mediator usually possesses different types of training, cultural backgrounds, skills levels and operational styles. These factors all contribute to the challenge of trying to define and describe mediation practices.[29] For example, in traditional African society, several societal factors such as traditions, norms, kinship ties, joking relations, communal living and respect were instrumental in conflict management. In the traditional set up, mediation was seen as an everyday affair and an extension of a conflict management process on which it is dependent.[30] Mediation in the traditional setting thus operated and functioned within the wider societal context in which case it was influenced by factors such as the actors, their communication, expectations, experience, resources, interests, and the situation in which they all find themselves.[31] It is thus not a linear cause-and-effect interaction but a reciprocal give and take process. This reciprocity is the one that created an ideal environment for conflict resolution among African communities as it involved the mutual exchange of privileges, goods, favours and obligations thus fostering peaceful coexistence and eliminating the likelihood of wars and conflicts. It influences and is, in turn, influenced and responsive to the context and environment of the conflict.[32]

Since it is now acknowledged that conflict management is a more complex social phenomenon than earlier conceptualized, there is consensus that there are other factors and actors who have interests that influence the mediation process beyond the parties themselves. Such a wide environment in which the immediate parties to the conflict, mediator's constituents, and third parties who affect or are affected by the process and outcomes of the mediation and other factors such as societal norms, economic pressures, and institutional constraints directly or indirectly affecting the mediation process is what

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[29] Drews, M., 'The Four Models of Mediation,' DIAC Journal- Arbitration in the Middle East, Vol.3, No. 1(1), 2008, p.44. Available at *http://www.diac.ae/idias/journal/volume3no1/issue1/eng4.pdf* [Accessed on 9/08/2018].

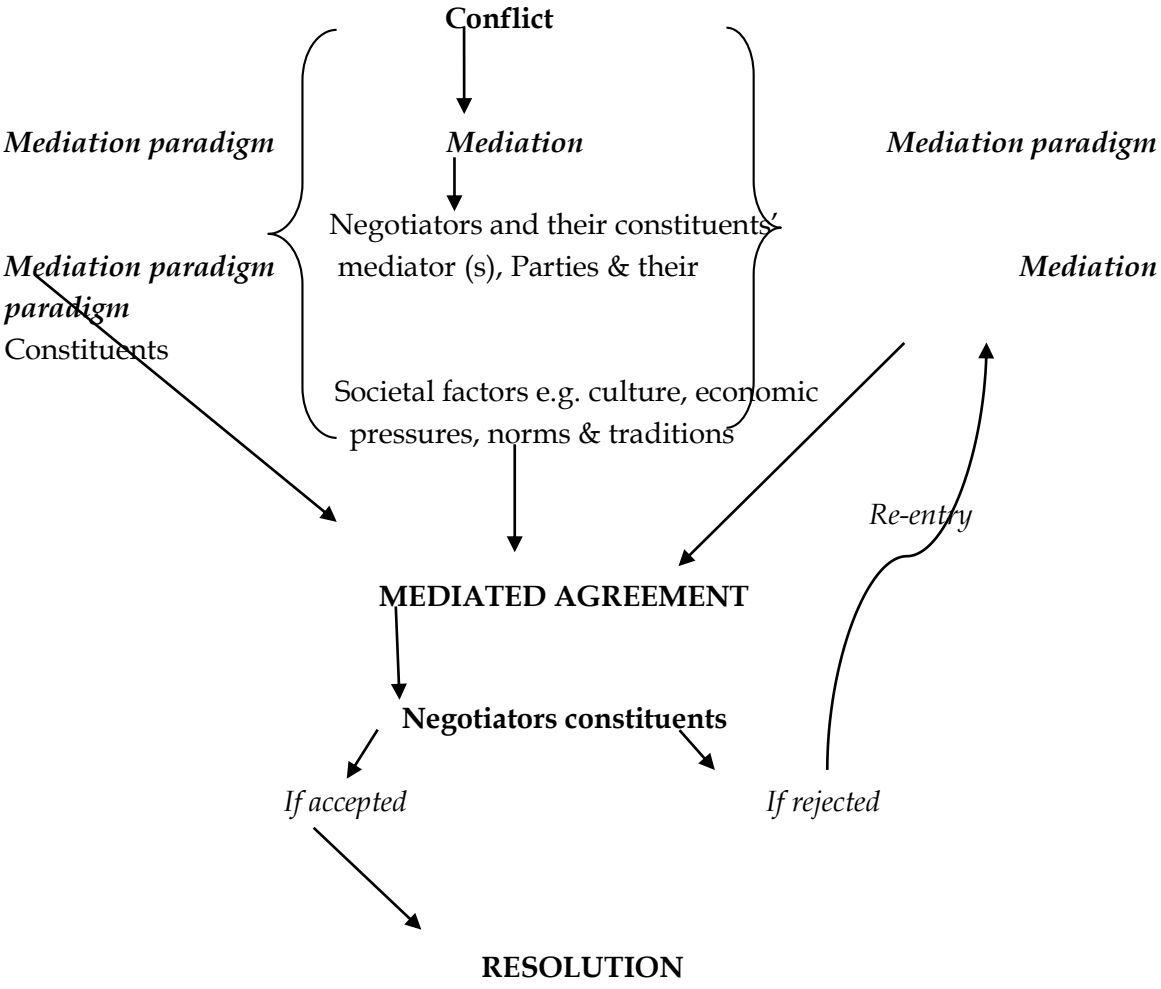
[30] See Davidheiser, M., "Joking for peace: Social organization, tradition, and change in Gambian conflict management," op cit.; Wegru, J.Y., "The Dagaaba-Frafra Joking Relationship," Folklore, Vol.14, 2000, pp.86-97; Parkin, R., "The Joking Relationship and Kinship: Charting a Theoretical Dependency," Journal of the Anthropological Society of Oxford, Vol.24, 1993, 251-263; Davidheiser, M., "Special Affinities and Conflict Resolution: West African Social Institutions and Mediation," Beyond Intractability (2005). Available at *https://www.researchgate.net/profile/Mark_Davidheiser/publication/265063587_Special_Affinities_and_Conflict_Resolution_West_African_Social_Institutions_and_Mediation/links/5621990a08aed8dd1943e828.pdf* [Accessed on 9/08/2018].; De Jong, F., "A joking nation: conflict resolution in Senegal," Canadian Journal of African Studies/La Revue canadienne des études africaines, Vol.39, No. 2, 2005, pp.391-415.

[31] "The Cognitive Perspective on Social Interaction," available at *https://www.ocf.berkeley.edu/%7Ejfkihlstrom/SocialCognitionWeb/CogPerspect/CogPerspect_supp.htm* [Accessed on 9/08/2018].

[32] See Baregu, M., "Understanding Obstacles to Peace: Actors, Interests, and Strategies in Africa's Great Lakes Region," (International Development Research Centre, 2011). Available at *https://prd-idrc.azureedge.net/sites/default/files/openebooks/516-8/* [Accessed on 9/08/2018].

is referred to as the mediation paradigm.[33] [See *Fig. 1* below for an illustration of the mediation paradigm]. However, the concept has now been extended further to include sources of the benefits for the parties and third parties such as a mediator which are located in the conflict, region where conflict arose, international audience /neighbours, parties and third party constituents.[34]

Fig. 1 Mediation Paradigm



***Source: The author.**

Fig. 1.2 illustrates the mediation paradigm with some of the main actors, that is, the conflict, negotiators and their constituents, the mediators, third parties and their

[33] Wall, Jr, J.A., "An Analysis, Review, and Proposed Research", The Journal of Conflict Resolution, Vol. 25, No.25 [March., 1981], pp.157-180.

[34] Mitchell, C., "The Motives for Mediation," in Mitchell, C.R. & Webb, K. (eds), New Approaches to International Mediation (Westport, CT: Greenwood Press, 1988), pp. 29-51; Mwagiru, M., The Water's Edge: Mediation of Violent Electoral Conflict in Kenya, (Institute of Diplomacy and International Studies, Nairobi, 2008), pp.43-54.

constituents and other societal factors that influence the mediation process. It further reveals that the constituents are normally interested in the mediated agreement. This is because, if the negotiators do not consult them sufficiently they may reject the agreement leading to the re-entry problem. However, where there are adequate consultations with the constituents the negotiators will find that the agreement they negotiated is acceptable and hence an end to the conflict. The mediation paradigm is thus useful in understanding the conflict context. The context of the conflict is the wider context, the societal aspects to the conflict reflecting the nature of the disagreement, the parties' perceptions of it, and the level and type of their conflict behavior.[35]

There are about four models of mediation that are used in different jurisdictions and subject areas: Facilitative mediation- where the parties are encouraged to negotiate based upon their needs and interests instead of their strict legal rights; Settlement mediation- where parties are encouraged to compromise in order to settle the disputes between them; Transformative mediation- where the parties are encouraged to deal with underlying causes of their problems with a view to repairing their relationship as the basis for settlement; Evaluative mediation- where parties are encouraged to reach settlement according to their rights and entitlements within the anticipated range of court remedies.[36] Despite the foregoing, it should be noted that scholars have summarised about five elements of a successful mediation process that would work in various approaches:[37]

a. First, there needs to be 'an impartial third party facilitator' who helps the parties explore the alternatives and find a satisfactory resolution;

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[35]Bercovitch, J. & Houston, A., "Why Do They Do It like This? An Analysis of the Factors Influencing Mediation Behaviour in International Conflicts", The Journal of Conflict Resolution, Vol. 44, No. 2 (Apr., 2000), pp. 170-202; Kenyatta, J., Facing Mount Kenya: The Tribal Life of the Gikuyu, (Vintage Books, New York, 1965); Mkangi, K, Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa, available at www.payson.tulane.edu, [Accessed on 9/08/2018]; See generally Report by Mohamud, A, et al (eds), Conflict Management in Kenya: Towards Policy and Strategy Formulation (Practical Action, Nairobi, 2006).

[36] Ibid; See also Fenn, P. Introduction to Civil and Commercial Mediation, Part 1 (Chartered Institute of Arbitrators), p. 42:

> Para. 4.12 provides for contingency approach to mediation, which means that there is no set procedure but the procedure is tailored to suit the parties and the dispute in question. This often means that mediation is conducted without joint meetings and the mediators play a variety of roles.

[37] Marsh, Stephen R. 1997a. What is mediation? Available at *http://members.aol.com/ethesis/mw1/adr1/essayi.htm)* [Accessed on 9/08/2018], (As quoted in Smith, C.R., 'Mediation: The Process and the Issues,' (Industrial Relations Centre, Queen's University Kingston, Ontario, 1998), p.3.

b. Second, the mediator must 'protect the integrity of the proceedings' by setting ground rules that all parties must follow and protecting the confidentiality of the proceedings;
c. Third, there must be 'good faith from the participants' or the process will soon be frustrated and fail;
d. Fourth, those with full authority to make decisions must attend the proceedings to show true commitment to the process. If one side lacks full authority, the other side can easily become frustrated when approval from superiors must continually be obtained; and
e. Finally, the mediator must choose an appropriate neutral location, so that both sides will feel relaxed and the process will be less intimidating.

It is also true that 'practitioners are likely to be influenced by their professional background, their training, skill level and their framework for practice. They may have different perspectives that influence their style and may not always be consistent in every case. This influence most often comes from their initial training, their mentors, literature, ongoing professional and personal development, membership of professional bodies and their organisational or agency standards and accreditation requirements.'[38]

4. Facilitative Role of the Non-Mediator Lawyers in the Mediation Process

It has been suggested that where a party goes with a non-mediator lawyer in the mediation process, such a lawyer can perform various facilitative roles ranging from the referring clients to mediation, helping during the mediation process, reviewing a mediated agreement, and communicating with the mediator.[39] In addition, in deciding whether or not to refer clients to mediation, such lawyers should assess the personality, capabilities, and motives of clients to determine whether they would appropriately contribute to and profit from mediation.[40]

The lawyer may also participate in selecting a mediator or providing clients with a list of reputable mediators.[41] Other roles include but not limited to: remaining available to clients to provide information and advice without depriving clients of autonomy in the mediation process; and advising clients about the enforceability of the decisions being made and the need for security to ensure the integrity of the agreement.[42] It has also rightly been pointed out that the wise lawyer takes care to understand the scope of the

[38] Brandon, M. & Stodulka, T., 'A Comparative Analysis of The Practice Of Mediation And Conciliation In Family Dispute Resolution In Australia: How Practitioners Practice Across Both Processes,' Queensland University of Technology Law and Justice Journal, Vol. 8 No 1, 2008, pp. 194-212, at p. 209.
[39] See generally, Samuels, M. D. & Shawn, J.A., "The role of the lawyer outside the mediation process," Conflict Resolution Quarterly, No. 2, 1983, pp.13-19.
[40] Ibid.
[41] Ibid.
[42] Ibid.

protection the law affords to statements made and acts done in connection with settlement negotiations.[43]

It is therefore arguable that lawyers can play a facilitative role in mediation without interfering with either the mediator's role or jeopardizing the parties' ability to resolve their issues.

5. Conclusion

This paper has discussed the mediation process as a continuation of the negotiation process. It is an informal, flexible, voluntary and expeditious process. This is the sense in which mediation was practiced by Kenyan communities before the advent of formal legal mechanisms. The paper however highlights the general elements of a mediation process that is broad enough for all the mediators to incorporate. Regarding the specific elements of the process, that will greatly depend on the mediator, their training, nature of dispute and parties, amongst others.

As outlined above, mediation may involve the three phases the preparatory stages, actual negotiations and the implementation stage. However, they are not cast in stone. They are not fixed procedures as happens in court. They allow flexibility during the negotiations and the mediation. Conflict resolution in the traditional African set up was such a process and most of these phases were involved albeit in an unconscious manner.

As seen above, the mediation process involves other constituents and not just the parties to the conflict. It has been suggested that it includes the mediator, constituents of the parties, constituents of the mediator and the third parties who affect or are affected by the process and outcome of the mediation. Furthermore, this environment also includes other factors such as societal norms, economic pressures and institutional constraints which affect the mediation process and the outcome either directly or indirectly. [44]

Since Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution Mechanisms (TDRMs) are now enshrined in the Constitution, their positive attributes should now be harnessed to foster peaceful co-existence and enhance access to justice in Kenya. It is thus hoped that the policy, legal and institutional framework on resolution of conflicts in Kenya is bound to shift to encourage ADR and other traditional means of conflict management. It thus becomes imperative for the practitioners to appreciate the minimum accepted ingredients of mediation process to enhance the process and acceptability of the outcome by the parties.

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[43] Brazil, W.D., "Protecting the Confidentiality of Settlement Negotiations," Hastings Lj, No. 39, 1987, pp. 955-1029 at 955.

[44] Wall, Jr, J.A., "An Analysis, Review, and Proposed Research", The Journal of Conflict Resolution, Vol. 25, No.25 [March., 1981], pp.157-160.

Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation

Abstract

In light of the ongoing efforts to enhance the place of mediation in Kenya as a choice mechanism for access to justice across various sectors, this paper offers some thoughts on some viable ways through which the efficiency of mediation can be promoted and realized. The paper looks at law related as well as attitude issues that may affect the effectiveness of mediation as a tool for access to justice.

1. Introduction

This paper offers some reflections on the use of mediation and other traditional conflict resolution mechanisms that have been used by Kenyan communities since time immemorial in conflict management and enhancing access to justice. This is informed by the renewed drive to enhance the use of ADR mechanisms including mediation, as a result of their formal recognition under the current Constitution of Kenya 2010[1] and subsequent statutes.

Ongoing discussions on the role of mediation and other traditional conflict management mechanisms have now been spiced up by the enactment of laws recognizing the role of these mechanisms in enhancing access to justice and peaceful coexistence.[2] The author looks at where we have been, where we are now and the prospects for the future. The prospects for the future include recommendations and urgent reforms that should be undertaken to reap the benefits presented by mediation and other ADR mechanisms in enhancing access to justice and fostering peaceful co-existence among people in Kenya. This comes at a time when Judiciary's Court Annexed Mediation Project has been completed and a report by an independent evaluation of the same released and even more recently, the project was extended to stations outside Nairobi on pilot basis.[3]

2. Use of Mediation for Access to Justice in Kenya

Most communities in Kenya have used mediation and other ADR and Alternative Justice Systems in resolving their conflicts for centuries.[4] It was customary and an everyday affair to see people sitting down informally and agreeing on certain issues, such as the allocation

[1] See Art. 60, 67, 159 of the Constitution of Kenya, 2010.

[2] See sec. 5(1) (f), National Land Commission Act, No. 5 of 2012; sec. 4, Land Registration Act 2012; Part x, Sec. 68, Marriage Act 2014; sec. 15, Industrial Courts Act, 2011; sec. 8(f), Commission on Administrative Justice Act, 2011; sec. 20, Environment and Land Court Act, 2011; sec. 5(1), Legal Aid Act, 2016; sec. 40, 41, Community Land Act, 2016.

[3] See Muigua, K., Resolving Conflicts through Mediation in Kenya. (Glenwood Publishers Ltd, Nairobi, 2012), Chap.10, pp. 123-134.

[4] 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.

of resources in traditional African societies.[5] Since conflicts have the potential to break down the economic, social and political organization of a people, most Kenyan communities had certain principles and religious beliefs that they observed and that fostered unity and peaceful coexistence.

It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.[6]

In this way conflicts were shunned and where they arose, there were mechanisms and institutions that were in place to effectively resolve those conflicts. It is for this reason that the author opines that the plethora of principles, mechanisms and institutions that were used and have continued to be used (though rarely) be employed as envisaged in the constitution to enhance access to justice and foster peaceful coexistence. Traditional conflict management mechanisms were resolution mechanisms. Even where mediation was practised, it was in the political process where it was a resolution mechanism. It is imperative that traditional conflict management mechanisms be harnessed in managing conflicts as they are resolution rather than settlement mechanisms[7].

Mediation, if carried out correctly leads to outcomes that are enduring. The parties have autonomy over the process and the outcome. Parties who have a conflict may decide to negotiate. When negotiations hit a deadlock they get a third party to help them continue with the negotiations. The mediator's role in such a process is to assist the parties in the

[5] Ibid.

[6] Mkangi, K., Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa, available at *www.payson.tulane.edu*. [Accessed on 14/10/2017].

[7] Resolution of conflicts gives rise to an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power-based outcomes (K. Cloke, The Culture of Mediation: Settlement vs. Resolution, The Conflict Resolution Information Source, Version IV, December 2005). A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power (Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management (Nairobi: Centre for Conflict Research, 2006), p. 42). Resolution is based on the belief that the causes of conflicts in the society are needs of the parties which are non-negotiable and inherent to all human beings (J. Bercovitch, Mediation Success or Failure: A Search for the Elusive Criteria, Cardozo Journal of Conflict Resolution, Vol.7.289, p.296). Settlement is an agreement over the issue(s) of the conflict which often involves a compromise (D. Bloomfield, Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, Journal of Peace Research, vol. 32 no. 2 May 1995, pp. 151-164).

negotiations. He or she does not dictate the outcomes of the negotiations. Parties must have the autonomy of the process and of the outcome.[8]

Mediation is a voluntary process. However, Kenya has introduced court mandated mediation. Although it is a good step, once the voluntariness to go for mediation is lost then the process of mediation is negatively affected. The parties are expected to report back the outcome of their negotiations to court for it to endorse it. It is however important to ensure that the process is not exposed to the vagaries that bedevil the court system including delays, bureaucracy and inefficiency.

Traditional societies have used mediation to resolve conflicts for hundreds of years. It was used informally where disputants could just sit with a third party such as the council of elders who could facilitate the negotiations. The formal legal system has failed to recognize that mediation is not a new concept in Kenya and has thus tried to classify mediation as part of the Alternative Dispute Resolution mechanisms. It views mediation as an alternative to litigation. This view of mediation is flawed as it gives mediation a second place in the conflict settlement continuum. Mediation can stand alone as a method of resolving conflicts. However, care has to be taken to ensure that the parties enter mediation voluntarily, the outcome of the process is respected and the solutions reached are acceptable and enduring.

In order to enhance access to justice, foster peace coexistence, promote the cultural aspects of the Kenyan people and enhance cohesion among communities, traditional concepts of conflict management as envisaged in the law should be applied in that regard. All these can be achieved through resolution of conflicts, including those ones that are caused either by scarcity or abundance of natural resources. In a nutshell, there is a need to enhance the conflict resolution mechanisms and the existing institutional capacity, if resolution of conflicts rather than settlement is to be achieved. A lot of resources and time is expended dealing with conflicts. They hamper the economic advancement of a nation since people are not fully engaged in economic activities but have to spend time in court defending suits. Resolution of conflicts removes all underlying causes of the conflict and hence once resolved it cannot flare up again later. This is not the time to procrastinate. The time to search for and adopt an effective conflict resolution mechanism is now.

Mediation is essentially negotiation with the assistance of a third party. Human beings have not lost the capacity to negotiate. Resolution as opposed to settlement of conflicts can assist in healing the wounds caused by conflicts. Mediation can deal with the psychological dimensions of the conflicts. As Martin Luther King Junior said:

[8] Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management (Nairobi: Centre for Conflict Research, 2006), p. 42.

> "*The time for healing of wounds has come. The time to bridge the chasms that divide us has come. The time to build is upon us*".[9]

Resolving conflicts in Kenya through mediation is indeed an imperative.

3. Opportunities for Mediation in Kenya

3.1 Mediation and Access to justice

Access to justice is considered to be more than just about presence of formal courts in a country but also entails the opening up of those formal systems and legal structures to the disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.[10] Realization of the right of access to justice can only be as effective as the available mechanisms to facilitate the same. For the constitutional right of access to justice to be realized, there has to be a framework based on the principles of: *expedition*; *proportionality*; *equality of opportunity*; *fairness of process*; *party autonomy*; *cost-effectiveness*; *party satisfaction* and *effectiveness of remedies* (emphasis added).[11]

Marginalised individuals and groups often possess limited influence in shaping decision-making processes that affect their well-being.[12] It is contended that in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.[13] It is often difficult for Kenyans to seek redress from the formal court system especially owing to numerous challenges[14]. The end result is that the disadvantaged people may harbour feelings of bitterness, marginalization, resentment and other negative feelings that also affect the stability and peace of the country. Such scenarios have been cited as some of the causes of ethnic or clan animosity in Kenya.[15]

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[9] Martin Luther King: Excerpt from acceptance Speech by the 1993 Nobel Peace Laureate, Inaugural Celebration address 1994, sources from,
http.www.goote.htm, (accessed on 5/08/2012).

[10] Global Alliance against Traffic in Women (GAATW), Available at
http://www.gaatw.org/atj/(Accessed on 13/10/ 2017).

[11] See Maiese, M., "Principles of Justice and Fairness," in Burgess, G. and Heidi Burgess, H. (Eds.) ―Conflict Information Consortium‖, Beyond Intractability, University of Colorado, Boulder (July 2003).

[12] Gibson, C., et. al., 'Empowerment and Local Level Conflict Mediation in Indonesia: A Comparative Analysis of Concepts, Measures, and Project Efficacy,' Policy research working papers, Vol. 3713, World Bank Publications, 2005, p.1.

[13] United Nations Development Programme, 'Access to Justice and Rule of Law,' available at
http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/ [Accessed on 14/10/2017]

[14] Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), p. 29.

[15] Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya', (the 'Akiwumi Commission') (Government Printer, Nairobi, 1999).

In litigation, the dispute settlement coupled with power struggles will usually leave broken relationships and the problem might recur in future or even worse still the dissatisfied party may seek to personally administer 'justice' in ways they think best. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed.[16]

Recognition of ADR and traditional dispute resolution mechanisms is predicated on the above cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system.[17] Access to justice should thus include the use of informal conflict management mechanisms such as ADR and traditional dispute resolution mechanisms, to bring justice closer to the people and make it more affordable.[18]

3.2 Mediation, Environmental Democracy, Public Participation andCommunity Empowerment

The process of managing natural resource-based conflicts is an off-shoot of the right to access to environmental justice and by extension, environmental democracy. The right of access to justice is essential as it affords the means by which the public challenge application of and implementation of environmental laws and policies.[19] Environmental democracy which involves giving people access to information on environmental rights, easing access to justice in environmental matters and enabling public participation in environmental decision making, inter alia, is desirable in the Kenyan context.[20]

With regard to public participation in natural resource management, it has been argued that since most resource issues today are less dependent on technical matters than they are on social and economic factors, if a state is to maintain the land's health, they must

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[16] Muigua, K., 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,' Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution, Vol. 3, No. 2, 2015, pp. 64-108 at p.80.

[17] Muigua, K., Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010, p. 6.

[18] See Muigua, K. & Kariuki F., 'ADR, Access to Justice and Development in Kenya, ' Paper Presented at Strathmore Annual Law Conference 2014 held on 3rd& 4th July, 2014 at Strathmore University Law School, Nairobi.

[19] FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

[20] See generally, Hazen, S., Environmental Democracy, *(<http.www.ourplanet.com).* [Accessed on 18/01/2016]. Washington DC. Csaba Kiss and Michael Ewing (eds), "Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries." European Regional Report (published by The Access Initiative Europe.) available at *http://www.accessinitiative.org* [Accessed on 18/01/2016]; See also Art. 69(1) (d) of the Constitution of Kenya, 2010. The Constitution supports the notion of environmental democracy by providing that one of the obligations of the State in relation to the environment is to encourage public participation in the management, protection and conservation of the environment.

learn to balance local and national needs.[21] It is argued that the state must learn to better work with the people who use and care about the land while serving their evolving needs.[22]

In The Matter of the National Land Commission [2015] eKLR, the Supreme Court observed that the dominant perception at the time of constitution-making was that the decentralization of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfillment, through an enlarged scheme of actual participation in governance mechanisms by the people thus giving more fulfillment to the concept of democracy.[23]

The Constitution of Kenya outlines the national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.[24] These values and principles include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and *participation of the people*; human dignity, equity, social justice, *inclusiveness*, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development (emphasis added).[25]

The Rio Declaration in principle 10 emphases the importance of public participation in environmental management through access to justice thus: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.… Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[26] Participatory approaches have been increasingly advocated as effective decision-making processes to address complex environment and sustainable development issues.[27]

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[21] Daniels, SE & Walker, GB, 'Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches,' p. 2.
Available at *http://dev.mtnforum.org/sites/default/files/publication/files/260.pdf* [Accessed on 3/01/2016].
[22] Ibid; Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 5.
[23] In the Matter of the National Land Commission [2015] eKLR, para. 21; See also Muigua, K., et al, (2015) Natural Resources and Environmental Justice in Kenya, (Glenwood Publishers Limited, 2015, Nairobi).
[24] Constitution of Kenya 2010, Art. 10(2).
[25] Constitution of Kenya 2010, Art. 10(3).
[26] United Nations Conference on Environment and development, Rio Declaration on Environment and Development, Rio de Janeiro, Brazil, 1992.
[27] Hove, S.V.D., 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' Land Use Policy, Vol. 23, Issue 1, January 2006, p.10.

The provision of effective avenues for resolution of natural resource-based conflicts is thus far one of the most practical ways of ensuring access to justice, and by extension adhering to public participation principle. Scholars have asserted that participatory approaches should be thought of as located somewhere on a continuum between consensus-oriented processes in the pursuit of a common interest and compromise-oriented negotiation processes aiming at the adjustment of particular interests.[28]

It has been suggested that government policies can create opportunities for use of mediation during disputes.[29] However, they must include mechanisms for judging the prospects of success at the outset and adopting contingencies to ensure the mediators' security if situations deteriorate.[30] ADR mechanisms, and particularly negotiation and mediation, have intrinsic advantages that can facilitate effective management of natural resource-based conflicts. They have the potential to be expeditious, cost effective, participatory and all-inclusive and thus, can be used to manage natural resource-based conflicts in way that addresses all the underlying issues affecting the various parties.

Empowerment is aimed at achieving the following: developing the ability to access and control material and non-material resources and to effectively mobilize them in order to influence decision outcomes; developing the ability to access and influence decision-making processes on various levels (household, community, national, global) in order to ensure the proper representation of one's interests (also described as getting a voice); gaining an awareness of dominant ideologies and of the nature of domination that one is subjected to in order to discover one's identity, and ultimately to develop the ability to independently determine one's preferences and act upon them; and developing the ability to trust in one's personal abilities in order to act with confidence.[31]

It has rightly been noted that a right is not just the ability to do something that is among your important interests (whatever they are), but a guarantee or empowerment to actually do it, because it is the correct thing that you have this empowerment.[32] Political empowerment requires inclusion in democratic decision-making processes which is equated to mainly gaining a voice within the local and/or central state.[33]

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[28] Ibid, p.16.
[29] Castro, A.P. & Nielsen, E. (eds), 'Natural resource conflict management case studies: an analysis of power, participation and protected areas,' op cit, p. 272.
[30] Ibid.
[31] Oladipo, S.E., 'Psychological Empowerment and Development', African Journals Online, Vol. 2, No 1, 2009, p.121.
[32] The Hendrick Hudson Lincoln-Douglas Philosophical Handbook, Version 4.0 (including a few Frenchmen), p. 4. Available at *http://www.jimmenick.com/henhud/hhldph.pdf* [Accessed on 15/10/2017].
[33] Miller, B., 'Political empowerment, local—central state relations, and geographically shifting political opportunity structures: Strategies of the Cambridge, Massachusetts, Peace Movement‖,

Mediation has been used successfully to manage and resolve conflicts in Kenya. It has been seen, for example, that it was and has been efficacious in resolving environmental conflicts and lately in resolving family disputes. Because of the myriad causes of these conflicts a mechanism that addresses the underlying causes and that lends a mutually acceptable outcome is the most appealing to the parties. Such a mechanism is mediation.

Arguably, mediation is the best option for resolution of conflicts such as those involving natural resources. The process has to involve all the parties who have an interest in the matter. The mediation process would have to be voluntary and bear all the positive attributes of mediation. The parties have to be autonomous: Autonomy of the process and of the outcome is a prerequisite. A mediation agreement that can be respected by all the parties would lead to enduring outcomes for the present and future generations.

As such, ADR mechanisms such as negotiation and mediation provide an opportunity for empowering the Kenyan people through saving resources such as time and money, fostered relationships and mutually satisfying outcomes.[34] It is however noteworthy that adopting a community-based approach to empowerment does not automatically translate into greater participation and inclusion. This is because some of the traditional practices have negative impacts such as discrimination of women and disabled persons.[35] In fact, it is against this fact that the Constitution retains the test of non-repugnancy while applying traditional justice systems.[36] This is where the Courts come in as the legal guardians of the Bill of Human rights as envisaged in the Constitution.[37]

Political Geography, (Special Issue: Empowering Political Struggle), Volume 13, Issue 5, September 1994, pp. 393–406.

[34] Muigua, K., 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,' op cit. p. 84.

[35] See generally, Muigua, K., ―Securing the Realization of Environmental and Social Rights for Persons with Disabilities in Kenya‖. Available at *http://www.kmco.co.ke/attachments/article/117/Securing%20the%20Realization%20of%20Environmental%20and%20Social%20Rights%20for%20Persons%20with%20Disabilities%20in%20Kenya.pdf; See also generally Human Rights Watch, World Report 2013, available at http://www.hrw.org/sites/default/files/wr2013_web.pdf*[Accessed on 15/10/2017].

[36] Constitution of Kenya 2010, Art. 159(3).

[37] Constitution of Kenya 2010, Art.23. Article 23 of Constitution of Kenya deals with Authority of courts to uphold and enforce the Bill of Rights:

> (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
>
> (2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
>
> (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including––
>
> (a) a declaration of rights;
>
> (b) an injunction;

3.3 Mediation and Conflict Management for Sustainable Development

Conflicts do not occur in vacuum, and to a large extent, they are dependent on the context. Indeed, it has been argued that the governance of natural resources is especially important in the context of divided societies because control over the benefits from local natural resources is often a chief motivator of ethnic or identity-based conflicts.[38] Natural resource based conflicts also are, directly and indirectly connected to and/or impact human development factors and especially the quest for social-economic development.[39] Natural resource-based conflicts continue to negatively affect Kenyans owing to the many weaknesses of the present legal and institutional framework. It is noteworthy that most of the sectoral laws mainly provide for conflict management through the national court system.

National legal systems governing natural resource management are based on legislation and policy statements that are administered through regulatory and judicial institutions, where adjudication and arbitration are the main strategies for addressing conflicts, with decision-making vested in judges and officials who possess the authority to impose a settlement on disputants.[40] Further, decisions are more likely to be based on national legal norms applied in a standardized or rigid manner, with all-or-nothing outcomes. Thus, contesting parties often have very limited control over the process and outcomes of conflict management.[41] In Kenya, where these conflicts may be clan-based or community based, courts offer little help in terms of achieving lasting peace due to the settlement nature of the outcome. Thus, conflicts are likely to flare up later.[42]

The Sustainable Development Goals (SDGs) recognise the connection between peace and development and thus provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.[43] The SDGs Agenda also recognizes the need to build peaceful, just and

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(c) a conservatory order;
(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
(e) an order for compensation; and
(f) an order of judicial review.

[38] Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' op cit, p. 5.

[39] Wilson, C. & Tisdell, C., 'Conflicts over Natural Resources and the Environment: Economics and Security,' Working Papers on Economics, Ecology and the Environment, Working Paper No. 86, September 2003; Lumerman, P., et al, 'Climate Change Impacts on Socio-environmental Conflicts: Diagnosis and Challenges of the Argentinean Situation,' (Initiative for Peacebuilding 2011).

[40] FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

[41] Ibid.

[42] See generally Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management, op. cit.

[43] United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, para. 35.

inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda. The aim is to redouble the efforts to resolve or prevent conflict and to support post-conflict countries, including through ensuring that women have a role in peace building and state building.[44] The SDGs Agenda also calls for further effective measures and actions to be taken, in conformity with international law, to remove the obstacles to the full realization of the right of self-determination of peoples living under colonial and foreign occupation, which continue to adversely affect their economic and social development as well as their environment.[45] Thus, conflicts management should be one of the key issues that should be addressed in the quest for sustainable development.

Sustainable development is not possible in the context of unchecked natural resource-based conflicts. In recognition of this fact, Sustainable Development Goal (SDGs) 16 aims to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.[46] It is also noteworthy that SDGs seek to promote participation of local communities in natural resource management.[47]

Indigenous knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment.[48] Negotiation and mediation have more value to the local communities than just being means of conflict management. At least, they are means of sharing information and participating in decision-making. The two mechanisms have the unique and positive attributes which include their participatory nature that can be used to manage natural resource-based conflicts and ensure that Kenyans achieve sustainable development.

Furthermore, the affected communities, in cases of decision making, can have guaranteed and meaningful participation in the decision-making process by presenting proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.[49]

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[44] Ibid.
[45] Ibid.
[46] United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.
[47] Ibid, Goal 6b.
[48] Preamble, United Nations Declaration on the Rights of Indigenous Peoples. UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295.
[49] Ristanić, A., 'Alternative Dispute Resolution And Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,' (Lund University, April 2015), available at

However, even where the use of ADR and TDR mechanisms is contemplated, there barely exists effective framework to oversee their utilisation. There is need to actualise the use of ADR and particularly negotiation and mediation in managing natural resource-based conflicts as envisaged in the Constitution. ADR is not fully utilised in the Kenyan context. Therefore, the attributes of cost effectiveness, party autonomy, flexibility, amongst others, are hardly taken advantage of in the environmental arena. There is need to ensure that there is put in place a framework within which communities are actively involved in achieving peace for sustainable development.

The Government efforts as evidenced by bodies such as the National Cohesion and Integration Commission[50] should actively involve communities in addressing natural resource-based conflicts in the country. While acknowledging that negotiation and mediation may not provide holistic solutions to the problem, they can still be used in tandem with other methods of conflict management to address problem of natural resource-based conflicts in Kenya.

Natural resource-based conflicts, like all other kinds of conflicts, are inevitable in human interactions and if left unmanaged, they tend to degenerate into disputes that ruin the relations between persons or communities and yield undesired costs. The use of ADR in the resolution of natural resource-based conflicts is viable and should be exploited to its fullest. ADR is not a panacea to all the natural resource-based conflicts and environmental problems as it has many limitations and is also faced with numerous challenges. However, ADR is worth working with in the environmental arena. The benefits accruing from ADR processes should be fully utilised in the Kenyan context to minimise or at least manage natural resource-based conflicts and ensure Kenya realises its goals of sustainable development and the Vision 2030.

4. The Future of Mediation in Kenya: Making Mediation Work for All

4.1 Facilitative Policy, Legal and Institutional Framework

In the short term, there should be ongoing efforts to identify and use mediation in ways that create a bridge between traditional conflict resolution mechanisms and the more formal mechanisms like the courts as recognized in Article 159 (2) (c) of the constitution. Before the advent of contemporary conflict resolution mechanisms, traditional communities developed and refined, over time, their own mechanisms for resolving local

https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf [Accessed on 08/01/2016].

[50] This is a Commission established under s. 15 of the National Cohesion and Integration Act, 2008, No. 12 of 2008, Revised Edition 2012 [2008]. One of the functions of the Commission is to promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace (s.25 (2) (g).

level disputes, both within their communities and with others. These were based on solid traditional institutions such as mediation through a Council of Elders. These institutions were respected by community members and hence those affected generally complied with their decisions.[51]

Development, in order to be authentic, must respond to the traditions, attitudes, organisations and goals of the people whose society is under consideration.[52] Elders are traditionally regarded as experienced, expert custodians of knowledge, diplomacy and the judicial system of their specific society grouping.[53] At independence in many African countries (including Kenya) most disputes were resolved using traditional/informal justice. Despite their popularity, these justice systems were regarded as obstacles to development. It was assumed that as the countries became more and more modernized TJS would naturally die but this, according to a study by Penal Reform International (PRI) has not been the case.[54]

The current land mediation system in East Timor for example, creates a bridge between traditional dispute-resolution mechanisms and the courts.[55] The need for greater connectivity between the traditional and formal systems has been widely acknowledged and to this end, we must consider the social and economic benefits of incorporating traditional institutions and mediation mechanisms, within the formal mechanisms, to bridge the gap in conflict resolution.

Secondly, mediation should be embedded in administration as seen in Article 189 (4) of the constitution where alternative dispute resolution mechanisms including negotiation and mediation are to be used in settling disputes between the two systems of government. Mediation systems should reduce burdens on the court system and broaden the options available to deal with conflicts. Conflict resolution mechanisms such as mediation should be embedded in the devolved administration and in the judiciary. This allows remedies unavailable in the courts and also alleviates problems associated with a lack of capacity in the court system, including minimal facilities in rural areas.[56] Multi-Door Courtrooms

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[51] Chapman, C. & Kagaha, A., "Resolving Conflicts Using Traditional Mechanisms in The Karamoja and Teso Regions of Uganda", Northern Uganda Rehabilitation Programme (NUREP) Briefing, Minority Rights Group International, August 2009, p.1.

[52] Brainch, B., ADR/Customary Law, a paper presented at the World Bank Institute for Distance Learning for Anglophone Africa, November 6, 2003.

[53] Ibid.

[54] See Penal Reform International, "Access to justice in Sub Saharan Africa: The Role of Traditional and Informal Justice Systems", PRI, (2000), pp. 1 – 196. *Sourced from http://www.gsdrc.org/docs,* [Accessed on 03/06/2012].

[55] Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", in AusAID's Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific, (2008), Case Study No. 9, p. 175. Sourced from *http://www.ausaid.gov.au/publications/pdf,* [Accessed on 24/5/2012].

[56] Ibid.

like those in Lagos, Nigeria, which provides a comprehensive approach to dispute resolution within the administrative structure of the court offering a range of options other than litigation should also be considered.

Thirdly, parties should take advantage of no -violence agreements. Due to their very nature conflicts such as the ones involving use of and access to natural resources usually have multiple causes, some proximate, others underlying or merely contributing. The legal and institutional mechanisms in Kenya advocate mostly for settlement procedures dealing with issues only and not the underlying causes of the conflicts and can thus not be suitable in resolving natural resource-based conflicts. Mediation is better suited to deal with conflicts involving groups or individuals from different groups. Where mediation involves interim no-violence and resource-use agreements, it can successfully manage a number of potentially violent conflicts, pending resolution through agreement or adjudication.[57]

Apart from the above, there are medium term strategies recommended towards achieving resolution of conflicts in Kenya. The mediation of conflicts should be backed by an appropriately comprehensive and effective legislative and administrative infrastructure capable of resolving more stubborn cases and cases that fall outside the jurisdiction of the mediation process. The current institutional and legal framework for the resolution of conflicts in Kenya, which mainly consists of tribunals and courts, has not been very effective in resolving conflicts, for example, those touching on the environment. It should be overhauled after careful scrutiny and after extensive consultation with all stakeholders including communities involved, to provide for mediation.

There may be a need for the drafting of a policy to inform the contents of a legal and institutional framework for mediation. The framework should not be "top-down". It should be a framework that recognizes traditional norms, laws, customs and institutions that deal with mediation and grants them an equal place in line with the constitution. The way to go is institutionalization of mediation for resolution of all conflicts, to ensure an element of effectiveness in enforcement of the agreed positions/decisions.

A comprehensive Mediation guide would provide for the setting up of an institutional framework within which mediation would be carried out. Care has to be taken, however, to ensure that parties engage in mediation voluntarily, the autonomy of the process is respected and the solutions reached are acceptable and enduring. Reforms to the current system of conflict resolution would effectively address weaknesses such as delays, costs, backlog of cases and bureaucracy.

[57] Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", op cit.

Another medium-term measure would be establishment of mediation boards and training of mediators. Judges and courts are used to presiding over disputes and rendering verdicts on the disputes brought before them. Equally, lawyers are trained to argue out cases with the best interest of their client at heart and to the best of their ability. These institutions are not best suited to mediate certain conflicts.

A balance needs to be struck between using mediators with local expertise and ensuring objectivity in resolution of conflicts. In striking this balance, important issues need to be addressed such as providing appropriate training and building transparency and accountability into the mediation system.[58] Local administration officials involved in peace committees, for example, have local knowledge and expertise but they are more susceptible than outsiders to allegations of bias and partisanship, thus the need to have independent members of the public as commissioners in the mediation boards. There should also be more resources devoted to capacity building programs for mediators.

A code of conduct to regulate the mediation practice should be put in place. The code should set out principles relating to competence, appointment, independence, neutrality and impartiality, mediation agreements, fairness of the process, the end of the process, fees and confidentiality, which mediators should commit to.[59] The Mediation boards and community mediators as well, should have a feedback mechanism on the measures they take to support respect for the code through training, evaluation and monitoring of the mediators. Standards of training, practice and codes of ethics should be set and mediators should be trained through a strategy of participation. Capacity-building requires the transfer of quality skills and knowledge tailored to the needs of a specific group, which is adapted to local practice and benefits from existing capacity, for instance an established NGO network of community-based paralegals.[60]

The role of women in mediation of conflicts should be institutionalized. The place of women in our society puts them in the most proximate contact. Within the African traditional setting, they played a primary role in resolving conflicts as negotiators. Conflict mediation systems should require specifically that gender issues are given adequate weight and should include some requirement for inclusion of female mediators when appropriate, like when land rights are involved.[61] The constitution now requires gender parity in almost all commissions or organs of government.[62] If mediation is to work well in Kenya, there are some long-term strategies that should be considered. There is need for maintenance of political support in the long term. For the proposed reform

[58] Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", op. cit., p. 196.
[59] See generally, The European Code of Conduct for Mediators and Directive 2008/52 [2008] OJL 136/3.
[60] See Brainch, B., ADR/Customary Law, op. cit.
[61] Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", op. cit., p. 196.
[62] See Constitution of Kenya 2010-Art. 10; Art. 27; Art. 90; 97.

measures to be effective, there is a need to have political support for them. This shall require monitoring at the local level and goodwill from all state actors to maintain it. The government should for example, pledge use of mediation clauses in all government contracts and to resort to mediation in the first instance.[63] All other contracts should also make mediation as the first port of call whenever a dispute arises so as to reduce backlog in courts and to arrive at acceptable outcomes that could otherwise not be realized in a court of law.

Further, facilitation of more international links, particularly Pan African and those of jurisdictions with successful mediation regimes, to exchange ideas and experiences will help further the growth of mediation as a conflict resolution mechanism especially in relation to transboundary environmental conflicts. Such links and collaborations will support and conduct research and disseminate information to maintain development of mediation.

Further to the above, there is a need to create awareness and sensitize members of the public how to resolve conflicts using amicable means. Until Kofi Annan appeared on the scene to mediate over the post-election crisis in Kenya, most Kenyans had no clue what mediation was and to date, very few are aware of how it works. Yet, mediation is not alien in Kenya or Africa for that matter as it has been practised for generations. There is a need therefore to create mediation awareness through public education and training of community mediators. This can only be achieved if there is dedicated funding by development partners and public-private sector partnerships, for a continuous training programme.

It is only by training the public, government officials including judicial officers on how to resolve conflicts that occur, that the economic wellbeing of Kenya, access to justice and peace can be guaranteed. Kenya can learn from Malawi whose economic backbone, like Kenya's, is equally agriculture, where the Danish Institute for Human Rights (DIHR) initiated a pilot project to create a community-based mediation scheme aimed at empowering the poor and vulnerable people to access justice.[64] Mediation is essentially negotiation with the assistance of a third party. The mediator's role in such a process is to assist the parties in the negotiations and he cannot dictate the outcomes of the negotiation. Resolution as opposed to settlement of conflicts can assist in healing the wounds caused by a conflict.[65]

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[63] Brainch, B., ADR/Customary Law, op. cit.

[64] Sweeney, B., Training Villagers To Resolve Disputes in Malawi, an article published on Danish Institute of Human Rights website <*http://www.human rights.dk/news/training,* (Accessed on 21/5/2010).

[65] Mwagiru, M., Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), pp. 39-43.

Article 159 (2) (c) of the constitution now provides for the promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Research should be geared towards giving parties in mediation autonomy over the process and the outcome. This will be achieved through the enactment of legislation that provides for mediation in the political perspective, which is the true mediation. Such legislation should not kill mediation by annexing it to the court system and making it a judicial process.

4.2 Composition of Mediation Accreditation Committee and Training of Mediators

The Constitution of Kenya 2010 requires that communities be encouraged to settle land disputes through recognised local community initiatives consistent with the Constitution.[66] If there is a dispute filed in Court by such affected communities and the Court decides to refer the same for ADR and specifically mediation, it is not clear from the law what criteria would be used to decide whether the Community initiative is well equipped to handle the matter and then file their report back to Court. It is also not clear who would handle such cases.

It is commendable that the Mediation Accreditation Committee membership consists of experienced ADR practitioners. However, considering that true mediation also incorporates informal mediation, this composition excludes the real informal mediation practitioners who conduct mediation everyday outside court. The list is arguably elitist and it locks out the mediators at the grassroots level. This is especially reinforced by the encouragement for formal qualifications for mediators.

With the pre-determined qualifications of who can act as a mediator, this effectively bars those mediators who may be untrained in formal mediation, but are experts in informal mediation from being recognised as mediators. It is important to remember that some of the conflicts especially those with a cultural aspect to them may benefit from the vast experience and knowledge of these informal mediators. However, they may not be able to participate citing lack of the formally acceptable qualifications as mediators. Accreditation becomes tricky considering that the current membership of the Committee[67] may not be well versed with particular traditional knowledge and may therefore leave out those who hold such knowledge when it comes to accrediting mediators. Such mediators may not need any formal training as they may have gained expertise and experience from long practice and their knowledge of traditions and customs of a

[66] Constitution of Kenya, Article 60 (1) (g); 67(2) (f).

[67] The membership consists of: Representatives from the Office of the Attorney General; Law Society of Kenya; Chartered Institute of Arbitrators (Kenya Branch); Kenya Private Sector Alliance; Institute of Certified Public Accountants of Kenya (ICPAK); Institute of Certified Public Secretaries of Kenya; Kenya Bankers Association; Federation of Kenya Employers; International Commission of Jurists (Kenyan Chapter); and the Central Organizations of Trade Unions. (See Kenya Gazette, Vol. CXVII-No. 17, Gazette Notice No. 1088, Nairobi, 20th February, 2015, p. 348..)

particular community. Again, if they are to be considered untrained in certain aspects of that community, the question that comes up is whether the Mediation Accreditation Committee has the expertise or capacity to set the relevant level of requisite expertise or even offer training for subsequent accreditation. These issues may require to be comprehensively addressed by policy makers in order to determine how to create a bridge between formal and informal mediation, especially where the two conflict in application. The use of ADR mechanisms as contemplated under Article 159 of the Constitution of Kenya should be interpreted in broader terms that not only involve the Court sanctioned mediation but also informal ADR mechanisms especially mediation, negotiation and reconciliation, amongst others.

These are some of the concerns that might need to be addressed if the Judiciary ADR Pilot Scheme is to succeed. Mediation conducted within the community context as contemplated under Article 60[68] of the Constitution of Kenya may necessitate incorporation of the informal mediators into the Committee as the carry with them invaluable experience and expertise that the formal mediators may not possess or even obtain through the formal training.

4.3 Enforcement of Mediation Outcomes

While the formal mediation processes require written mediation agreement or outcome, this may be problematic for informal approaches where these may not take these forms. An informal mediation outcome may take the form of shaking hands, slaughtering a bull or goat, taking solemn oath to keep the promises or just confidential agreements especially between spouses.[69] Arguably, it should be possible under the legal framework to report back to court albeit orally such informal mediation outcome for purposes of terminating the conflicts or even enforcing the outcome where such was the agreement between the parties.

This may create difficulties in recognition, enforcement or even execution of such mediation agreements. The question is, therefore, how broadly a mediation agreement can be defined in order to accommodate informally brokered mediation agreements. It is important to assess whether it is possible to accommodate the issues as perceived in informal ADR practice especially informal mediation. The Judiciary could also review the framework as it is and decide whether a mere recording that the matter has been settled can suffice.[70]

[68] One of the principles of land management in Kenya is encouragement of communities to settle disputes through ADR.

[69] See generally J. Kenyatta, Facing Mount Kenya, The Tribal Life of the Kikuyu, (Vintage Books Edition, October 1965); See also H.O. Ayot, A History of the Luo-Abasuba of Western Kenya From A.D. 1760-1940, (Kenya Literature Bureau, 1979, Nairobi).

[70] See Republic v Mohamed Abdow Mohamed, [2013] eKLR, Criminal Case 86 of 2011.

5. Conclusion

The constitution now recognizes in Article 48 that realising access to justice for all Kenyans by the enhanced application of the traditional forms of dispute resolution is essential. Access to justice imperatives to wit: expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies are present in mediation in the political perspective. Reforming the judiciary to conform to the spirit of the constitution is also timely and vital. As indicated earlier, Kenyans as a people have not lost the capacity to coexist peacefully, commune together, respect one another, negotiate, forgive and reconcile in resolving their conflicts. This is essential in not only ensuring access to justice but more importantly in promoting peace. We should bear in mind that justice may not necessarily bring peace and coexistence to a people. Traditional dispute resolution mechanisms can achieve both. They are still a part of the Kenyan society and hence their constitutionalisation. Cultural, kinship and other ties that have always tied as together as one people have not died out. In many parts of the country Kenyans still believe in the principles of reciprocity, common humanity, respect for one another and to the environment. This explains why we still have the cooperative movement, *harambee* and other schemes that are a communal in nature.

Negotiation, mediation and reconciliation have been practiced for many years by traditional African communities'. They are not alien concepts. It is thus correct to say that mediation in the African context was and has been an informal process. Informality of mediation as a conflict resolution mechanism makes it flexible, expeditious and speedier, it fosters relationships and is cost-effective. It also means that since parties exhibit autonomy over the process and outcome of the mediation process, the outcome is usually acceptable and durable. Similarly, mediation addresses the underlying causes of conflicts preventing them from flaring up later on. Mediation is no longer on trial. It has come of age and has the capacity to resolve conflicts in the Kenyan context. Resolving conflicts through mediation in Kenya is possible. It is a goal that should be harnessed and realized.

The Alternative Dispute Resolution (ADR) Framework for Tax Dispute Resolution

1. Background

Since the promulgation of the Constitution of Kenya, 2010 incorporating Article 159 which enjoins the Courts to promote use of Alternative Dispute Resolution (ADR), the application of ADR in resolving disputes in Kenya has gone from general usage as a voluntary private arrangement of parties to incorporate use in resolving specialized disputes as part of administrative and quasi-judicial arrangement by public institution. The best example of the incorporation of ADR as a mechanism of resolving disputes in the administrative structure of a public entity is Kenya Revenue Authority (KRA). In June 2015, KRA developed its pioneering Alternative Dispute Resolution (ADR) Framework to guide stakeholders on using ADR in tax dispute resolution in Kenya.[1] In June 2020, the National Treasury enacted the Tax Procedures (Settlement of Disputes Out of Court or Tribunal) Regulations, 2020 to buttress the KRA ADR Framework and guide the use of ADR in the settlement of tax disputes out of the Courts or Tax Appeals Tribunal.[2]

The phrase alternative dispute resolution refers to all dispute resolution mechanisms and processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others. It has, however, been argued that the term "alternative dispute resolution" is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is not true.[3] Article 33 of the Charter of the United Nations outlines these conflict management mechanisms and is considered the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties whether States or individuals.[4] 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.

This article discusses the legal framework for use of ADR in tax dispute resolution in Kenya with South Africa as a case study. It starts with a review of the constitutional basis

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[1] Rispah Simiyu, "Tax Dispute Resolution Mechanisms in Kenya," Presentation to Stakeholders by KRA Tax Dispute Resolution Division (TDRD), on 22nd August 2019, Available at: *https://www2.deloitte.com/content/dam/Deloitte/ke/Documents/tax/TDR_KRA_Presentation.pdf*(accessed on 25/01/2022).

[2] Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020, Legal Notice No. 123, Kenya Gazette Supplement No. 114, 9th July 2020, Available at: *http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN123_2020.pdf* (accessed on 25/01/2022).

[3] P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, (CIArb, London, 2002), pp. 50-52.

[4] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI (Chapter VI: Pacific Settlement of Disputes).

for use of ADR in tax disputes in Kenya and the relevant provisions of the Civil Procedure Code relevant to use of ADR in resolving commercial disputes (including tax disputes) out of Court. The next section explores the methods of resolving tax disputes in Kenya as outlined by the Tax Procedures Act, 2015, the Tax Appeals Tribunal Act, 2013, the Tax Procedures (Settlement of Disputes Out of Court or Tribunal) Regulations, 2020 and the Revised KRA Alternative Dispute Resolution (ADR) Framework. This is followed by a review of the legal framework for Alternative Dispute Resolution of Tax Disputes to serve as a case study for the critique of the Kenyan Tax ADR framework. Finally, the author undertakes a critique of the framework for ADR of tax disputes in Kenya incorporating assessment of the successes, challenges and limitation.

2. The Constitution and Alternative Dispute Resolution of Tax Disputes

Alternative Dispute Resolution (ADR) is now recognized in the Kenyan legal framework including under the Constitution which has elevated status of ADR from being merely a convenient private arrangement for resolving disputes between parties to an access to justice mechanism with applicability to a wide array of disputes including tax dispute resolution.

2.1 Promotion of Alternative Dispute Resolution

Article 159(2) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted,…"[5] In essence, article 159 of the Constitution makes promotion of ADR a key principle of exercise of judicial authority in Kenya. In turn, courts and tribunals are called upon to promote the use alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms as long as they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.[6]

Further, the scope for the application of ADR has also been extensively widened by the constitution with Article 189 (4) stating that national laws shall provide for the procedures to be followed in settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. These are the key provisions that form the constitutional basis for the application of ADR in dispute resolution in Kenya.[7] The import of these provisions is that ADR can apply to all disputes and enjoys broad applicability now more than ever. It is also a clear manifestation of the acceptance of ADR as a means of conflict resolution in all disputes.

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[5] Article 159, Constitution of Kenya, 2010.

[6] Muigua, K., "Alternative Dispute Resolution and Article 159 of the Constitution," Available at *http://kmco.co.ke/ wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf* (accessed on 25/01/2022).

[7] Article 189, Constitution of Kenya, 2010.

2.2 Public Finance and No Taxation without Legislation

The principles of public finance under the constitution include "openness and accountability" and the need to "promote an equitable society, and in particular ensure "the burden of taxation shall be shared fairly."[8] In turn, the Constitution gives the National Government power to impose taxes and charges which include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax.[9] In addition, parliament may enact laws authorizing the national government to impose any other tax or duty.[10] On its part, the county may impose property rates, entertainment taxes and any other tax that is authorize by an Act of Parliament.[11] Important for tax dispute resolution, Article 210(1) of the Constitution on imposition of tax provides that "no tax or licensing fee may be imposed, waived or varied except as provided by legislation."[12] This means that any resolution or settlement of tax disputes which has the effect of imposing, waiving or varying taxes must be pursuant to provision of legislation to be valid.

2.3 Fair Administrative Action and Access to Justice

In addition to the provisions of the Constitution on authority and principles of public finance, the right to fair administrative action and access to justice are also relevant to tax dispute resolution given that some aspects of it are administrative in nature such as objection decision and the decision by KRA officials to accept request to refer disputes to ADR or request for settlement out of court or tribunal. In that regard, taxpayers enjoy the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[13] Given that most of tax administrative decisions affect the right or fundamental freedom of a person including right to property, taxpayers have the right to be given written reasons for the action.[14]

Further, the right to fair administrative action is the basis for review of KRA decisions by Court or impartial tribunal.[15] The question that begs is, can the Court refer for settlement an application for review of administrative action of KRA referred to it by a taxpayer to an ADR Facilitator who is a KRA employee given the requirement of "independent and impartial tribunal"? Further, the State is enjoined to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.[16] This raises the question, whether requiring where taxpayer opts for an Independent ADR facilitator who is not an employee of KRA that they pay for them may be considered an

[8] Article 201 (a) and (b), Constitution of Kenya, 2010.
[9] Article 209(1), Constitution of Kenya, 2010.
[10] Article 209(1), Constitution of Kenya, 2010.
[11] Article 209(3), Constitution of Kenya, 2010.
[12] Article 210(1), Constitution of Kenya, 2010.
[13] Article 47(1), Constitution of Kenya, 2010.
[14] Article 47(2), Constitution of Kenya, 2010.
[15] Article 47(3), Constitution of Kenya, 2010.
[16] Article 48, Constitution of Kenya, 2010.

impediment to access to justice. In any case, the Tax Procedures (Settlement Out of Court or Tribunal) Regulations, 2020 have to be considered from the perspective that they are offering an alternative to Court-Annexed Mediation which allows parties access to an Independent Mediator.

3. The Civil Procedure Act and Alternative Dispute Resolution of Tax Disputes

There are numerous provisions under the Civil Procedure Act, Cap. 21, Laws of Kenya, on the use of Alternative Dispute Resolution (ADR) in conflict management and are relevant to the resolution of tax disputes. In July 2009, Parliament passed a raft of proposals for amendment to the Civil Procedure Act to introduce ADR. Essentially, these were proposed amendments to sections 1 and 81 of the Civil Procedure Act which have so far been enacted into law.[17] For starters, the amendment introduced section 1A (1) of the Civil Procedure Act which outlined the overriding objective of the Act as to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.

The Civil Procedure Act enjoins the Judiciary to exercise its powers and interpretation of the civil procedure to give effect to the overriding objective above. In effect, this implies that the court in its interpretation of laws and issuance of orders will ensure that the civil procedure shall, as far as possible, not be used to inflict injustice or delay the proceedings and thus minimize the litigation costs for the parties.[18] This provision also serves as a basis for the court to employ rules of procedure that provide for use of Alternative Dispute Resolution mechanisms, to ensure that they serve the ends of the overriding objective.

Section 14 of the Tax Appeals Tribunal Act, exempts the provisions of Cap. 21. In particular, the Act provides that the provisions of the Civil Procedure Act (Cap. 21) shall not apply to the proceedings of the Tribunal.[19] On the other hand, section 32 of the Act clearly states that the High Court shall hear appeals from the Tribunal in accordance with rules set out by the Chief Justice.[20] However, the Tax Procedures Act does not exempt the Civil Procedure Act and tax appeals to High Court are similar to other Civil Disputes that are referred to High Court and therefore subject to Civil Procedure. Therefore, the provisions of Civil Procedure Act and Civil Procedure Rules on ADR are applicable to tax disputes.

3.1 Court annexed arbitration

Court-annexed arbitration can arise as a result of the application of the Arbitration Act (as Amended in 2009) and also under supervision of the court under the Civil Procedure Act. Under the Civil Procedure Act, the courts involvement in the arbitral process is

[17] Section 1A (1) and section 81 (2) (ff) of Civil Procedure Act, Revised Edition 2010(2008), Government Printer, Nairobi.

[18] Section 1A (2) of Civil Procedure Act, op. cit.

[19] Tax Appeals Tribunal Act, No. 40 of 2013, Laws of Kenya, Government Printer, Nairobi.

[20] Section 32, Tax Procedures Act, No. 29 of 25, Laws of Kenya, Government Printer, Nairobi.

specifically provided for in Section 59 and Order 46 of the Civil Procedure Rules, 2010. Section 59 of the Act provides for references of issues to arbitration, which references are to be governed in a manner provided for by the rules. Order 46 rule 1 provides that;

> *"Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference."*

Under Order 46 Rule 2, the arbitrator is to be appointed in a manner that the parties have agreed upon. However, where no arbitrator or umpire (under rule 4) has been appointed the court under rule 5 may, on application by the party who gave the notice to the other to appoint, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire, or make an order superseding the arbitration and in such case the court shall proceed with the suit. Where an award has been made pursuant to arbitration under the Rules, rule 10 requires that that the persons who made it shall sign it, date it and cause it to be filed in court within 14 days together with any depositions and documents which have been taken and proved before them.

A court has the power to modify or correct an award under rule 14 if it is imperfect or contains an obvious error, if a part of the award is upon a matter not referred to arbitration or if it contains a clerical mistake or error from an accidental slip or omission. The court also has power to remit an award for reconsideration by the arbitrator under rule 15. Rule 18 provides that the court shall, upon due notice to the other parties, enter judgment according to the award and upon such that judgment a decree shall follow thereof. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award.

Order 46 Rule 20 of the Civil Procedure Rules provides that; "Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act." Order 46 Rule 20 read together with Sections 1A and 1B of the Civil Procedure Act therefore obligates the court to employ ADR mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. Under Order 46 rule 20 (2) it is provided that a court may adopt any ADR mechanism for the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism. Judges will thus need to be adeptly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the particular mechanism and that will lead to the attainment of the overriding objective under sections 1A and 1B of the Act.

3.2 Mediation and other ADR Mechanisms

The clamor to introduce court-annexed mediation led to the enactment of section 81 (2) (ff) of the Civil Procedure Act, as amended by the Statute Law (Miscellaneous Amendment) Act.[21] Section 81 (2) (ff) provides for the selection of mediators and the hearing of matters referred to mediation under the Act. Parties who have presented their cases to court now are able to have their matter referred to mediation by the court for resolution.

The Statute Law (Miscellaneous Amendments) Act amended sections 2 and 59 of the Civil Procedure Act to provide for mediation of disputes. Section 2 of the Civil Procedure Act has been amended to define mediation as an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings.[22] Section 59 of the Civil Procedure Act has also been amended to introduce the aspect of mediation of cases as an aid to the streamlining of the court process. This includes the establishment of a Mediation Accreditation Committee appointed by the Chief Justice to determine and apply the criteria for the certification of mediators, propose rules for the certification of mediators, maintain a register of qualified mediators, enforce such code of ethics for mediators as may be prescribed and set up appropriate training programmes for mediators.[23]

The law now requires the court either at the request of the parties, where it deems appropriate to do so or where the law provides so, to refer a dispute presented before it to mediation. Where a dispute is referred to mediation, the parties are enjoined to select for that purpose a mediator whose name appears in the mediation register maintained by the Mediation Accreditation Committee. Such reference should, however, be conducted in accordance with the mediation rules. Section 59B (4) provides that an agreement between the parties to a dispute as a result of mediation be recorded in writing and registered with the court and is enforceable as if it were a judgment of that court. No appeal lies against such agreement.

Under Section 59C, a suit may be referred to any other method of dispute resolution where the parties agree or where the court considers the case suitable for referral. Under Section 59C (2), any such other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order. Any settlement arising from a suit referred to any such other alternative dispute resolution method by the Court or agreement of the parties shall be enforceable as a judgment of the Court and no appeal shall lie in respect of such judgment. Further, all

[21] No. 6 of 2009, Government Printer, Nairobi, 2012, whose date of commencement is 12th July 2012.
[22] Section 2 of the Civil Procedure Act.
[23] Section 59A of the Civil Procedure Act.

agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court. Pursuant to Order 46 rule 20 (3) it is only after a court-mandated mediation fails that the court shall set the matter down for hearing and determination.

Clearly, these provisions of the Civil Procedure Act are not, in my view, really introducing mediation per se, but merely setting up a legal process where a court can coerce parties to mediate and the outcome of the mediation taken back to court for ratification. These amendments have introduced a mediation process which is formal and annexed to the procedures governing the conduct of cases in the High Court. Informal mediation which may not require the use of writing is not provided for. Hence, it can be said that the codification of mediation rules in the Civil Procedure Act merely reflect the concept of mediation as viewed from the Western perspective and not in the traditional, political and informal perspective where it could lead to a resolution of the conflict.

4. The Methods of Tax Dispute Resolution in Kenya

The tax law in Kenya envisages four approaches and levels of resolving tax disputes, namely, the administrative decision, quasi-judicial process involving Tax Appeals Tribunal (TAT), formal judicial process involving High Court as court of first instance or appeal from the Tribunal and appeal to Court of Appeal and alternative dispute resolution on agreement of parties at administrative level or as an out of tribunal/court dispute settlement procedure. The relevant laws are the Tax Procedures Act,[24] Tax Appeals Tribunal Act[25] and the relevant Tax Laws in Kenya. Parties can opt for Alternative Dispute Resolution of tax disputes at any level of the dispute under KRA Alternative Dispute Resolution (ADR) Framework.[26]

4.1 Tax Objection and Objection Decision

The Tax Procedures Act requires that a taxpayer who wishes to dispute a tax decision at first instance lodges an objection with Commissioner against the tax decision within 30 days of notification under section 51 before proceeding to take any steps envisaged under any other written law. Any such notice of objection must state the precise grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments. Further, the tax payer must confirm payment of the entire amount of tax due under the assessment that is not in dispute. If the Commissioner concludes that these conditions have not been met, she is to immediately notify the taxpayer in writing that the objection has not been validly lodged. The Commissioner has sixty (60) days to

[24] Tax Procedures Act, Act, No. 29 of 2015, Laws of Kenya, Government Printer, Nairobi.
[25] Tax Appeals Tribunal Act, Act No. 40 of the 2013, Laws of Kenya, Government Printer, Nairobi.
[26] KRA Tax Dispute Resolution Division, KRA Alternative Dispute Resolution (ADR) Framework, Revised on 27th June 2019, available at: *https://kra.go.ke/images/publications/ADR-FRAMEWORK.pdf* (accessed on 25/01/2022).

make an objection decision from the date the taxpayer lodged the notice of the objection failing which the objection is considered to be allowed.[27]

The taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection. The Commissioner has discretion to allow an application for the extension of time to file a notice of objection if the taxpayer was prevented from lodging the notice of objection within the prescribed period because of an absence from Kenya, sickness or other reasonable cause and the taxpayer did not unreasonably delay in lodging the notice of objection. Once a notice of objection has been validly lodged within time, the Commissioner is bound to consider the objection and decide either to allow the objection in whole or in part, or disallow it. The Commissioner's decision is referred to as an "objection decision" and includes a statement of findings on the material facts and the reasons for the decision. In any case, the Commissioner is required to notify in writing the taxpayer of the objection decision and take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.[28]

4.2 Appeal to the Tax Appeals Tribunal

Section 52 of the Tax Procedures Act gives a person who is dissatisfied with an appealable decision the discretion to appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013. As per the Tax Appeals Tribunal Act, whether or not a decision is appealable to the tax tribunal depends on the relevant tax law on case to case basis. In turn, a person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may upon giving notice in writing to the Commissioner, appeal to the Tribunal.[29] However, a notice of appeal to the Tribunal relating to an assessment is only valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice. Further, the person appealing is required to pay a non-refundable fee of twenty thousand shillings to the tribunal.[30]

As a matter of fact, while the proceedings of the Tribunal are of a judicial nature, the Civil Procedure rules have been specifically excluded. The provisions of the Civil Procedure Act (Cap. 21) are expressly excluded from application to the proceedings of the Tribunal meaning aspects such as Court-Annexed Mediation are not allowable.[31] However, the Act allows parties to an appeal before the Tribunal to apply, in writing, to the Tribunal to settle the dispute out of the Tribunal.[32] In such a case, the time taken to resolve or conclude

[27] Section 51 of the Tax Procedures Act, 2015.
[28] Section 51 of the Tax Procedures Act, 2015.
[29] Section 12 of the Tax Appeals Tribunal Act, 2013.
[30] Proviso to Section 12 of the Tax Appeals Tribunal Act, 2013.
[31] Section 14 of the Tax Appeals Tribunal Act, 2013.
[32] Section 13(8) of the Tax Appeals Tribunal Act.

the settlement out of the Tribunal is to be excluded when calculating the period contemplated for resolution of Appeals under the Act. In particular, the Tribunal is bound to hear and determine an appeal within ninety days from the date the appeal is filed with the Tribunal.[33]

4.3 Appeal to the High Court

If a party to proceedings before the Tribunal is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, they are entitled within thirty days of being notified of the decision or within such further period as the High Court may allow, to appeal the decision to the High Court[34] in accordance with the provisions of the Tax Appeals Tribunal Act, 2013.[35] The High Court is to hear such appeals in accordance with rules to be issued by the Chief Justice.

Essentially, appeal to the High Court marks the formal start of tax litigation in Kenya and tax cases usually take three forms, namely, appeals from decisions of the Tax Appeals Tribunal (TAT), judicial review cases challenging abuse of process or other administrative excesses by the Kenya Revenue Authority (KRA) and constitution petitions by aggrieved tax payer(s) alleging infringement of constitutional rights.[36] In an appeal by a taxpayer to the Tribunal, High Court (or Court of Appeal) in relation to an appealable decision, the taxpayer is only permitted to rely on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.[37]

4.4 Appeals to Court of Appeal

In event any party to tax litigation proceedings before the High Court is dissatisfied with the decision of the High Court in relation to an appealable decision, they may in thirty (30) days of being notified of the decision or within such further period as the Court of Appeal may allow, appeal the decision to the Court of Appeal.[38] Both KRA and tax payers have resorted to appeals to Court of Appeal to challenge several decisions of the High Court. The Tax Procedures Act is clear that any appeal to the decision of the Tax Tribunal to the High Court or to decision of the High Court to the Court of Appeal shall be on a question of law only.[39]

5. Alternative Dispute Resolution of Tax Disputes out of Court or Tribunal

The law provides that where a Court or the Tribunal permits the parties to settle a dispute out of Court or the Tribunal, as the case may be, the parties are to make the settlement

[33] Section 13(7) of the Tax Appeals Tribunal Act.
[34] Section 53 of the Tax Procedures Act, 2015.
[35] Section 32 of the Tax Appeals Tribunal Act.
[36] Taxbaddy, Tax Litigation in Kenya, Available at: *https://www.taxbaddy.com/applications/academy/litigation/litigation_intro_ke.php* (accessed on 25/01/2022).
[37] Section 56(3) of the Tax Procedure Act, 2015.
[38] Section 54 of the Tax Procedures Act, 2015.
[39] Section 56(2) of the Tax Procedures Act, 2015.

within ninety days from the date the Court or the Tribunal permits the settlement. In that regard, if the parties fail to settle the dispute within that period, the dispute is to be referred back to the Court or the Tribunal that permitted the settlement. This provision of the Tax Procedures Act in allowing for settlement of tax disputes vide Alternative Dispute Resolution along with Article 159 of the Constitution are the basis for use of ADR in tax disputes resolution in Kenya.[40] The provision is activated by the Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020 and KRA Alternative Dispute Resolution (ADR) Framework both of which provide the procedures for parties to refer disputes to Alternative Dispute Resolution before or in lieu of referring them to the Tribunal or appealing to the Court and for settlement out of court or tribunal.

5.1 Settlement of Tax Disputes Out of Court or Tribunal Regulations, 2020

The Cabinet Secretary for the National Treasury and Planning on 17th June 2020, pursuant to section 112 of Tax Procedures Act, 2015 (the Act), enacted The Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020 (which were gazetted on 9th July 2020) to make provision for Alternative Dispute Resolution after tax appeal has been lodged either with the Tax Appeals Tribunal (TAT) or Court of Law whether High Court or Court of Appeal.[41] The regulations apply where a tax dispute has been permitted to be settled out of court or tribunal in accordance with section 55 of the Act and section 28 of the Tax Appeals Tribunal providing for out of Court and out of Tribunal settlement.

The regulations provide that a party to a tax dispute may apply to the court or tribunal to settle the tax dispute out of court or tribunal as the case may be. However, the parties to a tax dispute have to agree voluntarily to settle the dispute out of court or tribunal and the party seeking to settle the dispute out of court or tribunal has to obtain the consent of the other party as proof before applying to the court or tribunal. In any case, the parties must be committed to the settlement process.[42] Even where parties agree, there are tax disputes that cannot be settled out of court or tribunal. These include disputes whose settlement would be contrary to the Constitution, the tax law or any other written law; tax dispute involving the interpretation of the law or where there is evidence that the taxpayer has committed fraud in relation to tax.[43]

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[40] Section 55 of the Tax Procedure Act, 2015.

[41] Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020, Legal Notice No. 123, Kenya Gazette Supplement No. 114, 9th July 2020, Available at: *http://kenyalaw.org/kl/fileadmin/pdfdownloads/ LegalNotices/2020/LN123_2020.pdf* (accessed on 25/01/2022).

[42] Regulation 3, Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

[43] Regulation 4, Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

Further, if the parties to the tax dispute have previously fail to settle the dispute out of court or tribunal, the matter cannot be referred to out of court settlement again.[44] In essence, this provision appears to limit the discretion of the Court or Tribunal to allow referral of disputes that had previously failed to reach settlement under ADR process. This is key given that the parties to a tax dispute are required to conclude the settlement process within ninety days from the date the court or tribunal grants permission to settle the dispute out of court or tribunal as stipulated under the Tax Procedures Act.[45] Thus, if the parties do not reach a settlement agreement within the stipulated 90 days, the tax dispute shall be referred back to the court or tribunal and it is not possible for parties to agree to extend the time for settlement except with the permission of the court or the tribunal to extend the time.[46]

Once the court or tribunal has permitted the parties to a tax dispute to settle the dispute out of court or tribunal, a facilitator is to be nominated, with the consent of the other party to the dispute. In this regard, the Commissioner may recommend a facilitator from amongst the staff of the Authority or the taxpayer may propose one from a list of mediators accredited by an institution recognized in Kenya.[47] Clearly, this means a taxpayer is not bound to choose a Court Accredited Meditator as is the case in the Court Mandated Mediation. The nomination of a facilitator has to be done within fourteen days after the court or tribunal has granted the parties to a tax dispute permission to settle the dispute. The facilitator is to be notified in writing of the nomination by the Commissioner.[48]

In the interest of impartiality and neutrality, a facilitator must not have been involved in any way in the matter which is the subject to the tax dispute or be a practicing tax agent or represent or have represented the taxpayer in any matter or have any interest in the tax dispute.[49] Further, the facilitator has to disclose in writing to the parties to the tax dispute any conflict of interest which may arise before the commencement of the proceedings for the settlement of the tax dispute or which may arise during the proceedings.[50] In that regard, upon the disclosure of a conflict of interest by a facilitator, the facilitator is required to immediately recuse himself or herself from dealing with the tax dispute and

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[44] Ibid.
[45] Section 55 of the Tax Procedures Act, 2015.
[46] Regulation 3(5), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
[47] Regulation 5(4), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
[48] Ibid.
[49] Regulation 5(5), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
[50] Regulation 5(7), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

another facilitator shall be nominated.[51] This is needlessly too stringent and may lead to undue delays in settlement of tax disputes. The best option would have been to allow both parties to decide whether to continue with the facilitator or press for recusal.

In facilitating the resolution of a tax dispute, the Facilitator is bound to hold such number of meetings as may be appropriate, guide the parties to the tax dispute in the settlement of the dispute, promote and protect the integrity, confidentiality, fairness and efficiency of the process; act independently and avoid circumstances that may result in a conflict of interest; and employ the procedures necessary for the expeditious resolution of the dispute.[52] At the same time, the facilitator has to convene the first meeting between the parties to the tax dispute within fourteen days of being notified of nomination.[53] At the first meeting, the parties identify the issues for settlement; agree on a schedule of meetings; decide on the service of documentary material relevant to the tax dispute; agree on the conduct of the meetings; and agree on any other issues necessary to facilitate the settlement of the tax dispute.[54]

Once the settlement meetings commence, the parties to the tax dispute or the parties' appointed representatives are forbidden from communicating with the facilitator in the absence of the other party and any communication with the facilitator shall only be in relation to the tax dispute.[55] During meetings convened by the facilitator, the parties or their appointed representatives are required to maintain confidentiality and uphold decorum; uphold integrity and fairness; make full disclosure of material facts and documents relevant to the tax dispute; and strictly adhere to the agreed timelines.[56] If a party to a tax dispute is unable to meet any timelines agreed upon at a meeting convened by the facilitator, that party has to notify the facilitator and the other party in writing of the inability and specify the reasons for the inability.[57] In event of failure by a party or their representative without justifiable cause to attend a meeting convened by the

[51] Regulation 5(8), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
[52] Regulation 5(6), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
[53] Regulation 5(2), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
[54] Regulation 6(1), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
[55] Regulation 6(2), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
[56] Regulation 6(3), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
[57] Regulation 6(4), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

facilitator, the facilitator may appoint another date for the meeting or terminate the process.[58]

The regulations provide for the reasons for termination of settlement proceedings which include where a party to the tax dispute opts to terminate the proceedings and notifies the other party, the court or tribunal in writing of the intention to terminate the proceedings or where both parties to the tax dispute mutually agree to terminate the proceedings and notify the court or tribunal in writing. Further, the settlement proceedings may terminate where a party fails to attend three consecutive meetings convened by the facilitator without any justifiable cause or where the ninety days' timeline required to resolve the dispute has lapsed and an extension of time by the court or the tribunal has not been granted.[59] Upon the termination of settlement proceedings, the facilitator is to send a notice of termination in writing to the parties and the matter stands referred back to the court or the tribunal.[60]

The settlement agreement constitutes the decision between the parties and has to be dated and signed by the parties or their appointed representatives and witnessed by the facilitator. It forms the basis for preparation of tax a dispute resolution consent for filing before the court or tribunal and is binding to both parties.[61] Such agreement is considered to be the full and final settlement of the dispute save where the parties have expressly specified otherwise in the Agreement. The agreement is also confidential and entered into on a "without prejudice" basis and does not form the basis for judicial precedent.[62] If the parties fail to reach a settlement agreement, the tax dispute shall be referred back to the court or tribunal, as the case may be, for determination.[63]

In case a tax dispute is settled wholly or partially a consent agreement between the parties to a tax dispute setting down the terms of the settlement agreement shall be filed with the court or tribunal, as the case may be.[64] Such consent agreement between parties to a tax

[58] Regulation 6(5), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
[59] Regulation 7(1), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
[60] Regulation 7(2), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
[61] Regulation 8(1), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
[62] Regulation 8(3), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
[63] Regulation 8(4), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
[64] Regulation 9(1), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

dispute shall be recorded by the court or tribunal as an order of the court or tribunal.[65] Where a party to a tax dispute violates the terms of a settlement agreement between the parties, the other party may apply to the court or the tribunal for enforcement of the agreement.[66] Each party is to bear its own costs for the settlement of the tax dispute out of court or the tribunal and pay any expert witness they call.[67] Where a taxpayer nominated a facilitator, they shall bear any cost that may be payable to the facilitator.[68] The Commissioner provides a venue for the meetings but where the other party prefers a different venue, that party shall bear the costs of that different venue.[69]

5.2 KRA Alternative Dispute Resolution (ADR) Framework

The KRA Alternative Dispute Resolution (ADR) Framework "for the general guidance of the Stakeholders who wish to engage in Alternative Dispute Resolution (ADR) to resolve their tax disputes."[70] In essence, this means that the ADR Framework is not binding on the parties except until the parties agree to refer to their dispute to ADR. Even then, the ADR Framework serves as a guidance allowing the ADR Facilitator the discretion to do what is necessary to resolve the dispute. Indeed, KRA has attempted to Tax Procedures (Alternative Dispute Resolution) Regulations 2019 which have been described as seeking to "to anchor the existing ADR Framework in law" and to govern the alternative tax dispute resolution (**ADR**) process.[71] Eventually, the Cabinet Secretary for National Treasury on 17th June 2020 enacted the revised regulations as Tax Procedures (Settlement of Tax Disputes out of Court or Tribunal) Regulations, 2020 which appear to be limited to settlement of tax disputes already instituted in court or tribunal.

The KRA ADR Framework was launched in June 2015 and revised in June 2019 to provide an internal process for KRA to amicably resolve and settle tax disputes outside the judicial process. The ADR Framework aimed at complementing the judicial and quasi-judicial mechanisms for resolving tax disputes in the tax laws "by introducing ADR as an additional and/or alternative means of resolving tax disputes."[72] The ADR framework

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[65] Regulation 9(2), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

[66] Regulation 10, Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

[67] Regulation 11(1), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

[68] Regulation 11(3), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

[69] Regulation 11(4), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

[70] KRA Tax Dispute Resolution Division, "Alternative Dispute Resolution (ADR) Framework," p. 3, Available at: *https://kra.go.ke/images/publications/adr-framework.pdf* (Accessed on 25/01/2022).

[71] Ngummy, D. and Mwaniki, W., Settling Tax Disputes: A Closer Look at the Draft Tax Procedures (Alternative Dispute Resolution) Regulations, 2019, Anjarwalla & Khanna Legal Alert, Available at: *https://www.africalegalnetwork.com/kenya/news/settling-tax-disputes/* (Accessed on 25/01/2022).

[72] KRA ADR Framework, p. 7.

has in the first five (5) years of its existence provided a useful "reference point for the alternative tax dispute resolution process."[73] Importantly, the ADR Framework helped to achieve alternative dispute resolution of tax disputes as envisaged and proposed under Article 159 (2) (c) of the Constitution of Kenya, 2010, section 28 of the Tax Appeals Tribunal Act, 2013 and section 55 of the Tax Procedures Act, 2015.

However, with the enactment of the Tax Procedures (Settlement of Tax Disputes out of Court or Tribunal) Regulations, 2020, the place of the KRA ADR Framework is now exclusively guiding alternative dispute resolution (ADR) under the KRA Internal Dispute Resolution Mechanism (IDRM) before or in lieu of referral to the tribunal or the court. The Framework acknowledges that it seeks to provide flexibility and eliminate "the limitations imposed by judicial and quasi-judicial processes and the complexity of technical procedures and high costs of litigation." The ADR envisaged under the framework is a voluntary, participatory and facilitated discussion of a tax dispute between a tax payer and the commissioner.[74]

Further, the KRA ADR Framework clarifies that it is in the form of facilitated mediation and not arbitration as envisaged by the Arbitration Act (Cap 49 of Laws of Kenya). This is because the Facilitator of the ADR has no power to impose any decision regarding the outcome of the tax dispute. Under the Framework, "the parties are facilitated to find a solution to the dispute."[75] This form of ADR is favoured over litigation because it gives parties autonomy to achieve settlement of their tax disputes on their terms. The approach taken in the Framework has benefited from benchmarking against the experiences of many Tax Dispute Resolution Frameworks from the World.[76]

According to KRA, ADR is preferable for resolving tax disputes in that it shifts focus from enforcement to trust and facilitation, avoids inordinate delays before conclusion of cases before courts and tribunals, is cost-effective and confidential especially where tax litigation has the possibility of having adverse impact on the business relations of the tax payer or may attract negative publicity for KRA. In addition, ADR is without prejudice in that if it does not succeed the discussions under its framework cannot be used against any party without express agreement. ADR also helps to preserve relationships between KRA and tax payers and also ensures higher compliance levels as parties are more likely to abide by the negotiated outcome. It also removes the specter of uncertainty associated with tax litigation over the outcome of a tax case for both KRA & the taxpayer. Alternative

[73] Ngummy and Mwaniki, Ibid.
[74] KRA ADR Framework, p. 7.
[75] KRA ADR Framework, p. 7.
[76] KRA ADR Framework, p. 7.

Dispute Resolution (ADR) of tax disputes is also encouraged in compliance with the constitution principle promoting negotiated settlement of appropriate disputes.[77]

The ADR Framework expressly states that it does not negate the legal right of either party to appeal to the Tax Appeals Tribunal or the Court of Law. Thus, an aggrieved party must file appeal within the time stipulated under the law under the tax Procedures Act. This creates a dilemma in that while parties are pursuing ADR under the framework, the time is ticking and the party has a duty to comply with the stipulated timelines for filling appeal. The end result most tax payers would rather file their Tax Appeal and then seek out of court or tribunal settlement that take the risk of pursuing ADR within the framework even as the clock ticks against them.

The Commissioner is entitled to give taxpayer opportunity to engage ADR before issuing objection decision in case of a decision to amend assessment partially or decline to amend an assessment. In that regard, the timelines of the ADR are restricted to the time remaining in the time imposed by the Tax Procedures Act (of 60 days for Commissioner to make Objection Decision) and 30 days for Commissioner to make a review decision under the East African Community Customs Management Act (EACCMA) 2004.

The parties may engage a tax agent or legal advisor to assist in the implementation of the framework. On the other hand, an ADR Facilitator provides guidance to the discussion and need not be an expert in tax or law. They convene and chair the ADR meetings, attest the signing of ADR agreements and generally guide the parties towards arriving at amicable agreement. ADR Facilitators although they are usually KRA employees are expected to maintain independence and must not have been involved in the tax audit or investigation. In event of conflict of interest, they are expected to make full disclosure and parties may request appointment of a new facilitator where necessary in such event.[78]

The facilitators are bound to keep the process as simple and flexible as possible and as far as possible make it easy for each party to participate freely in the ADR discussions and adhere to the timelines. At the same time, they must remain neutral and maintain confidentiality of the process.[79] The duty of the Facilitators is to seek fair, equitable and legal resolution of the tax dispute, promote and protect integrity, fairness and efficiency of the process. Facilitators must also act independently, impartially and avoid conflict of interest and bring the dispute to expeditious resolution.[80]

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[77] KRA, "Why Alternative Dispute Resolution?" Available at: *https://kra.go.ke/en/individual/alt-dispute-resolution-adr/learn-about-adr/benefits-of-adr* (accessed on 25/01/2022).
[78] KRA ADR Framework, p. 12.
[79] KRA ADR Framework, p. 13.
[80] KRA ADR Framework, p. 13.

In addition, the ADR Framework addresses issues of procedure during discussions. In this regard, it provides for adjournments, documentation of the dispute in ADR, management and procedure of ADR sittings, termination of ADR discussions and the signing of ADR Agreement and the prerequisites for validity of such agreement. The Framework also provides for reservation of rights by providing that discussions be held on without prejudice basis. Finally, the ADR Framework lays down the suitability test of tax disputes for ADR which limits the scope of the disputes that may be referred to the process to purely factual disputes.

6. Alternative Dispute Resolution (ADR) of Tax Disputes in South Africa

The South Africa Revenue Service (SARS) has established an Internal Administrative Appeal (IAA) mechanism which allows anyone does not agree with the decision of tax officer and has approached the officer's immediate supervisor to clarify the decision in question and resolve any uncertainties but the mater remains unresolved to institute a formal internal administrative appeal. In such cases, the client(s) not satisfied with any decision taken by officers in terms of the relevant tax law, have a right to appeal that decision to the relevant appeal committee. Once the appeal is lodged in the prescribed form to the office that communicated the decision. The Appeal has to be made within thirty (30) days from the date the client became aware of the decision or received reasons for the decision. An extension of twenty (20) days may be granted, if such extension is applied before the expiry of the 30-days period but if that is exceeded, the IAA process cannot be followed and the applicant's only recourse will then lie in litigation.[81]

In the event of successful appeal, the Appeal Committee has to provide a decision and reasons for the decision in writing within forty-five (45) days from the date of acknowledgement of receipt of the Appeal. If the taxpayer is unhappy with the decision of any appeal committee, their recourse is to lodge an application for Alternative Dispute Resolution (ADR) with that relevant appeal committee which made the decision. In that case, the committee will add its comments thereto and forward the application to the ADR Unit for attention. The ADR process is used as recourse against the final decision made under the IAA process and may be initiated by either the aggrieved person or SARS but the final decision on whether a matter is suitable for ADR vests with SARS.

To apply for ADR, a properly completed prescribed form together with the relevant supporting documents, must be submitted to the chairperson of the appeal committee who informed the client of the decision within 30 days of the date of the letter. The Commissioner may agree to extend the period for submission of the application for ADR. The Commissioner is required within 20 days to decide and inform the applicant whether

[81] South Africa Revenue Service (SARS), "What is Internal Administrative Appeal and How does it Work?, Available at: *https://www.sars.gov.za/customs-and-excise/offences-penalties-and-disputes/appeals/* (accessed on 25/01/2022).

the matter is appropriate for ADR or not and that it may be resolved by way of the procedures contemplated in the rules. The SAR Alternative Dispute Resolution (ADR) External Policy provides the standard approach to be followed by stakeholders when a dispute is referred to Alternative Dispute Resolution (ADR), as provided for in Section 77I of the Customs and Excise Act (Act No. 91 of 1964).[82]

ADR can also be used as an alternative to judicial tax proceedings in South Africa. In that regard, the Commissioner must within ten days after receipt of a notice in terms of Section 96(1) of the Act inform the person delivering such notice that he is of the opinion that the matter is appropriate for ADR. Within ten days after the date of the above notice by the Commissioner such person must deliver a duly completed prescribed form for Application for ADR to the Commissioner should he or she agree to the ADR process. If the party does not complete the application for ADR within ten days after the date of the notice by the Commissioner, the matter may not be dealt with through ADR.[83]

The ADR must be concluded within 90 days, or such further period as SARS may agree to. The period within which the ADR proceedings are conducted commences either 20 days after date of notice by the Commissioner of suitability of the matter for resolution by ADR or on receipt of an application for ADR by the Commissioner after communication a matter suitable for ADR as alternative to judicial proceedings. The period ends on the date of termination of proceedings in the manner provided for in the terms governing the ADR procedures. SARS is entitled to appoint a facilitator, who may be an appropriately qualified officer of SARS within 15 days and the Commissioner must inform the aggrieved person of the appointment of the facilitator. The role of the facilitator is to seek a fair, equitable and legal resolution of the dispute between an aggrieved person and SARS.

The procedure to be adopted, the time place and date and requirements as to the furnishing of submissions and documentation, are determined by the facilitator after consultation with the aggrieved person and the officer(s) or appeal committee of SARS. The aggrieved person must be personally present during the ADR proceedings but may however be accompanied by any representative of their choice. But the facilitator may, in exceptional circumstances, allow the aggrieved person to be represented in their absence by a duly authorized representative of their choice. With agreement of the facilitator, the parties may to lead or bring witnesses in the ADR process. The facilitator may also require either party to produce a witness to give evidence. At the conclusion of the meeting, either at the instance of the facilitator or by mutual agreement, the facilitator must record all issues which were resolved and issues upon which no agreement or settlement could be

[82] SARS, "Dispute Resolution," Available at: *https://www.sars.gov.za/customs-and-excise/offences-penalties-and-disputes/dispute-resolution/#elementor-toc__heading-anchor-1* (accessed on 25/01/2022).
[83] SARS, Alternative Dispute Resolution (ADR) External Policy, Available at: *https://www.sars.gov.za/wp-content/uploads/Ops/Policies/SC-CC-26-Alternative-Dispute-Resolution-External-Policy.pdf* (accessed on 25/01/2022).

reached and the facilitator must deliver a report to the parties within ten days of the conclusion of the ADR process.[84]

The ADR proceedings are envisaged to be without prejudice and not one of record, and any representation made or document tendered in the course of the proceedings may not be tendered in any subsequent proceedings as evidence by any other party, unless: it is used with the knowledge and consent of the party who made the representation or tendered the document during the proceedings or the representation/document is already known to, or in possession of, that party or where it was obtained by that party otherwise than in terms of the ADR proceedings. Further, no person may subpoena any person involved in the ADR process (including the facilitator), in whatever capacity, to compel disclosure of any representation made or document tendered in the course of the proceedings.[85]

A dispute may either be resolved by agreement whereby either SARS or the aggrieved person accepts, either in whole or in part, the other party's interpretation of the facts or the law applicable to those facts or both. However, such agreement must be reduced to writing and signed by both parties. If the parties fail to resolve the dispute, the parties may attempt to settle the matter as set out in the Act. In any case, once a dispute is resolved either by agreement or settlement SARS must give effect to that agreement or settlement within a period of 60 days after conclusion. If the dispute is not resolved by either agreement or settlement or the proceedings are terminated, SARS must inform the aggrieved person within 10 days inform the aggrieved party of their right to institute judicial proceedings. Any agreement or settlement reached through the ADR process has no binding effect in respect of any other matters relating to that aggrieved person not actually covered by the agreement or settlement or any other person.[86]

The Tax Law gives SARS the power to settle a dispute which is to the benefit of the State. A dispute may be settled at any time as the settlement provisions are not limited for use only during the ADR process. However, the ADR is noted as a process to resolve disputes one ideal situation where the settlement provisions may be applied in an attempt to settle the matter. The settlement provisions in the South African law may only be applied if the circumstances of the matter comply with these regulations. The settlement procedures provide guidelines as to the circumstances when it would be appropriate and when it would be inappropriate to settle.[87]

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[84] Clause 5:10 of the SARS Alternative Dispute Resolution (ADR) External Policy.
[85] Clause 5:11 of the SARS Alternative Dispute Resolution (ADR) External Policy on "Reservation of Rights."
[86] Clause 5:12 of the SARS Alternative Dispute Resolution (ADR) External Policy on "Agreement or Settlement."
[87] Clause 5:12.1 of the SARS Alternative Dispute Resolution (ADR) External Policy on "Settlements."

Circumstances where it is inappropriate to settle include where, if in the opinion of SARS: the action of the aggrieved person constitute intentional tax evasion or fraud or where the settlement would be contrary to the law or a clearly established practice of the Commissioner on the matter, and no exceptional circumstances exist to justify a departure from the law or practice. Further, it is not appropriate to settle where it is in the public interest to have judicial clarification of the issue or pursuit of the matter through the courts will significantly promote compliance of the tax laws or the person concerned has not complied with the provisions of any Act administered by SARS and SARS is of the opinion that the non-compliance is of a serious nature.[88]

On the other hand, where it is to the best advantage of the State, SARS may settle a dispute, in whole or in part, on a basis that is fair and equitable to both the person concerned and SARS. SARS is enjoined when contemplating the settling of a matter, to have regard to a number of factors including: whether that settlement would be in the interest of good management of the tax system, overall fairness and the best use of SARS' resources; the cost of litigation in comparison to the possible benefits, whether there are any complex factual or quantum issues in contention or evidentiary difficulties which are sufficient to make the case problematic in outcome or unsuitable for resolution through the ADR process or the courts. Settlement is also to be embraced where the settlement of the dispute will promote compliance of the tax laws by the person concerned or a group of taxpayers or a section of the public in a cost-effective way.[89]

The tax law provides for reporting requirements in terms of which SARS must report on an annual basis to the Minister of Finance and the Commissioner on settlements reached. This report must be in such format as does not disclose the identity of the person concerned and contain details of the number of disputes settled or part settled, the amounts of revenue foregone and estimated amount of savings in costs of litigation, which must be reflected in respect of main classes of taxpayers.[90] In the end, ADR as contemplated in South African law is "a form of dispute resolution other than litigation, or adjudication through the courts." It is less formal, less cumbersome and less adversarial and a more cost-effective and speedier process of resolving a dispute with SARS.

7. Critique of the Alternative Dispute Resolution (ADR) of Tax Disputes in Kenya

The adverse impact of resolving disputes through litigation including high cost, delays, loss of trust and relationship is what has driven Kenya to incorporate alternative dispute resolution (ADR) as one of the mechanism of resolving tax disputes in the country. There

[88] Clause 5:12.2 of the SARS Alternative Dispute Resolution (ADR) External Policy on "Circumstances where Inappropriate to Settle."
[89] Clause 5:12.3 of the SARS Alternative Dispute Resolution (ADR) External Policy on "Circumstances where Appropriate to Settle."
[90] Clause 5:13 of the SARS Alternative Dispute Resolution (ADR) External Policy on "Reporting Requirements."

is no question that the application of ADR Framework has enabled KRA to register numerous successes which would not have been possible using the judicial and quasi-judicial processes stipulated under the law. Kenya Revenue Authority (KRA) reported collecting over KShs 21 billion through the Alternative Disputes Resolution (ADR) mechanism by resolving 393 cases vide ADR in the period between July 2020 to March 2021. That was 109% growth in number of cases and 389% growth in revenue when compared to a similar period last financial year 2019/2020.[91]

One of the positive aspects of the KRA ADR Scheme is that many taxpayers have embraced it as evidenced by the increasing number of ADR applications being received by KRA. For instance, in the above period, KRA recorded a 56% growth in the number of ADR applications from 425 received in the financial year 2019/2020 to 661 despite the current Covid-19 pandemic related challenges. As a matter of fact, resolution of disputes through ADR remained unhampered as meetings were conducted virtually. This has further reduced the time within which the meetings are held. ADR of tax disputes is now preferred because it ensures that disputes are resolved in an expeditious and timeous manner with resolution of cases under ADR being achieved in a much shorter time span. Indeed, the speed of tax ADR in Kenya has improved tremendously and average time taken to resolve ADR cases stood at 42 days in the current financial year 2020/2021, more than half the stipulated 90 days.[92]

The ADR of tax disputes in Kenya is also acknowledged in that unlike other dispute resolution mechanisms, it is more pocket friendly as it does not require payment of any filing fees. It is also a mediation process in which a taxpayer can opt to represent himself without the need for an Advocate or a tax representative hence saving costs. The ADR process has also proved effective in preserving the relationship between the taxpayer and the Authority. The mediator ensures that parties are not antagonized and maintain cordial relationships. The process provides a win-win outcome for the parties which leaves both parties happy with the outcome and prevents further escalation of disputes.[93] The ADR mechanism also allows reservation of rights meaning the record of the ADR discussions cannot be used in a court of law without agreement of parties. In addition, given the relaxed procedures, a taxpayer can be allowed to present documents for verification under the ADR process which would otherwise be rejected in a Tribunal or Court hearing in strict adherence to the law governing admission of evidence.[94]

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[91] KRA, "KRA collects KShs 21B from Alternative Disputes Resolution," Press Release Dated 16th April 2021, Available at: *https://www.kra.go.ke/en/media-center/press-release/1168-kra-collects-kshs-21b-from-alternative-disputes-resolution* (accessed on 25/01/2022).
[92] Ibid.
[93] KRA, "Why Alternative Dispute Resolution (ADR)?," Available at: *https://kra.go.ke/en/individual/alt-dispute-resolution-adr/learn-about-adr/benefits-of-adr*(accessed on 25/01/2022).
[94] KRA ADR Framework.

7.1 Challenges of Use of Alternative Dispute Resolution in Tax Disputes in Kenya

The KRA Alternative Dispute Resolution (ADR) Framework and the Tax Procedures (Settlement Out of the Tribunal or Court) Regulations as they are currently framed have created challenges that bedevil ADR of Tax Disputes in Kenya. These include lack of independence of the ADR mechanism from KRA, time constraints, lack of clarity on the circumstances to settle or not to settle, need for tribunal or court permission to pursue out of court settlement, conflict of interest challenges because of the use of KRA employees as ADR facilitators and potential conflict between the ADR mechanism for out of court or tribunal settlement as envisaged under the tax laws and regulations and the existing court annexed ADR mechanisms.

7.1.1 The Overreaching Role of KRA in the ADR Mechanism

The role of KRA as envisaged under the KRA ADR Framework and the Settlement Out of Court or Tribunal Regulations is overreaching in that not only does KRA decide whether a matter is fit for ADR resolution but also appoints and pays the ADR Facilitator who is its employee. The decision to appoint the ADR Facilitator is communicated both to the facilitator and the taxpayer by the Commissioner. It would have been better to create an independent Dispute Resolution Unit which is not directly answerable to KRA. However, the Kenyan system is similar to what exists in South Africa where the Facilitators are staff of South Africa Revenue Authority (SARS). Further, thus far no significant complaints have arisen as to adverse effect of use of KRA paid facilitators but in the interest of fairness, in future the role of KRA as investigator, prosecutor and facilitator of ADR may need to be revisited in the interest of enhancing integrity of the ADR process.

7.1.2 Time Constraints of the ADR Process

There is no clarity as to the time allocated for ADR Process under the KRA Alternative Dispute Resolution (ADR) Mechanism as when the process commences depends on when the application for ADR but the time allocated for it is restricted to the time remaining within the 60 days the Commissioner is required to issue the Objection Decision when KRA issues and communicates their decision. This puts pressure on the parties, especially the taxpayer, to choose between ADR and pursuing quasi-judicial process and judicial process and opting for ADR or waiting to opt for out of court settlement after the matter has been lodged with the tribunal or court. In any case, the time to lodge an appeal does not freeze against the party who has lodged an ADR process meaning they have to choose between filling an appeal and pursuing ADR only or pursuing ADR and filling an appeal at the same time. There is need to amend the law clearly stipulate the time for ADR to the scenario of parties wasting resources to first file a needless appeal and then opt for out of court or tribunal settlement just to overcome the limitations imposed by the rules as they currently are.

7.1.3 Lack of clarity on circumstances to settle or not to settle

There are no clear provisions in the regulations and the ADR Framework on the circumstances when to settle or when not to settle tax dispute as stipulated under the relevant tax law and the Alternative Dispute Resolution External Policy of South Africa. The assumption is that any matter that is suitable for ADR is suitable for settlement. In South Africa, it is clear that SARS has power to settle any tax dispute where doing so to the benefit of the State and such settlement may be entered at any time and not necessarily under the ADR process as part of out of court or tribunal settlement. The danger of the current arrangement is that KRA officials involved in a dispute may have to go through motions for lack of clarity on whether to settle or while waiting for bureaucratic decision to come from the top on whether to settle.

7.1.4 Need for Permission of Court for Out of Court Settlement

The ADR mechanism for settlement of tax disputes out of court or tribunal has been complicated further by the requirement that the Court or the Tribunal gives permission for the parties to commence the process. This removes the element of spontaneity of the agreement of parties to engage in ADR after filling of the Appeal as now a formal application has to be made to commence the process. The Court permission is required in addition to the administrative constraints that require that the taxpayer obtains the permission or at least mutual agreement of KRA to opt for out of Court or Tribunal Settlement. It is proposed that the regulations be amended to allow parties upon agreement to merely give notice to the Court or Tribunal for adjournment to pursue settlement without need for formal permission which calls for application.

7.1.5 Aligning the Law on ADR and Out of Court or Tribunal Settlement

There is no clarity in the tax law, in particular section 55 of the Tax Procedures Act and section 28 of the Tax Appeals Tribunal Act render clarity on the ADR procedure before referral to Appeal. There is thus need to reform the law to clearly accommodate ADR and settlement before the tax dispute is referred to the Tribunal or Court. Further, there is no clarity how the ADR process and especially the out of court or tribunal settlement integrates with the existing Court Mandated ADR which has been provided and which runs parallel to proposed ADR for tax disputes. This is necessary to extricate the out of court or tribunal settlement process from KRA control in the interest of the perception of independence and impartiality of the ADR facilitators.

8. Conclusion

The use of ADR in resolution of tax disputes has inspired other sectors into embracing ADR as the mode of resolution of disputes. For instance, Cabinet Secretary for ICT and Youth recently enacted the Data Protection (Complaints Handling and Enforcement Procedures) Regulations, 2021 which include provision for mediation, negation and

conciliation of data protection disputes in Kenya.[95] Last year, the Office of the Data Commissioner with the help of the UNDP has also engaged a consultant for the development of Alternative Dispute Resolution Framework similar to the KRA Alternative Dispute Resolution (ADR) Framework.[96] This points to the need to ensure the KRA ADR Framework is perfected to avoid other public entities taking up ADR from inheriting the inefficiencies and challenges inherent in it even as they seek to adopt the positive aspects of it. In particular, there is need to revise the law anchoring the KRA ADR Framework to sufficiently accommodate ADR in in the tax dispute resolution timeline. The KRA ADR Framework should also be revised to reconcile it fully with the provisions of the Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020. There is also need to expand the place and role of Independent ADR Practitioners in alternative dispute resolution of tax disputes in Kenya.

[95] ODPC, "New Regulations to Guide Data Protection," Available at: *https://www.standardmedia.co.ke/branding-voice/article/2001435848/new-regulations-to-guide-data-protection(accessed on 25/01/2022).*

[96] UNDP, Request for Proposal (RFP): Consultancy Services -Development of Alternative Disputes Resolution (ADR) Framework, Available at: *https://procurement-notices.undp.org/view_file.cfm?doc_id=262351* (accessed on 25/01/2022).

Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation

Abstract

This paper offers a reflective discussion on the psychological aspects of conflict and how Alternative Dispute Resolution (ADR) practitioners involved in mediation can effectively identify and address the psychological aspects of conflicts as a way ensuring that the process achieves lasting outcomes for the parties. This is because in almost all conflicts, there are usually underlying needs of the parties to have the root causes of the conflict fully addressed to avoid recurrence of the problem. Arguably, the ability of any mediator to identify and address these aspects will not only boost their reputation as competent mediators but will also go a long way in helping parties negotiate meaningfully and achieve outcomes that are win-win and long lasting. The author thus offers some thoughts on how mediators can achieve this.

1. Introduction

It has rightly been pointed out that the integration of modern dispute resolution processes into legally pluralistic African justice systems has been accomplished through multiple mechanisms, including in some cases, merging traditional conflict processes with modern Alternative Dispute Resolution (ADR).[1] In others, there have been varied adaptations of western ADR models.[2] The latter arguably captures Kenya's approach to incorporation of ADR mechanisms into the mainstream justice system. The current Constitution of Kenya 2010 under article 159 now provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional conflict resolution mechanisms should be promoted as long as they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.[3]

Sometimes, parties in litigation can engage in mediation outside the court process and then move the court to record a consent judgment.[4] This procedure exists as a remote form of court-annexed mediation[5]. On the other hand, parties in a conflict that is not before a court may undergo a mediation process and conclude the mediation agreement as a

[1] Haley, J.N., 'Mediation and Access to Justice in Africa: Perspectives from Ghana,' Harvard Negotiation Law Review, Vol. 21, 59, Fall 2015, pp. 59-106, p. 68.
[2] Ibid, p.68.
[3] Constitution of Kenya 2010.
[4] Civil Procedure Rules, former Order XXIV Rule 6 (now order 25 rule 5(1) and section 3A of the Act.
[5] The Pilot Project on Court Annexed Mediation in Kenya 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); Alternative Dispute Operationalization Committee (AOC); and the Secretariat (Technical Working Group (TWG). The Mediation Accreditation Committee (MAC) is a committee established under section 59A of the Civil Procedure Act, Cap 21, Laws of Kenya. The Mediation (Pilot Project) Rules, 2015 were enacted to guide the process. The project has since been rolled out to the rest of the country beginning May 2018.

contract *inter partes* enforceable and binding as between them, so long as it abides by the provisions of the Law of Contract Act.[6]

On a more practical level, mediation is also applied to the resolution of environmental conflicts, like land boundary conflicts, at a very informal level. Parties with such a conflict will bring it, for instance, to a panel of elders who are respected members of the society. They will listen to the parties and encourage them to come to a consensus on those matters. This ensures access to justice for the aggrieved parties, as the consensus reached is binding and the society has widely accepted internal enforcement mechanisms. This process has been widely applied by many communities in Kenya. It is a safe method as it preserves the relationship of the parties as it was before the conflict.[7]

In recognition of the important role of mediation in conflict management, there have been efforts by the Judiciary to accredit mediators to facilitate the Judiciary's Court Annexed Mediation program. While it is appreciated that there are different training bodies in the country and different approaches to mediation, this paper explores the *psychological facets of a conflict* that emerge in mediation to help mediators become more effective in discharging their duties as mediators (emphasis added). This is because, while the mediators are assigned matters by the Judiciary based on their qualifications, there are no guidelines on how they should approach the same. The focus is on the outcomes. They are expected to rely on their professional training which is as diverse as their backgrounds in training. As such, most of the professional skills, tactics and approaches to mediation are expected to be picked along the way as they gain experience and interact with different matters.

This paper therefore helps them understand some of the psychological aspects that they should pay attention to as they discharge their duties as mediators, based on the parties involved, model of mediation adopted and the type of disputes at hand. The paper first looks at the advantages and disadvantages of engaging in mediation, highlights the different models of mediation and finally explores the role of mediators which includes identifying the different psychological aspects of the conflict that are likely to arise, with the aim of helping mediators, both nascent and experienced, appreciate these aspects whenever they are called upon to resolve conflicts through mediation.

[6] Law of Contract Act, Cap 14, Laws of Kenya Revised Edition 2012 [2002].Government Printer, Nairobi.

[7] Shamir, Y., "Alternative dispute resolution approaches and their application," in Technical documents in hydrology, no. 7. UNESCO, 2003, p. 25.

According to the American Psychological Association, psychology is the study of the mind and behavior; it is the study of the mind, how it works, and how it affects behaviour.[8]

2. The Advantages and Disadvantages of Mediation

Mediation process is associated with the advantages of being, *inter alia,* a fast process compared to the other processes. The timing of the process is within the control of the parties, is informal, cost-effective, flexible, efficient, confidential, preserves relationships, provides a range of possible solutions and there is autonomy over the process and the outcome. On confidentiality it is generally agreed that any admissions, proposals or offers for solutions do not have any consequences beyond the mediation process and cannot, as a general rule, be used in subsequent litigation or arbitration.[9]

Regarding its expeditious and time saving nature, the American Bar Association[10] notes that it is often possible to schedule mediation around work schedules or on the weekend. Mediation is thus often marketed as being both economically and time efficient. However, that marketing assumes that both parties are honestly willing to mediate the dispute. If one party (or both parties) do not enter the mediation with the intention to make concessions and reach a compromise then the mediation is likely to fail. While mediations are less expensive and take less time than court cases, they still cost money and can last anywhere from a few hours to a few days. The cost of the mediation, and obviously the time it took, are not refundable and the parties to a failed mediation typically need to incur the costs of litigation after the failed mediation is over.[11]

Mediation is also non-coercive in that parties have autonomy over the forum, the process, and the outcome. There are no sanctions such as are applied in courts and in arbitration.
In summary, mediation is associated with the following positive aspects: It helps to identify the true issues of the dispute; It resolves some or all of the issues; Agreement can be reached on all or part of the issues of the dispute; The needs and interests of the parties

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[8] Nordqvist, C., "What is psychology and what does it involve?" Medical News Today Last updated Thu 1 February 2018 (Reviewed by Timothy J. Legg, PhD, CRNP).
Available at *https://www.medicalnewstoday.com/articles/154874.php* [Accessed on 1/08/2018].

[9] World Intellectual Property Organization, "Mediation: Frequently Asked Questions," available at *http://www.wipo.int/amc/en/mediation/guide/* [Accessed on 1/08/2018]. This is also captured in the Mediation (Pilot Project) Rules, 2015 which provide under Rule 12 that 'all communication during mediation including the mediator's notes shall be deemed to be confidential and shall not be admissible in evidence in any current or subsequent litigation or proceedings'.

[10] American Bar Association, "**Beyond the Myths; Get the Facts about Dispute Resolution",** Washington DC, 2007, p. 8. Published by the American Bar Association Section of Dispute Resolution with the generous support of the JAMS Foundation. Sourced from *www.abanet.org/dispute,* [Accessed on 1/08/2018].

[11] LawInfo, "The Pros and Cons of Mediation," available at *https://resources.lawinfo.com/alternative-dispute-resolution/mediation/* [Accessed on 1/08/2018].

are met (in part or in full); The parties reach an understanding of the true cause of the dispute; The parties reach an understanding of each other's needs and interests; It provides the possibility of preserving the relationship; and an improved relationship may result.[12]

Despite possessing the above positive attributes mediation has some drawbacks.[13] Firstly, there is the issue of 'power imbalance'. Power is a major concern in mediation. Where there is a significant power difference, the concern is that one party may dominate the process and the resulting outcome such that the agreement reflects largely only that party's needs and interests. Power also has broader repercussions in mediation as it may affect the legitimacy of the process itself. For a mediation process to be legitimate, it must be able to deal fairly with disputes involving significant power differences.[14] A power differential may originate from a variety of sources which include those derived from financial resources, knowledge and skill in negotiating, access to decision makers, personal respect and friendships.[15] Rarely, if ever, will power be equally balanced between the parties to a dispute. Even if it were desirable, there is no way a mediator would accurately measure the distribution of power between parties, and then intervene to redistribute power more equally.[16]

Secondly, mediation suffers from its non-binding nature. This means that, even though parties have agreed to submit a dispute to mediation, they are not obliged to continue with the mediation process after the first meeting. In this sense, the parties remain always in control of the mediation process. The continuation of the process depends on their continuing acceptance of it.[17] It is a process that requires the goodwill of the parties. The non-binding nature of mediation also means that a decision cannot be imposed on the parties.[18]

Thirdly, mediation may lead to endless proceedings. Moreover, and unlike in litigation, there are no precedents that are set in mediation hence creating uncertainty in the way decisions will be made in future. Lastly, mediation may not be suitable when one party

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[12] Shamir, Y., "Alternative dispute resolution approaches and their application," in Technical documents in hydrology, no. 7. UNESCO, 2003, p. 25.
[13] See generally Owen M. F., "Against Settlement," Yale Law Journal, Vol.93, no. 1073 (1984).
[14]Baylis, C. & Carroll, R., "Power Issues in Mediation", ADR Bulletin, Vol.7, No.8 [2005], Art.1, p.135.
[15]Manning, C., "Power Imbalance in Mediation," p. 2. Available at *http://dialmformediation.com.au/* [Accessed on 1/08/2018].
[16]Power Imbalances in Mediation, SCMC Briefing Papers, Scottish Community Mediation Centres, Edinburg. Available at *www.scmc.sacro.org.uk*, [Accessed on 1/08/2018].
[17]World Intellectual Property Organization, "Mediation: Frequently Asked Questions," available at *http://www.wipo.int/amc/en/mediation/guide/* [Accessed on 1/08/2018].
[18] Ibid.

needs urgent protection like an injunction and hence viewed against litigation this could be a demerit.[19]

3. Models of Mediation: An Overview

Mediators are generally free to use a variety of strategies and techniques during mediation, which often vary from one mediator to the other depending on their personality, experience, and beliefs in the role of mediation.[20] It has rightly been pointed out that there is considerable diversity in the practice of mediation internationally and within countries. Furthermore, mediation is used for various purposes and operates in a variety of social and legal contexts. As such, the mediator usually possesses different types of training, cultural backgrounds[21], skills levels and operational styles. These factors all contribute to the challenge of trying to define and describe mediation practices.[22]

There are various models of mediation that are used in different jurisdictions and subject areas: *Facilitative mediation*- where the parties are encouraged to negotiate based upon their needs and interests instead of their strict legal rights; *Settlement mediation*- where parties are encouraged to compromise in order to settle the disputes between them; *Transformative mediation*- where the parties are encouraged to deal with underlying causes of their problems with a view to repairing their relationship as the basis for settlement; and *Evaluative mediation*- where parties are encouraged to reach settlement according to their rights and entitlements within the anticipated range of court remedies. Some mediators utilise a number of models in the same mediation.[23]

Despite the foregoing, it should be noted that scholars have summarised about five elements of a successful mediation process that would work in various approaches: First,

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[19] Findlaw, "Alternative Dispute Resolution: Which Method Is Best For Your Client," available at *https://corporate.findlaw.com/litigation-disputes/alternative-dispute-resolution-which-method-is-best-for-your.html* [Accessed on 1/08/2018].

[20] Shamir, Y., "Alternative dispute resolution approaches and their application," in Technical documents in hydrology, no. 7. UNESCO, 2003, p. 26.

[21] Some scholars have argued that 'the pre-conceived expectations of the mediation process, which are a synthesis of culture and power relationships, create the greatest challenges a mediator faces when working with parties from other cultures.' De Voe, P.A. & Larkin, C.J., 'Cultural Challenges to Mediation,' ACResolution, A Quarterly Magazine, Fall-Winter 2007, pp. 30-31, at p. 30. Available at *https://law.wustl.edu/faculty_profiles/documents/larkin/CulturalChallengesMediation.pdf* [Accessed on 1/08/2018].

[22] Drews, M., 'The Four Models of Mediation,' DIAC Journal- Arbitration in the Middle East, Vol.3, No. 1(1), 2008, p.44.

[23] Ibid; See also Fenn, P. Introduction to Civil and Commercial Mediation, Part 1 (Chartered Institute of Arbitrators), p. 42:

> Para. 4.12 provides for contingency approach to mediation, which means that there is no set procedure but the procedure is tailored to suit the parties and the dispute in question. This often means that mediation is conducted without joint meetings and the mediators play a variety of roles.

there needs to be 'an impartial third party facilitator' who helps the parties explore the alternatives and find a satisfactory resolution; Second, the mediator must 'protect the integrity of the proceedings' by setting ground rules that all parties must follow and protecting the confidentiality of the proceedings; Third, there must be 'good faith from the participants' or the process will soon be frustrated and fail; Fourth, those with full authority to make decisions must attend the proceedings to show true commitment to the process. If one side lacks full authority, the other side can easily become frustrated when approval from superiors must continually be obtained; and finally, the mediator must choose an appropriate neutral location, so that both sides will feel relaxed and the process will be less intimidating.[24]

It is also true that 'practitioners are likely to be influenced by their professional background, their training, skill level and their framework for practice. They may have different perspectives that influence their style and may not always be consistent in every case. This influence most often comes from their initial training, their mentors, literature, ongoing professional and personal development, membership of professional bodies and their organisational or agency standards and accreditation requirements.'[25]

4. Making Mediation Work: The Role of Mediators in the Mediation Process

The mediator's role is considered to be multiple, that is: to help the parties think in new and innovative ways, to avoid the pitfalls of adopting rigid positions instead of looking after their interests, to smooth discussions when there is animosity between the parties that renders the discussions futile, and in general to steer the process away from negative outcomes and possible breakdown towards joint gains.[26] In addition, it has been observed that the mediator not only facilitates but also designs the process, and assists and helps the parties to get to the root of their conflict, to understand their interests, and reach a resolution agreed by all concerned.[27]

In summary, this role is believed to incorporate the following: Help to coordinate the meetings; introduce the parties; explain the process to the parties; set the agenda and rules; create a cease-fire between the parties; open communication channels; gain the

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[24] Marsh, Stephen R. 1997a. What is mediation? Available at *http://members.aol.com/ethesis/mw1/adr1/essayi.htm),* (As quoted in Smith, C.R., 'Mediation: The Process and the Issues,' (Industrial Relations Centre, Queen's University Kingston, Ontario, 1998), p.3.

[25] Brandon, M. & Stodulka, T., 'A Comparative Analysis of The Practice Of Mediation And Conciliation In Family Dispute Resolution In Australia: How Practitioners Practice Across Both Processes,' Queensland University of Technology Law and Justice Journal, Vol. 8 No 1, 2008, pp. 194-212, at p. 209.

[26] Shamir, Y., "Alternative dispute resolution approaches and their application," in Technical documents in hydrology, no. 7. UNESCO, 2003, p. 24.

[27] Shamir, Y., "Alternative dispute resolution approaches and their application," in Technical documents in hydrology, op cit., p. 24.

confidence and trust of the parties; gather information and identify obstacles; allow the parties to express feelings and vent emotions; help the parties to identify and understand their interests and priorities; help the parties with brainstorming creative options and solutions; help in defining acceptable objective criteria; help the parties understand the limitations of their demands through what is known as "a reality test"; help in evaluating alternatives; allow the process to move forward according to the needs and pace of the parties; help in crafting the agreement; and help in validating the agreement by the courts (if there is a court that has jurisdiction).[28]

4.1 Psychological Aspects

It has been argued that realization of the right of access to justice can only be as effective as the available mechanisms to facilitate the same. The same should also be achieved through a framework based on the principles of: *expedition*; *proportionality*; *equality of opportunity*; *fairness of process*; *party autonomy*; *cost-effectiveness*; *party satisfaction* and *effectiveness of remedies* (emphasis added).[29] Arguably, part of achieving party satisfaction involves addressing the psychological facets that may arise in the mediation process.

Mediation can be viewed from a psychological lens rather than merely as an alternative to litigation and arbitration. At mediation, the psychology of the parties is at play. The mediators' psychology is also relevant. Scholars have argued that all disputes are affected and influenced by psychological or emotional principles or what is referred to as psychological barriers.[30] All disputes/conflicts involve injury to feelings. This is so because conflicts do occur within individuals, as well as between individuals, groups, departments, organizations and nations.

In discussing negotiation, some authors have argued that it involves individual-level psychological processes: cognition, emotion, and motivation; it involves multiple social processes: persuasion, communication, cooperation, competition and powers; and it is always socially situated and thus can involve a wide range of social contextual factors.[31] The mediator must, therefore, be aware of the psychological dimensions of the conflict in order to be able to effectively assist the parties to conclude negotiating and reach mutually acceptable solutions.

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[28] Shamir, Y., "Alternative dispute resolution approaches and their application," in Technical documents in hydrology, op cit., pp. 25-26.

[29] See Maiese, M., "Principles of Justice and Fairness," in Burgess, G. and Heidi Burgess, H. (Eds.) ―Conflict Information Consortium‖, Beyond Intractability, University of Colorado, Boulder (July 2003).

[30] Strasser, F. & Randolf, P., "Mediation: A Psychological Insight into Conflict Resolution", (Continuum International Publishing Group London, New York, 2004), at pp. 2-30.

[31] Gelfand, M.J., Fulmer, C.A. and Severance, L., "The psychology of negotiation and mediation," Handbook of industrial and organizational psychology, Vol.3 (2010), pp. 495-554 at p.498; See also the idea about self-help mediation, that most conflicts are manageable or preventable automatically by every individual through the use of social skills learned throughout life at *http://www.mediationworks.com/*, [Accessed on 1/08/2018].

Every conflict, by definition, contains an indispensable emotional element. The discipline that is most familiar with these emotional dynamics is psychology. Therefore, mediation can learn from psychology how to be more effective in resolving conflicts.[32] Each person's attitudes, intentions, intuitions, awareness, context and capacity for empathetic and honest emotional communication have a significant impact on their experience of conflict and capacity for resolution.[33]

Some fundamental tenets on conflict have been suggested as follows: that conflict is ever present and cannot be eliminated but can be worked with; that the attitude and stance of the mediator can be of significance to the outcome; and above all that the use of psychotherapeutic tools can facilitate a paradigm shift in the parties approach to conflict. They demonstrate how the mediator can move parties in a dispute from a position of intransigent adversity to a working alliance, thereby achieving a "good enough" resolution.[34]

The mediator has to consider the emotional needs of a party at a mediation table. At the very basic level there is a need to be heard. There is a need for accurate empathy, validation and a respectful, appropriately paced process of dealing with the conflict. The parties may have suffered loss, which is financial, reputational or market share related. It may be the loss of certain hopes and dreams, aspects of relationships and meaningful parts of their identity. These losses are in the realm of psychology and should be dealt with delicately.[35]

The clinical skills and experience used in assessment, diagnosis and treatment by psychologists are relevant in the mediation context.[36] Seminal writers on mediation and psychology have over time come up with certain approaches that can be employed in a mediation situation to address the psychological dimensions at play. Some of these approaches are discussed hereunder.

i. Understanding the Parties

The mediator should carry the agenda of assisting the parties to continue with the negotiations with a view to resolving the conflict. It has rightly been argued that the unanimously accepted roles of the mediator are those of a facilitator/catalyst of the

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[32] Cloke, K., "Building Bridges between Psychology and Conflict Resolution–Implications for Mediator Learning." Retrieved online from *http://www. mediate. com/articles/cloke7. cfm (2008), p.77.* [Accessed on 1/08/2018].

[33] Ibid.

[34] Strasser, F. & Randolf, P., "Mediation: A Psychological Insight into Conflict Resolution", op. cit.

[35] See generally, Diamond, I., "The Value of a Psychologist Mediator", March 2011. Available at *https://www.mediate.com/articles/diamondi1.cfm* [Accessed on 1/08/2018].

[36] Diamond, I., "The Value of a Psychologist Mediator". Available at *https://www.mediate.com/articles/diamondi1.cfm* [Accessed on 1/08/2018].

communication and of a facilitator of the negotiation.[37] Their powers are summarised as persuasion and communication skills.[38] They are also seen as negotiators who clarify issues, identify alternatives, and help disputants come to a mutual agreement, without making a decision for them.[39] Thus, mediation is based on communication principles, negotiation, providing information and problem solving.[40]

It has also been pointed that it is possible for mediators to become targets of one or both parties' anger and frustration, which should not be taken personally.[41] It is even suggested that it is good to let the parties relieve their frustrations, and experienced mediators will be able to facilitate the release of these emotions without themselves getting emotionally involved and compromising their role.[42]

The mediator should understand that the parties are governed by their own outlook and their own 'self-concept' and 'self-esteem'.[43] Emotional or psychological obstacles are created because we are people first and litigants second. People get angry, depressed, fearful, hostile, frustrated and offended. They have egos that can easily be threatened.
It has been argued that the mediator will first need to explore how these people exist as persons prior to being litigants. By examining how these persons 'function' the mediator can reveal and determine the strategies they have adopted to extricate themselves from the conflict situation.[44] Understanding what the problem is, the thinking, feelings and emotions of the parties by asking them open-ended questions is essential if resolution is to be achieved in mediation. This is because understanding the opponent's position does not mean that you agree with it but may help a party revise its own position.[45]

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[37] Stoica, S., 'The Role And The Techniques Used By The Mediator In The Mediation Process,' Challenges of the Knowledge Society, Vol. 2011, No.1, 1986-1995, p. 4.
[38] See generally Bahr, S.J., "An evaluation of court mediation: A comparison in divorce cases with children," Journal of Family Issues, Vol.2, no. 1 (1981): 39-60, p. 41.
[39] Ibid, p. 41.
[40] Committee of Accrediting Organizations in Family Mediation (COAMF) (ed.), Standards of Practice in Familial Mediation, (Committee of Accrediting Organizations in Family Mediation (COAMF), Montreal, 2016), p.6. Available at *https://www.barreau.qc.ca/pdf/mediation/familiale/guide-pratique-mediation-familiale-an.pdf* [Accessed on 1/08/2018].
[41] Smith, C.R., 'Mediation: The Process and the Issues,' p.6.
[42] Smith, C.R., 'Mediation: The Process and the Issues,' op cit., p.6; See also generally, Duffy, J., "Empathy, Neutrality and Emotional Intelligence: A Balancing Act for the Emotional Einstein," Queensland U. Tech. L. & Just. J. Vol.10, No.1, 2010, p.44.
[43] Diamond, I., "The Value of a Psychologist Mediator", op cit.
[44] Ibid.
[45] Jacobs-May, J., "The Psychology of Mediation: An atmosphere that instills fairness and understanding is more likely to lead to resolution", available at *www.jamsadr.com/files/Uploads/Documents/Articles/Jacobs-May-Recorder-04-04-11.pdf,* [Accessed on 1/8/2018].

ii. Proposals by the Mediator

There is a prevalent view among scholars that a proposal from a mediator often allows both parties to save face, and enter an agreement that neither is willing to propose. This may happen where there is trust and rapport between the mediator and the parties, and if the mediator's proposal is in striking range of both parties.[46]

It has also been contended that issues of self-identity and self-esteem play an important role in mediation. Sometimes they are spoken of in terms of a party's need to "save face" or of a person's 'ego' clouding his thinking. Most people take the conflict personally and the outcome of the mediation is a reflection of who they are.[47]

The "IDR Cycle," that is, the cycle of narcissistic inflation, deflation and realistic resolution also typically occurs in mediation. The mediator's ability to deal with issues of self and identity is thus a key ingredient of a successful mediation. These issues arise not only for the parties but also for the mediator as well.[48] The mediator uses interventions such as 'looping' and reframing.[49] The term 'looping' has been used to describe the process of the mediators reciting back or neutrally paraphrasing the statements of the parties in order to demonstrate understanding.[50]

iii. Meeting the Parties' Needs

Other tools available to the mediator include empathy which helps parties to reconnect with a deeper sense of reflective functioning and capacity for insight.[51] The mediator should bear in mind that issues of self-identity are implicated in all aspects of human conflict. The mediator must come up with ways of satisfying basic human needs such as security, status, autonomy, love, fairness and economic well-being.[52]

From the space created by the release of expectation and identity the resolution has had room to emerge. Sometimes a party just wants to be apologized to. Hearing "I am sorry" may soften the ego of a party who had taken a hard-line stand in a mediation. Not all mediations require one party to forgive the other; yet in some mediations, an apology

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[46] Ibid; Strasser, F. & Randolf, P., "Mediation: A Psychological Insight into Conflict Resolution", op. cit, pp.43-44.

[47] Bader, E., "The Psychology of Mediation: Issues of Self and Identity and the ADR Cycle", Pepperdine Dispute Resolution Law Journal, Vol. 10, No.2, 2010, p. 180. Parties in mediation typically pass through a cycle of psychological inflation (overconfidence), deflation, and, finally, if the dispute settles, realistic resolution. This is often referred to as the IDR cycle.

[48] Ibid., pp. 189-200.

[49] Friedman, G.J. & Himmelstein, J., "Resolving Conflict Together: The Understanding Based Model of Mediation, 2006, Journal of Dispute Resolution, pp. 523-529.

[50] Ibid.

[51] Bader, E., "The Psychology of Mediation: Issues of Self and Identity and the ADR Cycle", op. cit, p. 207.

[52] See generally, Fisher, R. & Ury, W., Getting to Yes: Negotiating Agreement Without Giving In, (Penguin Books, New York, 1981).

from one side and forgiveness on the other can play an important role in resolving the conflict.[53]

iv. Creative Solutions

It has already been noted elsewhere in this paper that mediation as a process allows for creative solutions. Creative solutions are arrived at if the parties actually participate in the generation of outcomes that are mutually acceptable. Where parties have voluntarily participated in the generation of options to their conflict, the likelihood of coming to a creative solution are very high. The contention here is that parties generally see things from different angles when they are actively involved in the creation of solutions to their problems and may end up making allowances they otherwise might not make. Participation by the parties in *generating options* and deciding on how to meet needs makes them own the process and the outcome (emphasis added). Involving parties in creating solutions to their problems is, thus, essential in ensuring that the outcome of a mediation process is acceptable to the parties.[54]

As already stated, in every conflict there are certain emotions, feelings and other psychological matters at play. If these psychological aspects can be harnessed by mediators in the course of conflict management, then mediation can become a more effective mechanism in resolving conflicts.[55] Each person's attitudes, intentions, intuitions, awareness context and capacity for empathetic and honest emotional communication have a significant impact on their experience of conflict and capacity for resolution.[56]
Further and as earlier indicated, there are certain fundamental tenets: that conflict is ever present and cannot be eliminated but can be worked with; that the attitude and stance of the mediator can be of significance to the outcome; and above all that the use of psychotherapeutic tools can facilitate a paradigm shift in the parties approach to conflict. The mediator can move parties in a dispute from a position of intransigent adversity to a working alliance, thereby achieving an outcome that is acceptable to the parties.[57]

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[53]See generally, The Psychology of Mediation, Pretice Mediation LLC, available at *http//www.mediator.seatle.com,* [Accessed on 1/8/2018].; Jacobs-May, J., "The Psychology of Mediation: An atmosphere that instills fairness and understanding is more likely to lead to resolution", op.cit.

[54]Jacobs-May, J., "The Psychology of Mediation: An atmosphere that instills fairness and understanding is more likely to lead to resolution", op.cit.

[55] Cloke, K., "Building Bridges between Psychology and Conflict Resolution-Implications for Mediator Learning, American Institute of Mediation, available at *www.americaninstituteofmediation.com, p.77.* [Accessed on 1/8/2018].

[56] Ibid. See also Diamond, I., "The Value of a Psychologist Mediator", available at www.mediate.com[Accessed on 1/8/2018].; who argues that a mediator who understands the psychological imperatives will engage with the parties during caucuses to ensure they open up about their lives or even vent out. Through such caucuses the mediator gets wider possibilities of understanding the conflict context; and where there is trust and good rapport between the mediator and the parties, the parties will be satisfied with both the process and the outcome of the process because of the creative options generated by parties.

[57] Strasser, F. & Randolf, P., "Mediation: A Psychological Insight into Conflict Resolution", op. cit.

Consequently, the need by a mediator to consider the emotional needs of the parties at a mediation table is of utmost importance if a resolution is to be achieved. For example, at the very basic level parties need to be heard, they need accurate empathy, validation and a respectful, appropriately paced process of dealing with the conflict. Whether the parties have suffered loss, which is financial, reputational, market share related, or they have lost certain hopes and dreams or aspects of relationships and meaningful parts of their identity, such losses are in the realm of psychology and should be dealt with delicately. For that reason, in a dispute involving such losses the mediator cannot ignore the clinical skills and experience used in assessment, diagnosis and treatment by psychologists in unraveling the emotions and feelings of the parties to realize a resolution in the conflict.[58]

v. Fairness in Mediation

Fairness is one of the abstract concepts influencing mediation. Some scholars have argued that it is inherent for every human being to react to unfairness. The hardwired reaction to perceived *unfairness* can be a particular source of trouble in mediation (emphasis added).[59] In addition, when a disputant is cooperative, generous and trustworthy, the reward centers of the brain are activated, and the other will generally reciprocate in kind.[60] Whereas when a disputant feels that the opponent is distrustful he may think that he is being treated unfairly and retaliate, causing the same reward centers of the brain to be activated as he punishes the opponent.[61] In such an event the negotiations come to a standstill.

Consequently, the mediation process requires us to recognize the hardwired nature of fairness and employ approaches that address the psychological questions at play. Approaches that can be employed to address psychological features of a conflict and guarantee fairness in mediation include understanding the parties, meeting their needs, assessing values, coming up with creative solutions and proposals from the mediator to allow parties to save face.[62]

A successful mediation can result in resolution of a conflict. This means that the parties agree on an outcome that they can live with. The conflict is resolved and does not come back. Resolution comes about as a result of a process that addresses all the aspects of the conflict including its psychological dimensions. It is as a result of these outcomes that are mutually acceptable that both parties feel that the solutions arrived at are legitimate. It

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[58] Diamond, I., "The Value of a Psychologist Mediator", op.cit.

[59] Jacobs-May, J., "The Psychology of Mediation: An atmosphere that instills fairness and understanding is more likely to lead to resolution", op.cit.

[60] Ibid.

[61] Ibid.

[62] Smith, C.R., 'Mediation: The Process and the Issues,' Current Issues Series, (IRC Press, Industrial Relations Centre, Queen's University, Ontario, 1998), p. 6.
Available at *http://irc.queensu.ca/sites/default/files/articles/mediation-the-process-and-the-issues.pdf [Accessed on 1/08/2018].*

has been postulated that when a problem is defined in terms of the parties' underlying interests, it is often possible to find a solution which satisfies both parties' interests. Indeed, it has been observed that information is the life force of negotiation. The more you can learn about the other party's target, resistance point, motives, feelings of confidence, and so on, the more able you will be to strike a favourable agreement with parties focusing on their interests while at the same time remaining open to different proposals and positions.[63]

A process is likely to meet each party's expectations and achieve justice if it demonstrates a procedurally and substantively fair process of justice. This is because access to justice also includes how parties feel about the process. It is essential that a party not only accesses justice but feels satisfied by the outcome at the psychological level.[64]

5. Conclusion

Article 159 of the constitution of Kenya aims at easing access to justice through the use of reconciliation, mediation and traditional conflict resolution mechanisms. It is essential that a party not only accesses justice but feels satisfied by the outcome at the psychological level. A party must be able to have his feelings of anger, recognition, satisfaction and sense of justice addressed. A successful mediation has the capacity to restore a party's hopes, dreams and self-confidence. These characteristics of mediation should be exploited by Kenyans in appropriate cases.

Some of the cases where mediation can be effectively applied include those relating to the environment, communities, commercial matters, workplace issues, restorative justice, family disputes, among others.[65] In all these disputes the psychological processes at play are fairly similar. There is a need for the mediators to continually engage in continuous professional development seminars to enable them appreciate the relevant skills that they must acquire in their journey to becoming effective mediators. These skills include the ability to identify and address any psychological dimensions of the conflict in the mediation process. This is the only way that access to justice through mediation can be

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[63] See Chapter 2 'Strategy and Tactics of Distributive Bargaining' p. 23,
Available at *http://highered.mcgraw-hill.com/sites/dl/free/0070979960/894027/lew79960_chapter02.pdf* [Accessed on 1/08/2018].

[64] Fisher, R., et al, Getting to Yes: Negotiating an Agreement without Giving In, op cit, p.21; See also D. Carneiro, et al, 'The Conflict Resolution Process,' Law, Governance and Technology Series, Vol. 18, 2014, pp. 163-186.

[65] Interagency ADR Working Group Steering Committee, 'Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators' (April 2006); Stone-Molloy, M.S., "Mediating Environmental Conflicts: A Practical Manual", available at *http://www. law. ufl.edu/conservation/pdf/ mediating .pdf* [Accessed on 1/08/2018]; Caratsch, C., Resolving Family Conflicts: A Guide to International Family Mediation, (International Social Service, Geneva, 2014).
Available at *http://www.iss-usa.org/uploads/File/Guide%20to%20IFM.pdf*; Cornes, D., "Commercial Mediation: the Impact of the Courts", Arbitration Vol. 73, No.1, 2007, p.12.

fully realised as a result of the satisfactory outcomes for the parties. The more satisfied the parties are with the process, the better and easier it will become for the integration of the use of mediation in conflict resolution in Kenya to ensure parties access justice as envisaged under Article 159 of the Constitution.

Role of State Agencies and Communities in Achieving Effective Environmental Conflicts Management

Abstract

Environmental conflicts affect not only the stability of a country but also the livelihoods of communities. This is especially true for communities living around the environmental resources causing the conflict in question. Considering that these conflicts have different actors involved in their origin as well as their management, it calls for concerted efforts from state agencies and communities towards addressing them. This paper discusses the role of state agencies as well as communities in management of environmental conflicts.

1. Introduction

Almost every community in the world occasionally has conflicts over ecological concerns, including, but not limited to, land use, environmental quality, water allocation, waste disposal, and natural resource management.[1] Environmental variables are important in many conflicts, either as direct causes of conflict or as its main drivers. There are many different types of environmental conflicts, ranging from value-based disputes over divergent notions of location, space, and our relationship with the natural world to interest-based rivalry over limited or valuable natural resources. Conflicts involving the environmental drivers of identity, security, and health can also be based on needs.[2]

Notably, the management of natural resources in Africa using community-based methods has gained popularity over time.[3] It has been argued that the two main ways for improving people's lives in order to create peace, stability, human security, and development are good governance and conflict management.[4] In addition, the majority of conflicts arise as a result of the state's failure to address critical issues such as human rights, the rule of law, better economic opportunities, particularly for youths, health, educational, housing, and transportation facilities for the general public, and, most importantly, a functioning justice system. These challenges, it has been suggested, can be addressed if the government focuses on good administration and improving people's quality of life.[5] States automatically become one of the key players in any conflict transformation process when they reframe conflict in terms of concerns relating to

[1]Humphreys, M., "Natural resources, conflict, and conflict resolution: Uncovering the mechanisms." Journal of conflict resolution 49, no. 4 (2005): 508-537; Bob, U. and Bronkhorst, S., "Environmental conflicts: Key issues and management implications." African Journal on Conflict Resolution 10, no. 2 (2010): 9-30.

[2] Fisher, J., "Managing environmental conflict." The handbook of conflict resolution: theory and practice (2014): 3, p.1.

[3] See Haro, G.O., Doyo, G.J. and McPeak, J.G., "Linkages between community, environmental, and conflict management: Experiences from Northern Kenya." World development 33, no. 2 (2005): 285-299.

[4] Ahmar, Moonis. "Conflict Management and Good Governance in Pakistan: Lessons from Germany." Journal of Political Studies, Special Conference Issue, 2019, 211:221, at 211.

[5] Ibid, at 211.

human rights since they have a responsibility to respect, safeguard, and uphold human rights.[6]

The need for concerted efforts in addressing environmental conflicts is justified by the observation that while the nation-states are the main players in global politics, they are not the only ones; the international system also includes international institutions, business entities, and non-state actors.[7] Indigenous peoples see the deprivation of their basic human and indigenous rights as a threat to their very existence. This results in conflict between the state and its indigenous peoples and, if handled incorrectly, can result in bloodshed. Since disputes between indigenous peoples and the state are fundamentally about rights, it makes sense to think about using a human rights-based strategy to resolve disputes in these situations.[8] This chapter discusses the place of State agencies in managing internal conflicts, non-state actors as well as the role of communities in achieving lasting peace.

2. Role of State Institutions in Environmental Conflict Management

Article 69(1) of the Constitution of Kenya outlines the obligations of State in respect of the environment as follows: The State should: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance the intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment, and utilize the environment and natural resources for the benefit of the people of Kenya. Besides, every person is obligated to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[9]

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[6] Lefevre N, 'The Human Rights-Based Approach to Conflict Transformation in Indigenous Contexts'<*https://www.academia.edu/9964347/The_Human_Rights_Based_Approach_to_Conflict_Transformation_in_Indigenous_Contexts*> accessed 21 August 2022, p.3.

[7] Ataman, M., "The impact of non-State actors on world politics: a challenge to Nation-States." Alternatives: Turkish Journal of International Relations 2, no. 1 (2003), p. 42.

[8] Broberg M and Sano H-O, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – an Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22 The International Journal of Human Rights 664; Davis, M., "Indigenous struggles in standard-setting: The United Nations Declaration on the Rights of Indigenous Peoples." Melbourne Journal of International Law 9, no. 2 (2008): 439-471.

[9] Article 69(2), Constitution of Kenya, 2010.

In addition to helping to modify institutional norms, the law can also help to influence attitudes and behaviour.[10] Due to its distinguishing characteristics, the rule of law offers a practical framework for the peaceful resolution of conflicts. These characteristics include: establishing the societal norms and thereby ensuring dependability, justice, and stability; institutions capable of resolving conflicts; laws and mechanisms protecting citizens' rights.[11] It goes without a saying that the State obligations relating to environmental conservation and promoting sustainable development are part of the process of addressing environmental conflicts as well as preventing their emergence.

Notably, depending on the nature of the conflict, the state, including state institutions and officials, plays a strategic role in the management of domestic conflict, either as a mediator and peacekeeper or as a participant.[12] It has additionally been contended that while by and large, many (maybe most) country states emerged by success (e.g., by triumph of the most impressive primitive lord over more vulnerable adjoining medieval masters), and accordingly were brought into the world as struggle members instead of as referees, on account of Africa, imperialism assumed a significant part in using together people groups from a welter of nationalities, commonwealths, societies and areas under a solitary country state where it likewise granted struggle between people groups of various foundation, especially concerning influence and asset.[13]

Regardless of the course of state arrangement, it is the obligation of the state to guarantee the upkeep of peace and lawfulness in the public eye where in dealing with the variety of human necessities and setting up systems for overseeing questions, the state capacities as a referee. Beside administration structures, the state likewise plans strategies and projects pointed toward working with serene conjunction among its assorted residents. Experiencing the same thing of savage struggle, the state liability goes past only the stoppage of viciousness, to executing drives focused on the goal of the contention issue(s) among the disputants.[14]

3. Role of Communities in Conflict Management

In some African nations, violent inter - group conflict is seen on a yearly basis. It is frequently organised according to identity. The conflicts frequently revolve around local land, raw materials, or political power. These conflicts pose a serious danger to human

[10] Muigua, K., "Securing Our Destiny Through Effective Management of the Environment", Journal of Conflict Management and Sustainable Development, Volume 4, No 3, (May, 2020).
[11] Peace Building Initiative, "Introduction: Justice, Rule of Law & Peacebuilding Processes, 2009" <*http://www.peacebuildinginitiative.org/indexe33f.html?pageId=1844*> accessed 21 August 2022.
[12] Abdulrahman, Imran, and Usman A. Tar, "Conflict management and peacebuilding in Africa: the role of state and non-state agencies," Information, society and justice journal 1, no. 2 (2008): 185-202, at 190.
[13] Ibid, at 190.
[14] Ibid, at 191.

security and development, despite the fact that they often stay localized and are not directed at the central state.[15]

While communal conflicts in some areas only result in a few fatalities or are resolved before any fatalities occur, in other areas, these disagreements turn violent and result in the deaths of dozens, hundreds, or even thousands of people.[16] The term "communal conflict" refers to disputes between non-state organisations that are unified by a common identity.[17] Since group identity is thought to be socially constructed rather than a static phenomenon, some people would equate the concept of communal identity with ethnic or religious identity, but others have purposefully left the definition more ambiguous. The communal identity is conceptualized as subjective group identification based on, for example, a common history, culture, or core values.[18]

Governments, it has been said, are rarely able to act as an impartial arbitrator in situations of intercommunal conflict since, when such a dispute arises, political leaders are frequently linked to its origin. This can happen directly through bias or provocation, or it can happen inadvertently due to poor policies and a failure to treat all individuals equally. As a result, politicians have to make an effort to find and promote conflict resolution techniques that are respected in the community. Traditional leaders, community-based organisations, and NGOs may fall under this category.[19] Communities must be given the chance to describe how conflicts are manifesting in the broader socioeconomic setting. They must be given the chance to recognize external elements that fuel conflict and to create locally suitable conflict resolution techniques.[20]

4. The Place of the State and the Communities in Addressing Environmental Conflicts: Striking the Balance

i. Addressing the Bias and legitimacy

The government's capacity to control intercommunal disputes declines if the state is biased toward the conflict players. The circumstances that support collaboration are

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[15] Elfversson E, 'How Government Bias Can Fuel Communal Conflicts in Africa' (The Conversation) <*http://theconversation.com/how-government-bias-can-fuel-communal-conflicts-in-africa-121640*> accessed 26 August 2022.

[16] Brosché, Johan, 'Causes of Communal Conflicts: Government Bias, Elites and Conditions for Cooperation,' Expert group for Aid Studies, Swedish Ministry of Foreign Affairs, 2015, p.3. Available at *https://uu.diva-portal.org/smash/get/diva2:899332/FULLTEXT01.pdf accessed 21* August 2022.

[17] Ibid, p.4.

[18] Ibid, p.4.

[19] Elfversson E, 'How Government Bias Can Fuel Communal Conflicts in Africa' (The Conversation) <*http://theconversation.com/how-government-bias-can-fuel-communal-conflicts-in-africa-121640*> accessed 26 August 2022.

[20] Frank, E., "A participatory approach for local peace initiatives: The Lodwar border harmonization meeting," Africa Today (2002): 69-87, p. 72.

subject to other players' influence. Because it has the power to change a number of variables crucial to intercommunal interactions, the government's behaviour is crucial. The strategic interests of the government are important when determining whether or not to interfere in a community conflict, because biased choices about property rights raise the likelihood of conflicts. Additionally, central players might form alliances with local actors engaged in conflict, which could intensify contacts between central and local elites as well as interactions among local elites, potentially leading to war.[21]

The government will be better able to control the community strife if the state has a high level of democracy. The ability of democratic institutions and procedures to support the aspects of rights, equality, and accountability is directly correlated with the degree to which government is responsive to the interests and requirements of the greatest number of individuals.[22] Some academics advise using the following set of best practices when using collaborative decision-making processes: An agency should first decide if a cooperative strategy to finding agreements is necessary; Stakeholders should be able and willing to engage in the process and support it; Agency executives should encourage the process and guarantee there are enough resources to hold the process; A collaborative procedure to find an agreement should start with an evaluation; There should be consensus among all participants about ground rules, rather than just the sponsoring organisation setting them; The sponsoring organisation ought to guarantee the facilitator's objectivity and responsibility to each participant; Planning for execution of the agreement should begin as soon as the process is initiated by the agency and participants; and these processes should be governed by guidelines rather than rigid rules.[23]

ii. Environmental Governance Through Civic Engagement

Institutionalized participation can go a long way in enhancing the role of communities in addressing environmental conflicts in the country. To guarantee citizens enjoy unhindered justice and the rule of law, which are essential for sustainable development, responsible and inclusive institutions guided by the law may help to promote and ensure inclusive public policymaking that leaves no one behind.[24]

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[21] Brosché J, 'Conflict Over the Commons: Government Bias and Communal Conflicts in Darfur and Eastern Sudan' (2022) 0 Ethnopolitics 1.

[22] United Nations, 'Rule of Law and Democracy: Addressing the Gap between Policies and Practices' (United Nations) <*https://www.un.org/en/chronicle/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices*> accessed 26 August 2022.

[23] Walker GB and Daniels SE, 'Collaboration in Environmental Conflict Management and Decision-Making: Comparing Best Practices with Insights from Collaborative Learning Work' (2019) 4 Frontiers in Communication <https://www.frontiersin.org/articles/10.3389/fcomm.2019.00002> accessed 26 August 2022.

[24] 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP) *https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html* accessed 26 July 2022.

Decision-making about environmental and natural resource policies is evolving. As parties resolve policy issues, citizens and management agency staff are increasingly looking for methods to "do things differently" and to actively engage in the decision-making process. Nowadays, "doing things differently" refers to working together.[25]

iii. Capacity building for Enhancing Participatory Conflict Management

In order for less powerful parties to participate fairly in a process of consensual negotiation, it is essential to create a level playing field.[26] Although the terms "capacity building" and "capacity development" are frequently used to refer to a wide range of activities, in the broadest sense, capacity refers to a party's ability to solve problems and accomplish goals, and capacity building aims to improve parties' ability to collaborate for their mutual benefit by giving them the knowledge and resources they need to identify problems and formulate solutions.[27] Since it encompasses the total system, environment, or context in which people, organisations, and societies operate and interact, capacity building is larger than organizational development. It is seen as the process through which people, groups, organisations, institutions, and communities improve their capacity to: (1) carry out essential tasks, solve issues, set and attain goals; and (2) comprehend and address their developmental requirements in a comprehensive and sustainable manner.[28]

It has also been correctly noted that the provision of basic human needs, such as food, clean drinking water, health care, basic education, and economic possibilities within a society, is a prerequisite for developing capacity for effective governance and conflict management.[29] Nevertheless, capacity building goes well beyond meeting the minimum requirements. It is an issue of development at all societal levels, which includes institutional, community, and economic development. Knowledge and technical skills, organizational and institutional capacity, and the capacity to foresee, manage, and

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[25] Daniels S and Walker G, 'Working through Environmental Conflict: The Collaborative Learning Approach' [2001] Working through Environmental Conflict 1.

[26] Warner, M., "Conflict management in community-based natural resource projects: experiences from Fiji and Papua New Guinea" (2000), p. 30.

[27] Corissajoy, 'Capacity Building' (Beyond Intractability, 6 July 2016) <https://www.beyondintractability.org/essay/capacity-building> accessed 20 August 2022; see also Lattanzio DJ, 'Capacity Building: A Powerful Tool to Prevent and Resolve Conflicts' (MediateGuru, 20 March 2021) <*https://www.mediateguru.com/post/capacity-building-a-powerful-tool-to-prevent-and-resolve-conflicts*> accessed 20 August 2022.

[28] Geene, J. V. "Participatory Capacity Building: A Facilitator's Toolbox for Assessment and Strategic Planning of NGO Capacity." The Institute of Cultural Affairs, Zimbabwe, available at *http://assets. sportanddev. org/downloads/participatory_ capacity_building_full. pdf*. Accessed on February 10 (2003): 2020, p. 4.

[29] Corissajoy, 'Capacity Building' (Beyond Intractability, 6 July 2016) <*https://www.beyondintractability.org/essay/capacity-building*> accessed 20 August 2022.

resolve disputes are some of the key assets that people, organisations, communities, and governments need in order to reach their full potential.[30]

Notably, capacity building is a perpetual and mutually reinforcing process of changing people's attitudes, values, and organizational practices while accumulating the necessary knowledge and skills among different partners in a partnership. The goal is to improve each partner's capacity to make wise decisions about their own lives and to fully accept the consequences of those decisions.[31] It has also been pointed out that despite the fact that there are many different approaches to building capacity, the capacity-building strategy for resolving conflicts is essential because it gives people the tools they need to recognize conflicts, properly analyze their options for dealing with them, solve them, and prevent future ones.[32]

The need for capacity building is justified on the observation that long-term, conflict resolvers help parties build better relationships with one another in order to increase institutional and interpersonal capacity to resolve or de-escalate conflict in the future and stop it from turning violent. This entails helping the parties examine their underlying presumptions and attitudes about their enemies and, if necessary, change them.[33] While acknowledging that conflict is common and frequently beneficial, conflict resolvers detest the bloodshed, suffering, and loss of life it causes. They support constructive tactics over destructive ones because they feel that there are both productive and destructive ways to handle conflict.[34]

Sustainable Development Goal (SDG) 16 seeks to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'. In line with this, there is a need for the Government to invest in strengthening conflict management institutions both formal and informal. While formal institutions are mainly pegged on the state, the informal ones require strong and empowered communities for their efficiency. As such, there should be empowerment of both state institutions and the communities.[35]

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[30] Ibid.

[31] Geene, J. V. "Participatory Capacity Building: A Facilitator's Toolbox for Assessment and Strategic Planning of NGO Capacity." The Institute of Cultural Affairs, Zimbabwe, available at *http://assets. sportanddev. org/downloads/participatory_ capacity_building_full. pdf.* Accessed on February 10 (2003): 2020, p. 4.

[32] Lattanzio DJ, 'Capacity Building: A Powerful Tool to Prevent and Resolve Conflicts' (MediateGuru, 20 March 2021) <*https://www.mediateguru.com/post/capacity-building-a-powerful-tool-to-prevent-and-resolve-conflicts*> accessed 20 August 2022.

[33] Lutz EL, Babbitt EF and Hannum H, 'Human Rights and Conflict Resolution from the Practitioners' Perspectives' (2003) 27 The Fletcher Forum of World Affairs 173, p. 179.

[34] Ibid, p. 179.

[35] 'Peacebuilding Needs Strong Communities as Well as Strong Institutions' (Peace Insight) <*https://www.peaceinsight.org/en/articles/peacebuilding-needs-strong-communities-as-well-as-strong-institutions/*> accessed 12 September 2022; '4 Governance and Conflict Resolution in Multi-Ethnic

5. Conclusion

It is possible for the various parties (government agencies, stakeholder organisations, and citizens) to look for a collaborative approach as an alternative to adversarial conflicts when environmental or natural resource conflicts have arisen. By doing this, they will be able to work through conflicts to find common ground and make wise decisions.[36] SDG 16 and the SDGs as a whole must be accomplished through partnerships, integrated solutions, and the initiative and leadership of countries and member states in reshaping the institutional and social landscape and laying the foundation for significant reforms that support the establishment of sustainable peace.[37] Because marginalization and exclusion may have a destabilizing effect, it is essential to adopt an inclusive and participatory approach to development.[38]

Better economic climates, greater per capita incomes, higher educational achievement, and more social cohesiveness have all been benefits of peaceful societies.[39] Better interpersonal ties within a community tend to promote higher levels of peace by preventing the emergence of tensions and lowering the likelihood that conflicts would turn violent.[40] It is imperative that conflict management efforts should aim at strengthening both state agencies and communities as both have a distinct role to play.

Societies' <*https://archive.unu.edu/unupress/unupbooks/uu12ee/uu12ee05.htm*> accessed 12 September 2022.

[36] Gregg B Walker and Steven E Daniels, 'Collaboration in Environmental Conflict Management and Decision-Making: Comparing Best Practices with Insights from Collaborative Learning Work' (2019) 4 Frontiers in Communication <*https://www.frontiersin.org/articles/10.3389/fcomm.2019.00002*> accessed 26 August 2022.

[37] 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP) <*https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html*>
accessed 20 August 2022.

[38] SDG 16 as an Accelerator for the 2030 Agenda' (UNDP) *https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html* accessed 20 August 2022

[39] The Institute for Economics and Peace (IEP), 'Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)', p. 2 <*https://issat.dcaf.ch/ser/Learn/Resource-Library/Policy-and-Research-Papers/Pillars-of-Peace-Understanding-the-key-attitudes-and-institutions-that-underpin-peaceful-societies*> accessed 20 August 2022

[40] The Institute for Economics and Peace (IEP), 'Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)', p. 6.

Entrenching Family Mediation in the Law in Kenya

Abstract

While disputes within family settings are considered a normal occurrence, the law, in many jurisdictions around the world, has always made attempts to provide for specialised procedures and mechanisms aimed at managing such conflicts or disputes in the best ways possible by reducing friction and salvaging future relations where need be. Family mediation is considered to be a viable means of resolving family disputes before and even after divorce, where divorce is the ultimate outcome. Mediation is deemed to have some characteristics that make it suitable in affording the parties involved a forum to discuss and agree on the interests and needs of each party. This paper discusses family mediation in the context of Kenya and how the same can be enhanced through clearer and more effective legal and policy framework to resolve family disputes among Kenyans.

1. Introduction

Mediation can been defined as a social process in which a third party helps people in conflict understand their situation and decide for themselves what, if anything, to do about it.[1] It has also been defined as a method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussion and the flow of information, and thus aiding in the processes of reaching an agreement. Since mediation is, in essence, a form of "assisted negotiation" it does not have any direct legal basis.[2] The mediator's objectives are typically believed to lie in helping the parties search for a mutually acceptable solution to their conflict and to counter tendencies toward competitive win-lose strategies and objectives.[3]

Notably, mediation has a long history and roots in many cultures.[4] Mediation comes in many forms, depending on the nature of conflict at hand and the culture within which it is being practised.[5] Although mediation can be used in dealing with different types of

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[1] Della Noce, D.J., Bush, R.A.B. and Folger, J.P., "Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy," Pepperdine Dispute Resolution Law Journal, 3, 2002, 39, at 39.

[2]Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", Cardozo Journal of Conflict Resolution, Vol.7, p.289, at p.290.

[3] Kressel, Kenneth. "Mediation revisited." The handbook of conflict resolution: Theory and practice (2006): "Chapter Thirty-Two", 726-756, at p.726. Available at *https://www.researchgate.net/profile/Kenneth_Kressel/publication/232492497_Mediation_revisited/links/550306ca0cf24cee39fd5639.pdf*

[4] Della Noce, D.J., Bush, R.A.B. and Folger, J.P., "Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy," Pepperdine Dispute Resolution Law Journal, 3, 2002, 39, at 39.

[5] There are about four models of mediation that are used in different jurisdictions and subject areas: Facilitative mediation- where the parties are encouraged to negotiate based upon their needs and interests instead of their strict legal rights; Settlement mediation- where parties are encouraged to compromise in order to settle the disputes between them; Transformative mediation- where the parties are encouraged to deal with underlying causes of their problems with a view to repairing their relationship as the basis for settlement; Evaluative mediation- where parties are encouraged to reach settlement according to their rights and entitlements within the anticipated range of court

conflicts, this paper mainly focuses on the use of mediation in resolving family conflicts, through what is now popularly known as family mediation.

2. Emergence of Family Mediation as a Distinct Area of Practice

Family mediation has been defined as a structured process in which an unbiased mediator enables members of a family in crisis, generally the parents, to speak in a constructive way about their conflict. The goal is to settle the conflict through communication and exchange and discuss how they will continue to parent their children, in order to find solutions that work for all family members that are affected.[6]

Family mediation has emerged as a major conflict management process in many states within the U.S., Australia, Canada, and Scotland. With increasing acceptance, family mediation has broadened to include adoption, child protection, guardianship, juvenile, parent-teen, and probate matters, although divorce mediation remains the predominant practice.[7] Family mediation is seen as a family-oriented, problem-solving, task completion model that empowers family members to negotiate mutually agreed-on decisions.[8]

In the US, the emergence and growth of family mediation has been attributed to the introduction of no-fault divorce in the 1970s, where family courts and their related professional communities moved steadily, if not swiftly, towards a philosophy that supports collaborative, interdisciplinary, interest based conflict management processes and limited use of traditional litigation.[9] It has also been observed that divorce mediation arose from widespread, intense dissatisfaction with the negative process and long-term impact of adversarial divorce proceedings on the participants and their children.[10] One of the factors contributing to its growth was the anticipation was that the divorce mediation

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remedies (See Drews, M., 'The Four Models of Mediation,' DIAC Journal- Arbitration in the Middle East, Vol.3, No. 1(1), 2008, p.44. Available at *http://www.diac.ae/idias/journal/volume3no1/issue1/eng4.pdf;* see also Fenn, P. Introduction to Civil and Commercial Mediation, Part 1 (Chartered Institute of Arbitrators), p. 42; See also Alberstein, M., "Forms of Mediation and Law: Cultures of Dispute Resolution," Ohio State Journal on Dispute Resolution 22, no. 2 (2007); Goldfien, J.H., and Robbennolt, J.K., "What If the Lawyers Have Their Way-An Empirical Assessment of Conflict Strategies and Attitudes toward Mediation Styles." Ohio St. J. on Disp. Resol. 22 (2006): 277.).

[6] Caratsch, C., Resolving Family Conflicts: A Guide to International Family Mediation, (International Social Service, Geneva, 2014), p.6. Available at *http://www.iss-usa.org/uploads/File/Guide%20to%20IFM.pdf*

[7] Kelly, J.B., 'Issues Facing Family Mediation Field,' Pepperdine Dispute Resolution Law Journal, Vol. 1, 2000, pp. 37-44, at p.37.

[8] Parsons, R.J. & Cox, E.O., 'Family Mediation in Elder Caregiving Decisions: An Empowerment Intervention,' Social Work, Vol. 34, No. 2 (March 1989), pp. 122-126, at p.122.

[9] Salem, P., "The emergence of triage in family court services: the beginning of the end for mandatory mediation?" Family court review, 47, no. 3 (2009): 371-388, at 371.

[10] Kelly, J.B., 'Issues Facing Family Mediation Field,' Pepperdine Dispute Resolution Law Journal, op cit., , p. 37.

process, provided by trained, competent mediators, would result in less conflict during and after the divorce process, more parent communication and cooperation post-divorce, and significantly greater client satisfaction with both the process as well as the outcome. Further, it was expected that the negotiated outcomes would not disadvantage either party as compared to the outcomes of couples using the traditional adversarial divorce process.[11]

Mediation of family disputes is lauded as a tool for promotion of family self-determination, where scholars have argued that 'if parents are able to participate in mediation, they will be better able to fully explore options, truly hear one another, and ultimately be empowered to make their own decisions that determine their own future. Because parents know the most about their children and their own living situation, their decisions will integrate the needs of all family members better than determinations imposed by judges (perhaps based on the recommendation of another third party, a custody evaluator) or distributive negotiations orchestrated by lawyers.'[12]

Furthermore, 'having fully participated in the process, the parents will experience a greater sense of ownership and satisfaction with the outcomes. Because the agreements they make will reflect the parents' actual needs and interests, they will, therefore, be more enduring.'[13]

In addition, it has been observed that through reports based on multiple mediation studies, clients indicated they felt heard, respected, and given a chance to say what they felt was important. They also indicated they were not pressured to reach agreements, were helped to work together as parents, and felt that their agreements would be good for children. Moreover,

> *". . . parents using a more extended mediation process experience a decrease in conflict during divorce. . . are more cooperative and supportive of each other as parents and communicate more regarding their children".*[14]

Despite the foregoing perceived advantages, family mediation is however not seen as the panacea for management of all types of family based disputes. For instance, advocates for battered women and feminist scholars have argued that mediation is inherently unfair and may be dangerous for victims of domestic violence and that their participation should

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[11] Ibid, p.38.
[12] Salem, P., "The emergence of triage in family court services: the beginning of the end for mandatory mediation?" Op cit., at 375.
[13] Salem, P., "The emergence of triage in family court services: the beginning of the end for mandatory mediation?" Op cit., at 375.
[14] Salem, P., "The emergence of triage in family court services: the beginning of the end for mandatory mediation?" Op cit., at 375.

not be required.[15] The scope of this paper may not allow for a discussion on the philosophical arguments for and against family mediation, and thus, the author dwells on the already identified advantages of using mediation to resolve family disputes. This section has focused on the development of family mediation in other parts of the world. The next section looks at the development and use of family mediation in Kenya.

3. Development and Current Status of Family Mediation in Kenya

Under the Constitution of Kenya 2010, family is treated as the natural and fundamental unit of society and the necessary basis of social order and entitled to enjoy the recognition and protection of the State.[16] Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.[17] Compulsory mediation pilot scheme introduced in Kenya in April 2016 on a pilot program for one year was to run initially in the Commercial and Family Divisions of the High Court in Nairobi.

The compulsory mediation scheme is meant to decongest the courts and hopefully encourage members of the public to pursue alternative dispute resolution.[18] As at May 2018, the same has been extended to court stations outside Nairobi. It is noteworthy that while family mediation in many jurisdictions has been used in a wide range of issues including in separation and divorce actions, the Kenyan family laws only contemplate the use of mediation as a reconciliatory process during the subsistence of marriages and not during the dissolution of marriages.

i. Mediation of disputes in Christian marriages

The parties to a marriage celebrated under Part III (Christian Marriages) may seek the services of any reconciliation bodies established for that purpose that may exist in the public place of worship where the marriage was celebrated.[19]

ii. Mediation of disputes in customary marriages

The parties to marriage celebrated under Part V (Customary Marriages) may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of the marriage.[20]

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[15] Salem, P., "The emergence of triage in family court services: the beginning of the end for mandatory mediation?" Op cit., at 372.
[16] Art. 45(1), Constitution of Kenya 2010.
[17] Art. 45(3), Constitution of Kenya 2010.
[18] Judge Lee G. Muthoga, "Family Mediation and Court Annexed Mediation," Presented by at Sarova Panafric Hotel on 10th September 2015 at 2:00pm, p. 39. Available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0ahUKEwjv54_HmJjWAhUKvBQKHZVJBTMQFghAMAQ&url=https%3A%2F%2Fwww.icpsk.com%2Fseminar-presentations%2Ffinish%2F10-seminar-presentations%2F939-alternative-dispute-resolution-seminar-2015-family-mediation-court-annexed-mediation-judge-lee-g-muthoga&usg=AFQjCNGWdkVl1iusKOSxnIrqm7YDAvkxFA
[19] Marriage Act, No. 4 of 2014, Laws of Kenya, sec. 64.
[20] Marriage Act, 2014, sec. 68(1).

iii. Mediation of disputes in customary marriages

The process of mediation or traditional conflict resolution in subsection (1) shall conform to the principles of the Constitution.[21] The person who takes the parties to a marriage celebrated under Part V through the process of conciliation or traditional dispute resolution shall prepare a report of the process for the court.[22]

In other jurisdictions, 'marital reconciliation is encouraged if feasible, but an equally important objective is to help the couple negotiate a workable divorce settlement'.[23] However, mediation is limited to the settlement of child custody and visitation disputes and the justification is that, firstly, divorce does not change parental status or responsibility and secondly, the best interests of children, parents, and society are served by keeping hostilities to a minimum.[24] It is therefore important to employ mediation in such matters in Kenya on a larger scale than it may currently be the case.

The foregoing provisions on the use of family mediation in Kenya are a good pointer on the deficiency of the use of family mediation in Kenya. Notably, some of the foregoing provisions generally point to reconciliation and not specifically mediation. There are no clear guidelines on the use of mediation and there are no clear directions on the point at which parties may seek the services of a mediator, especially in instances where they have already filed a case in court. Even where the law requires evidence of attempted reconciliation as a prerequisite for filing divorce matters in courts, there is lacking a framework on the possible use of divorce mediation within the Kenyan family law framework, which would allow parties to negotiate, even if with the help of their lawyers, on the important yet contentious issues such as child support. The law as it is, currently, only allows parties and court to use evidence of attempted reconciliation to decide if the marriage has irretrievably broken down for purposes of granting divorce, with little or no regard for the post-divorce phase of the relationship. The other issues that emerge at this stage are also subjected to the adversarial processes of the court. Parties contend on almost everything, and the 'winner' takes it all. It is noteworthy that some of these relationships should not be allowed to have win-lose situations, as they do now, and the use of mediation pre and post-divorce to address some of the emerging issues such as parenting disputes can help achieve better results.

It has been pointed out that while family mediation is not a substitute for the need for family members to obtain independent legal advice or counseling or therapy, nor is it

[21] Marriage Act, 2014, sec. 68(2).
[22] Marriage Act, 2014, sec. 68(3).
[23] Bahr, S.J., 'An Evaluation of Court Mediation: A Comparison in Divorce Cases with Children,' op cit., p.42.
[24] Bahr, S.J., 'An Evaluation of Court Mediation: A Comparison in Divorce Cases with Children,' op cit., pp.42-43; Coogles, O.J., Structured Mediation in Divorce Settlement - A Handbook for Marital Mediators, (Lexington, Mass, Lexington Books, 1978). Available at *https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=92977* [Accessed on 12/09/2017].

appropriate for all families, family mediation is a valuable option for many families because it can: increase the self-determination of participants and their ability to communicate; promote the best interests of children; and reduce the economic and emotional costs associated with the resolution of family disputes.[25]

iv. Making Family Mediation Work for the Kenyan Families

Article 45(1) of the Constitution of Kenya 2010 recognises family as the natural and fundamental unit of society and the necessary basis of social order and guarantees that it should enjoy the recognition and protection of the State. In addition to this, Article 45(3) also guarantees that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. These provisions, while acknowledging the importance of family and marriages, and the parties therein, fail to acknowledge the other interested parties such as children. Marriages cannot be treated as any other contract between two people, and thus, special conflict management processes such as family mediation can help in a great way to not only acknowledge this fact but also take care of all the involved parties and their interests.

With the increased acceptance and formalization of mediation in Kenya, it is hoped that family mediation will take root in Kenya, based on the many advantages of mediation as discussed in this paper, to an extent of being effectively used in the other areas of family disputes such as divorce, custody matters and matrimonial property division. While it is currently envisaged as a mechanism to be used for marital reconciliation before filing of divorce, it should also be given a chance to salvage relationships through divorce mediation where possible, especially in cases of children custody.

Family mediation has the ability to assist parties to cooperate in post-divorce adjustment, especially where children are involved, due to its many advantages over court process.[26] This is especially true in light of the fact that the conventionally, divorce process as currently conducted continues to be structured as a contest between two opponents.[27] There is, however, a need for paradigm shift in a number of areas, as discussed herein below by way of possible recommendations.

3.1 Standards of Practice and Skills in Family Mediation

In order to boost effectiveness of family and divorce mediation, it is deemed important for the mediators who wish to specialise in this area to continually acquire skills that are specific to family mediation considering that it is a critical area with possibly more interests at stake compared to the other areas of mediation practice. Caution should

[25] The Association of Family and Conciliation Courts, "Model Standards of Practice for Family and Divorce Mediation," available at https://www.mediate.com/articles/afccstds.cfm

[26] See generally, Bahr, S.J., 'An Evaluation of Court Mediation: A Comparison in Divorce Cases with Children,' Journal of Family Issues, Vol. 2, No.1, March 1981, pp. 39-60.

[27] Ibid, p. 41.

especially be taken when dealing with gender issues, the poor and disadvantaged, due to power imbalance. It is a common feature in most marriages to have the man wielding more financial power and this may adversely affect the woman's rights where they are forced to enter into not necessarily favourable compromise through undue influence by the mediator and the man in the dispute.[28] This is more likely to happen in unions involving young children and the mediator should thus be conscious of this eventuality. Notably, family mediation is not a preserve of the lawyers. Other professionals such as Social workers, psychologists and marriage counselors, among others also act as family mediators after acquiring relevant training in the area.[29] There are multiple paths to competence as a family mediator. The individual's life skills, knowledge, professional experience working with families, specific training in family mediation, peer consultation, and continuing education all contribute to mediator competence.[30]

Cross-disciplinary training and knowledge is therefore critical for providing effective family mediation. Practitioners need to retain and reshape the skill, experience, and knowledge of their own professional discipline, while simultaneously integrating new theoretical frameworks, information, and practices which are more specific to providing effective mediation. Thus, for example, family lawyers, more accustomed to giving advice to an individual client and representing only that client's interests, must shift to a different framework which enables two disputing individuals to work together to find their own acceptable solutions without undue influence from the mediator. Further, family lawyers need to develop excellent communication skills starting with the use of neutral language, attentive listening, and the expression of empathy to effective framing of issues.[31]

Some scholars have argued that family mediators should be trained because; (1) this mediation involves new and generally unfamiliar conflict management procedures, and (2) the probability that the parties will reach successful settlement of issues increases as the framing and experience of the mediator increase, and, (3) training provides quality control and regulation of persons entering the profession.[32] While some support the training of professionals already engaged in helping families, such as attorneys, social workers, and therapists, others feel that training should be open to anyone interested in

[28] See generally, Noone, M.A., 'ADR, Public Interest Law and Access to Justice: The Need for Vigilance,' Monash University Law Review, Vol. 37, No. 1, pp.57-80.
[29] Severson, M.M. & Bankston, T.V., 'Social Work and the Pursuit of Justice through Mediation,' Social Work, Vol. 40, No. 5 (September 1995), pp. 683-691, at p. 688; See also Haynes, J.M., "A conceptual model of the process of family mediation: Implications for training," The American Journal of Family Therapy, Vol. 10, No. 4, 2007, pp.5-16.
[30] Kelly, J.B., 'Issues Facing Family Mediation Field,' Pepperdine Dispute Resolution Law Journal, Vol. 1, 2000, pp. 37-44, at p.39.
[31] Kelly, J.B., 'Issues Facing Family Mediation Field,' op cit., at p.39.
[32] Moore, C. W., 'Training mediators for family dispute resolution,' Mediation Quarterly, No.2, 1983, pp.79-89.

learning about family dispute resolution.[33] Such training, it is argued, should include substantive information, negotiation and mediation procedures and skills, conciliation procedures and skills, and ethics.[34]

It has been suggested that the particular components of family mediation training that are especially important in achieving competence include: communication theories and techniques, conflict theory, research, management, theories of power, empowerment techniques, an exploration of differences in mediation models and their underlying assumptions, and what practices stem from these rationales.[35] These components are considered important in enhancing the mediator's ability to relate effectively and impartially with the parties, to initiate and maintain a respectful process, and to understand what is happening and how to react in these often highly charged emotional situations.[36]

4. Conclusion

While conflicts within family settings cannot be avoided, there is a need to effectively manage them so as to ensure harmony amongst people and to prevent violence and the potential loss of lives and property. It has been suggested that mediation is better able to deliver authentic access to justice when it builds upon traditional dispute resolution systems and is adopted and promoted as a consensual process.[37]

ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, have been effective in managing conflicts where they have been used. Their relevance has been recognized in the constitution.[38] They are mechanisms that enhance Access to Justice. Their effective implementation and in line with the constitution will bring about a paradigm shift in the policy on resolution of conflicts towards enhancing access to justice and the expeditious resolution of conflicts without undue regard to procedural technicalities.[39] This paper has highlighted the use of family mediation to address family conflicts. Conducted within the bounds of acceptable standards of professionalism and other acceptable values, family mediation is capable of enhancing access to justice when dealing with family conflicts in Kenya.

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[33] Moore, C. W., 'Training mediators for family dispute resolution,' op cit.; See also generally, Neilson, L.C., "Mediators' and lawyers' perceptions of education and training in family mediation," Conflict Resolution Quarterly, Vol.12, No. 2, 1994, pp.165-184.

[34] Moore, C. W., 'Training mediators for family dispute resolution,' op cit.

[35] Kelly, J.B., 'Issues Facing the Family Mediation Field,' Pepperdine Dispute Resolution Law Journal, Vol.1, No. 1, 2000, pp.37-44, at p.40.

[36] Ibid, p.40.

[37] Haley, J.N., 'Mediation and Access to Justice in Africa: Perspectives from Ghana,' Harvard Negotiation Law Review, Vol. 21, 59, Fall 2015, pp. 59-106, p. 65.

[38] See Art. 159.

[39] Constitution of Kenya, Art. 159(2).

Traditional Conflict Resolution Mechanisms and Institutions

Abstract

This paper discusses traditional conflict resolution mechanisms and institutions among traditional African societies, and their relevance in Kenya today. With the constitutional and statutory recognition of these mechanisms as an important aspect of the access to justice mechanisms in Kenya, it is important to revisit their main characteristics and what makes them worth exploring. Their relevance has been enhanced by the formal recognition and protection of communities' right to indulge in cultural activities of their choice. These mechanisms are as diverse as the needs of communities in the quest for justice and hence, they may be better suited to satisfactorily address more issues when compared to courts of law.

1. Introduction

This paper discusses traditional conflict resolution mechanisms and institutions among traditional African societies, and their relevance in Kenya today. The paper is based on the view that traditional African communities had institutions and mechanisms which were effective in handling and managing conflicts among the people. This is because they reflected the socio-political orientation of the African people. These mechanisms addressed all the social, political and economic conflicts among the people. Since Africans have always been peace loving people, they led a communal way of life.[1] Even today, Africans value peaceful coexistence. As a consequence they developed certain principles that were ideal in managing conflicts.[2]

With particular respect to mediation, most communities in Kenya have used mediation in resolving their conflicts for centuries only that it was not known as mediation, as it is known today. It was customary and an everyday affair to see people sitting down informally and agreeing on certain issues, such as the allocation of resources. They did not have formal courts of law where their conflicts could be dealt with. For instance, the *Kiama* or Council of Elders among the Kikuyu community used to act both as an arbitral forum and as a mediator. These elders and institutions were accessible to the populace and their decisions were respected.[3] The paper critically examines these institutions and mechanisms in the context of making a case for the enhanced use of traditional conflict resolution mechanisms in conflict management today.

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[1] Makgoro, Y., "Ubuntu and the law in South Africa," Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad, Vol.1, No. 1, 1998; Conteh-Morgan, E., "Peacebuilding and human security: a constructivist perspective," International Journal of Peace Studies, Vol. 10, No.1, 2005, pp.69-86 at pp.78-81.

[2]Ibid; AFP, "Proposed Law Criticised as Backward and Discriminatory", Daily Nation newspaper (Nairobi, 3rd November 2012), p. 29; where President Jacob Zuma argues that African problems need African justice. According to Zuma the nature and the value system of the traditional courts of promoting social cohesion and reconciliation must be recognized and strengthened in the laws.

[3]Interview with Ndungu Mwaura, an 82 year old Kikuyu elder on 16th August 2008, at Kahuhia, Murang'a District.

2. Background

Before the advent of colonialism, the communities living in Africa had their own conflict resolution mechanisms. Those mechanisms were geared toward fostering peaceful co-existence among the Africans. Existence of traditional conflict resolution mechanisms such as negotiation, reconciliation, mediation and others is evidence that these concepts are not new in Africa.[4] They are practices that have been in application in Africa for a long period. Conflict resolution among the traditional African people was anchored on the ability of the people to negotiate.[5] However, with the arrival of the colonialists, western notions of justice such as the application of the common law of England were introduced in Kenya. The common law brought the court system which, being adversarial, greatly eroded the traditional conflict resolution mechanisms.[6]

A misconception of the African communal way of life, conflict resolution institutions and prejudice against their traditional way of life saw the Europeans introduce the western ideals of justice which were not based on political negotiations and reconciliation.[7] The court system is the main dispute settlement mechanism in Kenya today. There are however many barriers to accessing justice through the court system in Kenya including, *inter alia*, high fees, complex rules of procedure, geographical location of courts that does not reflect the demographic dynamics, cultural, economic and socio-political orientation of the society, lack of financial independence and selective application of laws.[8]

Due to the above cited hurdles encountered in accessing justice in the courts, there is a tendency in many African States including Kenya, to adopt traditional dispute resolution

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[4] See generally, Brock-Utne, B., "Indigenous conflict resolution in Africa," A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Educational Research, 2001, pp. 23-24; See also Ajayi, A.T., & Buhari, L.O., "Methods of conflict resolution in African traditional society," African research review, Vol.8, No. 2, 2014, pp.138-157.

[5] See generally, Brock-Utne, B., "Indigenous conflict resolution in Africa," op cit.; See also generally, Mwenda, W.S., "Paradigms of alternative dispute resolution and justice delivery in Zambia," PhD diss., (University of South Africa, 2009). Available at *uir.unisa.ac.za/bitstream/handle/10500/2163/thesis.pdf* [Accessed on 12/09/2017].

[6] See generally, Penal reform international, Access to Justice in Sub-Saharan Africa: the role of traditional and informal justice systems, (Penal reform international, 2000). Available at *http://www.gsdrc.org/docs/open/ssaj4.pdf* [Accessed on 12/09/2017]; See also See generally, Mac Ginty, R., "Indigenous peace-making versus the liberal peace," Cooperation and conflict, Vol.43, No. 2, 2008, pp.139-163.

[7] See generally, Penal reform international, Access to Justice in Sub-Saharan Africa: the role of traditional and informal justice systems, op cit.

[8] See Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol.III, May, 2002; Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Kenya Law Review Journal, Vol. 1, 2007, pp. 19-29, p. 29; See also generally, Gloppen, S. & Kanyongolo, F.E., "Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law," International Journal of Constitutional Law,Vol.5, No. 2, 2007, pp.258-293.

mechanisms in their legal systems.[9] The role of culture as the foundation of the nation and the requirement that all forms of national and cultural expression should be promoted is now constitutionally guaranteed.[10] It is worth noting that each of the more than 42 tribes in Kenya had its own conflict management mechanisms. Traditional conflict resolution mechanisms have been effective and their declarations and resolutions have been recognized by the government. This is exemplified, for instance, by the Modagashe Declaration in which community members from Garissa, Mandera and Wajir districts agreed to resolve the problems of banditry, trafficking of arms, livestock movements, socioeconomic problems and identifying role of peace committees, among others. The Declaration also outlined decisions made by the community around these issues affecting the community especially unauthorized grazing, cattle rustling, trafficking of arms, control of livestock diseases and trade, highway banditry, identity cards by non-Kenyans and others.[11]

3. Principles fostering Peaceful Coexistence and Conflict Resolution

3.1 Common Humanity/Communal Living

The principle of *common humanity/communal living* saw Africans consider themselves as one people. Divisions among the members were abhorred. No wonder it is common in Africa to hear people saying "we are all one people, we are all Africans, we are all one community". This is reflected in the southern Africa term "*ubuntu*" and the Swahili term "*utu*" meaning humanness. Peaceful coexistence was emphasized and conflicts in African traditional society were seen as a threat to the existence of the society itself.[12] In essence, they underscored corporate/communal interests as opposed to selfish ambitions or individualistic pursuits. Individualistic ideals were introduced into the African people by the Europeans in propagating the capitalist ideology.[13]

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[9] See Articles 60(1)(g); 67(2)(f); 159 (2) (c) of the Constitution of Kenya 2010, (Government Printer, Nairobi, 2010); See also sec.8(f), Commission on Administrative Justice Act, No. 23 of 2011, Laws of Kenya. (Government Printer, Nairobi, 2011); sec. 5 (f), National Land Commission Act, No. 5 of 2012, Laws of Kenya; sec. 39-41, Community Land Act, 2016, No. 27 of 2016, Laws of Kenya. Government Printer, Nairobi, 2016); sec. 20, Environment & Land Court Act, No. 19 of 2011, Laws of Kenya, Revised Edition 2015 [2012]. (Government Printer, Nairobi, 2011).

[10] Ibid, Article 11.

[11] See generally, CEWARN Baseline Study: For the Kenyan-Side of the Somali Cluster, available at, www.cewarn.org, [Accessed on 15/06/2012].

[12] See generally, Murithi, T., "Practical Peacemaking Wisdom from Africa: Reflections on Ubuntu," Journal of Pan African Studies, Vol.1, No. 4, 2006, pp.25-34.

[13] See generally, Walter, R., "How Europe Underdeveloped Africa," Beyond borders: Thinking critically about global issues (1972), pp. 107-125; see also Samir, A., "Imperialism and globalization," Monthly Review, Vol.53, No. 2, 2001, p.6; See also Bamikole, L.O., "Nkrumah and the Triple Heritage Thesis and Development in Africana Societies," International Journal of Business, Humanities and Technology, Vol. 2, No. 2, March, 2012.

It has been argued that this principle stressed the central value that, despite cultural and ethnic differences, human beings are basically the same and hence the African communal way of life.[14] By living in a communal setting, there was acceptance that every member of the community was entitled to access natural resources, with the result that this principle formed an integral aspect in resolving conflicts involving natural resources such as land.[15] It has been suggested that there were few environmental conflicts among the Maasai community because land, forest and water resources in the olden days were communally owned. The grazing lands, watering points, hunting grounds and the forests were accessed equally by the members of the particular clans that possessed them. Thus, the scarcity or abundance of a resource was never a source of conflict as such.[16]

3.2 Reciprocity

Reciprocity is the other principle that created an ideal environment for conflict resolution. A mutual exchange of privileges, goods, favours, obligations, among others, existed among African communities thus fostering peaceful coexistence and consequently eliminating the likelihood of wars and conflicts. If a community was facing a calamity, say famine or death of livestock, other communities would come to the aid of that particular community.[17] Reciprocity thus nurtured a culture of communal life which fostered relationships. Reciprocity emphasized sharing and also sustained a sense for collective security through a social set up which supported an egalitarian social living.[18] Reciprocity

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[14] See generally, Ezenweke, E.O., & Nwadialor, L.K., "Understanding human relations in African traditional religious context in the face of globalization: Nigerian perspectives," American International Journal of Contemporary Research Vol.3, No. 2, 2013, pp.61-70; See also Acquah, F., "The impact of African traditional religious beliefs and cultural values on Christian-Muslim relations in Ghana from 1920 through the present: A case study of Nkusukum-Ekumfi-Enyan area of the Central Region." PhD diss., PhD thesis, (University of Exeter, UK, 2011). Available at *https://ore.exeter.ac.uk/repository/bitstream/handle/10036/3473/AcquahF.pdf?sequence=3* [Accessed on 12/09/2017].

[15] Mkangi K, Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa, available at *www.payson.tulane.edu,* [Accessed on 02/06/2012].

[16] Interview with William Ole Munyere, a 97 year old Maasai elder on 6th June, 2009, at Oloirien Inkarusa village, Ngong Division, Kajiado District; See also, Tarayia, G. N., "The Legal Perspectives of the Maasai Culture, Customs, and Traditions," Arizona Journal of International & Comparative Law, Vol. 21, No. 1, 2004, pp.183-913.

[17] See Opening Remarks by Lotte Hughes (Open University), "Session One: Presentation on the research project 'Managing Heritage, Building Peace: Museums, memorialisation and the uses of memory in Kenya'", Heritage workshop Nairobi, 27-28 May 2011. Available at *http://www.open.ac.uk/Arts/ferguson-centre/memorialisation/events/ukc-workshop/Lotte-presentation-NBO-wkshop-FINAL%20_2_.pdf* [Accessed on 20/10/2017]; See also generally, Toulson, T., "Europeans and the Kikuyu to 1910: a study of resistance, collaboration and conquest," PhD diss., (University of British Columbia, 1976). Available at *https://open.library.ubc.ca/cIRcle/collections/ubctheses/831/items/1.0058350* [Accessed on 20/10/2017].

[18] See generally, Agulanna, C., "Community and Human Well-Being in an African Culture." Trames: A Journal of the Humanities & Social Sciences, Vol.14, No. 3, 2010; See also Buckmaster,

enhanced harmonious relationships by putting communal interests above individual pursuits. Through this principle individual norms were transformed into social welfare security schemes and thus a sense of justice and fairness was embedded in it as mutual trust became an overriding value.[19]

The principle of reciprocal obligations was firmly anchored in the Agikuyu way of life. The Agikuyu believed that if you assist the neighbour in domestic chores, gardening or during times of adversity, that neighbour would do the same for you in future. Those who do not reciprocate acts of neighbourliness were looked down upon and could not be assisted when faced with difficulties.[20] Anchored on this principle, conflict resolution mechanisms in the traditional African society had to be responsive to conflicts by mending broken or damaged relationships to restore justice, restore conflicting parties into the community and continue with the spirit of togetherness.[21]

3.3 Respect

Respect towards parents, elders, ancestors and the environment was cherished and well entrenched in the customs, traditions and taboos. Strong traditions, customs and norms fostered respect and wayward members of the community faced disastrous consequences, such as, the imposition of fines and other penalties. This way, religion played a central role in shunning conflict-causing conduct.[22] In the traditional African society, respect for the elders, parents and ancestors was highly regarded. It was a virtue well entrenched in the customs, traditions and taboos. Respect was codified in taboos and the concept of social distance which regulated "*what one could do, whom to talk to and how to relate to one another according to one's sex, age and status.*" In this way, social conflicts were avoided and resolved through respect that people had for one another, parents, elders, the ancestors and even to the environment.[23]

According to the Agikuyu traditions, norms and customs, no man could dare to remove his neighbour's boundary mark, for fear of his neighbour's curses and out of respect for

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L., & Thomas, M., Social inclusion and social citizenship: towards a truly inclusive society. (Canberra, Parliamentary Library, 2009).

[19] See generally, Tarayia, G.N., "The Legal Perspectives of the Maasai Culture, Customs, and Traditions," op.cit.

[20] Interview on 16th August 2008 with Ndungu Mwaura at Kahuhia, Murang'a District; Kenyatta, J., Facing Mount Kenya: The Tribal Life of the Gikuyu, (Vintage Books, New York, 1965), pp.38-41.

[21] Nora, F. & Fernando, .T., The Importance of Training on ADR in the Creation of a Justice of Peace in the Community of Portuguese-Speaking Countries, A Paper presented at the International Congress on Mediation, Lisbon, Portugal, 7-9 October 2010, available at www.gral.mj.pt, [Accessed on 15/05/2012].

[22] Acquah, F., "The impact of African traditional religious beliefs and cultural values on Christian-Muslim relations in Ghana from 1920 through the present: A case study of Nkusukum-Ekumfi-Enyan area of the Central Region," op cit.

[23] Mkangi, K., Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa, op.cit.

him. Boundary trees and lilies among the Agikuyu were ceremonially planted and highly respected by the people. If the boundary trees or lilies dried out, fell down or was rooted up by wild animals, the two neighbours would replace it. If they could not agree as to the actual positioning of the mark, they invited one or two elders who, after conducting a ceremony, replanted the tree or lilies.[24] Respect inculcated through such traditions, norms and customs thus ensured that neighbours lived harmoniously and could not engage in boundary disputes.

4. Institutions of Conflict Management

4.1 The family

The family has been a key institution in conflict management.[25] Among the Pokot, a family consists of the husband, his wives and children. The husband is the head of the family and his authority is unquestionable. He is the overall administrator of family matters and property including bride price, inheritance and where applicable, land issues.[26]

4.2 Extended family and Neighbourhood

The extended family comprising of the aging parents, in-laws, relatives and other dependants is the basic socio-political and hence, the first institution in the management of conflicts. For instance, Turkana people regarded the extended family as the first institution of conflict management. Disputes that transcend the nuclear family could be determined by the extended family and the neighbours among the Pokot thus acting as a conflict management institution. [27]

4.3 Clan

The clan is another institution in the management of conflicts traditionally.[28] Both the Turkana and the Agikuyu consider it one of the most important socio-political organizations that knit together distant relatives, facilitating a feeling of rendering mutual support in all important matters in the interest of the clan.[29] Clan members are also guided

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[24] Kenyatta, J., Facing Mount Kenya: The Tribal Life of the Gikuyu, op. cit, pp.38-41.

[25] See Osei-Hwedie, K., & Rankopo, M. J., 'Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana,' IPSHU English Research Report Series, Vol.29, 2012, pp.33-51.

[26] See generally, Muli, E. (ed), Conflict Management in Kenya: Towards Policy and Strategy Formulation (Practical Action, Nairobi, 2006).

[27] See generally, Rabar, B. & Karimi, M. (Eds), Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities, (ITDG, Nairobi, 2004).

[28] See generally, Sewanyana, L., "The Use of Traditional Communications in Conflict Management: the case of Uganda," Africa Media Review, Vol. 11, No. 3, 1997, pp. 40-69; Murithi, T., "Practical peacemaking wisdom from Africa: Reflections on Ubuntu," The journal of Pan African studies, Vol.1, No. 4, 2006, pp. 25-34.

[29] See generally, Rabar, B. & Karimi, M. (Eds), Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities, op cit.; Interview on 16th August 2008 with Ndungu Mwaura at Kahuhia, Murang'a District.

by certain rules and regulations that are key in avoiding conflicts, for instance, that member of the same clan cannot inter-marry but can marry from other clans.[30]

4.4 Council of Elders

This is a common institution in almost all communities in Kenya. Their role differed from community to community ranging from cultural, economic, socio-political organization to conflict management in the community. Among the Pokot and Marakwet the council of elders is referred to as *kokwo* and is the highest institution of conflict management and socio-political organization. It is composed of respected, wise elderly men who are knowledgeable in the affairs and history of the community.[31] The council of elders among the Agikuyu community was referred to as the 'Kiama' and used to act as an arbitral forum or mediator in dispute resolution. These elders and institutions were accessible to the populace and their decisions were respected.[32] This notion is in consonance with the earlier assertion that mediation has been practiced by Kenyan communities for centuries only that it was not known as mediation. It was the familiar way of sitting down informally and agreeing on certain issues, such as the allocation of resources. This informality is best illustrated by mediation in the political process[33].

4.5 The Tribe

Tribe is at the top of the hierarchy of most traditional African communities' socio-political organization. It is the custodian of the community land, resources and customary law. It also brokers inter-community peace pacts, negotiate for peace, grazing land, water and other resources and in compensation arrangements. [34]

4.6 Age-Set/Age-Grade

The *age-grade (rika)* is another common institution for conflict resolution. It is a structure of social organization among many communities in Kenya. Belonging to a certain age-group demanded observance of the rules, duties and rights arising from such membership. Age-mates respected one another and observed the rules of that *rika* and as such conflicts among age-mates were unheard of, as they were considered taboo. Parents

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[30] Ibid, p.44.

[31] Rabar, B. & Karimi, M. (Eds), Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities, p.63.

[32] Interview on 16th August 2008 with Ndungu Mwaura at Kahuhia, Murang'a District.

[33] Mediation in the political process is informed by resolution. Resolution of a conflict is the mutual construction of a relationship which is legitimate because the needs of each party are satisfied. As such mediation in the political process allows the parties to have autonomy over the choice of the mediator, the process and the outcome. (Cloke, K., "The Culture of Mediation: Settlement vs. Resolution," The Conflict Resolution Information Source, Version IV, December 2005.)

[34] See generally, Rabar, B. & Karimi, M. (Eds), Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities,, op. cit, p.45; See also Kenyatta, J., Facing Mount Kenya: The Tribal Life of the Gikuyu, op. cit.

of the age-mates were expected to be peace-makers whenever conflicts arose among their children or relatives. [35]

Among the Samburu, the age-set is a ritual of passage that doubles as a form of socio-political organization of the community. People in a given age set regard themselves as brothers and sisters respectively and are expected to behave in a certain way in the community. The age set is supposed to regulate its members and where necessary punish troublemakers.[36] In this way, age-sets were essential features in preventing conflict-causing conduct in the traditional communities.

Age-set system was an effective conflict management institution among the Maasai.[37] Among the Maasai, the panel to mediate the matter comprised mainly leaders of the offender's age set, who were chosen in their youth and led that particular age group for their life time. The aggrieved party would lodge a complaint with the offender's age group leader who would then call upon the offender to appear before his/her peers.[38]

These age group leaders were known as *Oloibor-enkene* (loosely translated to mean 'holder of the white rope' or leader) and the venue for conflict resolution, known as *Orkiu loo Ilpayiani* (meaning 'a tree for the elders') would usually be in the forest under a tree which was viewed as neutral ground. Each party would then state its case and the age group members would try and have the parties resolve the conflict. The offender, if found guilty, would be asked to apologise and told to desist from encroaching on the complainant's watering hole or some other resource unless it was with his permission. If the offender failed to obey this reprimand, he would be taken away by his peers and made to stand trial where an appropriate punishment was meted out on him/her. Punishment ranged from canning, penalties or a fine to the offender's family or his clan.[39]

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[35] Interview on 16th August 2008 with Ndungu Mwaura at Kahuhia, Murang'a District; See also Kenyatta, J., Facing Mount Kenya: The Tribal Life of the Gikuyu, op. cit, pp.95-124.

[36] See generally, Spencer, P., The Samburu: a Study of Gerontocracy in a Nomadic Tribe, (Routlege Library Editions-Anthropology and Ethnography, 2004), available at *http://books.google.co.ke,* [Accessed on 16/05/2012].

[37] See generally, Morton, R.F., "The Structure of East African Age-Set Systems," Pula: Botswana Journal of African Studies, Vol.1, No. 2, 1979, pp.77-102; See also Krätli, S., & Swift, J., Understanding and managing pastoral conflict in Kenya: A literature review, (1999). Available at *http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.505.7930&rep=rep1&type=pdf* [Accessed on 20/10/2017].

[38] Interview with William Ole Munyere, op.cit.

[39] See Osamba, J., "Peace building and transformation from below: Indigenous approaches to conflict resolution and reconciliation among the pastoral societies in the borderlands of eastern Africa," African Journal on Conflict Resolution, Vol.2, No. 1, 2001, pp.22-28.

This form of conflict resolution is admirable in that it was premised on the need to maintain relations within the community and the decisions reached were respected. This system had worked for generations and still exists in some form within the community.[40]

5. Mechanisms for Conflict Resolution

In view of the African style of living, certain mechanisms had to be employed in resolving conflicts. Africans used most of the mechanisms popularly known as Alternative Dispute Resolution (ADR), only that they had not been tagged as such. They used negotiation, mediation, Med-Arb[41] and conciliation in resolving their disputes. It could happen informally by people sitting down and agreeing to resolve their differences. The mechanisms they used include kinship systems, joking relations, third party approach, consensus approach, *riika* (age-sets) social groups, women/men elders and blood brotherhood. Most of these mechanisms resembled modern day ADR mechanisms such as negotiation, mediation, reconciliation and arbitration.

5.1 Kinship System

By *kinship system it* was believed that relatives or kin never really fight as "*blood is thicker than water*." Through kinship ties and group identities people could make statements such as, "*we are all part of the same village, we are all of the same ethnic group, we are all Africans*". These relations were geared towards preventing conflict and to create or restore relationships that could have been damaged by conflict. That is why whenever there was a conflict between different parties or communities, the first thing that is done is an attempt at rebuilding and fostering the broken relationships. Kinship system among the Agikuyu was formed by family group (*mbari* or *nyumba*) and the clan (*muhiriga*). The family group (*mbari*) brought together all those related by blood such as a man, wife or wives, children, grand and great-grandchildren while the clan (*muhiriga*) knits together distant relatives, facilitating a feeling of rendering mutual support in all important matters in the interest of the clan. Kinship ties were further fortified by the age-grading which united and solidified the whole tribe in all its activities.[42]

5.2 Joking Relations

Joking relations is a typical African social phenomenon employed to avoid conflicts between neighbouring ethnic groups through verbal exchanges, attitudes, behaviours,

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[40] Interview with William Ole Munyere, op.cit.

[41] Mediation Arbitration (Med-Arb) is a combination of mediation and arbitration where the parties agree to mediate but if that fails to achieve a settlement the dispute is referred to arbitration. (Osborne, C., Civil Litigation 2007-2008: Legal practice course guides; 2007-2008, (Oxford University Press, 2007), p. 461; Lowe, D., & Leiringer, R., (eds), Commercial Management of Projects: Defining the Discipline, (John Wiley & Sons, 2008), p. 238).

[42] Interview on 16th August 2008 with Ndungu Mwaura at Kahuhia, Murang'a District; See also Kenyatta, J., Facing Mount Kenya: The Tribal Life of the Gikuyu, op. cit, pp. 3-20.

sometimes with "violence" and "aggressiveness", but always with a joking tone.[43] In most communities, they were a daily practice, a kind of "agreement" between the numerous ethnic groups, aimed at banning anger and hatred which are sources of conflicts. In some cases, joking relationships were established after social conflicts or wars, as a way of saying "no more" war.[44] Those resolving conflicts could thus invoke these ties to show that there were established relations and hence no need for war. In modern conflict resolution parlance, therefore, joking relations can be an effective mode of settling ideological differences which cannot be resolved using bargaining skills. Joking relations would be successful in mitigating and resolving such conflicts since they are premised on forgiveness and tolerance. They also provide the mediator with power, influence or control over the conflicting parties and ensure disputants observe decorum in view of their relations to the same community. This implies that in the African context, the third party had more resources to use in resolving the conflict.[45]

5.3 Consensus Approach

Another mechanism used was the *consensus approach,* where resolutions were attained on the basis of consensus rather than on winner-takes-all approach. Consensual outcomes were highly regarded as they created confidence and parties had autonomy over the process. Thus, the decision of the elders was effective, durable and long lasting. An agreement reached through consensus could be communicated to the whole community and affirmed as a social contract in a ritual way. This was done to pass the news of the satisfactory conclusion of the conflict resolution process. In terms of implementing the agreement, the parties and the entire community followed up to confirm compliance with the agreement.[46]

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[43] See generally, Davidheiser, M., "Joking for peace: Social organization, tradition, and change in Gambian conflict management," Cahiers d'études africaines, Vol. 4, 2006, pp.835-859.

[44] Available at, www.library.thinkquest.org [Accessed on 02/07/2012].

[45] See Davidheiser, M., "Joking for peace: Social organization, tradition, and change in Gambian conflict management," op cit.; Wegru, J.Y., "The Dagaaba-Frafra Joking Relationship," Folklore, Vol.14, 2000, pp.86-97; Parkin, R., "The Joking Relationship and Kinship: Charting a Theoretical Dependency," Journal of the Anthropological Society of Oxford, Vol.24, 1993, 251-263; Davidheiser, M., "Special Affinities and Conflict Resolution: West African Social Institutions and Mediation," Beyond Intractability (2005). Available at *https://www.researchgate.net/profile/Mark_Davidheiser/publication/265063587_Special_Affinities_and_Conflict_Resolution_West_African_Social_Institutions_and_Mediation/links/5621990a08aed8dd1943e828.pdf* [Accessed on 21/10/2017]; De Jong, F., "A joking nation: conflict resolution in Senegal," Canadian Journal of African Studies/La Revue canadienne des études africaines, Vol.39, No. 2, 2005, pp.391-415.

[46] Karugire, S.R., A Political History of Uganda, (Fountain Publishers, Kampala, 2010), pp. 1-16; See also Ayot, H.O., A History of the Luo-Abasuba of Western Kenya from A.D. 1760-1940, (KLB, Nairobi, 1979), pp. 177-190.

5.4 Third Party Approaches

Third party approaches arose when the help of the extended family, clan or council of elders was sought to resolve a conflict.[47] This approach was employed to minimize tension by the disputing parties not addressing each other face to face but through the third party. This practice was and is still widely used in marriage negotiations among the Gikuyu people.[48]

5.5 Age-Grade

Virtually all tribes in Kenya had the *age-grade* as a structure of social organisation. Among the Agikuyu, it was referred to as the *riika* and among the Maasai it was referred to as the *moran*.[49] In the age-groups, the teachings of social obligations are re-emphasised thus binding those of the same status in ties of closest loyalty and devotion. In the *riika* among the Agikuyu, when a man of the same age-group injures another, it was considered a serious magico-religious offence.[50] As such, belonging to an age-group demanded observance of the rules, duties and rights in the various communities. Because members of the age-group respected one another and observed the rules of that *riika,* conflicts among age-group members were rare as such were considered taboo. Parents of the age-mates were expected to be peace-makers whenever conflicts arose among their children or relatives.[51]

5.6 Role of Male and Female Elders in Conflict Resolution

The Role of male elders as mechanisms of conflict resolution was as a result of the wide powers, knowledge, wisdom and the respect they were accorded in the society.[52]

Women elders also played a key role in resolving conflicts.[53] For instance, it is said that among the traditional Igbo society in Eastern Nigeria, women are the sustainers and healers of human relationships.[54] Chinua Achebe buttresses this point further in his renowned novel, *Things Fall Part,* where he asserts as follows:

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[47] Bukari, K.N., "Exploring indigenous approaches to conflict resolution: The Case of the Bawku Conflict in Ghana," Journal of Sociological Research, Vol.4, No. 2, 2013, p.86;

[48] Kinuthia, J.W., et al, "Gendered Identities in Gikuyu Marriage Negotiation Discursive Domain," International Journal, Vol.3, No. 2, 2015, pp.135-146; Sobania, N.W., Culture and customs of Kenya, (Greenwood Publishing Group, 2003). Available at *http://www.sahistory.org.za/sites/default/files/file%20uploads%20/neal_sobania_culture_and_customs_of_kenya_cultubook4you.pdf [Accessed on 21/10/2017].*

[49] See generally, Morton, R. F., "The Structure of East African Age-Set Systems," Pula: Botswana Journal of African Studies, Vol.1, No. 2, 1979, pp.77-102.

[50] Interview on 13th January 2012 with Nelson Nyamu at Kagio, Kirinyaga District; See also Kenyatta, J., Facing Mount Kenya: The Tribal Life of the Gikuyu, op.cit, pp.95-124.

[51] See generally, Morton, R. F., "The Structure of East African Age-Set Systems," op cit; See also Ferraro, G. & Andreatta, S., Cultural Anthropology: An Applied Perspective, (11th Ed., Cengage Learning, 2017).

[52] See generally, Boege, V., Potential and limits of traditional approaches in peacebuilding. Berghof Handbook II: Advancing Conflict Transformation, 2011, pp.431-457.

[53] Ibid.

[54] Brock-Utne, B., "Indigenous conflict resolution in Africa," op cit., p.13.

> *"…when a father beats his child, it seeks sympathy in its mother's hut. A man belongs to his father when things are good and life is sweet. But when there is sorrow and bitterness, he finds refuge in his motherland. Your mother is there to protect you".*[55]

This is true in virtually all the other African communities. The role of the Luo women, for instance, is also well documented in various stages of peace processes in their community. They could directly or indirectly intervene through elders and women networks within the warring factions to bring peace.[56]

A critical look at the cultures of most of the other African communities reveals that the role of women as compared to men in conflict management activities was and is still negligible.[57] For instance, among the Pokot and the Marakwet, women act as reference resource people but cannot challenge or influence decisions adopted by the male-dominated council of elders, the *Kokwo*. Among the Samburu, women are supposed to merely convey their suggestions through their male relatives. Such information may or may not be conveyed at all to the council of elders.[58]

Consequently, traditions, cultural norms and practices that may be considered repugnant and contrary to written laws and that hinder the participation of women in conflict management, should be discarded. Women empowerment is essential to enable them participate in the various conflict resolution fora as they are the majority of the victims of conflicts.

Their role as carriers of life and agents of peace has not changed in modern society. As such their participation in conflict resolution activities should not be curtailed by the adoption of formal dispute resolution mechanisms or adherence to traditions hindering their role on the same. Women have the capacity to negotiate and bring about peace, either directly or through creation of peace networks, among warring communities.[59] Their participation in conflict resolution should thus be enhanced.

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[55] Achebe, C., Things Fall Apart, (William Heinemann Ltd, London, 1958) (As quoted in Brock-Utne, B., "Indigenous conflict resolution in Africa," op cit., p.13).

[56]Brock-Utne, B., Indigenous Conflict Resolution in Africa, op cit.

[57] See Alaga, E., Challenges for women in peacebuilding in West Africa, (Africa Institute of South Africa (AISA), 2010); Cf. Ibewuike, V. O., African Women and Religious Change: A study of the Western Igbo of Nigeria with a special focus on Asaba town, (Uppsala, 2006). Available at *https://uu.diva-portal.org/smash/get/diva2:167448/FULLTEXT01.pdf* [Accessed on 20/2017].

[58] See generally, Rabar, B. & Karimi, M. (Eds), Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities, op.cit, p.96.

[59] See generally, De la Rey, C., & McKay, S., Peacebuilding as a gendered process. Journal of Social Issues, Vol.62, No.1, 2006, pp.141-153; See also Paffenholz, T., et al, "Making Women Count - Not Just Counting Women: Assessing Women's Inclusion and Influence on Peace Negotiations," (Geneva: Inclusive Peace and Transition Initiative (The Graduate Institute of International and

Peace building generally goes beyond conflict management measures, as it involves developing institutional capacities that alter the situations that lead to violent conflicts.[60] As already pointed out, in traditional African society, people engaged in activities that promoted peace through the various activities they engaged in. Resort to courts searching for justice when peace is what is needed may thus destroy relationships rather than build and foster them in the Kenyan case. In such cases, reconciliation, negotiation, mediation and other traditional mechanisms would be the better option.[61]

5.7 Traditions, customs and norms

The *traditions, customs and norms* of a particular community played a pivotal role in conflict resolution.[62] Traditions, customs and norms were highly valued and adhered to by the members of the community.[63] Disregard of some of these beliefs could attract the wrath of the gods, ridicule and reprimand from members of the society hence ensuring that persons shunned conflict-causing conduct.[64]

6. Conclusion

Realising access to justice for all Kenyans by the enhanced application of the traditional forms of dispute resolution is essential. Reforming the judiciary to conform to the spirit of the constitution is also timely and vital. Realization of the fact that in some parts of the country, the demographic changes, cultural, economic and socio-political orientation of the people has not changed greatly is of essence. Kenya is still a cultural society. This is its foundation as a state. Each of the more than 42 tribes have their own cultures which have to be valued, respected and recognized and the good elements thereof utilized for the good of the nation.[65] The constitution recognizes this in Article 11 by stating that

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Development Studies) and UN Women, April 2016).Available at *http://www.inclusivepeace.org/sites/default/files/IPTI-UN-Women-Report-Making-Women-Count-60-Pages.pdf [Accessed on 20/10/2017].*

[60] See Maiese, M., 'Peacebuilding,' September 2003. Available at *http://www.beyondintractability.org/essay/peacebuilding* [Accessed on 20/10/2017].

[61] See generally, Huyse, L., "Tradition-based Justice and Reconciliation after Violent Conflict: Learning from African Experiences." (2008). Available at *174.129.218.71/resources/analysis/upload/paper_060208_bis.pdf* [Accessed on 15/09/2017]; See also Bar-Tal, D., "From Intractable Conflict through Conflict Resolution to Reconciliation: Psychological Analysis." Political Psychology, Vol.21, No. 2 (2000); see also Bloomfield, D., et al, (eds.), Reconciliation after violent conflict: A handbook, (International Idea, 2003).

[62] See generally Kassa, G.N., "The Role of Culture and Traditional Institutions in Peace and Conflict: Gada System of Conflict Prevention and Resolution among the Oromo-Borana," Master's thesis, 2006. Available at *http://urn.nb.no/URN:NBN:no-17988 [Accessed on 20/10/2017]; See also Mengesha, A. D., et al, 'Indigenous Conflict Resolution Mechanisms among the Kembata Society,' American Journal of Educational Research, Vol.3, No.2, 2015, pp.225-242.*

[63] See generally, Nussbaum, B. "African culture and Ubuntu," Perspectives, Vol.17, No. 1, 2003, pp.1-12; See also Idang, G.E., 'African culture and values,' Phronimon, Vol.16, No.2, 2015, pp.97-111.

[64] Idang, G.E., 'African culture and values,' op cit. p.103.

[65] See National Cohesion and Integration Commission (NCIC), Kenya Ethnic and Race Relations Policy, available at*www.cohesion.or.ke,* [Accessed on 15/04/2012].

culture is the foundation of the nation and that all forms of national and cultural expression should be promoted.

Kenyans, as a people, have not lost the capacity to coexist peacefully, commune together, respect one another, negotiate, forgive and reconcile in resolving their conflicts. This is essential in not only ensuring access to justice but more importantly in promoting peace. We should bear in mind that justice may not necessarily bring peace and coexistence to a people. Traditional dispute resolution mechanisms may achieve both. They are still a part of the Kenyan society and hence their constitutionalisation.

Cultural, kinship and other ties that have always bound communities together as one people have not died. Kenyans still believe in the principles of reciprocity, common humanity, respect for one another and for the environment. This explains why we still have the cooperative movement, *harambee*[66] and other schemes that are a communal endeavour.

As seen above, negotiation, mediation and reconciliation have deep roots in traditional African communities' conflict resolution mechanisms. They are not alien concepts. It is thus correct to say that these were informal processes. For instance, the informality of mediation as a conflict resolution mechanism makes it flexible, expeditious and speedier, it fosters relationships and is cost-effective. It also means that since parties exhibit autonomy over the process and outcome of the mediation process, the outcome is usually acceptable and durable.

The informal processes address the underlying causes of conflicts thus preventing them from flaring up later on. These positive attributes of negotiation, mediation and reconciliation can only be realized if they are conceptualized as informal processes as they were in the traditional African society. Mediation especially should thus not be used in managing conflicts in the context of the legal environment, as in the case of court annexed mediation, as it will not resolve conflicts but will rather settle the same.[67]

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[66] Harambee literally means "all pull together" in Swahili or 'Community getting together to collectively solve problems'.

[67] In a conflict, a settlement implies that the parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. A settlement takes place when conflict-generating behaviour notably of the damaging, violent or destructive kind is neutralized, dampened, reduced or eliminated. A settlement is criticized since it is a damaging half-measure which leaves the causes of the conflicts to smoulder beneath the surface before erupting again. (Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", Cardozo Journal of Conflict Resolution, Vol.7.289, p. 296.) In the mediation discourse, 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. (Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", Journal of Peace Research, Vol.32, No. 2 (May, 1995), pp.152-153 at p.153.)

Traditional Conflict Resolution Mechanisms and institutions should thus be given due consideration in any meaningful conflict discourse.

Adopting The Singapore Convention in Kenya: Insight and Analysis

Abstract

The paper offers insight on adopting the United Nations Convention on International Settlement Agreements Resulting from Mediation 'Singapore Convention' and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 'Model Law'. The two legal instruments are aimed at strengthening the practice of international commercial mediation whose development and uptake has been curtailed by numerous challenges including the absence of an elaborate enforcement mechanism. The paper critically analyses the salient provisions of both the Singapore Convention and the Model Law. It then discusses the applicability of the two legal instruments in Kenya and proposes the best approach in their adoption in order to enhance the practice of international commercial mediation in Kenya.

1. Introduction

The United Nations Convention on International Settlement Agreements Resulting from Mediation *'Singapore Convention'* is an international legal instrument that recognizes the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations and which provides a legal framework for enforcement of settlement agreements resulting from mediation.[1] The Convention was opened for signature in Singapore on 7th August 2019 and calls upon governments and regional integration organizations that wish to strengthen their legal frameworks on international dispute settlement *to consider becoming parties to the convention* (emphasis added).[2] Adoption of the Convention is thus voluntary[3]

Development of the convention was necessitated by challenges facing the practice of international commercial mediation where the trend has been that the outcome of a mediation is treated as a contractual agreement enforced as such and not as an award as in the case of arbitration.[4] This has always been a problem in many states in that one party may pull out of such an agreement and seek court intervention as if the mediation never took place.[5] The convention aims at enhancing the practice of international commercial

[1] United Nations Convention on International Settlement Agreements Resulting from Mediation, United Nations, New York, 2019, 'Singapore Convention'.
[2] Ibid, Preamble.
[3] Schnabel.T., 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' 19 Pepp. Disp. Resol. L.J. 1 (2019)
[4] Muigua. K., 'The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States' available at *http://kmco.co.ke/wp-content/uploads/2019/12/The-Singapore-Convention-on-International-Settlement-Agreements-Resulting-from-Mediation-Kariuki-Muigua-December-2019.pdf* (accessed on 24/08/2020).
[5] Ibid.

mediation by building a bridge that would enable acceptability of international settlement agreements across states with different legal, social and economic systems.[6]

The Singapore Convention is consistent with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 which amends the UNCITRAL Model Law on International Commercial Conciliation, 2002. The Model Law deals with procedural aspects of mediation. The paper discusses the best approach in adopting these legal instruments in Kenya in order to create a conducive legal environment for the practice of international commercial mediation.

2. Scope and Application of the Singapore Convention

The Convention applies to an *agreement resulting from mediation* and *concluded in writing* by parties to *resolve a commercial dispute* ("settlement agreement") which, at the time of its conclusion, *is international*.[7] This is aimed at encouraging cross border mediation and provides parties with an alternative to arbitration which has hitherto been the main dispute resolution mechanism for international commercial disputes.[8] It does not apply to personal or family disputes.[9] A party which relies on a settlement agreement under the Convention is required to supply to the competent authority of the party to the convention where relief is sought certain information which include inter alia the *settlement agreement signed by the parties*; *a document signed by the mediator evidencing that the mediation was conducted* and an *attestation by the institution which administered the mediation*.[10]

Grant of relief under the convention is not absolute and the competent authority of the party to the convention where relief is sought may refuse to grant such relief upon proof that a party to the agreement was under some incapacity; the settlement agreement is null and void, inoperative or incapable of being performed; the settlement agreement is not binding or is not final; there is a serious breach by the mediator of standards applicable to the mediator or the mediation and public policy considerations.[11]

The Convention is expected to have similar benefits for mediation as an international dispute resolution mechanism as the New York Convention has had for arbitration.[12] The New York Convention was formulated for purposes of providing a legal framework for the recognition and enforcement of foreign arbitral awards and has had tremendous

[6] Singapore Convention, Preamble
[7] United Nations Convention on International Settlement Agreements Resulting from Mediation, Article 1(1).
[8] IK. Zafar., 'The Singapore Mediation Convention, 2019', available at *https://www.academia.edu/40289206/The_Singapore_Mediation_Convention* (accessed on 25/08/2020)
[9] Ibid, Article 1(2) (a).
[10] Ibid, Article 4.
[11] Ibid, Article 5.
[12] IK. Zafar., 'The Singapore Mediation Convention, 2019', Op Cit

impact and success on the practice of international commercial arbitration.[13] The Singapore Convention has the potential of having such an impact on the practice of international commercial mediation. [14]One of the key benefits of the convention is that it provides a process for the direct enforcement of cross-border settlement agreement between parties resulting from mediation. Consequently, it stipulates that each party to the convention shall enforce a settlement agreement in accordance with its rules of procedure.[15] This provision allows parties to formulate their own rules of procedure suitable to national or local circumstances for purposes of effective enforcement of the convention. Such procedural rules can include the requirement for the settlement agreement to be in an official language of the party to the convention where relief is sought as envisaged under the Convention.[16]

The *Singapore Convention* is consistent with the *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018(Model Law)*[17]. This provides parties with the flexibility to adopt either the *Singapore Convention* or the *Model Law* as stand-alone legal instruments or both as complementary instruments in order to facilitate a comprehensive legal framework on mediation.[18] Whereas the Singapore Convention governs the substantive aspects of mediation, the Model Law deals with the procedural aspects. However, the substantive aspects of the two legal instruments are a mirror image of each other in order to provide consistency in the practice of international commercial mediation. Article 1 of the Singapore Convention which provides for its scope and application is similar to article 3 of the Model Law. Both provide that the conventions apply to international commercial mediation.[19] Section 3 of the Model Law also captures the substantive aspects stipulated under the Singapore Convention including the requirements for reliance on settlement agreements and grounds for refusing to grant a relief.[20]

[13] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), available at www.newyorkconvention.org/english (accessed on 26/08/2020)
[14] IK. Zafar., 'The Singapore Mediation Convention, 2019', Op Cit
[15] Singapore Convention, Article 3(1)
[16] Ibid, Article 4(3)
[17] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002).
[18] Muigua. K., 'The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States' Op Cit
[19] Singapore Convention, Article 1; See also Model Law, article 3.
[20] Model Law, Articles 18 and 19; See also the Singapore Convention, articles 4 and 5.

3. UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)

In addition to the substantive aspects discussed above, the Model Law governs the procedural aspects of international commercial mediation and international settlement agreements. It governs aspects such as commencement of mediation proceedings; number and appointment of mediators; conduct of mediation; communication between mediator and parties; disclosure of information; confidentiality; admissibility of evidence; termination of mediation proceedings and resort to arbitral or judicial proceedings.[21]

On the conduct of mediation, the Model Law gives effect to the principle of party autonomy which is one of the hallmarks of mediation and provides that parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the mediation is be conducted.[22] Where parties fail to agree on the manner in which the mediation is to be conducted, the Model Law allows the mediator to conduct the mediation in a manner he/she considers appropriate taking into account the circumstances of the case, wishes of the parties and the need for expeditious dispute resolution.[23] The Model Law also enshrines the principle of confidentiality and provides that unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential.[24] Disclosure is only permissible pursuant to legal requirements or for purposes of implementation or enforcement of a settlement agreement.[25]

Further, in order to safeguard the sanctity of the mediation proceedings, the Model Law prevents admissibility of evidence by a party to the mediation proceedings, the mediator and any third person in arbitral, judicial or similar proceedings regarding matters such as an invitation to engage in mediation proceedings; views expressed by a party in the mediation in respect of a possible settlement of the dispute; statements or admissions made by a party in the course of the proceedings; proposals by the mediator and documents made solely for purpose of the mediation proceedings.[26]

To guard against possible conflict of interest, the Model Law precludes the mediator from acting as an arbitrator in respect of a dispute that is subject of the mediation proceedings or a dispute that has arisen from the same contract or legal relationship. [27] This is due to the likelihood of bias owing to the arbitrator's knowledge of the parties and the dispute. The arbitrator is likely to have formed an opinion on the relative strength or weakness of

[21] Ibid.
[22] Model Law, Article 7
[23] Ibid, Article 7(2)
[24] Ibid, Article 10
[25] Ibid
[26] Ibid, Article 11
[27] Ibid, Article 13

the case based on the analysis of the facts and evidence from the mediation proceedings which could be prejudicial in neutral settlement of the dispute. A settlement agreement concluded under the Model Law is binding and enforceable according to the rules of procedure of the state where enforcement is sought.[28]

4. Application of the Singapore Convention and the Model Law in Kenya

Unlike international commercial arbitration, international commercial mediation is yet to take root in Kenya. Kenya has quite an elaborate legal and institutional framework that has facilitated the use of arbitration in managing international commercial disputes. These include the Arbitration Act[29], the Nairobi Centre for International Arbitration Act[30] and institutions such as the Chartered Institute of Arbitrators-Kenya, the Nairobi Centre for International Arbitration and the International Chamber of Commerce that have facilitated the uptake of international commercial arbitration. Kenya is also a signatory to the New York convention* that provides a framework for the enforcement of international arbitral awards. This is not the case for international commercial mediation at the moment. However, Kenya is continuing to develop its domestic mediation framework and this offers promise for international commercial mediation.

The Constitution of Kenya enshrines the right of access to justice and provides that the state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.[31] In actualising the right of access to justice, the Constitution mandates courts and tribunals while exercising judicial authority to give effect to alternative forms of dispute resolution including *reconciliation*, *mediation*, *arbitration* and *traditional dispute resolution mechanisms*.[32]

Mediation is one of the forms of Alternative Dispute Resolution and flows from negotiation.[33] It arises where parties to a dispute have attempted negotiations but have reached a deadlock. As a result, parties agree to involve a third party to assist them continue with the negotiation process with the aim of breaking the deadlock.[34] *Mediation has been practiced in the country since time immemorial. Indigenous African communities adhered to the values of harmony and togetherness and whenever a dispute arose between two parties, they would attempt to amicably resolve the dispute through

[28] Ibid, Article 15.
[29] Arbitration Act, No. 4 of 1995, Government Printer, Nairobi.
[30] Nairobi Centre for International Arbitration Act, No. 26 of 2013, Government Printer, Nairobi.
[31] Constitution of Kenya, 2010, Article 48, Government Printer, Nairobi.
[32] Ibid, Article 159 (2) (c).
[33] Muigua. K., Resolving Conflicts Through Mediation in Kenya, Glenwood Publishers, 2nd Ed.,2017, pg 3.
[34] Ibid

negotiation.[35] In case of a deadlock, other parties and institutions such as the council of elders would come in and assist parties arrive at a solution.[36]

Following Constitutional recognition of mediation and other ADR mechanisms vide article 159 (2) (c), measures have been taken towards mainstreaming mediation in the justice system. The Civil Procedure Act[37] was amended to introduce Court Annexed Mediation. The Act establishes the Mediation Accreditation Committee appointed by the Chief Justice whose functions include inter alia determining the criteria for certification of mediators; maintaining a register of qualified mediators and enforcing a code of ethics for mediators as may be prescribed.[38] The Act further allows courts to refer cases to mediation on the request of the parties concerned; where it is deemed appropriate to do so and where the law requires.[39] Vide the *Mediation (Pilot Project) Rules, 2015*, court-annexed mediation was introduced in the commercial and family divisions of the High Court at Milimani Law courts, Nairobi and has since spread to other divisions and court stations outside Nairobi. Court-Annexed mediation has had its impact and success with the annual State of the Judiciary & Administration of Justice reports highlighting the role it plays in enhancing access to justice in Kenya.[40]

However, Court-Annexed Mediation has also been criticised for its inherent weaknesses. It has been argued that the process is formal contrary to the attributes of mediation such flexibility and ability to be conducted in informal settings.[41] Further, the process to a large extent goes against the principle of voluntariness which is one of the hallmarks of mediation since parties are forced to mediate.[42] It has also been asserted that court-annexed mediation is contrary to the attribute of privacy since court documents become public once filed and can be accessed by any person.[43]

Attempts have been made towards addressing some of the challenges arising from the current practice of mediation in Kenya. The *Alternative Dispute Resolution Policy*[44] is one

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[35] Mwagiru, M., 'Conflict in Africa; Theory, Processes and Institutions of Management' Centre for Conflict Research, Nairobi, 2006.
[36] Ibid.
[37] Civil Procedure Act, Cap 21, Government Printer, Nairobi.
[38] Ibid, S 59A, Government Printer, Nairobi.
[39] Ibid, S 59B.
[40] Judiciary, State of the Judiciary and Administration of Justice Annual Reports, available at *https://www.judiciary.go.ke/resources/reports/* (accessed on 24/08/2020)
[41] Muigua. K., 'Court Sanctioned Mediation in Kenya-An Appraisal' available at *http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf* (accessed on 24/08/2020)
[42] Ibid; See also Wazir.MS, 'An Analysis of Mandatory Mediation' available at *https://su-plus.strathmore.edu/handle/11071/4817* (accessed on 27/08/2020)
[43] Ibid
[44] Alternative Dispute Resolution Policy (zero Draft), available *at*

such endeavour. The purpose of this draft policy is to strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) in the Country in order to achieve optimal delivery of access to justice for all Kenyans.[45] The policy is intended to create a *well-coordinated, well capacitated and cohesive ADR system* that is strategically linked to the formal system, while at the same time maintaining *its autonomy as an informal system* and providing quality justice services to Kenyans across the country.[46]

The Policy identifies several challenges that undermine the full realization of the goals of ADR mechanisms including mediation. These include unclear scope of ADR, jurisdictional challenges, question of justiciability, inadequate implementation of existing laws and lack of framework legislation. The policy also identifies some of the challenges facing mediation in particular such as the existence of numerous institutions with each developing their own different rules, curricula and training programs.[47] This has resulted to duplication, disparate standards and a disjointed practice of mediation in Kenya. The policy proposes several recommendations aimed at enhancing the practice of ADR in Kenya which include strengthening the legal and institutional framework for ADR; enhancing the quality and efficacy of ADR services; regulation and governance; promoting quality and standards of practice in ADR; capacity building; increasing availability, accessibility and uptake of ADR services and developing a framework for efficient recognition, adoption and enforcement of ADR decisions.[48] Promoting quality and standards of practice of mediation as envisaged by the ADR policy will also be essential in facilitating international commercial mediation since it will boost confidence within the business community of the country's capability as an ideal mediation forum.

While Kenya continues to strengthen its domestic legal and institutional framework on mediation, it is also important to create an enabling environment that would facilitate the uptake of international commercial mediation. Mediation is increasingly being used in international and domestic commercial practice as an alternative to litigation and arbitration due to its significant benefits, such as preserving commercial relationships, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.[49] As part of the international business community Kenya should not be left behind. The country should join the noble course towards creating an enabling legal and institutional environment to facilitate international commercial mediation. Adopting the Singapore Convention and the Model

https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf (accessed on 24/08/2020)

[45] Ibid

[46] Ibid

[47] Ibid

[48] Ibid

[49] Singapore Convention, Preamble

Law represents a good starting point in the quest towards enhancing the scope of international commercial mediation in Kenya.

5. Adopting the Singapore Convention in Kenya

The foregoing discussion highlights some of the challenges facing the practice of mediation in Kenya such as inadequate legal framework; duplication, disparate standards and a disjointed practice of mediation and enforceability challenges with the exception of court-annexed mediation. These challenges do not create an enabling environment for the practice of international commercial mediation. *The Singapore Convention* and *Model Law* can cure these challenges by providing an elaborate procedural framework for the conduct of international commercial mediation and enforcement of mediation settlement agreements. Kenya can thus strengthen its legal framework on mediation by adopting the two legal instruments. Since conflict is culture specific[50], Kenya can adopt the two legal instruments with necessary modifications to suit to local circumstances. Indeed, both the Singapore Convention and the Model Law provide for their adoption with necessary modifications to suit local circumstances. The Singapore Convention recognises the different levels of experience with mediation in different jurisdictions and allows reservations whereby a party may declare application of the convention only to the extent that the parties to the settlement agreement have agreed.[51] The Model Law also allows adjustments to be made to relevant articles according to the needs of party states.[52]

In adopting the two legal instruments, Kenya can consider revising them appropriately to allow for the conduct of mediation proceedings in Kiswahili which is one of the official languages in the country. This will be important in facilitating commercial relationships between Kenya and its neighbouring countries such as Tanzania which is a key trading partner. Further, since article 12 of the Singapore Convention allows participation by regional economic integration organizations, the convention can be adopted within the context of the East African Community in addition to adoption by individual member states. This will be critical in promoting the pillars of East African Community integration and in particular the customs union and the common market aimed at accelerating economic growth and development within the region.[53] It will also facilitate building of a legal bridge to promote uniform application of the convention within the East African Community region considering that some of the countries are Anglophone (Kenya, Uganda and Tanzania) whereas some are Francophone (Rwanda and Burundi). Further, in order to facilitate adoption and application of the Singapore Convention and the Model Law, Kenya should strengthen its institutional framework on mediation. Both the

[50] LeBaron. M., 'Bridging Cultural Conflicts: A New Approach for a Changing World' Jossey-Bass, San Francisco, CA, 2003

[51] Singapore Convention, Article 8

[52] Model Law, Article 16

[53] East African Community, Pillars of EAC Regional Integration, available at *https://www.eac.int/integration-pillar*s (accessed on 26/08/2020)

Singapore Convention and the Model Law envisage the role of an institution on matters such as appointment or replacement of a mediator.[54] The country may consider establishing a national mediation institute to facilitate such matters. The country should also strengthen its legal framework on mediation which should provide for the procedure for crucial matters such recognition and enforcement of mediation settlement agreements or setting aside of mediation settlement agreements. The Arbitration Act clearly provides for such procedures and this has led to the growth of arbitration as the preferred mode of commercial dispute resolution in the country.[55] In developing a national legal framework on mediation, drafters should ensure that the legislation captures these issues in order to give effect to the Singapore Convention and the Model Law.

The Mediation Bill[56] in Parliament represents a good starting point. However, the ideals of the ADR Policy need to be reflected in the Mediation law in order to enhance the uptake of mediation in the country. The Bill should go through adequate public participation to incorporate the views of all stakeholders in the country. There is need to rally the support from the business community and collaborating with institutions such as the International Chamber of Commerce, Kenya Private Sector Alliance (KEPSA) among others in developing a national framework on mediation in order to promote commercial mediation in the country. Public awareness and participation in developing a national legal an institutional framework on mediation is important in ensuring acceptability and uptake of mediation in the country.

The Singapore Convention represents an idea whose time has come. It can work to advance international commercial mediation as a facilitator of trade and business relations and boost commerce in the country. Kenya should adopt the convention in order to enhance its international commercial mediation environment.

[54] Model Law, Article 6

[55] Section 35 of the Arbitration Act, No. 4 of 1995 provides for setting aside of arbitral awards while section 36 provides for recognition and enforcement of awards.

[56] Mediation Bill, 2020, Government Printer, Nairobi.

Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration*

Abstract

Arbitral institutions play an important role in the growth and development of international arbitration the world over. They are tasked with promoting and safeguarding the discipline, both through ensuring development of sound legal framework and facilitating the practice of arbitration and other Alternative Dispute Resolution mechanisms. While international arbitration is 'international' in nature, various regional blocks have developed arbitral institutions that target particular economic areas and take care of commercial disputes in that area. While these institutions have been established under various legal regimes, they strive to maintain professional standards that correspond to the international best practices in arbitration. The authors, in this paper, critically discuss the potential of the Nairobi Centre for International Arbitration in promoting effective management of commercial disputes in Kenya and the African region as a whole. The paper offers recommendations on how to tackle the potential challenges that the Centre is likely to encounter in discharging its statutory mandate of facilitating and encouraging the conduct of international commercial arbitration in accordance with the Act, and administering domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices.

1. Introduction

One of the key features of international and regional trade is the need for effective framework for the management of commercial disputes. This is because disputes are considered to be inevitable in the international business world.[1] Considering the transnational nature of international trade, national courts and legal systems in general do not appeal to the international commercial community due to the uncertainties that may come with resorting to them for commercial disputes management.[2] One of the main contentions against the use of national legal systems in international commercial disputes is that they may not be sensitive to the expectations of disputants from different national and legal backgrounds. The general international law as well may not be adequate to deal with cross-border commercial transactions.[3] While there are those who argue for a third

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* *This paper is co authored with Maina Ngararu.*

[1] Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' William Mitchell Law Review, Vol. 21, Iss. 3, Art. 23, 1996, pp. 942-987 at p. 942.

[2] Manriruzzaman, A.F.M., "The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?" American University International Law Review, Vol. 14, no. 3 (1999), 657-734.

[3] Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p. 658.

legal order to be *lex mercatoria*,[4] international arbitration has gained popularity as the primary way through which international companies resolve their transnational problems. It is associated with advantages which include: flexibility and adaptability of procedure; the ability to customize the process; party participation; predictability; expertise of arbitrators; procedural and evidentiary advantages; finality of decisions and awards; enforceability of awards; speed and efficiency of arbitration; cost savings; privacy; and fairness and accountability.[5]

It has been observed that international commercial arbitration has been successful in recent decades among international traders as an alternative to national courts for the settlement of disputes.[6] The growth in international commercial arbitration is mainly attributed to globalization and the impracticability of traditional justice systems. However, the tremendous expansion of international commerce and the recognition of [our] global economy has also played a significant role.[7] Also important is the fact that the growth in international arbitration has seen a corresponding growth in the availability of institutions experienced in handling arbitration and other forms of ADR, providing a practical alternative to litigation.[8]

It is against this background that this paper focuses on the Nairobi Centre for International Arbitration (NCIA) and how the institution can effectively contribute to management of commercial disputes in the East African region and Africa as a whole, for increased efficiency in regional and international trade. This is because arbitral institutions are an

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[4] See Manriruzzaman, A.F.M., "The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?" op cit. It is important to point out that this is a highly contentious issue especially with regard to its relationship with international commercial arbitration. Lex mercatoria is defined as an international law system applied by international merchants based on commercial rules and principles. It is noteworthy that this legal system (Lex mercatoria) is not enforced by any national law and is not contained in an international agreement. See Güçer, S., 'Lex Mercatoria in International Arbitration,' Ankara bar Revıew, Vol. 1, 2009, pp.30-39 at p. 34; See also Sweet, A.S., 'The new Lex Mercatoria and Transnational Governance,' Journal of European Public Policy, Vol. 13, No.5, August 2006,pp. 627–646.

[5] Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p. 948; cf. Burton, S.J., "Combining Conciliation Arbitration of International Commercial Disputes", Hastings International and Comparative Law Review, 18, (July, 1995), 637.

[6] Croff, C., 'The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?' The International Lawyer, Vol. 16, No. 4 (Fall 1982), pp. 613-645, p. 613.

[7] Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p. 945; 947; See also Perlman, L. & Nelson, S.C., 'New Approaches to the Resolution of International Commercial Disputes,' The International Lawyer, Vol. 17, No. 2 (Spring 1983), pp. 215-255; See also Burstein, H., 'Arbitration of International Commercial Disputes,' Boston College Law Review, Vol. 6, Iss. 3, Art. 13, 1965, pp. 569-577.

[8] Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p.947.

important part of the contributing factors in growth of efficacious international arbitration which in turn facilitates deepening of international trade.

2. The Nairobi Centre for International Arbitration

One of the most recent international arbitral institutions in the African region is the Nairobi Centre for International Arbitration (NCIA), based in Nairobi, Kenya. NCIA is a regional centre for international commercial arbitration set up pursuant to the Nairobi Centre for International Arbitration Act (the Act),[9] alongside an Arbitral Court, with its headquarters in Nairobi, Kenya. The Act provides for the functions of the Centre, the Centre's administrative Board of Directors and their functions, establishment, composition and jurisdiction of the Arbitral Court, amongst others. The Centre is supposed to, inter alia: promote, facilitate and encourage the conduct of international commercial arbitration in accordance with the Act; administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; develop rules encompassing conciliation and mediation processes; organize international conferences, seminars and training programs for arbitrators and scholars; maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives; provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties; provide advice and assistance for the enforcement and translation of arbitral awards; provide training and accreditation for mediators and arbitrators; educate the public on arbitration as well as other alternative dispute resolution mechanisms; enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre achieve its objectives; and provide facilities for hearing, transcription and other technological services.[10]

The Centre has since discharged some of these functions, such as developing rules encompassing conciliation and mediation processes.[11] However, there still lies an uphill task ahead and for the Centre to effectively discharge most of its statutory functions. There are potential challenges that it will arguably have to overcome for it to secure a place among the World's most successful arbitration centres. This paper critically analyses the challenges that are likely to characterize this journey to establishing Kenya as an international arbitration destination. Through highlighting the international best practices in international arbitration, the authors proffer solutions on how the Centre can help make

[9] No. 26 of 2013, Laws of Kenya, Preamble. This Act is also binding on the Government (s. 26).
[10] S. 5, No. 26 of 2013.
[11] See Nairobi Centre for International Arbitration (Arbitration) Rules, 2015, Legal Notice No. 255, Kenya Gazette Supplement No. 210, 24th December, 2015; Nairobi Centre for International Arbitration (Mediation) Rules, 2015, Legal Notice No. 253, Kenya Gazette Supplement No. 205, 18th December, 2015.

Kenya and the East African region as a whole, the preferred destination for arbitration by the business community around the world.

3. Hitting the Ground Running: Key issues in International Arbitral Institution

The Nairobi Centre for International Arbitration (NCIA) was established in the wake of increased regional arbitral institutions across the African continent and beyond, some of which have been around long enough to win the confidence of the international business community. For instance, it is recorded that the International Chamber of Commerce ("ICC") Court of Arbitration was created shortly after World War I by business people who wrestled with the practical difficulties of resolving disputes with merchants of different national backgrounds.'[12] NCIA became the second regional arbitral institution to be set up in the Eastern African region, after Kigali Centre for International Arbitration in Kigali, Rwanda. However, the competition for business extends beyond the region and indeed Africa, to such areas as the Middle East and the United Kingdom where there are a number of globally competitive arbitral institutions which have been getting much of the arbitration business from this region.[13] The established institutions include, inter alia: American Arbitration Association (AAA); International Chamber of Commerce (ICC); London Court of International Arbitration (LCIA); Cairo Regional Centre for International Commercial Arbitration (CRCICA); Kuala Lumpur Regional Centre for Arbitration (the KLRCA); Lagos Regional Centre (the RCICAL); and Permanent Court of Arbitration (PCA).[14] While it may be expected that NCIA may face challenges in the initial stages, there are key issues that ought to be addressed to catapult the Centre to internationally accepted standards to make sure that all that remains is marketing the institution and the country as a whole. The next section, evaluates key elements from the NCIA Act as well as the NCIA institutional arbitration rules with a view to highlight the potential opportunities and pitfalls that may hinder the blossoming of the Centre.

3.1 Seat of arbitration and place of hearings.

Rule 18(1) states that the parties may agree in writing on the seat of arbitration. However, unless otherwise agreed under paragraph (1), the seat of arbitration shall be Nairobi, Kenya.[15] The Arbitral Tribunal may also, on considering all the circumstances, and on giving the parties an opportunity to make written comments, determine a more appropriate seat.[16] The Rules are flexible on physical location as they give the Arbitral Tribunal the power to, with the consent of all the parties to the arbitration, meet at any

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[12] Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p. 944.

[13] Lew, J.D.M., 'Comparative International Commercial Arbitration,' p.237, [London: Kluwer Law International, 2003].

[14] See Blackaby, N., et al, An Overview of International Arbitration, in Redfern & Hunter on International Arbitration, (Oxford University Press, 2009), pp. 1-83 at pp. 59-69.

[15] Rule 18(2).

[16] Rule 18(3).

geographical location it considers appropriate to hold meetings or hearings.[17] Where the Arbitral Tribunal holds a meeting or hearing in a place other than the seat of arbitration, the arbitration is to be treated as arbitration conducted at the seat of the arbitration and any award as an award made at the seat of the arbitration for all purposes.[18] Thus, the change in geographical location may only offer physical comfort and satisfy parties' aesthetic preferences rather than have any legal implications on the *lex arbitri*, that is, law of the seat of arbitration.[19]

Rule 19 of NCIA Arbitration Rules states that the law applicable to the arbitration shall be the arbitration law of the seat of arbitration, unless and to the extent that the parties have expressly agreed in writing on the application of another arbitration law and such agreement is not prohibited by the law of the arbitral seat. It has been observed that since it is the law of the seat that governs how the arbitral proceedings are to be conducted, the choice of seat can affect: whether the national courts will intervene in the arbitration; whether the subject matter of the dispute is capable of being resolved by arbitration; the ease by which an arbitral award can be challenged or appealed; and the enforceability of an arbitral award in other jurisdictions.[20]

It is, therefore, important for the NCIA to actively coordinate and facilitate, in collaboration with other lead agencies and non-State actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation. This is one of its main functions as provided for by the establishing Act and it is one of the most important roles since it will help in enhancing the competitiveness of the Centre in the region. If there is a negative perception about Kenyan courts' willingness to enforce and uphold arbitral awards, then the effectiveness of NCIA would be affected. The Centre must ensure that the country remains globally attractive by way of having in place laws, policies and institutions that support ADR and arbitration in particular. In the Kenyan case of *Nyutu Agrovet Limited v Airtel Networks Limited*,[21] the Court, in supporting limited role of national courts, stated as an *Obiter:* "*Our courts must therefore endeavor to remain steadfast with the rest of the international community we trade with that have embraced the international trade practices espoused in the UNICITRAL Model. If we fail to do so, we may become*

[17] Rule 18(4).
[18] Rule 18(5).
[19] See generally, Henderson, A., 'Lex Arbitri, Procedural Law and the Seat of Arbitration: Unravelling the Laws of the Arbitration Process,' Singapore Academy of Law Journal, 26, 2014, pp. 886-910.
[20] Ashurst, 'Anatomy of an arbitration Part II: Key elements of an arbitration clause,' International arbitration briefing, Ashurst London, July 2013, p.2. Available at *https://www.ashurst.com/doc.aspx?id_Content=9363* [Accessed on 4/03/2016].
[21] Nyutu Agrovet Limited V Airtel Networks Limited [2015] eKLR, Civil Appeal (Application) No 61of 2012.

what Nyamu J. (as he then was) in Prof. Lawrence Gumbe & Anor –v - Hon. Mwai Kibaki & Others, High Court Misc. Application No. 1025/2004 referred to as; "A Pariah state and could be isolated internationally (emphasis added)."

It is believed that the success of an arbitration institution is dependent on a number of factors that range from its pricing strategy to the overall quality of the legal system of the host state.[22] NCIA must therefore take up the challenge and aggressively play its expected role of selling Kenya as the preferred destination for international arbitration. It must work with the other stakeholders to ensure that the national legal system offers support rather than a sabotaging international arbitration.

3.2 The enforcement of the award

The fact that Kenya is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[23] will make it easy for arbitral awards to be enforced in states that have reciprocity agreements with Kenya. This may, therefore, help in achieving certainty and predictability that is vital in international arbitration. Also noteworthy is the express provision in the East African Court of Justice Arbitration Rules, 2012 that enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought.[24] It has been argued that "overly technical judicial review of arbitration awards would frustrate the basic purposes of arbitration: to resolve disputes speedily and to avoid the expense and delay of extended court proceedings."[25] The Kenyan Courts have demonstrated goodwill in recognizing and enforcing international arbitral awards especially under the New York Convention. In the Kenyan case of *Nyutu Agrovet Limited V Airtel Networks Limited*,[26] the Court affirmed its intention to support arbitration by holding, inter alia, '*no court should*

[22] Gadelshina, E.R., 'What plays the key role in the success of an arbitration institution?' Financier Worldwide Magazine, February 2013. Available at *http://www.financierworldwide.com/what-plays-the-key-role-in-the-success-of-an-arbitration-institution/#.Vt_n_dA4Q7o* [Accessed on 02/03/2016].

[23] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), New York, June 10, 1958 330 U.N.T.S. 38.

The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. (United Nations Commission on International Trade Law, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), available at *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html* [Accessed on 03/03/2016].

[24] Rule 36(3).

[25] Sweeney, J.C., 'Judicial Review of Arbitral Proceedings,' Fordham International Law Journal, Vol. 5, Issue 2, Art. 3, 1981, pp. 253-276 at 276.

[26] [2015] eKLR, Civil Appeal (Application) 61 of 2012.

interfere in any arbitral process except as in the manner specifically agreed upon by the parties or in particular instances stipulated by the Arbitration Act. The principle of finality of arbitral awards as enshrined in the UNCITRAL Model law that had been adopted by many nations had to be respected. The parties herein had agreed that the Arbitrators decision shall be final and binding upon each of them. Since they did not agree that any appeal would lie, the appeal by the appellant was an unjustifiable attempt to wriggle out of an agreement freely entered into and had to be rejected (emphasis added).' This denotes a positive step and a bright future for parties that choose to enforce arbitral awards in Kenya.

3.3 Language

Language is an important aspect of the process and it can potentially affect the proceedings in many circumstances, leading in most cases to an inefficient arbitration.[27] As such, it has been observed that parties should not only choose the language, but also they should do it with due consideration. This is because choice of the "wrong" language may imply the need to resort to translation and interpretation for most of the conduct of the proceedings and this may, on one hand affect the costs and the duration of the proceedings and, on the other, may not be very accurate.[28]

Rule 20(1) of the NCIA Arbitration Rules states that the initial language of the arbitration shall be the language of the arbitration agreement, unless the parties have agreed in writing otherwise. The Rules also provide that in the event that the arbitration agreement is written in more than one language, the Centre may, unless the arbitration agreement provides that the arbitration proceedings shall be conducted in more than one language, decide which of those languages shall be the initial language of the arbitration.[29] The Rules further provide that upon the formation of the Arbitral Tribunal and unless the parties have agreed upon the language of the arbitration, the Arbitral Tribunal shall decide upon the language of the arbitration, after giving the parties an opportunity to make written comments and after taking into account— the initial language of the arbitration; and any other matter it may consider appropriate in all the circumstances of the case.[30]

Rule 20 (5) provides that if a document is expressed in a language other than the language of the arbitration and no translation of such document is submitted by the party relying upon the document, the Arbitral Tribunal or, if the Arbitral Tribunal has not been formed,

[27] Faienza, V., 'The Choice of the Language of the Proceedings: An Underestimated Aspect of the Arbitration?' Kluwer Arbitration Blog, available at *http://kluwerarbitrationblog.com/2014/05/06/the-choice-of-the-language-of-the-proceedings-an-underestimated-aspect-of-the-arbitration/* [Accessed on 4/03/2016].
[28] Ibid.
[29] Rule 20(3), Nairobi Centre for International Arbitration (Arbitration) Rules, 2015.
[30] Rule 20(4).

the Centre may direct that party to submit a translation in a form to be determined by the Arbitral Tribunal or the Centre, as the case may be.

Art. 17 (1) UNCITRAL Arbitration Rules provide that the arbitral tribunal shall determine the language of the arbitration 'promptly after its appointment'. The *Arbitration Rules of the Singapore International Arbitration Centre*[31] also provide that where unless the parties have agreed otherwise, the Tribunal is to determine the language to be used in the proceedings. There are those who argue that in view of the extreme significance of the language issue in international commercial arbitration, where the parties usually come from different countries and speak different languages, this rule should generally be followed in international arbitration, even if the proceedings are not conducted under the UNCITRAL Arbitration Rules.[32] It has rightly been observed that party autonomy is particularly important here since the choice of the language affects the parties' position in the proceedings and the expediency and costs of the arbitration.[33] If the parties have reached an agreement on the language to be used in the arbitration, due to the principle of the priority of party autonomy, the tribunal has to accept the determination by the parties.[34] NCIA may, therefore, need to have in its list, arbitrators who are knowledgeable in a number of major languages. It is to be appreciated that translations may not always capture the original intent of the parties. Arbitration proceedings may also have on board parties, as witnesses, who were not parties to the original contract. Understanding more languages may help the arbitrator gather important information directly from the witness during proceedings as opposed to translated proceedings.

3.4 Choice of Rules of Procedure

Rule 3(1) of NCIA Arbitration Rules provides that the Rules shall apply to arbitrations where any agreement, submission or reference, whether entered into before or after a dispute has arisen, provides in writing for arbitration under the Nairobi Centre for International Arbitration Rules or such amended Rules as the Centre may have adopted to take effect before the commencement of the arbitration. It has been noted that if institutional arbitration is chosen, it is usual for the selected institution's rules to govern the conduct of the arbitration.[35] If ad hoc arbitration is chosen, the parties may choose to draft their own rules or, as is more common, to use other rules, such as the UNCITRAL Rules.[36]

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[31] Arbitration Rules of the Singapore International Arbitration Centre, SIAC Rules (5th Edition, 1 April 2013), Rule 19.

[32] Ibid.

[33] Principle No. XIII.3.4 - Language of the arbitration: "Commentary to Trans-Lex Principle, available at *http://www.trans-lex.org/969050*" [Accessed on 26/02/2016].

[34] Ibid.

[35] Ashurst, 'Anatomy of an arbitration Part II: Key elements of an arbitration clause,' International arbitration briefing, Ashurst London, July 2013, p. 1.

[36] Ibid.

In recognition of this, the NCIA Act provides that subject to any other rules of procedure by the Court, the Arbitration Rules of the United Nations Commission on International Trade Law, with necessary modifications, shall apply.[37] Further, Rule 3(3) states that nothing in the Rules shall prevent parties to a dispute or arbitration agreement from naming the Centre as the appointing authority without submitting the arbitration to the provisions of these Rules. This, therefore, ensures that flexibility and autonomy of parties is retained especially where the Centre is expected to provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties, as provided in its mandate. It has been observed that the adaptability and flexibility parties have in choosing or shaping their own arbitral process is one of arbitration's strengths.[38] It is important to guarantee both national and international parties that their autonomy and flexibility in the process, being one of the key advantages of international arbitration, would not be lost should they settle on NCIA as their preferred choice for institutional arbitration or even appointing authority.

3.5 Confidentiality

Rule 34(1) of the NCIA Arbitration Rules states that unless the parties expressly agree in writing to the contrary, the parties must undertake to keep confidential all awards in their arbitration, as well as all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not in the public domain, except where disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a judicial authority. Further, the deliberations of the Arbitral Tribunal are confidential to its members, except where disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under rules 12, 14 and 30.[39] The Centre also commits also not to publish an award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.[40]

Safeguarding the confidentiality of the arbitration process and outcome is important for the international arbitration parties who may wish to maintain business interests and secrets. It is however noteworthy that confidentiality may be lost in case of appeal to national courts.

[37] S. 23, No. 26 of 2013, Laws of Kenya.
[38] Fischer, R.D. & Haydock, R.S, "International Commercial Disputes Drafting an Enforceable Arbitration Agreement," William Mitchell Law Review, op cit. at p. 948.
[39] Rule 34(2).
[40] Rule 34(3).

3.6 The Role of National Courts during the Arbitration Proceedings

The NCIA Act provides for the establishment of a Court to be known as the Arbitral Court, to be presided over by a President; two deputy presidents; fifteen other members all of whom shall be leading international arbitrators; and the Registrar.[41] The Court is to have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with the Act or any other written law.[42] Further, a decision of the Court in respect of a matter referred to it is to be final.[43] Rule 33 of the NCIA Arbitration Rules provides that the decisions of the Centre with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal.

The NCIA Act is not clear on the role of the Arbitral Court and its relationship with national courts as far as jurisdiction in arbitration matters is concerned. While this may be attractive as far as arbitral independence is concerned, it is also likely to cause confusion especially when considered in light of Kenya's Arbitration Act, 1995[44] which provides for the role of the national courts in arbitration proceedings. The Arbitration Act provides for limited role of the court in arbitration as stated as follows: '*Except as provided in this Act, no court shall intervene in matters governed by this Act* (emphasis added).'[45]

The role of the national courts as provided in the Arbitration Act, 1995 is limited to: appointment of a tribunal as provided for under section 12 of the Arbitration Act, 1995; Stay of legal proceedings as provided for under section 6 of the Act; power of the High Court to grant interim orders for the maintaining of the status quo of the subject matter of the arbitration pending the determination of the dispute through arbitration (s. 7); application by a party to challenge arbitrator or arbitral tribunal (s.14); assistance in taking evidence for use in arbitration (s.28); and setting aside of an arbitral award (s.35). The legal provisions on intervention by the two courts (national courts and arbitral court) are mainly found in the Arbitration Act, 1995 and the NCIA Arbitration Rules. The role of national court as provided for in the Arbitration Act, however, is divided between the Arbitral tribunal and the arbitral court in the NCIA Act.

Most of the foregoing instances where national courts can intervene fall within the jurisdiction of the arbitral tribunal in NCIA Act.[46] While the NCIA Act is silent on the specific role of the Arbitral Court, the NCIA Arbitration Rules provides for a number of instances where the jurisdiction of the court may be invoked. Rule 11(3) provides that a party who intends to remove an arbitrator shall, within fifteen days of the formation of

[41] S. 21.
[42] S. 22(1).
[43] S. 22(2).
[44] Act No. 4 of 1995, Laws of Kenya.
[45] S. 10, Act No. 4 of 1995, Laws of Kenya.
[46] See Rule 27 of NCIA Arbitration Rules on Interim and conservatory measures.

the Arbitral Tribunal or on becoming aware of any circumstances referred to in paragraph (1) and (2)[47], send a written statement of the reasons for requiring the removal, to the Arbitral Court, the Centre, the Arbitral Tribunal and all other parties. The Arbitral Court is to make its decision on the removal of an arbitrator within fifteen days of receipt of the written statement, unless—the arbitrator resigns from office; or all other parties agree to the removal of the arbitrator.[48]

While the creation of an independent arbitral court and an arbitral tribunal with expanded mandate is laudable as a positive step towards encouraging international arbitration in Kenya, there is the potential of dissatisfied parties, especially of Kenyan nationality, challenging the same on grounds of ousted jurisdiction of national courts. While international commercial arbitration mostly takes place in a country that is neutral, it may not be uncommon to have nationals taking part. The most likely challenge would be where an arbitration is international by virtue of the subject matter being in a foreign country, while both parties may be locals. In the Tanzanian case of *Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited v. Tanzania Electric Supply Company Limited (Tanzania*),[49] it was held that the intervention by the national courts is automatic, regardless of any clause in the arbitration agreement, which purports to oust or waive the jurisdiction of courts. Such a position by Kenyan courts is likely to interfere with the functions of NCIA. From the NCIA Act, it appears that the national courts shall only come in during recognition and enforcement of the arbitral award, although this is likely to create confusion especially in case of dissatisfied party (ies).

It is, therefore, important for the NCIA to trend this ground carefully so as to safeguard its independence from domestic interference. This is especially important if the Centre is to compete with other regional independent institutions. For instance, the East African Court of Justice Arbitration Rules, 2012 provide under Rule 36 for finality and enforceability of Award. It states that subject to Rules 33[50], 34[51] and 35[52], the arbitral award shall be final. It also states that by submitting the dispute to arbitration under Article 32 of the Treaty, the parties shall be deemed to have undertaken to implement the resulting award without delay. It is noteworthy that the East African Court of Justice is independent of any national laws as far as its activities are concerned, and the only

[47] Rule 11. (1) A party may require the removal of an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
(2) A party may remove an arbitrator it has nominated, or in whose appointment it has participated, only for reasons of which the party becomes aware after the appointment has been made.
[48] Rule 11(6).
[49] Dowans Holding SA & Anor v Tanzania Electric Supply Co Ltd [2011] EWHC 1957 (Comm), Case No: 2010 Folio 1539.
[50] Rule 33: Interpretation of the Award.
[51] Rule 34: Correction of the Award.
[52] Rule 35: Additional Award and Review of the Award.

instance where national courts may come in would be during recognition and enforcement of its awards, as foreign or international arbitral awards. There are those who believe that the tribunal can handle contested issues of arbitral procedure and the courts of the seat be available for supportive and supervisory action if the parties require, in accordance with the lex arbitri.[53] Others argue that the typical statute governing arbitration provides for cooperation between the judicial and arbitral processes, limits judicial supervision of awards, and perhaps most importantly divests courts of the jurisdiction to hear matters submitted to arbitration in recognition of the legitimate exercise of contractual rights between parties.'[54]

NCIA must scrupulously maintain a reputation of independence and non-ambiguity in the guiding laws and regulations. The possible confusion in the role of court may therefore need to be clarified so that it will be clear to the parties, from the onset, what they are submitting to.

3.7 NCIA and ADR Mechanisms

The NCIA Act provides that nothing in the 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.[55] NCIA may benefit from teaming up with other local and regional institutions that specialize in ADR mechanisms, for cooperation in training and building capacity in the region. This is important if the Centre is to achieve some of its main functions: to provide training and accreditation for mediators and arbitrators; to educate the public on arbitration as well as other alternative dispute resolution mechanisms; and to enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre achieve its objectives.[56]

Building capacity in all the major ADR mechanisms is important to ensure that those who approach the Centre in need of other services other arbitration have confidence in the institutional capacity. There are those who believe that parties to international contracts often fail to face squarely the issue of whether they really want arbitration rather than either court litigation or nonbinding procedures such as conciliation and mediation.[57] This

[53] Henderson, A., 'Lex Arbitri, Procedural Law and the Seat of Arbitration: Unravelling the Laws of the Arbitration Process,' op cit, p. 910; See also Lew, J.D., Does National Court Involvement Undermine the International Arbitration Process? AM. U. INT'L L. REV., Vol. 24, 2009, pp. 489-537.
[54] Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p.947.
[55] S. 24.
[56] S. 5, No. 26 of 2013.
[57] Park, W.W., 'Arbitration of International Contract Disputes,' The Business Lawyer, Vol. 39, No. 4 (August 1984), pp. 1783-1799 at p. 1783.

may be attributed to an ambiguous arbitration agreement or clause or the nature of the subject matter, especially in light of arbitrability.[58] It is also possible to combine conciliation and international arbitration where circumstances so demand.[59] Indeed, the International Chamber of Commerce Court of Arbitration provides for optional conciliation in its rules.[60] Even if the NCIA Arbitration Rules do not have such express provisions on conciliation, it can still exploit the provisions of NCIA Act which require the Centre and Court to adopt and implement ADR mechanisms.[61]

It is also commendable that the institution already has in place the Nairobi Centre for International Arbitration (Mediation) Rules, 2015.[62] The Mediation Rules are to apply to both domestic and international mediation proceedings.[63] Thus, parties to a domestic or international commercial contract may choose to engage in mediation to resolve their dispute under NCIA. It is also possible to employ both mediation and arbitration in a contract as conflict management mechanisms, since the rules do not restrict parties from doing so. Under the doctrine of party autonomy, it is possible to exploit the advantages of both mechanisms where necessary. NCIA should take advantage of this possibility to afford parties the best option to their dispute.

It may therefore be important to ensure that NCIA is well equipped in offering services in the various ADR mechanisms.

3.8 Opportunities for Nairobi Centre for International Arbitration

It has convincingly been argued that arbitration involving parties from developing countries will only work effectively if it is tailored to satisfy the needs and legitimate expectations of all parties.[64] The belief comes from the perception that many developing countries view existing forms of international arbitration as mechanisms which primarily serve the interests of Western entities. Thus, unless the developing countries are reasonably persuaded that arbitration will fairly protect their interests, its potential will remain unrealized in the developing world. NCIA, in collaboration with other regional

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[58] See Curtin, K.M., 'Redefining Public Policy in International Arbitration of Mandatory National Laws,' Defense Counsel Journal, April, 1997, pp. 271-284 at p. 271.

[59] See van den Berg, A.J. (ed), New Horizons in International Commercial Arbitration and Beyond, (Kluwer Law International, 2005), pp. 480-481; Schneider, M.E., 'Combining Arbitration with Conciliation,' available at *http://www.nigerianlawguru.com/articles/arbitration/COMBINING%20ARBITRATION%20WITH%20CONCILIATION.pdf* [Accessed on 10/03/2016].

[60] 'Rules for the ICC Court of Arbitration,' Berkeley Journal of International Law, Vol. 4, Issue 2, Article 17, pp. 422-432 at pp. 422-424.

[61] S. 24, S. 26 of 2013.

[62] Legal Notice No. 253, Kenya Gazette Supplement No. 205, 18th December, 2015.

[63] Ibid, Rules 4 & 5.

[64] Mclaughlin, J.T., 'Arbitration and Developing Countries,' The International Lawyer, Vol. 13, No. 2 (Spring 1979), pp. 211-232 at p. 231.

institutions can take up the challenge and offer tailor made services for the regional and international clientele. It is arguable that they are in a better position to understand and address the interests and expectations of the locals, without necessarily appearing like they are favouring them in the process.

The familiarity with the cultural setting may boost the chances of acceptance or recognition of award by parties thus saving on time. It may also inform parties' choice of ADR mechanism to be employed, and NCIA Act contemplates such a situation. It has been argued that culture can profoundly affect a dispute resolution process. This is because far from being merely a function of practical and procedural efficiency contemplated by disputing parties, the choice of a dispute resolution mechanism -- whether mediation, arbitration or litigation -- within the forum of a certain society is strongly influenced by the peculiarities of tradition, culture, and legal evolution of that society.[65] Thus, it is possible to argue that NCIA is likely to get most of the clients in need of other ADR services, apart from international arbitration, from the local business community. They may take advantage of the proximity (thus saving on costs), and the feeling that the experts in NCIA are more likely to appreciate the nature of their dispute in local context, either out of having lived around the same area or having interacted with the local circumstances.[66]

Maintaining international standards is key if NCIA is to rise above the perceptions that typify the legal institutions in this region and country, namely, inter alia: unprofessionalism, corruption, institutional incapacity and lack of goodwill. While it is expected that the Centre will receive financial and technical support from the State and its machinery, this should not interfere with its functioning or discharge of its statutory duties. It should retain its independence as far as neutrality, predictability,

[65] De Vera, C., 'Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China,' Columbia Journal of Asian Law, 18, 2004, p. 149. Cf. Barkett , J.M. & Paulsson, J., The Myth of Culture Clash in International Commercial Arbitration, FIU Law Review, Vol. 5, No.1 (2009).

[66] See Kohler, G.K. & Kun, F., 'Integrating Mediation into Arbitration: Why It Works in China,' Journal of International Arbitration, Vol. 25, No. 4, 2008, 479–492; See also Goldsmith, J.C., et al, ADR in Business: Practice and Issues Across Countries and Cultures, Volume 2, (Kluwer Law International, 2011); See also LeBaron, M., "Culture and Conflict." Beyond Intractability. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: July 2003 <http://www.beyondintractability.org/essay/culture-conflict>. [Accessed on [Accessed on 10/03/2016]; 'International Construction Arbitration: When Cultures Collide,' Trust the Leaders, Issue 1, Fall 2002. Available at *http://www.sgrlaw.com/resources/trust_the_leaders/leaders_issues/ttl1/594/* [Accessed on [Accessed on 10/03/2016].

professionalism and competitiveness are concerned. Foreigners as well as locals should be able to approach the institution for arbitration services without any reservations.[67]

One of the ways that NCIA can establish and maintain international standards is through forging strategic partnerships with other players in the sector-national, regional and international. Locally, it can liaise with such institutions as the Chartered institute of Arbitrators (Kenya branch) (CIArb-K), Centre for Alternative Dispute Resolution (CADRE), Kenya National Chamber of Commerce and Industry, Strathmore Dispute Resolution Centre (SDRC); and the Universities. While institutions such as CIArb-K, CADRE, SDRC and Universities may not be institutional arbitrations in the strict sense of the word, they can play a major role, through collaborative activities, in facilitating training, accreditation and making available a pool of competent practitioners. They can also be useful in creating public awareness on ADR mechanisms and international arbitration. This is besides collaboration with other regional and international arbitral institutions such as the Kigali International Arbitration Centre, Mauritius International Arbitration Centre (MIAC-LCIA), Cairo Regional Centre for International Commercial Arbitration (CRCICA); Kuala Lumpur Regional Centre for Arbitration (the KLRCA); and Lagos Regional Centre (the RCICAL) amongst others. Such collaborations and cooperation can go a long way in boosting NCIA's profile as well as the other institutions'. The relationship between the national courts and the arbitral Court established under NCIA Act, also ought to be clearly defined so as to promote predictability and confidence in the Centre.

The international business community may only trust the institution where they are assured that national courts will not unnecessarily interfere with the process. The Centre's administrative Board ought to ensure that the Centre will not be associated with the perceived court inefficiencies as this may adversely affect its development and growth. The Centre should seek to paint a better image, one associated with efficiency, neutrality and general professionalism.

4. Conclusion

Kenya is hoping to become a middle-level income economy by the year 2030 and one of the ways through which it can achieve this is increased regional and international trade.[68] As already pointed out, this often comes with commercial disputes which must be dealt with if trade is to thrive. As such, it is important for the country to have in place effective

[67] See Kirby, M., 'International Commercial Arbitration and Domestic Legal Culture,' Australian Centre for International Commercial Arbitration Conference, Melbourne, 4 December 2009, p. 2. Available at *http://www.michaelkirby.com.au/images/stories/speeches/2000s/2009+/2419.Speech_Acica_Conf.Melbourne_December_2009.pdf* [Accessed on 10/03/2016].

[68] Vision 2030, Republic of Kenya, (Government Printer, Nairobi, 2007). Vision 2030 is based on three main pillars: economic, social, and political.

conflict management mechanisms. This presents NCIA a good opportunity to establish itself and the country as the preferred destination for international arbitration. With support from the relevant stakeholders such as the Government, Judiciary, practitioners, amongst others, NCIA has the potential to achieve all its statutory obligations and even surpass the expectations to join the world's most respected international arbitral institutions. NCIA has the potential to become the one stop shop for the effective management of commercial disputes.

The Lawyer as a Negotiator, Mediator and Peacemaker in Kenya

Abstract

This paper critically examines the role of lawyers in the mediation and negotiation processes in Kenya. Lawyers are trained to help the larger society in conflict management through various mechanisms which include litigation, negotiation, mediation, arbitration, adjudication, and a number of other hybrid mechanisms. The discussion herein focuses on their role in negotiation, mediation and peacebuilding. The paper analyses the attitude of actors in negotiation and mediation in comparison to litigation. It explores how, given the flexible nature of negotiation and mediation as peace building tools, lawyers can effectively participate in the processes to facilitate realisation of a secure and prosperous Kenyan society based on the rule of law and harmony.

1. Introduction

With the promulgation of the current Constitution of Kenya 2010, there has been a renewed push for mainstreaming and use of Alternative Dispute Resolution Mechanisms (ADR) in conflict management in the country. This presents both a challenge and an opportunity for today's lawyer to get involved in the ADR processes as a matter of necessity. Courts have moved more towards compulsory referral of matters to ADR as a legal requirement[1] and this practice requires that if the lawyer is to remain as an all-round conflict management expert, then they must be willing to venture into the ADR arena.
As promoters of a peaceful and just society, lawyers can play a major role in facilitating negotiation and mediation as tools of conflict management in the country for peace building and development.

Through peace building, lawyers can go a long way in tackling injustice in non-violent ways and to transform the structural conditions that generate deadly conflict, and ultimately help in not only eradicating conflicts, but also in building communities, institutions, policies, and relationships that are better able to sustain peace and justice. The end result would be development and security for all. It is noteworthy that some of the internal human conflicts that are often experienced in parts of Kenya can be addressed through ADR and specifically negotiation and mediation as opposed to litigation as attested to by the Kofi Annan-led 2008 mediation process.[2]

This discourse focuses on how best the lawyers can participate in negotiation and mediation processes with a view to promoting a peaceful and just society for prosperity. Arguably, successful and comprehensive peace building requires the consolidation of internal and external security, the strengthening of political institutions and good

[1] Civil Procedure Act, Cap 21, Laws of Kenya- See Order 46, r. 20; S. 59B.

[2] ReliefWeb, 'Kenya: Mediation is making progress - Kofi Annan,' Report from Government of Kenya, 15 Feb 2008, available at *http://reliefweb.int/report/kenya/kenya-mediation-making-progress-kofi-annan [Accessed on 1/08/2015];* See also G. Machel & B. Mkapa, Back from the Brink: the 2008 mediation process and reforms in Kenya, (African Union Commission, 2014).

governance, promotion of economic, social rehabilitation, as well as transformation and development.[3] Going by the nature of their job, lawyers have a duty to contribute to the general stability and social development of a society through effective conflict management. At the international level, the United Nations encourages a peaceful approach to management of conflicts amongst States. Article 33 of the Charter of the United Nations states that

> *"the parties....should, 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]

The special place of ADR mechanisms in achieving a peaceful society is also reflected in Kenya's constitutional provisions which encourage the use of ADR in dealing with community conflicts.[5] The Constitution of Kenya 2010 generally recognises the use of Alternative Dispute Resolution Mechanisms (ADR) in conflicts management by Kenyan courts.[6] It provides that in exercising judicial authority, the Kenyan courts are to be guided by key principles which include, *inter alia,* promotion of alternative forms of conflict management including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.[7] As promoters of a peaceful and just society, lawyers can play a major role in facilitating negotiation and mediation of conflicts in the country for peace building and resolution of the same. Lawyers can effectively utilise these mechanisms as peacebuilding tools, even as they serve their purpose as problem solvers.

2. Lawyers and Society

Lawyers are viewed as social engineers, and as such, a lawyer's workspace is expected to extend beyond the courtroom or law office and into the wider society.[8] Law and lawyers form a very important part of the society, due to the role they play in shaping the human society.[9] It has been argued that law is not an abstract concept but a product of the internal conflicts in a society, created to ensure harmony and co-existence. As such, lawyers who are part of that society are expected to possess and demonstrate knowledge, skills and compassion and be rich enough to encompass the societal dynamics including economics,

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[3] F.K. Mulu, International Peace: The Nexus between Security and Development, Catholic University of Eastern Africa Press, 2014. p.8.
[4] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[5] Art. 60(1) (g), 67(2) (f), 159(2) (c).
[6] Art. 159(2).
[7] Art. 159(2) (c).
[8] L. O. Uzoechina, 'Appropriate Dispute Resolution: The Search for Viable Alternatives to Litigation and Arbitration in Nigeria,' (Scribd, 2009), available at *http://www.scribd.com/doc/24492949/Appropriate-Dispute-Resolution* [Accessed on 1/08/2015].
[9] R.C. Clark, 'Why So Many Lawyers? Are They Good or Bad?' Fordham Law Review, Vol. 61, Issue 2, 1992, p.277.

counseling, negotiations and management.[10] It is important to point out that development is not feasible in a conflict situation and such conflicts and disputes must be managed effectively and expeditiously for development to take place.[11] The effects that these conflicts have on society, the economy and development are severe.[12] Therefore, lawyers play the critical role of upholding law and order in the society, in collaboration with other stakeholders, for holistic development in Kenyan society.

The foregoing expectations from clients imply that clients expect lawyers to possess more than legal skills; they expect lawyers to be problem-solvers, regardless of the nature of the problem, provided it has what they consider to be legal aspects however remote.[13] However, this is not always the case with lawyers. This is partly occasioned by the reality that the core of legal education is mainly legal analysis through the case method. The case method teaches problem solving by asking, in one situation after another, about rights and liabilities of the parties.[14] It relies on a given set of facts and precedents, to determine rights and liabilities of the parties, and although this provides the essential foundation for the lawyer's core task of advising clients about the legal consequences of particular courses of action, it does not take proper consideration of situations where the expected end game is not only determination of rights and liabilities of the parties, but also restoration or *preservation of relations, be they social or commercial in nature* (emphasis added). Law schools often leave out other useful skills that are needed for dealing with problems arising in the today's dynamic world.

3. Negotiation and Mediation Processes

Mediation refers to a method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussion and the flow of information, and thus aiding in the processes of reaching an agreement.[15] It is important to point out that the main difference between mediation and negotiation is that mediation is a conflict resolution process in which the parties negotiate with the aid of a neutral third-party. They both work towards preserving relationships between the parties by arriving at mutually acceptable outcomes of the process. Mediation is actually negotiation with the assistance of a third party. This is because mediation is a continuation

[10]A.O.Weda, The Ideal Lawyer, (LawAfrica Publishing (K) Ltd, 2014), p.21.

[11] See K. Muigua & F. Kariuki, 'ADR, Access to Justice and Development in Kenya,' Strathmore Law Journal, Vol. 1, No.1, June 2015, pp. 1-21, p. 1.

[12] S. Loode, et al, 'Conflict Management Processes for Land-related conflict,' (Pacific Islands Forum Secretariat, Fiji, 2009), p.12, available *at http://espace.library.uq.edu.au/view/UQ:196546* [Accessed on 1/08/2015].

[13] R.C. Clark, 'Why So Many Lawyers? Are They Good or Bad?' op cit, p.277.

[14] P. Brest, 'The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers,' 58 Law and Contemporary Problems, Vol. 58, Summer 1995, pp. 5-17, p.7, available at *http://scholarship.law.duke.edu/lcp/vol58/iss3/3* [Accessed on 30/07/2015].

[15] J. Bercovitch, "Mediation Success or Failure: A search for the Elusive Criteria," Cardozo Journal of Conflict Management, Vol. 7, 289, p. 290.

of the negotiation process by other means whereby, instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the negotiations between the parties. The underlying point in the mediation process is that it arises where the parties to a conflict have attempted negotiations, but have reached a deadlock.[16]

The mediator's role in such a process is to assist the parties in the negotiations although they cannot dictate the outcomes of the negotiation process.[17] A mediator is one "who comes between the conflicting parties with the aim of offering a solution to their dispute and/or facilitating mutual concessions." However, such a person must be acceptable to both parties and should have no interest in the dispute other than achievement of a peaceful settlement.[18] They have also been described as a third party who is independent, impartial, and has no stake in the outcome of the process; helps parties in dispute to clarify issues, explore solutions and negotiate their own agreement and does not advise those in dispute, but helps people to communicate with one another.[19]

Conflict resolution processes such as negotiation and mediation delve into the roots or the underlying causes of the conflict and relationships and are thus concerned with removing them altogether.[20] Due to their peculiar nature, conflicts are well addressed through resolution by the non-coercive, non-legal or non-adjudicatory mechanisms.[21] Resolution is the mutual construction of a relationship which is legitimate because the needs of each party are satisfied. It is only through these mechanisms that the mutual needs of the parties and removal of the underlying causes of the conflict can be satisfied.[22] On the other hand, Disputes develop when conflicts are not or cannot be effectively managed.[23] They are about interests or issues. Interests are negotiable, divisible and finite whereas needs

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[16] M. Mwagiru, Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

[17] K. Muigua, Resolving Environmental Conflicts through Mediation in Kenya Ph.D Thesis, 2011, (Unpublished, University of Nairobi), p.43.

[18] M. Barkun, "Conflict Resolution through Implicit Mediation," Journal of Conflict Resolution, VIII (June, 1964), p. 126.

[19] A.W. Gichuhi, "Court Mandated Mediation-The Final Solution to Expeditious Disposal of Cases," Chartered Institute of Arbitrators, Alternative Dispute Resolution, Vol. 2, No. 1, 2014, pp. 135-180 at p. 137.

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

[21] L. A. Swatuk, 'Conflict Resolution and Negotiation Skills for Integrated Water Resources Management,' Cap-Net Training Manual, July, 2015, (International Network for Capacity Building in Integrated Water Resources Management, 2015), available at http://www.academia.edu/216405/Conflict_Resolution_and_Negotiation_Skills_for_Integrated_Water_Resources_Management [Accessed on 1/08/2015].

[22] K. Cloke, "The Culture of Mediation: Settlement vs. Resolution," The Conflict Resolution Information Source, Version IV, December, 2005.

[23] P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, (CIArb, London, 2002), pp.12-13.

are not. Conflicts and disputes arise where two or more people or groups who perceive their rights, interests or goals to be incompatible, communicate their view to the other person or group. Similarly disputes can be based on the interests, rights or the power imbalances in the society. These interests or issues can be negotiated and even bargained about.[24]

Since a dispute can be interest-based, rights-based or power-based the approaches in dealing with disputes are also varied. Where the dispute is interest-based the best approaches for dealing with it are negotiation and mediation. Where it is rights-based litigation is the best response and if it is power-based the use of force, threats, violence such as the one used by the police and the army would be the best response.[25]

It is necessary to understand the origins or sources of a dispute since if it is not addressed properly the chance for escalatory responses increases.[26] This can ultimately lead to violence and long-term fission of society. In certain types of disputes, such as those involving the use and access to natural resources, it should be noted that tensions keep recurring. Recurrence of a dispute over years could be a symptom of a much deeper conflict in which individuals or groups are embroiled.[27] In such cases the responses employed must take into consideration the interests, rights and power imbalances in the wider context of the dispute.[28] This would mean that the responses must target the dispute at various levels. Some responses could aim at settling the particular dispute, for example through adjudication mechanisms such as the courts and arbitration. Other intervention processes could aim at addressing the often much larger underlying causes of the dispute, for example through negotiations or mediation in the political process, involving the whole community or even a number of communities and which aim at airing grievances and inequalities which are perceived by different groups in the area.[29]

Litigation or judicial settlement and arbitration are the main power- and rights-based processes. They are dispute settlement mechanisms. Disputes are thus manageable using

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[24]A.B. Fetherston, "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op cit; M. Mwagiru, The Water's Edge: Mediation of Violent Electoral Conflict in Kenya, op cit, pp.36-38.

[25] Ibid.

[26] S. Loode, et al, 'Conflict Management Processes for Land-related conflict,' op cit, p.14.

[27] See generally, L. Owen, et al, "Conflicts over Farming Practices in Canada: The Role of Interactive Conflict Resolution Approaches," Journal of Rural Studies Vol.16, No.4, 2000, pp. 475-483; E.E. Osaghae, 'The persistence of conflict in Africa: Management failure or endemic catastrophe?' South African Journal of International Affairs, Vol. 2, Iss. 1, 1994, pp. 85-103.

[28] A. Engel & B. Korf, 'Negotiation and mediation techniques for natural resource management,' (Food and Agriculture Organization of the United Nations, Rome, 2005),
available at *http://www.fao.org/docrep/008/a0032e/a0032e00.htm#Contents* [Accessed on 31/07/2015].

[29] Ibid.

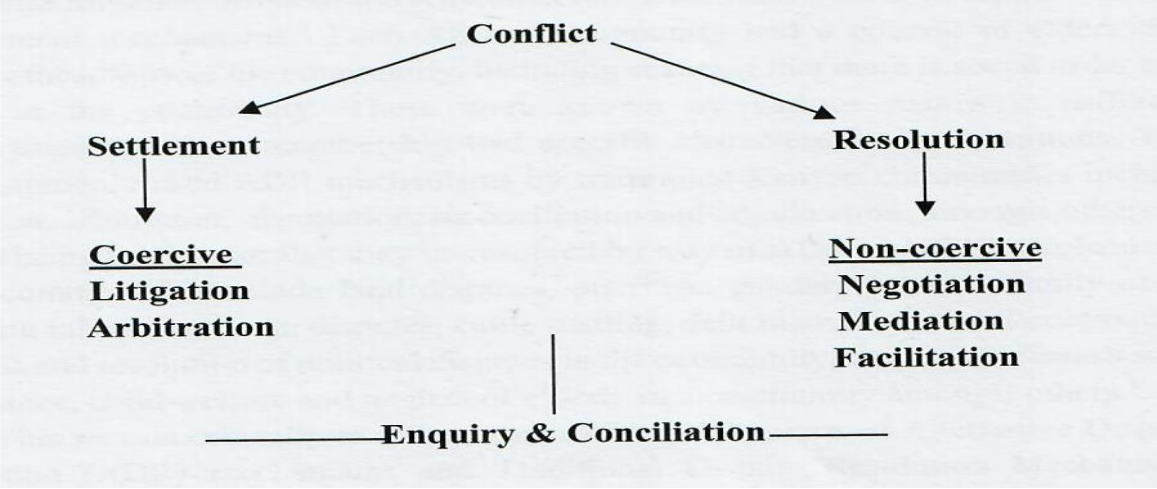
the adjudicatory or legal or coercive mechanisms such as courts and arbitration.[30] Both the power- and rights-based processes lead to results in which one side loses and the other side wins. These processes can lead to the issues in disagreement flaring up again. They can lead to resistance, violence and revolt as they are merely settlement mechanisms not addressing the underlying causes of the conflict.[31] Although rights-based dispute settlement feels fairer and less arbitrary than power-based processes, the outcome is zero-sum since one side must win and the other loses.[32]

On the other hand, Interest-based processes, can lead to win-win outcomes, in that they explore the real interests, goals and motivations of disputants and aim to develop a solution which mutually satisfies those needs. Interest-based processes are also more efficient at bringing about participant satisfaction, process fairness, effectiveness, efficiency, fostering of relationships and addressing power-based issues, all of which are important considerations in the conflict resolution process. [33]

As an opinion leader and peacebuilder in society, it is important that the contemporary lawyer in Kenya broadens their areas of practice and expertise to include out of court conflict management mechanisms and specifically, negotiation and mediation. These mechanisms can go a long way in enhancing lawyers' effectiveness as problem solvers in society. However, there are certain skills that any lawyer who wishes to engage in negotiation and mediation must acquire to enable them effectively participate in the process.

[30] See T.F. Burke, Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society, (Berkeley: University of California Press, 2002).
[31] M. Mwagiru, The Water's Edge: Mediation of Violent Electoral Conflict in Kenya, op cit, pp.36-38.
[32] Ibid.
[33] See L. Serge, et al, "Conflict Management Processes for Land-related conflict," A Consultancy Report by the Pacific Islands Forum Secretariat, op cit; K. Cloke, "The Culture of Mediation: Settlement vs. Resolution," The Conflict Resolution Information Source, op cit.

Fig. 1.1 Methods of Conflict Management



*__Source:__ The author

Figure 1.1 shows that there are certain methods of conflict management that can only lead to a settlement. Those that lead to a settlement fall into the category of coercive methods where parties have little or no autonomy over the forum, choice of the judges and the outcome. The coercive methods are litigation or judicial settlement and arbitration. It also shows the non-coercive methods (negotiation, mediation and facilitation) which lead to resolution. In the non-coercive conflict management methods the parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome. Conciliation and enquiry can be classified as coercive (when the reports emanating from them are enforced) and non-coercive for example when the reports are used as the basis for negotiation between the parties.

3.1 Lawyer in the Negotiation Process

Negotiation is one of the informal methods of conflict resolution, and one that offers the parties maximum control over the process.[34] It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.[35] As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests.[36]

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[34] See O. Animashaun & K. O. Odeku, 'Industrial Conflict Resolution using Court-connected Alternative Dispute Resolution,' Mediterranean Journal of Social Sciences, Vol. 5, No 16, July 2014, pp. 683-691, p. 685.

[35] United Nations Institute of Training and Research (UNITAR), 'Negotiations in Debt and Financial Management,' Document No.4, December 1994.

[36] R. Fisher, et al, Getting to Yes: Negotiating an Agreement without Giving In, (3rd ed., Random House Business Books, 2012), p. 27.

It has been observed that negotiations take place when both parties to a conflict lose faith in their chances of winning and see an opportunity for cutting losses and achieving satisfaction through accommodation.[37] Despite the popular and often misleading perception that negotiation which is classified as part of ADR is alternative to litigation, lawyers spend more time on settlement discussions than on research or on trials and appeals.[38] It is noteworthy that legal negotiation is conducted by agents (lawyer), rather than the principal (the client).[39] Arguably, this therefore places negotiation in a central point in the conflict management efforts and especially with regard to litigation process. In negotiation, the two parties directly and voluntarily exchange information back and forth, until the decision-maker makes his final decision.[40]

It has been observed that all lawyers negotiate, but few of them have either a conceptual understanding of the process or particular skills in it.[41] It is therefore suggested that if lawyers chose to specialise in negotiation, it would improve both their understanding of the process and the relevant skills.[42] There is a fundamental shift in lawyers' conduct, and especially ethical guidelines or rules when it comes to ADR. The lawyer must use different persuasive tactics when it comes to ADR as compared to the court process.[43]

It is suggested that instead of approaching negotiations as a battle with winners or losers, one can view negotiations as involving two parties, each with a problem that needs to be solved. By taking a collaborative rather than a competitive approach to negotiation, parties can attempt to find a solution satisfactory to both parties-making both sides feel like winners.[44] The outcome of a collaborative approach to negotiations is: improved relationships; a better chance of building trust and respect; self-confidence; more enjoyment; less stress; and more satisfactory results.[45] It is therefore imperative that when getting into negotiations, lawyers ought to have a mental shift from battling to win your

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[37] F.K. Mulu, The Role of Regional Organizations in Conflict Management: IGAD and the Sudanese Civil War, The Catholic University of Eastern Africa, 2008. p. xvii.
[38] M. Galanter, "Worlds of Deals: Using Negotiation to Teach about Legal Process," Journal of Legal Education,1984, 34, pp.28-276 at p. 269; See also A.B. Rubin, A Causerie of Lawyers' Ethics in Negotiation, 35 La. L. Rev. (1975), pp.577-578.
[39] R.H. Blumoff, "Just Negotiation," 88 Wash. U.L. Rev. 381 (2010-2011) at p. 381.
[40] M. Goltsman, et al, "Mediation, Arbitration and Negotiation," Journal of Economic Theory 144 (2009), pp.1397–1420 at 1398.
[41] F. Roger, "What about Negotiation as a Specialty," A.B.A. J., Vol. 69, 1983, p.1221, available at *http://heinonline.org/HOL/LandingPage?handle=hein.journals/abaj69&div=198&id=&page=* [Accessed on 5./07/2015].
[42] Ibid.
[43] See S.J. Schmitz, 'What Should We Teach in ADR Courses?: Concepts And Skills For Lawyers Representing Clients In Mediation,' Harvard Negotiation Law Review, Vol.6, Spring 2001, p.289.
[44] A. French, Negotiating Skills, (Alchemy, 2003), p. viii.
[45] Ibid.

initial position, to adopting approaches that help them genuinely look for more creative ways where a 'win-win' outcome can be achieved.[46]

3.1.1 Methods of Negotiation

There are various approaches to negotiation which include: positional negotiation; principled negotiation; and interest-based negotiation.[47] Positional bargaining is not the best form of negotiation because arguing over hardline positions produces unwise agreements, is inefficient, endangers an ongoing relationship and also leads to formation of coalition among parties whose shared interests are often more symbolic than substantive.[48]

Principled negotiation on the other hand, decides issues on their merits rather than through a haggling process focused on what each side says it will and will not do. It suggests that a negotiator should look for mutual gains whenever possible, and that where various interests conflict, negotiators are encouraged to have a result based on some fair standards independent of the will of either side.[49] Principled negotiation, which is the focus of this discussion, allows parties to obtain their fair share while still protecting them against exploitation of such fairness.[50] Negotiation as discussed in this paper is meant to be a tool for peacebuilding. Accordingly, the aim in negotiations is to arrive at "win-win" solutions to the dispute at hand.

3.1.2 Negotiation Skills for Lawyers

a. Flexibility in Negotiation

It has been rightly observed that the most important characteristic of an effective negotiator is flexibility, that is, the ability to adapt to the situation and adopt a different approach as the circumstances demand.[51] Negotiating flexibility can also be defined as any action taken to facilitate a movement in the direction of a mutually acceptable agreement.[52] It is important for lawyers in negotiation to remember that the aim of negotiation is to look out for mutually satisfying outcomes and as such, it is important to be flexible in the process, instead of adopting hardline positions, so as to facilitate resolution.

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[46] Ibid.
[47] R. Fisher, et al, Getting to Yes: Negotiating an Agreement without Giving In, op cit, pp. xxvi-xxvii.
[48] Ibid, p.23.
[49] Ibid.
[50] Ibid, p. xxvi.
[51] J.E. Raasch, 'Win-Win Negotiation Skills for Lawyers: The Art of Getting What You Both Want,' available at *http://www.cba.org/cba/PracticeLink/WWP/negotiation.aspx* [Accessed on 30/07/2015].
[52] N.B. Atiyas, 'Mediating Regional Conflicts and Negotiating Flexibility: Peace Efforts in Bosnia-Herzegovina,' The Annals of the American Academy, Vol.542, November 1995, pp. 185-201, at pp. 186-7.

b. People Skills

It is important to point out negotiations are always about two things, namely, people and issues. Lawyers were taught in law school to think like lawyers, and were discouraged from thinking about anything that was emotional. They were also taught skills of litigation, in drawing fine distinctions that focus on the differences between people while debating positions rather than engaging in dialogue focused on understanding each other.[53]

It is therefore important that lawyers, while engaged in negotiations, should not get carried away by issues to the extent of forgetting the people involved therein. It is essential that one develops or acquires people skills to improve the way they handle people since this, normally informs the perception parties have towards the negotiator.[54] It is important to separate people from the issues. A negotiator ought to maintain a positive and friendly attitude towards the other party while at the same time being tough about working to find a solution that satisfies both parties' needs.[55] The approach should be different from that exhibited in adversarial settings since addressing parties' personal issues such as feelings is part of the solution process.[56]

c. Listening and Questioning

Listening and questioning skills are important for a negotiator mainly because they help one to understand the issues and underlying interests and build relationships, as well as asking the right questions.[57] It is important to remember that if parties feel that their needs are genuinely understood and being addressed, chances of parties accepting the outcome are high, even if the same is achieved by way of reasonable compromise by parties involved. The knowledge of available options, openness and the willingness to accept a compromise are the main factors contributing to a real and voluntary agreement.[58] As such, it is important that negotiators polish their listening and questioning skills so as to understand the issues to be addressed.

d. Handling Emotions

At times, pressure builds around the negotiator to succeed in negotiation processes. It is important that one develops the skill to keep emotions in check since they can easily

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[53] J.K. Wright, 'Chapter One of Lawyers as Peacemakers, Practicing Holistic, Problem-Solving Law,' (Resourceful Internet Solutions, 2010), available at *http://www.mediate.com/articles/wrightK1.cfm* [Accessed on 1/08/2015].

[54] A. French, Negotiating Skills, op cit, p.11.

[55] Ibid, p. 48.

[56] R. Fisher, et al, Getting to Yes: Negotiating an Agreement without Giving In, op cit, p.21; See also D. Carneiro, et al, 'The Conflict Resolution Process,' Law, Governance and Technology Series, Vol. 18, 2014, pp. 163-186.

[57] A. French, Negotiating Skills, op cit, p.12.

[58] D.J. Galligan, Due Process and Fair Procedures: A Study of Administrative Procedures [1996] p.383.

hamper the ability to think straight, be creative or get accurate information.[59] It is also important to handle the other party or parties well to avoid making them feel misunderstood, and in the process causing a flare up of emotions which would affect the process. Having the ability to identify the psychological dimensions of the conflict can effectively assist in concluding negotiations and reach mutually acceptable solutions.[60]

e. Building Rapport

Building rapport by the negotiators on both sides can help keep the process going, to the benefit of all parties. One should start the negotiation by establishing rapport and mutual interests, while focusing on parties' interests and not positions.[61] It is important for the negotiator to come up with creative options based on both sides' interests.[62] Negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.[63]

3.2 Mediation in Kenya

Mediation is preferred over litigation as it offers some advantages over adversary processing namely: it is cheaper, faster, and potentially more hospitable to unique solutions that take more fully into account nonmaterial interests of the disputants; it can also educate the parties about each other's needs and those of their community.[64] Thus, it can help them learn to work together and to see that through cooperation both can make positive gains.[65] Law and mediation are inseparable in that most commercial disputes referred to mediation are legal in nature. Besides, parties usually resort to mediation after first engaging the legal remedies available. Additionally, due to the non-binding nature of mediation, parties appeal to legal avenues afterwards to render the decisions thereof binding and enforceable. Indeed, in recent times the trend towards having mediation provided for by law has also emerged.[66]

However, parties in litigation can engage in mediation outside the court process, then move the court to record a consent judgment, a procedure that exists as a remote form of court-annexed mediation. Parties who have presented their cases to court or about to do so get into mediation under the supervision of the court.[67] A successful mediation is then

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[59] A. French, Negotiating Skills, op cit, p.62.
[60] K. Muigua, Resolving Conflicts through Mediation in Kenya, op cit, pp. 110-111.
[61] A. French, Negotiating Skills, op cit, p. 49.
[62] Ibid, p. 50.
[63] M. Mwagiru, Conflict in Africa; Theory, Processes and Institutions of Management, op cit, pp. 115-116.
[64] L.L. Riskin, 'Mediation and lawyers,' Ohio State Law Journal, Vol.43, 1982, pp.29-60 at p.34.
[65] Ibid.
[66] Civil Procedure Act, Cap 21, Laws of Kenya. Order 46; S. 59B. These provisions envisage court-annexed mediation.
[67] Kathy, "What is court-annexed mediation?" Available at *http://www.janusconflictmanagement.com/2011/10/q-what-is-court-annexed-mediation/* [Accessed on 27/06/2015].

made binding through the recording of a consent in Court.[68] On the other hand, parties in a dispute that is not before a court may undertake mediation and conclude the mediation agreement as a contract *inter partes* enforceable and binding as between them, so long as it abides by the provisions of the Law of Contract Act.[69]

Currently, there are efforts by the legal fraternity in Kenya and other parties to enhance legal and institutional frameworks governing mediation in general. The Civil Procedure Act[70] provides for mediation of disputes.[71] The Act was amended to introduce the aspect of mediation of cases as an aid to case management for the streamlining of the court process.[72] This amendment of the Act required the setting up of a Mediation Accreditation Committee by the Chief Justice to determine the criteria for the certification of mediators, propose rules for the certification of mediators, maintain a register of qualified mediators, enforce such code of ethics for mediators as may be prescribed and set up appropriate training programmes for mediators.[73] The Chief Justice has since appointed Members to the Committee and had them gazetted.[74]

Under customary law, mediation is applied in resolution of many disputes in Kenya. The most prevalent ones are boundary conflicts and family conflicts, where in both cases and particularly boundary conflicts, parties in dispute bring the matter before a panel of elders who are drawn from respected members of the society. The elders listen to the parties and encourage them to come to a consensus. This serves to permit access to justice for the aggrieved parties as the consensus reached is binding, and various communities have internal enforcement mechanisms widely accepted by the given society.[75] It is however noteworthy that informal mediation may not require the use of writing although this may change with the codification of mediation rules.

3.2.1 Lawyers and the Mediation Process

As already noted, mediation applies to different fields, with some common elements and some differences for each of its specialties. However, its main fields of application are business/commerce, environmental disputes, family disputes and minor forms found in other fields. Indeed, it is noteworthy that mediation has been made the *primary* conflict

[68] S. 59B (1).
[69] Cap 14, Laws of Kenya.
[70] Cap 21, Laws of Kenya.
[71] Ss. 2 and 59 Civil Procedure Act as Amended by the Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, (Government Printer, Nairobi, 2012), at pp.1092-1097.
[72] Ibid.
[73] S. 59 A (1) and (2) of the Civil Procedure Act.
[74] Kenya Gazette, Vol. CXVII-No. 17, Gazette Notice No. 1088, Nairobi, 20th February, 2015, p. 348.
[75] K. Muigua, Resolving Conflicts through Mediation in Kenya, (Glenwood Publishers, 2012). pp. 21-22.

management process in family law in Australia and is increasingly being promoted in other legal contexts.[76]

Mediation is a useful and effective tool to resolve current conflicts and prevent future disputes. Mediation has a number of distinct advantages and unlike litigation, there are only parties in mediation and not adversaries. Mediation is associated with the bonus feature of providing speedy resolution of conflicts at low cost while at the same time preserving relationships. It also provides empowerment as it gives all involved parties a share of responsibility for a negotiation and develops in them the ability to make an independent contribution to a dispute's solution. In addition, mediation can open a dialogue between parties and also identify alternative solutions towards a win for all parties.[77]

In relation to litigation, mediation is usually faster, more cost-effective, private and confidential, and it gives participants the chance to create their own agreement since the outcome is entirely dependent on the parties' concessions. Mediation also creates the appropriate environment to address the conflict and this may also result in an understanding on how to deal with similar issues should they arise in future.[78]

The foregoing advantages however, do not mean that mediation has no demerits. Its success lies on the willingness of the parties to make the necessary concessions.[79] Secondly, mediation can only be as effective as the parties wish it to be and this is governed by their immediate situation.[80] It is also non-binding in nature and parties have sometimes used it merely as a delaying technique in the negotiation process or to obtain more information about the other party's case.[81]

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[76] D. Bagshaw, "Mediation, human rights and peacebuilding in the Asia-Pacific," p. 195 in R.G., Garbutt (ed.), Activating Human Rights and Peace: Universal Responsibility Conference 2008 Conference Proceedings, Byron Bay, NSW, 1-4 July, 2008, (Centre for Peace and Social Justice, Southern Cross University, Lismore, NSW, 2008).

[77] UNESCO-IHP, 'Alternative Dispute Resolution Approaches and Their Application in Water Management: A Focus On Negotiation, Mediation And Consensus Building,' available at *http://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_background_paper.pdf* [Accessed on 30/07/2015]; See also M. Considine, 'Beyond Winning: Unlocking Entrenched Conflict Using Principles and Practices of Negotiation in the Mediation Room,' p.12, available at *http://eprints.maynoothuniversity.ie/5840/1/M.Considine_Final_14th_Feb.pdf* [Accessed on 30/07/2015].

[78] UNESCO-IHP, 'Alternative Dispute Resolution Approaches and Their Application in Water Management: A Focus on Negotiation, Mediation And Consensus Building,' op cit, p.12.

[79] J.G. Merrills, International Dispute Settlement, Cambridge University Press, 1991, p. 39.

[80] S. Yahaya, 'Is Mediation a Viable Option for resolving International Disputes?' (University of Dundee, Centre Energy, petroleum and Mineral Law and Policy), p.16, available at *www.dundee.ac.uk/cepmlp/gateway/files*. [Accessed on 30/06/2015].

[81] See C. Moore, The Mediation Process: Practical Strategies for Resolving Conflict, 2nd ed., (San Francisco: Jossey-Bass Publishers, 1996); See also L. J. Ravdin, 'Coping with the Difficult Lawyer in Settlement Negotiations,' The Complete Lawyer, Vol. 13, No. 2, Spring 1996.

It has been observed that given the flexible nature of mediation as a conflict resolution mechanism, it is the attitude adopted towards it in a legal system that determines the roles lawyers play in mediation and their effectiveness in the same.[82] It is important to point out that the term 'lawyer' is used in this discussion in its broader term to mean anyone whose profession is about the law (law professors, attorneys, notaries, legal officers, non-practicing members of the legal profession, judges, amongst others) as opposed to only advocates who are lawyers admitted to the bar and entitled to and represent persons in courts of law.

Arguably, involvement of lawyers in the process can help surmount the limitations highlighted above. However, this calls for the lawyers to understand the difference between mediation and adversarial advocacy. The lawyers also have to be committed to deliver client satisfaction without allowing themselves to be used unprofessionally by the clients.[83] That way, the lawyers can gauge their client's objectives in mediation and judge whether the same are sustainable. The lawyers stand to give advice to their clients on their case and what they can gain if they utilize mediation so that the client does not enter mediation under the illusion that there is a boon awaiting them. Lastly, the lawyers can help in reducing the final product of mediation into a binding instrument and therefore ensure the whole process is not rendered futile.[84]

The question that arises therefore is: Considering the general perception that mediation and other ADR methods are still viewed as alternatives to law and lawyers, how come the presence of lawyers in mediation is still inevitable? Invariably, lawyers end up at the mediation table for a number of reasons.

To begin with, disputes usually come with lawyers involved. It may happen that an advocate is already on record if the dispute has reached the litigation arena. Further, if the mediation is triggered by a contractual clause mandating mediation as a precondition to the filing of lawsuit, the lawyer is usually already part of the remedial process. In fact, the real world scenario is that many, if not most, mediations are initiated by lawyers. After an assessment of the client's case, and in particular the relationship of the parties, the lawyer

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[82] Y. Shamir, 'Alternative Dispute Resolution Approaches and Their Application,' (Israel Center for Negotiation and Mediation, 2003), p.33, available at *http://webworld.unesco.org/water/wwap/pccp/cd/pdf/negotiation_mediation_facilitation/alternative_dispute_resolution_approaches.pdf* [Accessed on 2/07/2015]; C. SS Ooi, 'The Role of Lawyers in Mediation: What the Future Holds,' The Malaysian Bar, August, 2005, available at *http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=1757* [Accessed on 2/07/2015].

[83] C. M. Meadow, 'Pursuing Settlement in an Adversary Culture: a Tale of Innovation Co-opted or the Law of ADR,' Fla. St. UL Rev., Vol.19, 1991, p.1.

[84] See T. Cockburn & M. Shirley, 'Setting Aside Agreements Reached at Court-Annexed Mediation: Procedural Grounds and the Role of Unconscionability,' Western Australian Law Review, Vol.31, February, 2003, pp. 70-86.

may advise the client to take the advantages offered by mediation. This is especially so where the case has slim chances of success and the other side is willing to mediate.[85]

Secondly, lawyers understand the risks involved better. Often, a client may not fully appreciate what is at stake should he/she lose a claim or defence. However, lawyers are well versed with court matters and taxation of cases. The lawyer also understands better what the impact of a failed effort to compromise might be. Importantly, the clients understand that lawyers have superior knowledge of the matter at hand and are willing to take their counsel.[86]

Thus, lawyers invariably find themselves advising clients before and during mediation process on what interests to secure protection for and the positions to take. In mediation also, every party is in theory entitled to the partisan advocacy of his or her lawyer. The lawyer knows that in many instances, the strength of the client's case and likelihood of prevailing is offset by the costs and uncertainties of a trial. By bringing in the experienced mediator, the lawyer is providing the client a valuable reality check by an impartial third person without appearing to be foregoing his or her duty to represent that client and be their advocate.[87]

Thirdly, the lawyer's role invites involvement. A lawyer can and should be an important part of the mediation process. The conscientious lawyer can influence his client to consider mediation when a dispute arises, or ideally in advance by the policy of using a mediation clause in the contracting documents of each transaction.[88] The lawyer can retain the posture of an advocate for his client, while letting the mediator deal with the development of issues of compromise. In addition, through the judicious selection of an experienced mediator, the lawyer will be saving much time and cost for their client since the parties will not have to take the time to educate a court on the issues and practices common to a particular industry or area.

Through incorporation of mediation into the resolution process, the lawyer can reduce the stress endemic to dispute and increase the likelihood of the preservation of important relationships.[89] Finally, lawyers can help in achieving client's satisfaction. A successful

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[85] See M.J. Breger, 'Should an Attorney be required to Advise Client of ADR Options?' Geo. J. Legal Ethics, Vol.13, 2000, p. 427.

[86] See F.C. Zacharias, 'The Pre-employment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries?', William & Mary Law Review, Vol.49, No. 2, 2007, pp.569-641;

[87] See R.D. Benjamin, 'Considering Mediation: What Lawyers and Clients Should Know,' ABA Journal, Vol. 18, No.7,
October/November 2001.

[88] See R.D. Benjamin, 'The Use of Mediative Strategies in Traditional Legal Practice,' Journal of the American Academy of Matrimonial Lawyers, Vol. 14, No. 2, 1997, pp. 203-231, p.214.

[89] J.R. Linda, "Lawyers and Mediation: Their Role as Consultants," 2007.
Available at *http://www.familydisputesolutions.com/pdf/lawyermediation.pdf* [Accessed on 30/05/2015].

mediation usually produces a satisfied client. Even where mediation does not result in a compromise agreement it is useful and satisfying in that it usually clarifies, eliminates or consolidates the issues, and enables the parties to meet in a temperate setting for what has probably been the first direct exchange of views between them since the dispute arose.[90]

3.2.2 Making Positive impact to the mediation Process

The main question is how lawyers can enhance the mediation process. It is noteworthy that more and more lawyers in Kenya nowadays are beginning to understand and appreciate mediation. Advocates who are well informed on mediation are in a better position to transmit that understanding to their clients and to participate in preparing and coaching to take full advantage of what mediation has to offer.[91]

Lawyers can help clients make informed decisions. One of the foundational principles of mediation is informed decision-making by parties. In fact, mediation proceedings can easily stall when parties lack critical information. To participate meaningfully in the process, parties should fully understand the mediation process itself, the issues involved, options for settlement, and the alternatives that await the parties in the event that no agreement is reached. Attorneys at the table can provide their clients with the advice and information that they need to make the most of mediation. They also assist the clients evaluate options on the table and weigh the merits of settlement proposals.[92]

Lawyers can also enhance client's participation in the mediation process. Mediators can inform mediation clients about general legal issues that need to be addressed by the parties, but they cannot give specific legal advice. As a result, clients are encouraged by mediators to seek advice of lawyers at all points in the process. A good advocate will know and understand their client's interests and can help their client communicate those interests clearly and effectively in the mediation table.[93]

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[90]See B. Rix, "The Interface of Mediation and Litigation," Chartered Institute of Arbitrators 6th Mediation Symposium 2013 in Chartered Institute of Arbitrators, The International Journal of Arbitration, Mediation and Dispute Management, Vol. 80, No. 1, February 2014, pp. 21-27 at pp. 24-25.

[91] F.S. Mosten, 'Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court,' Family Law Quarterly, Vol. 43, No. 3, Fall 2009, p. 489–518; F.S. Mosten, 'Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making,' Journal Of Dispute Resolution, Vol. 2008, No. 1, 2008, pp. 163-193.

[92] Ibid; See also D. Levin, 'Bridging the divide between lawyers and mediators, Part 3: what lawyers can do for mediators,' (Online Guide to Mediation, March, 12, 2007), available at http://mediationblog.blogspot.co.ke/2007/03/bridging-divide-between-lawyers-and.html [Accessed on 2/08/2015]; See also M. Emerson, 'Tips to enhance mediation and negotiation skills,' (Emerson Family Law Partner – Brisbane Mediations, 2011), available at *http://www.emfl.com.au/.../Tips%20to%20Enhance%20Mediation%20&%20N...* [Accessed on 2/08/2015].

[93] See American Bar Association, Ethical Guidelines for Settlement Negotiations, August 2002, p.2, available at

In addition to the foregoing, lawyers are also useful in promoting creative problem-solving. First, as a lawyer, one is a skilled problem solver since it is part of their job. Secondly, there is the "two heads are better than one" phenomenon-an advocate and their client can arguably work together to brainstorm solutions and fine-tune options with the mediator's help.[94]They can do so through assisting settlement by reframing the issues and potential outcomes, such as by broadening them to include "non-legal" and non-monetary issues when they are important to the resolution of the dispute or by emphasizing the benefits of resolving the dispute and the costs of not settling.[95]

Lawyers can also help in offsetting power imbalances which can easily throw mediation out of the right course. The presence of advocates at the mediation table can act as a safeguard to ensure that each party is able to make decisions free from intimidation, influence or pressure by the other. Indeed, it has been argued that a mediator is a catalytic agent whose mere presence besides anything he or she may do or say will bring about positive changes in the behaviour of the disputing parties, and that progress achieved through the mediator's presence brings about nothing more than temperate speech.[96] Lawyers can further help their clients strategically assess their Best Alternative to a Negotiated Agreement (BATNA). It is however important to point out that "Best" may not mean "good". If the BATNA is trial, advocates know from experience that the possibility of success in court and how much time trial, with the possibility of appeal, may realistically take.[97]

Lawyers can also help in taking care of the details. After all the hard work that goes into mediation, no one wants a mediated agreement to fall apart later. A critical role that lawyers can and do play is to make sure that no details in an agreement have been left to chance and hence enhance chances of success of the settlement.[98]
To make the foregoing contribution in the mediation process, lawyers need to acquire basic skills that will enhance their role in the process. It is however noteworthy that some of the skills are natural and instinctive, but they can be enhanced or polished. This is important to enable them shift their approach to the process from the *rights-based training in law schools to the interest-based approach in mediation* (emphasis added).

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http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/settlementnegotiations.authcheckdam.pdf [Accessed on 2/08/2015].

[94] See J.K.L., Lawrence, "Mediation Advocacy: Partnering With the Mediator," 2000, 15, Ohio Journal Dispute Resolution, 425.

[95]C.A. McEwen and R.L. Wissler, Finding out If It Is True: Comparing Mediation and Negotiation through Research, Journal of Dispute Resolution, Vol. 2002, Iss. 1 [2002], Art. 8, pp. 130-142 at pp. 137-138.

[96] A. Meyer, "Function of the Mediator in Collective Bargaining," Industrial and Labour Relations Review, XIII, No. 2 (January, 1960), p. 161.

[97] R. Fisher, et al, Getting to Yes: Negotiating an Agreement without Giving In, op cit, pp.99-108.

[98]See B. Rix, "The Interface of Mediation and Litigation," Chartered Institute of Arbitrators 6th Mediation Symposium 2013, op cit, p.27.

3.2.3 Mediation Skills for Lawyers

a. Active Listening Techniques

One of the principal functions of the mediator has been identified as managing the communications process. He or she must intervene carefully at the correct moments and also, they must understand interpersonal relations and negotiations. They must also be able to listen well and perceive the underlying emotional, psychological, and value orientations that may hold the keys to resolving more quantifiable issues.[99] It has been noted that nearly all mediation efforts distinguish between the functions of the lawyer and those of the mediator, even where the mediator is a lawyer.[100]

There are several *active listening techniques* at the disposal of a mediator that can be employed to help the parties come up with a solution to the conflict. These include: paying attention, listening attentively, listening to the voice of silence/what is not said, encouraging parties, clarifying /paraphrasing/backtracking/restating, reframing,[101] reflecting, summarizing and validating. To be an active listener, the mediator must ensure that they do not pay attention to their own emotions; should react to ideas and not a person; must recognize own prejudices; must avoid assumptions/judgments; use non-verbal behavior to show understanding and acceptance; show empathy; rephrase/ restate/reframe key thoughts and feelings and must conduct caucuses.[102]

b. Non-Verbal Communication Techniques

A mediator needs to display in the mediation process are: maintaining frequent eye contact with the parties; body movements such as nodding and positioning; voice tone; keeping body oriented towards the speaker and showing a genuine curiosity to whatever is being said. These techniques allow the mediator to know and meet the parties' needs. They also help the to make proposals which allow both parties to save face and enter an agreement, that neither is willing to propose, and come up with creative solutions to the conflict.

c. Rapport Building

In order to establish relationships of trust and respect with the parties and their advisors, mediators need to build rapport using various ways which include: including everyone in the discussions; attentive listening; being neutral and non-judgmental; being

[99] L.L. Riskin, 'Mediation and lawyers,' op cit, p.36.
[100] Ibid, p. 36.
[101] The mediator uses this technique as a way of reciting back or neutrally, paraphrasing the statements of the parties in order to demonstrate understanding of whatever they are saying.
[102] Caucuses are private sessions that the mediator may have with a party to the dispute so as to get more information or clarity on a particular issue.

approachable, open, honest and friendly; being harmonious in verbal and non-verbal language, amongst others.[103]

With the foregoing skills, lawyers can resourcefully participate and enhance the effectiveness of a mediation process for mutually satisfying outcomes for the parties. The development of mediation can greatly be influenced by the attitudes and involvement of the legal profession, either positively or negatively.[104]

4. Role of the Lawyer as a Peacemaker in Society

Peace has been described as either negative peace, that is, the absence of violence or fear of violence, or positive peace which is defined as the attitudes, institutions and structures that, when strengthened, lead to a more peaceful society.[105] The Institute for Economics and Peace, identifies eight pillars of peace which they associate with peaceful environments and are both inter-dependent and mutually reinforcing, such that improvements in one factor would tend to strengthen others and vice versa. These include: a well-functioning government; a sound business environment; an equitable distribution of resources; an acceptance of the rights of others; good relations with neighbours; free flow of information; a high level of human capital; and low levels of corruption.[106] Conflict is grounded in social, structural, cultural, political and economic factors as seen from the foregoing pillars, since depreciation in one increases chances of conflict in a particular society.[107]

It has been argued that peaceful nations are better equipped through their attitudes, institutions and structures to respond to external shocks. This can be seen with internal peace correlating strongly to measures of inter-group cohesion and civic activism, which are key proxies that indicate the ability of societies to resolve internal political, economic, and cultural conflicts as well as being able to respond to external shocks.[108] The quest for

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[103] D. Richbell, Module 1: Commercial Mediation Training Handbook, (Chartered Institute of Arbitrators, 2014), p.14.

[104] L.L. Riskin, 'Mediation and lawyers,' op cit, p.36.

[105] Institute for Economics and Peace, 'Pillars of Peace: Understanding the key attitudes and institutions that underpin peaceful societies,' Global Peace Index Report, 2014, p.1, available at http://economicsandpeace.org/wp-content/uploads/2015/06/Pillars-of-Peace-Report-IEP2.pdf [Accessed on 31/07/2015].

[106] Ibid, pp.1-2.

[107] M. Maiese, 'Social Structural Change,' in G. Burgess & H. Burgess (eds), Beyond Intractability, (Conflict Information Consortium, University of Colorado, Boulder, July 2003), available at *http://www.beyondintractability.org/essay/social-structural-changes* [Accessed on 31/07/2015]; See also M. Maiese, 'Causes of Disputes and Conflicts,' in G. Burgess & H. Burgess (eds), Beyond Intractability, (Conflict Information Consortium, University of Colorado, Boulder, October, 2003), available at *http://www.beyondintractability.org/essay/underlying-causes* [Accessed on 31/07/2015].

[108] Institute for Economics and Peace, 'Pillars of Peace: Understanding the key attitudes and institutions that underpin peaceful societies,' op cit, p. 5.

a united, stable and more developed country calls for the active involvement of all parties, including lawyers. Peace is statistically associated with better business environments, higher per capita income, higher educational attainment and stronger social cohesion.[109] Better community relationships tend to encourage greater levels of peace, by discouraging the formation of tensions and reducing chances of tensions devolving into conflict.[110]

As already observed, lawyers are important in a societal setup as problem solvers. It has been observed that when a client with a problem consults a lawyer, it is because they perceive the problem to have a significant legal dimension.[111] However, since few real world problems conform to the boundaries that define and separate different professional disciplines, it is contended, therefore, that it is only a rare client who wants his or lawyer to confine themselves strictly to "the law." Rather, most clients expect their lawyers to integrate legal considerations with other aspects of their problems to come up with solutions that are often constrained or facilitated by the law, but finding the best solution - a solution that addresses all of the client's concerns.[112]

It is noteworthy that such solutions may not always be reached through the court process; there are those situations that require alternative approaches, depending on the expected outcome. These alternative approaches may include, but not limited to alternative dispute resolution mechanisms (ADR) such as negotiation and mediation, amongst others. Indeed, it has been observed that in addition to being trained as adversaries, however, lawyers are also trained to resolve disputes. As a result, only the poor lawyer mechanically applies legal principles and in so doing fails to recognize a client's underlying interests and emotions. The prospect of mediating such interests and of bringing parties together in the process is not without foundation in the traditional practice of law.[113]

It has been argued that the essence of lawyers in society is that they create, find, interpret, adapt, apply, and enforce rules and principles that structure human relationships and interactions, that is, they "handle" the rules and norms that define rights and duties among people and organizations.[114] In other words, they are viewed as specialists in societal ordering since they engage in various activities that form aspects of normative ordering, including, legislation, administrative rule-making, private contracting and deal-making, counseling and planning, mediation, arbitration, and litigation which all involve the

[109] Ibid, op cit, p. 2.
[110] Ibid, op cit, p. 6.
[111] P. Brest & L. H. Krieger, 'New Roles: Problem Solving Lawyers as Problem Solvers,' Temple Law Review, Vol. 72, 1999, p.811.
[112] Ibid.
[113] W. Rich, 'The Role of Lawyers: Beyond Advocacy,' BYU Law Review, Vol. 1980, Issue 4, 1980, pp. 767-784 at p.767.
[114] R.C. Clark, 'Why So Many Lawyers? Are They Good or Bad? Op cit, p.281.

processing of rules and norms that structure and stabilize human relationships.[115] It is noteworthy that law should not be practiced in the abstract since the societal context is important. Lawyers have a role to play as negotiators and peacebuilders. They are opinion shapers in society and what they say matters. The many lawyers in Kenya are leaders in their counties and villages or communities where they come from. It has been observed that the leadership roles that lawyers play in society tend to bring them into situations of greater, not less, uncertainty. They need to know how to make unbiased assessments of risky situations.[116] As such, a good lawyer can assist clients in articulating their problems, defining their interests, ordering their objectives, and generating, assessing, and implementing alternative solutions.[117] This demands multifaceted problem-solving and decision-making skills, amongst other skills as highlighted elsewhere, which in turn requires a broad approach to teaching and training of lawyers.[118]

5. Remoulding the Lawyer

It has been observed that negotiation tends to be used when conflicts are relatively simple, of a low intensity, and when both parties are relatively equal in power while mediation, on the other hand, tends to be used in disputes characterized by high complexity, high intensity, long duration, unequal and fractionated parties, and where the willingness of the parties to settle peacefully is in doubt.[119] Both negotiation and mediation are vital ingredients to peacebuilding. Lawyers have a role to play in the processes. It is however necessary to remould their thinking and effect necessary reforms so as to enable the lawyer to participate as a negotiator, mediator and peacemaker more effectively.

5.1 Guaranteed Remuneration

As way of encouraging more lawyers to take up ADR practice, the *Advocates (Remuneration) (Amendment) Order*, 2014 can be reviewed so as to include provisions on charges for ADR services rendered by advocates acting as ADR practitioners. This is because, as it is now, the Order mainly provides guidelines on fees related to matters that are considered 'legal' in terms of content and the arising rights or obligations. That is, it contemplates matters or transactions that relate to justiciable rights and obligations which can be defended through litigation, when violated. It thus leaves out services or processes carried out by lawyers, as problem solvers, with the aim of addressing human needs and desires which are more psychological than material in nature. The effect is that few lawyers engage in direct peacebuilding because, amongst other possible reasons, there is no financial incentive to do so. It needs not be emphasised that human needs and desires

[115] Ibid, p. 282.
[116] P. Brest, 'The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers,' op cit, p.11.
[117] Ibid, p.9.
[118] Ibid.
[119] J. Bercovitch and R. Jackson, "Negotiation or Mediation? An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict," Negotiation Journal, Vol. 17, Issue 1, January 2001, pp. 59–77, p.59.

are some of the main issues that affect peace, stability and the general wellbeing of a society. ADR mechanisms offer the perfect opportunity to address such issues and should therefore be encouraged.

Including a charging schedule for ADR services offered by practising lawyers can assure them of income, and this perhaps would address the existing fear that promotion of ADR may deny the advocates income. Instead, this would offer the country a chance to tap into the benefits that come with the exploitation of these mechanisms. ADR practitioners would also be motivated by the guaranteed income to engage in ADR and even promote its use in the country. The outcome would be savings in cost and time and ultimately, creation of a just, secure and peaceful society for all. With internal peace and harmony guaranteed, it becomes easier to deal with external threats to the country's peace and cohesion.

5.2 Training in ADR

The changing practice of law means that lawyers should be dynamic in their practice of law. There is need for reconceptualization of a lawyer's job to make their formal engagement as negotiators, mediators and peacebuilders part of what they do, and charge for it. There should be a formal mechanism that provides guidelines on how lawyers can be engaged to act as negotiators, mediators and peacebuilders in resolving community conflicts.[120] Conflict resolution processes have evolved as major alternatives to the litigation or adversary system, and practice in these processes continues to increase.[121] Another focus of law practice and legal education in the twenty-first century involves creative problem solving as an evolving role for lawyers.[122] They should be ready to embrace the non-adversarial approaches instead of traditional litigation strategies and this may include the practice of preventive law which departs from the more common litigation or court system approach and focuses primarily on counseling and regular "legal check-ups," in order to anticipate or avoid legal matters.[123] Lawyers ought to be problem solvers and peace makers, not ones obsessed with 'winning' cases.[124] In both mediation and negotiation, lawyers should reduce unrealistic expectations by their clients while maintaining the confidence of their clients to reach favourable outcomes for them.

[120] For instance, in the 2008 post-election violence in Kenya, the involvement of lawyers as peacebuilders was minimal.

[121] K.K. Kovach, "Lawyer Ethics must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards." Idaho L. Rev., Vol. 39, 2003, pp. 399-713.

[122] T.D. Morgan, 'The Changing Face of Legal Education: Its Impact on What it Means to Be a Lawyer,' Akron L. Rev., Vol. 45, 2011, p. 811.

[123] Ibid.

[124] See generally C.J.M. Meadow, "When Winning Isn't Everything: The Lawyer as Problem Solver," Hofstra Law Review: Vol. 28: Iss.4, 2000.

5.3 Holistic Law Curriculum

Arguably, both legal education and the lawyering process could benefit from careful attention to the skills and concepts needed for effective non-adversarial conflict management.[125] There is need to change the way university law schools in Kenya train lawyers. Right from first year, they are taught how to be combative in court. Attention is not drawn to the potential that exists in the ADR arena. Lawyers are not taught that they can be boardroom negotiators dealing with millions of dollars. They are not taught to be community peacemakers. 'Legal practice' needs to be redefined and include ADR practice considering that this is now part of Kenya's legal framework.[126] It has been argued that the need for these skills can only grow as law school graduates encounter problems with increasingly complex technological, global, financial, institutional, and ethical dimensions.[127] This is important if the legal education offered in law schools is to effectively prepare the lawyers in addressing the needs of a changing society.[128] This way, it is argued, students can develop lawyering skills in the contexts of different areas of practice, emphasizing those that fit their particular interests and career plans.[129]

Law schools can adequately prepare lawyers through equipping them with basic skills in negotiation and mediation, which will in turn help them play an active role in nation-building and peacebuilding for a better Kenya. To give them such a voice, they should be equipped with negotiation and mediation skills right from school or college level. Arguably, as a country, we might have been able to resolve the Kenyan 2007/2008 post-election crisis faster, had we had prominent lawyers engaged in the peace process. They would have participated as peacemakers not as hawkish partisans, like everyone else. Nelson Mandela, former South Africa's President, was a lawyer and a peacebuilder and his contribution to society was not in courtroom battles and submissions. His legacy is in what he did to ensure a peaceful transition. George J. Mitchell, a former U.S. Senate majority leader and lawyer known for efforts at brokering peace in Northern Ireland and the Middle East, was described in a May 2012 statement by President of the United States, Barack Obama, as "a tireless advocate for peace."[130] Obama went on to state that "His [George's] deep commitment to resolving conflict and advancing democracy has

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[125] W. Rich, 'The Role of Lawyers: Beyond Advocacy,' op cit p.777.

[126] The Policy, legal and institutional framework for ADR is systematically falling in place with the promulgation of the 2010 Constitution, the amendment to the Civil Procedure Rules and acceptance of ADR as an effective conflict management tool by various stakeholders.

[127] P. Brest, 'The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers,' op cit, p.5.

[128] Ibid.

[129] Ibid, p.6.

[130] B. McNeill, 'Former U.S. Sen. George Mitchell to Receive Thomas Jefferson Foundation Medal in Law,' (
University of Virginia School of Law, Feb. 28, 2012),
available at *http://www.law.virginia.edu/html/news/2012_spr/mitchell_tj_medal.htm* [Accessed on 1/08/2015].

contributed immeasurably to the goal of two states living side by side in peace and security."[131]

It has been argued that although no law school curriculum can substitute for good mentoring in a lawyer's early years of practice and for the experience of grappling with actual problems day to day, law schools can however, provide a strong foundation for the ongoing, reflective self-education that is integral to any successful professional career.[132]It is further contended that ensuring that today's law students graduate with this foundation will not, by itself, turn the legal profession around. However, to the extent that we increase the number of lawyers who possess the requisite skills for negotiation and mediation for peacebuilding we will improve the effectiveness of lawyers in their work, especially as peacemakers and development agents in the society.[133]

6. Conclusion

It is evident from the discussion above that lawyers have a critical role to play in society. They can enhance the rule of law through peacebuilding and engaging in ADR processes such as negotiation and mediation. Peace is necessary for development to take root. Lawyers have a role to play. It is possible to remould the Kenyan lawyer to be the ultimate negotiator, mediator and peacemaker in a society that aims at achieving the rule of law, development and prosperity.

[131] Ibid. George Mitchell served as special envoy (until May 2012) for Middle East peace under President Barack Obama, a role in which he led American efforts to advance Israeli-Palestinian peace negotiations.

[132] P. Brest, 'The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers,' op cit, p.17.

[133] Ibid, p.17.

Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework

Abstract

This paper critically discusses how the current legal and policy framework on access to justice can be enhanced through putting in place appropriate policy, statutory and administrative measures that will ensure that the Alternative Dispute Resolution (ADR), Traditional Dispute Resolution (TDR) mechanisms and other informal justice systems find their rightful place in the conventional judicial system and that the same are meaningfully and actively utilized in facilitating access to justice especially for the poor Kenyans. The author traces the existing provisions that provide for ADR and TDR mechanisms and examines the viability of such provisions in promoting the use of these mechanisms in access to justice in Kenya.

The paper argues that despite the formal recognition under the Constitution, TDR and other ADR mechanisms are yet to be institutionalized by way putting in place supporting adequate legal and policy measures that would ensure effective utilisation of the same in access to justice. This presents a challenge on implementation of the constitutional provisions on ADR and TDR. It is for this reason that the author offers recommendations on how best to institutionalise these mechanisms since they can go a long way in facilitating access to justice especially at the community level and the creation of a just and peaceful society for all.

1. Introduction

The constitution guarantees the right of every person to access justice and calls for the State to take appropriate policy, statutory and administrative interventions to ensure the efficacy of justice systems.[1] In order to guarantee access to justice for Kenyans, the Constitution broadens the available mechanisms in the justice system by encouraging the utilization of formal and informal justice systems.[2] In this regard, Article 159 recognizes the use of Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) mechanisms in addition to the court process. Article 159 (2) envisages the underlying principles for the exercise of judicial authority in Kenya which include promotion of ADR and TDR mechanisms.[3]

[1] Articles 21, 47, 48 & 50.

[2] Article 159(2) (d).

[3] It stipulates that in exercising judicial authority, the courts and tribunals are to be guided by the following principles: justice is to be done to all, irrespective of status, (b) justice shall not be delayed and (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause 3. Clause 3 thereof provides that TDR mechanisms shall not be used in a way that (a) contravenes the Bill of Rights, (b)is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality, or (c) is inconsistent with the Constitution or any written law.

Despite the formal recognition coupled with a constitutional mandate for their promotion in appropriate dispute resolution strategies, 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 effective utilisation of the same in access to justice. There exists no substantive policy or legislative framework to guide the promotion and use of these mechanisms despite their constitutional recognition and limitations set out under Article 159(2) and (3).[4]

It is against this background that this paper examines the current legal and policy framework on access to justice and the challenges that arise therefrom. It also makes recommendations on the need for appropriate policy, statutory and administrative measures that will ensure that the TDR strategies and other informal justice systems find their rightful place in the conventional judicial system and that the same are meaningfully and actively utilized in facilitating access to justice especially for the poor Kenyans.

2. Access to Justice through TDR and ADR Mechanisms in Kenya

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.[5] The Constitution provides for the right of access to justice and obligates the state to ensure access to justice for all persons.[6] Access to justice by majority of citizenry has been hampered by many unfavourable factors which include *inter alia*, high filing fees, bureaucracy, complex procedures, illiteracy, distance from the courts and lack of legal knowhow.[7] This makes access to justice through litigation a preserve of select few. Through providing for the use of ADR and TDR mechanisms to enhance access to justice, the Constitution of Kenya was responding to the foregoing challenge in order to make the right of access to justice accessible by all.[8] It was in recognition of the fact that TDR and other ADR mechanisms are vital in promoting access to justice among many communities in Kenya. Indeed, a great percentage of disputes in Kenya are resolved at the community

[4] It is noteworthy that the current Constitution of Kenya calls for promotion of alternative forms of dispute resolution as a guiding principle in the exercise of judicial authority by courts and tribunals but not necessarily as a requirement under any written law.

[5]See D.L., Rhode, "Access to Justice," Fordham Law Review, Vol. 69, 2001. pp. 1785-1819; See generally M. Sepúlveda Carmona and K. Donald, 'Access to justice for persons living in poverty: a human rights approach,' Ministry for Foreign Affairs, Finland. pp.8-9. Available at *https://www.academia.edu/6907000/Access_to_justice_for_persons_living_in_poverty_a_human_rights_approach* [Accessed on 2/07/2015].

[6]Article 48.

[7] J.B. Ojwang,' "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), pp. 19-29 at p. 29.

[8] Article 159(2); Article 48.

level through the use of community elders and other persons mandated to keep peace and order.[9]

Notably, the Constitution provides that one of the principles of land policy in Kenya is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.[10] This is reaffirmed under Article 67(2) (f) which provides that one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts. The recognition of ADR and TDR mechanisms under Article 159 of the Constitution is a restatement of the customary jurisprudence of Kenya.[11] This is because TDR mechanisms existed from time immemorial and are therefore derived from the customs and traditions of the communities in which they operate.

In most African communities, TDR mechanisms existed even before the formal dispute settlement mechanisms were introduced.[12]The formal courts, being adversarial in nature, greatly eroded the traditional conflict resolution mechanisms.[13] The use of TDR in accessing justice and conflict management in Africa is still relevant especially due to the fact that they are closer to the people, flexible, expeditious, foster relationships, voluntary-based and cost-effective. For this reason, most communities in Africa still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.[14]

The use of TDR mechanisms fosters societal harmony over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa.[15]

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[9] K. Muigua, Resolving Conflicts through Mediation in Kenya, (Glenwood Publishers, 2012). pp. 21-22; See generally J. Kenyatta, Facing Mount Kenya, The Tribal Life of the Kikuyu, Vintage Books Edition, October 1965.

[10] Article 60(1) (g).

[11]K. Muigua, "Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010," p. 2. Available at *http://www.chuitech.com/kmco/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf*; See also I.K.E., Oraegbunam, The Principles and Practice of Justice in Traditional Igbo Jurisprudence, African Journal Online, p.53. Available at *http://www.ajol.info/index.php/og/article/download/52335/40960* [Accessed on 30/06/2015].

[12] See generally L.J. Myers and D.H. Shinn, 'Appreciating Traditional Forms of Healing Conflict in Africa and the World, 2010, available at *scholarworks.iu.edu/journals/index.php/bdr/article/download/.../1220* [Accessed on 29/06/2015].

[13]J. Kenyatta, op.cit. pp. 259-269.

[14] K. Muigua, Resolving Conflicts through Mediation in Kenya, op cit at pp.21-22; See also N.N. Ntuli, 'Policy and Government's Role in Constructive ADR Developments in Africa.' Presented at a conference "ADR and Arbitration in Africa; Cape Town 28th and 29th November 2013. pp. 2-3. Available at *http://capechamber.co.za/wp-content/uploads/2013/11/POLICY-IN-AFRICA-AND-GOVERNMENT.pdf* [Accessed on 30/06/2015].

[15] Ibid, p.23.

Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts. 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.[16] The other advantages of TDR mechanisms and other community based justice systems are that: traditional values are part of the heritage of the people hence people subscribe to its principles; promotes social cohesion, peace and harmony; proximity to the people/accessibility and use of language that the people understand; the mechanisms are affordable; TDR are resolution mechanisms; are cost effective since parties can easily represent themselves in such forums; proceedings undertaken are confidential; TDR and ADR mechanisms are flexible since they do not adhere to strict rules of procedure or evidence and they yield durable solutions.[17]

TDR mechanisms are also preferable because: they decongest the courts and prisons, respect the traditional cultures and traditions, decisions emanating from such mechanisms are easily acceptable to communities, they promote peace, harmony, co-existence among communities and security, they are expeditious and most cases are resolved by elders who have background knowledge and understanding of cases and the people hence allow for handling matters discreetly for quick resolution, they are less costly and easy accessible to the poor, resolve disputes at grassroots' level and enhance access to justice, they also provide local solutions which are more acceptable to people and they are agents of change and promote economic development, foster love, cohesion, integrity and promote respect for each other.[18] In recognition of this, the Constitution obligates the State to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.[19] According to the Food and Agricultural Organisation of the United Nations, indigenous knowledge can been conceptualised as a repertoire of ideas and actions from which community members faced with specific problems can draw, depending on their level of knowledge, their

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[16] 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.

[17] K. Muigua, Resolving Conflicts through Mediation in Kenya, op cit pp. 23-26; see also A.A. Theresa, 'Methods of Conflict Resolution in African Traditional Society,' Indexed African Journal Online, vol. 8(2), Serial No. 33, April, 2014: pp. 138-157 at pp. 151-152.

[18] K. O. Hwedie and M. J. Rankopo, Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, p. 33, University of Botswana.
Available at
http://ir.lib.hiroshima-u.ac.jp/files/public/33654/20141016194149348069/ipshu_en_29_33.pdf [Accessed on 3/07/2015]

[19] Article 69(1) (c).

preferences, and their ability and motivation to act. In this regard, it would involve improvisation and flexibility in response to ongoing conditions. Dispute processing is similarly characterized as a repertoire of processes which communities and their members respond to dynamically and differentially.[20] It has been argued that chances for peaceful resolution of Africa's conflicts can be enhanced considerably if the region's indigenous principles, skills, and methods of conflict resolution are understood and harmonized with those of the modern nation-state.[21]

It is for this reason that the Constitutional provisions on the protection and enhancement of intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the Kenyan communities should be actualized through ensuring that there is put in place supportive policy and legal framework. This is because despite the constitutional spirit of promoting ADR and TDR mechanisms most of which rely on indigenous knowledge of the respective communities, what is not clear is how this should be carried out because as it is now, there is no defined procedure on how they should determine the matters to go for TDR and those for courts or even who should carry out the TDR. While it is true that the use of ADR and TDR mechanisms can go a long way in resolving some of the long standing conflicts over natural resources in Kenya, this well intentioned constitutional provision may be defeated owing to lack of a proper legal framework or guidelines on how they should be implemented. Arguably, a strong legal system based on a fusion of formal and informal justice systems improves the capacity of citizens to access justice. This is because the two justice systems complement each other and citizens are at liberty to choose the most appropriate and affordable system for themselves.[22]

It is against the foregoing that the author herein sets out to explore how best these mechanisms can be entrenched in Kenya's legal system through legal and policy measures.

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[20] Food and Agricultural Organisation of the United Nations, 'Indigenous Knowledge And Conflict Management: Exploring Local Perspectives And Mechanisms For Dealing With Community Forestry Disputes,' Paper Prepared for the United Nations Food and Agriculture Organization, Community Forestry Unit, for the Global Electronic Conference on "Addressing Natural Resource Conflicts Through Community Forestry," January-April 1996. Available at http://www.fao.org/docrep/005/AC696E/AC696E09.htm [Accessed 4/07/2015]

[21] F.B., Mensah, 'Indigenous Approaches to Conflict Resolution in Africa,' in the World Bank, Indigenous Knowledge: Local Pathways to Global Development, 2004. pp. 39-44 at p. 39. Available at *http://www.worldbank.org/afr/ik/ikcomplete.pdf [Accessed 4/07/2015]*

[22]*See K. Venerando, et al, United Nations Development Programme,* "Access to Justice in Asia and the Pacific: A DGTTF Comparative Experience Note Covering Projects in Cambodia, India, Indonesia and Sri Lanka," The DGTTF Lessons Learned Series, 2009. Available at *http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dgttf-/access-to-justice-in-asia-and-the-pacific/UNDP_CE%20Paper_Asia_web.pdf* [Accessed on 29/06/2015] p. 11.

3. Overview of TDR and ADR Mechanisms

Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms a society utilizes to resolve disputes without resort to costly adversarial litigation. Most of the African communities had their own unique dispute resolution mechanisms.[23] Similarly, 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 Kenyan communities include mediation, arbitration, negotiation, reconciliation and adjudication amongst others.[24]

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.[25] Conflict resolution among the traditional African societies was anchored on the ability of the people to negotiate.[26]

If negotiation fails, parties resort to mediation where they attempt to resolve the conflict with the help of a third party. 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.[27]

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.[28] The end product of adjudication is reconciliation, where after the disputants have been persuaded to end

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[23] B. Laurence, "A History of Alternative Dispute Resolution," ADR Bulletin: Vol. 7: No. 7, Article 3, 2005. p. 1. Available at: *http://epublications.bond.edu.au/adr/vol7/iss7/3* [Accessed on 26/06/2015].
[24] Ibid.
[25] See M. Mwagiru, Conflict in Africa: Theory, Processes and Institutions of Management (Centre for Conflict Research, Nairobi, 2006). p.115.
[26] See 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.
[27] K. Muigua, Resolving Conflicts through Mediation in Kenya, op cit pp. 27-28.
[28] AT Ajayi and LO Buhari, "Methods of Conflict Resolution in African Traditional Society," op cit at p. 150.

the dispute, peace is restored.[29] 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 which results in restoration of harmony and mending relationships of the parties.[30]

The main aspects of TDR and other ADR mechanisms which make them unique and community oriented is that they focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by formal common law and statutory regimes.[31] The main objective of TDR in African societies is to resolve emerging disputes and foster harmony and cohesion among the people.[32]

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.[33] 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 issues without venturing into the root causes of the dispute.[34] Examples of dispute settlement mechanisms are arbitration and ligation.

TDR utilize resolution mechanisms such as negotiation, mediation and conciliation to ensure that the root causes of the dispute are addressed and assist the parties to explore mutually satisfying and durable solutions.[35] These mechanisms can be effective in managing conflicts and have their outcome recognized by the formal institutions especially under the current constitutional dispensation.[36]

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[29] Ibid, p. 150.
[30] J. Kenyatta, op.cit.
[31] K. Muigua, 'Effective Justice for Kenyans: Is ADR Really Alternative?' pp. 12-13. Available at *http://www.kmco.co.ke/attachments/article/125/Alternative%20Dispute%20Resolution%20or%20Appropriate%20Dispute%20Resolution.pdf*
[32] K. O. Hwedie and M. J. Rankopo, Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, op cit p. 33.
[33] M. Mwagiru, The Water's Edge: Mediation of Violent Electoral Conflict in Kenya, (Institute of Diplomacy and International Studies, July 2008), pp. 36-38.
[34] See K. Cloke, "The Culture of Mediation: Settlement vs. Resolution", The Conflict Resolution Information Source, Version IV, December 2005, Available at *http://www.beyondintractability.org/bi-essay/culture-of-mediation [Accessed on 29/06/2015]*
[35] Ibid.
[36] Article 159(2); See also S. 20, Environment and Land Court Act, 2011.

However, 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.

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

The Constitution of Kenya, 2010 recognizes application of TDR and ADR mechanisms in dispute resolution for efficient dispensation of justice since their merits outweigh the disadvantages thereof.[37] It is noteworthy that the Constitution supports access to justice through informal systems such as TDR and ADR mechanisms in addition to the court process. A high percentage of disputes in Kenya are resolved outside courts or even before they reach courts by use of TDR or ADR mechanisms. TDR and other community justice mechanisms are widely used by communities to resolve conflicts owing to their legitimacy and accessibility. The main disputes that may be resolved by way of TDR mechanisms in the communities include land disputes, marriage, gender violence, family cases including inheritance, clan disputes, cattle rustling, debt recovery, overall community conflicts and resolution of political disputes in the community, and welfare issues such as nuisance, child welfare and neglect of elderly in a community amongst others.[38]

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.[39] This therefore

[37] See Article 159 (2) (c) of the Constitution of Kenya 2010.

[38] J. Kenyatta, op.cit.

[39] See 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

calls 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.

4. Legal and Policy Framework on ADR in Kenya

Currently, there is no stand-alone statute on traditional dispute resolution in Kenya. In communities where traditional dispute resolution process is utilized in conflict management, the rules and procedure used is derived from customs and traditions of the community. The preservation of TDR mainly relies on the fact that customs and traditions are handed down from one generation to the next and there is no form of documentation for TDR in most Kenyan communities. Consequently, there is a danger of distortion or neutralization of customs and traditions in the context of modern notions of Western civilization. Some of the Kenyan laws make reference to ADR and TDR mechanisms and advocate for their use in conflicts management in the country.

4.1 The Constitution, 2010

The Constitution seeks to promote the cultural practices and traditional knowledge of the Kenyan communities including the use of ADR and TDR mechanisms in conflict management. In this regard, Article 159 (1) provides that judicial authority is derived from the people and vests in and it is to be exercised by courts and tribunals established by or under the Constitution with regard to the principles of *inter alia* promoting the use of ADR mechanisms in conflicts management.[40]

The rationale of the constitutional recognition of TDR is to validate alternative forums and processes that provide justice to Kenyans. However, Article 159 (3) provides that 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. The policy behind subjection of customary law to the repugnancy test was founded on the contention that there are certain aspects of customary laws that do not augur well with human rights standards. This has resulted in continued subjection of customary laws to the repugnancy clause by courts hence undermining the efficacy of traditional justice systems.[41] Besides, 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.

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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.

[40] Article 159 (2) (c) and (3).

[41]Section 3(2), Judicature Act, Cap.8.

4.2 Civil Procedure Act and Rules

The Civil Procedure Act and rules, Cap 21 embodies the procedural law and practice in civil courts in Kenya. These include the High Court and Subordinate Courts. The Act and Rules envisage enabling provisions within which ADR mechanisms are to be supported.[42] Within this framework, the court has inherent power to explore dispute resolution options that further the overriding objectives. TDR mechanisms are arguably part of such options. Section 1B provides that the aims of ensuring a just, expeditious, proportionate and affordable resolution of civil disputes include the just determination of proceedings, efficient disposal of Court business, efficient use of judicial and administrative resources, timely disposal of proceedings, affordable costs and use of appropriate technology. In most civil matters emanating from customary law such as family disputes (marriage, divorce and matrimonial property), succession and inheritance often turn to customs and traditions of the communities of the parties. Thus, use of traditional processes in such cases facilitates achievement of the overriding objective. Pursuant to the inherent powers of the court under *Section 3A* which empowers courts to make orders that may be necessary for the ends of justice, the court can promote the use of TDR.

Mediation is one of the key dispute resolution mechanisms in traditional justice systems. *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.

Further, the use of TDR in resolution of civil disputes can be promoted under Order 46 rule 20[43] of the Civil Procedure Rules. Order 46 Rule 20 read together with Sections 1A and 1B of the Civil Procedure Act therefore obligates the court to employ ADR and TDR or any other appropriate mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. There is a need therefore to introduce court-annexed TDR and ADR as it will go a long way in tackling the problem relating to backlog of cases, enhance access to justice, encourage expeditious resolution of disputes and lower costs of accessing justice.

Under Order 46 rule 20 (2), a court may adopt any ADR mechanism for the settlement of the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism. Judges will thus need to be thoroughly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the particular mechanism that

[42] Section 1A (1)of the Civil Procedure Act encapsulates the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.

[43]"Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act."

will lead to the attainment of the overriding objectives under sections 1A and 1B of the Act. Nonetheless, Order 46 Rule 20 needs to be reviewed to put it into conformity with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases.

The application of TDR in dispute resolution can be promoted under the Evidence Act, Cap 80 by introducing amendments to relax the rules of evidence in informal hearings such as rules relating to character evidence, statements by persons who cannot be called as witnesses, competency of witnesses and rules as to examination of witnesses. To promote TDR in dispute resolution, Parliament should amend the Limitation of Actions Act, Cap 22 such that matters that are the subject of traditional dispute resolution proceedings can still be taken to court if no agreement is reached at the conclusion of the TDR process.

4.3 Land Act, 2012

The Land Act is the substantive regime for matters pertaining to land in Kenya. It was enacted with a view to harmonize land regimes which were scattered in different pieces of legislation. The Act lays down the guiding values and principles of land management and administration which include *inter alia*: elimination of gender discrimination in law, customs and practices related to land and property in land; encouragement of communities to settle land disputes through recognized local community initiatives; participation, accountability and democratic decision making within communities, the public and the Government; and alternative dispute resolution mechanisms in land dispute handling and management.[44]

This Act promotes the application of ADR mechanisms which in this case include traditional dispute resolution mechanisms. Thus, TDR can effectively be utilized within the framework of providing access to justice. In particular, disputes involving communal land can be better resolved through application of TDR. It is also important to point out that the use of ADR and TDR mechanisms can also facilitate the implementation of the constitutional principles of public participation, inclusiveness, protection of the marginalised, non-discrimination, equity and social justice amongst others.

Lack of a policy and legal framework on the operation of ADR and TDR mechanisms however gives a wide discretion to the National Land Commission[45] on how to go about ensuring the use of ADR and TDR in land matters and may even create confusion as how and when the same should be used.

[44]Section 4.

[45] Established by the Constitution of Kenya under Article 67 and the National Land Commission Act, 2012, No. 5 of 2012.

4.4 Commission on Administrative Justice Act, 2011

Section 3 establishes the Commission and confers it with the mandate under section 8 to perform various functions.[46] Under section 8 (f), the Commission is mandated to work with various public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration. In this regard, the utilization of ADR and TDR mechanisms enables the Commission to explore the root causes of the disputes and the most appropriate options for resolution.[47] The Commission has been instrumental in promoting the use of ADR mechanisms especially in handling disputes between various State and Constitutional organs with a high success rate.[48]

4.5 The National Land Commission Act, 2012

Under section 3, the object of the Act is to provide for the management and administration of land in accordance with the principles of national land policy and the Constitution of Kenya. Under section 5 (f) of the Act, the Commission is obligated to encourage the application of traditional dispute resolution mechanisms in land conflicts. Further, under sub-section 2(f), the Commission is mandated to develop and encourage alternative dispute resolution mechanisms in land dispute handling and management. Section 6 provides for the powers of the Commission and subsection 3 thereof provides, *inter alia*, that in the exercise of its powers and the discharge of its functions the Commission is not bound by strict rules of evidence.

There is need to amend section 17 on consultations to the effect that the Commission can consult or seek assistance from community leaders on matters pertaining to land. Having a legal framework on the use of TDR and ADR is arguably the only way that community elders can have a say in deliberations on the use, access and management of natural resources affecting their livelihoods, especially land, without being sidelined by the Commission. Currently, there have been no sign of actual and meaningful engagement of communities in land matters especially in the ongoing supremacy battle between the National Land Commission and the Ministry of Land, Housing & Urban Development on who should spearhead the control of use, access and management of land in the country.[49] There is need to put in place provisions in the Act that obligate the Commission to engage

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[46] See also Article 59(4), Constitution of Kenya, 2010.

[47] O, Amollo, "Constitutional and Statutory Regime of Alternative Dispute Resolution in Kenya," in Chartered Institute of Arbitrators (Kenya) Alternative Dispute Resolution Journal, Vol. 2, No. 1, 2014, pp. 96-111 at pp. 109-111.

[48] Ibid.

[49] Standard Digital, F. Ayieko, "Ngilu- National Land Commission wars hit lenders," Thursday, October 23rd 2014.
Available at *http://www.standardmedia.co.ke/lifestyle/article/2000139137/ngilu-national-land-commission-wars-hit-lenders.* [Accessed on 06/7/2015]; Daily Nation, "Ministry, judges on the spot over 5,000 land cases," Monday, June 9, 2014. Available at h*ttp://www.nation.co.ke/news/Ministry-judges-on-the-spot-over-5-000-land-cases/-/1056/2342658/-/qjbgvh/-/index.html* [Accessed on 06/7/2015]

the community experts in handling land disputes and ensuring that the same enable such communities to challenge the Commission's actions where they feel that they were sidelined.

4.6 Environment and Land Court Act, 2011

Under section 3, the objective of the Act is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act and that the parties and their representatives shall assist the court in furthering the overriding objectives.

Section 20 provides for the application of ADR and empowers the court to adopt and implement on its own motion with the agreement of or request of the parties any appropriate mechanism such as mediation, conciliation and TDR mechanisms in accordance with Article 159(2) (c) of the Constitution. Further, the Act provides that in cases where ADR is a condition precedent to any proceeding before the Court, the court must stay proceedings until such condition is fulfilled. What is ambiguous is what or who determines a matter where the use of ADR and TDR mechanisms is a condition precedent to any proceeding before the Court. The court's discretion and lack of clarity on these provisions may defeat the spirit of Article 159 and the same should therefore be clarified.

5. Towards a Policy and Legal Framework

5.1 Policy Framework on ADR in Kenya

It is noteworthy that currently there is no policy on TDR and other community based justice systems in Kenya. Thus, dispute resolution through TDR and other community justice systems is communal based. The rules governing the TDR processes differ from one community to another depending on the customs and traditions of the communities. In this regard, there is a gap owing to the absence of a comprehensive policy to guide dispute resolution through TDR MECHANISMS. 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. The policy should be targeted at promoting access to justice while preserving customs and traditions of the people of Kenya. 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 reconciliation and restorative justice. 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.[50]

The essence of the traditional justice system lies in the participation of communities in resolving their disputes. 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.

The Policy should provide the minimum qualifications for the recognised TDR practitioners. Mechanisms should also be put in place to ensure that TDR practitioners exercise their role and functions in line with culture and traditions of the community. These safeguards should be designed to prevent deviation from the applicable rules of the community. There should be mechanisms to ensure adherence to due process by the community and observance of the principles of natural justice.

The Policy should also promote continuous training of TDR practitioners. In order to link TDR mechanisms to formal justice systems, there is a need to train TDR practitioners on the minimum requirements of formal law such as constitutional requirements as to the Bill of Rights and best practices regarding TDR. Further, an enactment on TDR is necessary to provide for training programmes designed to promote efficient functioning of TDR mechanisms.

In most Kenyan communities, traditional dispute resolution systems have a wide and undefined jurisdiction comprising of both civil and criminal matters. There is no clear line as to which matters should be subjected to the TDR process and which matters should be taken to court. An enactment with clear guidelines would help clear the ambiguity that may arise.

The sanctions imposed in TDR processes should not contravene the Bill of Rights. As such, TDR and ADR practitioners would greatly benefit from clarification on what amounts to

[50] 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.

violation of the Bill of rights as spelt out in the Constitution.[51] The policy framework should also outline minimum procedural requirements in TDR proceedings in order to entrench due process and rules of natural justice. These include requirements as to submitting a dispute, service of processes and whether or not there needs to be representation, the hearing, among others.

Further, the policy framework should clearly provide for recourse of any party who is aggrieved with a decision delivered in TDR processes. This is in line with the Constitution and due process for a fair hearing and access to justice.[52] These mechanisms include review or appeal. The formal courts should be expressly conferred with jurisdiction to review decisions made in TDR proceedings.

There should also be a clear interface between TDR processes and formal courts and tribunals. To this end, there is a need to formulate a clear referral system indicating how disputes from TDR proceedings can be referred to court and vice versa. The framework should be clear on the stage of the dispute process at which a referral may or may not be done. In order to overcome the challenge of poor record keeping especially for purposes of appeal, review or referral, it there is need to adopt information technology in TDR processes.

5.2 Legal and Administrative /Institutional Framework

Article 159 (2) (c) of the Constitutions obligates courts and tribunals in the exercise of judicial authority promote the application of TDR and ADR mechanisms. In addition, the Civil Procedure Act under sections 1A provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. Within this framework, the court has inherent power to explore dispute resolution options that further the overriding objectives. Courts and tribunals, in consultation with knowledgeable community leaders, can therefore go a long way in encouraging and promoting the use of TDR and ADR mechanisms in conflict management.

In most Kenyan Communities, the institution of Council of Elders remains a strong regulatory institution. Most disputes are submitted to the elders for resolution before parties consider the court process. The Councils of Elders exercise jurisdiction over both interpersonal disputes relating to land, marriage and inheritance and minor crimes.

The foregoing institutions can join hands in a mutual relationship to promote the active uptake of TDR and ADR mechanisms in conflict management in Kenya. An effective working relationship between the formal justice system and TDR mechanisms, would call for an effective court-annexed TDR and ADR framework where the outcomes of such

[51] Chapter Four (Articles 19-58), Constitution of Kenya 2010.
[52] Articles 48, 50.

processes would enjoy the approval of the Judiciary for purposes of recognition, enforcement and appeal. It would also call for simplified procedures to ensure that courts and tribunals focus on substantive rather than procedural justice. This would tackle the problem of backlog of cases, enhance access to justice, and encourage expeditious disposal of disputes and lower costs of accessing justice.

Kenya can learn a lot from the case of Rwanda's mandatory mediation framework where carrying the agenda of local ownership of conflict resolution, the Rwandan government passed *Organic Law No. 31/2006* which recognises the role of *abunzi* or local mediators in conflict resolution of disputes and crimes.[53] The Constitution of Rwanda provides for the establishment in each Sector a "Mediation Committee" responsible for mediating between parties to certain disputes involving matters determined by law prior to the filing of a case with the court of first instance.[54] The Mediation Committee comprises of twelve residents of the Sector who are persons of integrity and are acknowledged for their mediating skills.[55] Such a framework may be useful in dealing with the challenges that are likely to arise in the actualization of Articles 60(1)(g) and 67(2)(f) together with all the relevant land laws which require the use of ADR and TDR mechanisms in managing natural resource based and especially land conflicts. There should be set in place a legal framework wit5hin which such an arrangement may operate.

Order 46 Rule 20 of Civil Procedure Act and Rules,[56] does not expressly mention TDR mechanisms. This needs to be amended so as to put it in line with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases. These provisions have has the potential to promote the active use of ADR and TDR through an all-inclusive policy, which takes into account the particular context, cultural distinctions and value systems of particular communities.

The Evidence Act, Cap 80 should also be reviewed so as to simplify the evidential rules to cover situations where informal systems of dispute resolution are being used. Simplified procedures should be introduced to ensure that courts and tribunals focus on substantive rather than procedural justice as contemplated under Article 159(2) (d). This is in appreciation of the fact that most of the practitioners of TDR are usually non-lawyers and mostly even persons with no formal education. If these persons are to take part in the

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[53] M. Mutisi, "Local conflict resolution in Rwanda: The case of abunzi mediators", in M. Mutisi and K. Sansculotte-Greenidge (eds), Integrating Traditional and Modern Conflict Resolution: Experiences from selected cases in Eastern and the Horn of Africa, pp. 41-74at p.41, African Centre for the Constructive Resolution of Disputes (ACCORD), Africa Dialogue Monograph Series No. 2/2012
Available at http://accord.org.za/images/downloads/monograph/ACCORD-monograph-2012-2.pdf [Accessed on 28/03/2015]

[54] Article 159, Constitution of Rwanda, 2003.

[55] Ibid.

[56] Cap 21, Laws of Kenya.

justice system, then there should be created an environment that allows them to participate meaningfully such as one that allows them to utilize their expertise and knowledge based on their cultural backgrounds.

It is also important that the Judicature Act, 1967 be reviewed in view of the recognition that culture and traditional dispute resolution mechanisms are now recognized under the Constitution and should inform the use of ADR and TDR mechanisms in conflict management and access to justice. There should also be put in place proper procedures and channels through which application of TDR in the appellate process where the matter in dispute involves customary law can take place.

Land Act, 2012, should also be reviewed to ensure clear and substantive provisions that ensure that requirement on encouragement of communities to settle land disputes through recognized local community initiatives and participation is phrased in a more mandatory manner so as to ensure that there is equal and equitable opportunities to members of all ethnic groups; non-discrimination and protection of the marginalized; democracy, inclusiveness and participation of the people; and the active utilisation of alternative dispute resolution mechanisms, especially TDR, in land dispute handling and management. As it is now, the provisions appear to be too general and ambiguous rendering their implementation more discretionary than mandatory. In addition to the foregoing, section 17 of the National Land Commission Act should be amended so as to ensure that the Commission consults or seeks assistance from community leaders on matters pertaining to land on a mandatory basis rather than discretionary one. Section 18 which provides for the establishment of County Land Management Boards needs to be amended in terms of the composition of the Boards so as to include community leaders/elders who would advise such boards on matters of ADR and TDR.

Such elders should also be accorded an opportunity through a legal platform to assist or advise the court in matters pertaining to customary law. There is therefore a need to formulate an enabling policy and legal framework for ADR and TDR mechanisms. As such, one of the ways that this would be actualized is enactment of a statute to be known as ADR and TDR Mechanisms Act in order to provide for the effective implementation of Article 159 of the constitution on the use of ADR and TDR and to provide for the regulatory and institutional framework to govern the practice of ADR and TDR. This would go a long way in ensuring that such mechanisms: are used in a way that is consistent with the Bill of Rights; existence of a clear referral mechanism; formal recognition and enforcement of ADR and TDR outcome and that there is clearly defined jurisdiction of ADR and TDR practitioners . All this should be done while ensuring that there is preserved the informality of these mechanisms.

6. Conclusion

Although the Constitution guarantees the right of access to justice and goes further to recognize ADR and TDR, there is no elaborate legal or policy framework for their effective application. Currently, the legal framework does not provide comprehensive guidelines on linkage of TDR with the formal court process. This has further frustrated the utilization of TDR in Kenya. While acknowledging that the adoption and application of Africa's traditional dispute resolution mechanisms including indigenous principles and methods on conflict management do not apply to all situations, 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. Traditional dispute resolution mechanisms can go a long way in facilitating access to justice at the community level, especially for those who feel alienated from the formal processes in terms of the cost for justice and technical procedures.[57] There is therefore a need for enactment of a sound legal and policy framework for effective utilization of TDR and ADR to ensure full access to justice for Kenyans. It is only through putting such legal and policy measures in place that we can fully legitimize the ADR and TDR mechanisms and tap into their advantages. This will facilitate effective justice for Kenyans and ultimately promote the creation of a just and peaceful society for all.

[57] Article 60(1)(g) of the Constitution of Kenya provides that one of the principles of land policy in Kenya is encouragement of communities to settle land disputes through recognised local community initiatives consistent
with the Constitution. This is also reflected under Article 67(2) (f) which provides that one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.

Court Sanctioned Mediation in Kenya-An Appraisal

Abstract

This paper is informed by the post constitution 2010 enactment of laws in Kenya recognizing the role of Alternative Dispute Resolution (ADR) mechanisms in enhancing access to justice and the subsequent set up of legal and institutional framework on court sanctioned mediation. The paper evaluates the effectiveness of these frameworks in ensuring effective mediation in Kenya and makes viable recommendations on the same with the aim of ensuring that the same achieves the desired results of effective justice for the people of Kenya.

1. Introduction

This paper critically analyses the merits and demerits of court annexed or court mandated mediation and suggests plausible ways of entrenching mediation in the Kenyan justice system. In this paper the author also explores the attributes of informal conflict resolution mechanisms including mediation, highlighting the fact that negotiation and mediation are not alien concepts in the conflict resolution discourse in Kenya.[1] It is on this basis that recommendations are made to enhance the practice of mediation in Kenya.

2. Conceptualising Mediation

Mediation is basically an informal process, where a mediator who is a third party with no decision-making authority attempts to bring the conflicting parties to end their conflict by agreement. A mediator is not part of the conflict, but an outsider who strives to ensure that the process of the conflict resolution turns out to be a perfect picture in the estimation of the parties.[2] The Kenyan *Civil Procedure Act*[3] defines mediation as an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings. This definition depicts mediation as taking part in the context that makes the whole process legal.[4]

Mediation is actually negotiation with the assistance of a third party. The mediator's role in such a process is to assist the parties in the negotiations and they cannot dictate the outcomes of the negotiation.[5]

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[1]The Constitution advocates for the use of Alternative Dispute Resolution Mechanisms (ADR) and Traditional Dispute resolution Mechanisms (TDRMS) for the management of disputes and conflicts in Kenya. See Articles 60(1) (g); 67(1); 159(2); 189.

[2] M. Mironi, "From Mediation to Settlement and from Settlement to Final Offer Arbitration: an Analysis of Transnational Business Dispute Mediation", 73(1) Arbitration 52 (2007), p. 53.

[3] Cap 21, Laws of Kenya.

[4] Ibid, Section 2 of the Civil Procedure Act.

[5] K. Muigua, Resolving Environmental Conflicts through Mediation in Kenya Ph.D Thesis, 2011, Unpublished, University of Nairobi. P.43.

The parties to the conflict are given the opportunity to play the lead role, although the mediator may be involved in direct communications between them or their representatives. The mediator may also seek to transform the relationship between the parties and to lead parties to reach an outcome that addresses the aggregate of their interests in the conflict.[6] Indeed, it has been observed that mediation is more of a private affair in which the mediator is neither applying nor interpreting the law but just facilitating the parties to arrive at their mutual agreement.[7] Mediation, with its confidentiality safeguards, offers a much more private, low-keyed approach to conflict resolution. It attempts to remove the parties' adversarial posturing replacing it with a harmonious relationship.[8]

Mediation is often believed to work best in a conflict in which the parties have had a significant prior relationship or when the parties have an interest in continuing a relationship in the future.[9] Thus, mediation is distinguishable from the other mechanisms of conflict resolution in that the resolution framework is owned by the parties who drive the process of reaching a negotiated outcome.[10] It is party centred and this makes its outcome more acceptable to them as they feel they can identify with the mediation outcome or their side of the story influenced such outcome.

3. Background

There has been enactment of laws in Kenya recognizing the role of Alternative Dispute Resolution (ADR) mechanisms in enhancing access to justice and peaceful coexistence and such mechanisms consist of mediation amongst others. It is however important to point out that such ADR mechanisms do operate either outside the law or as it has been the case in some countries, they are regulated through legislation. In some jurisdictions, mediation is court annexed and provided for under the law and, as such, the parties are not given much choice in deciding whether or not to mediate their conflict before lodging it to the court. The constitution of Kenya now provides that in exercising judicial authority, the courts and tribunals must abide by certain principles which include *inter alia* promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute management mechanisms.[11]

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[6] C. Pollack, "The Role of the Mediation Advocate: a User's Guide to Mediation", 73(1) Arbitration 20, (2007), p 20-23.

[7] Senator Johnstone Muthama v Tanathi Water Services Board & 2 others [2014] eKLR, para. 10. [Per GV Odunga, J]

[8] C.S. Meschievitz, "Mediation and Medical Malpractice: Problems with Definition and Implementation", Law and Contemporary Problems, Vol. 54, No. 1 in, Medical Malpractice: Lessons for Reform, (The Medical Malpractice System and Existing Reforms), (Duke University School of Law, Winter, 1991), pp. 195-215.

[9] J.S. Murray, Alan Scott Rau & Edward F. Sherman, Processes of Dispute Resolution: The Role of Lawyers, University casebook series, Foundation Press, 1989, p. 47.

[10]M.Tarrazon, "The Pursuit of Harmony: the Art of Mediating, the Art of Singing", 73(1) Arbitration 49, (2007), pp. 50-51.

[11] Article 159(2) (c), Constitution of Kenya 2010 (Government Printer, Nairobi).

The *Civil Procedure Act*[12] provides for mediation of disputes.[13] The Act was amended to introduce the aspect of mediation of cases as an aid to the streamlining of the court process.[14] This amendment of the Act required the setting up of a Mediation Accreditation Committee by the Chief Justice to determine the criteria for the certification of mediators, propose rules for the certification of mediators, maintain a register of qualified mediators, enforce such code of ethics for mediators as may be prescribed and set up appropriate training programmes for mediators.[15]The Chief Justice has since appointed Members to the Committee and had them gazetted.[16]

Mediation is to be conducted in accordance with the Mediation Rules.[17] Sub clause (4) provides that an agreement between the parties to a dispute as a result of mediation under this part must be recorded in writing and registered with the court giving direction under sub clause (1), and the same shall be enforceable as if it were a judgment of that court and no appeal shall lie against an agreement referred to in sub clause (4).[18]Informal mediation which may not require the use of writing is not provided for. The codification of mediation rules in the civil procedure Act seems to reflect the concept of mediation as viewed from a Westerner's perspective and not in the traditional and informal way. In addition to the foregoing Kenya's Judiciary efforts towards promoting the use of ADR have been witnessed in the Judiciary ADR Pilot Scheme.[19] This is expected to assist in dealing with backlog of cases in the courts. This paper casts a critical look at court sanctioned mediation in Kenya. It also explores mediation's capacity to resolve conflicts.

4. Approaches to Mediation

There are basically two approaches to mediation namely mediation in the Legal and Political Processes. Mediation as a conflict management mechanism can be used as a legal or political process. In the legal process mediation is a settlement mechanism and hence does not have all the attributes of mediation while in the political perspective it possesses

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[12] Cap 21, Laws of Kenya.

[13] Sections 2 and 59 Civil Procedure Act as Amended by the Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, Government Printer, Nairobi, 2012, at pp.1092-1097.

[14] Ibid

[15] Section 59 A (1) and (2) of the Civil Procedure Act.

[16] Kenya Gazette, Vol. CXVII-No. 17, Gazette Notice No. 1088, Nairobi, 20th February, 2015, p. 348.

[17]Ibid, Section 59B (3).

[18]Ibid, Section 59B (4).

[19] W. Mutunga, Chief Justice & President Of The Supreme Court Of Kenya, 'Alternative Dispute Resolution And Rule Of Law' For East African –Prosperity,' remarks By The Chief Justice At The East African Arbitrators Conference September 25, 2014. pp. 3-4. Available at *http://www.judiciary.go.ke/portal/assets/files/CJ%20speeches/Cjs%20Speech%20ADR%20-%20Sept.%2025,%202014,%20Windsor.pdf* [Accessed on 28/03/2015]; "Judiciary to adopt alternative dispute resolution mechanism," People Correspondent, People Daily Newspaper, 10 March, 2015. Available at *http://mediamaxnetwork.co.ke/peopledaily/139823/judiciary-adopt-alternative-dispute-resolution-mechanism/* [Accessed on 28/03/2015].

all the attributes of mediation and leads to resolution. A settlement is superficial addressing the issues of the conflict only and not the underlying causes of the conflict whereas resolution is the mutual construction of a relationship which is legitimate because the needs of each party are satisfied.[20] That is why it is arguable that only mediation in the political process leads to *resolution*. Consequently mediation in the political process is held out to be the true mediation. It has the true character of mediation: voluntariness, party autonomy in the choice of the mediator, over the process and the outcome.[21]

This dichotomy (legal and political process) is based on various variables. It is a typology founded on the differentiation between a dispute and a conflict.[22] A dispute refers to issues which are not about values, and can therefore be negotiated and even bargained about. As such disputes are merely settled hence the phrase dispute settlement. On their part conflicts refer to issues about values which are non-negotiable and hence the phrase conflict resolution.[23]

A conflict is about needs and values shared by the parties whereas a dispute is about interests or issues. Needs or values are inherent in all human beings and go to the root of the conflict while interests and issues are superficial and do not go to the root of the conflict.[24] Consequently conflict resolution is that approach which prescribes an out-come based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship whereas dispute settlement is an agreement over the issue(s) of the conflict which often involves a compromise and is power-based where the power relations keep changing thus turning the process into a contest of whose power will be dominant.[25]

4.1 Mediation in the Political Process

Mediation in the political process is informed by resolution.[26] Resolution of a conflict is the mutual construction of a relationship which is legitimate because the needs of each party are satisfied. Since conflicts arise out of the non-fulfillment of the non-negotiable needs or values of the conflicting parties in the society, conflicts are well addressed

[20] K. Cloke, "The Culture of Mediation: Settlement vs. Resolution", The Conflict Resolution Information Source, Version IV, December 2005

[21]K. Muigua, Resolving Environmental Conflicts through Mediation in Kenya Ph.D Thesis, 2011, op cit P.48.

[22] J. Burton, Conflict: Resolution and Prevention, (London: Macmillan, 1990), pp. 2-12.

[23] See generally M. Mwagiru, Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006).

[24] D. Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", Journal of Peace Research, Vol.32, No. 2 (May, 1995), pp.152-153

[25]Ibid; See also generally M. Mwagiru, Conflict in Africa; Theory, Processes and Institutions of Management, op cit.

[26] See K. Muigua, Resolving Conflicts through Mediation in Kenya, Chapter 4 (Resolution and Settlement), pp. 56-65. (Nairobi, Glenwood Publishers, 2012)

through resolution where the role of mediation is to satisfy the mutual needs of the parties and removal of the underlying causes of the conflict.[27]

Mediation in the political process allows the parties to have autonomy over the choice of the mediator, the process and the outcome. What makes mediation in the political process lead to a resolution is the fact that there is voluntariness, party autonomy over the process and of the outcome. Where the parties show a genuine desire to submit and commit themselves to mediation it is an indication that the parties are desirous of resolving the conflict. When one party only is willing to submit to mediation then the chances of resolving that conflict are slim.[28]

The political process does not rely on coercion or enforcement, but rather on the basis of a common ground upon which to build enduring and long lasting solutions, never to revisit the conflict in future.[29] Mediation in the political process derives its legitimacy from the voluntariness to engage in the mediation process, fairness, and the autonomy exhibited by the parties over the choice of the mediator, the process and the outcome.[30] The other abstract concepts that also inform the political process enabling it to achieve better results than the legal process include *participant satisfaction*, *power*, *effectiveness and efficiency of the process* (emphasis ours). The success of mediation is thus gauged by reference to such abstract concepts.[31]

These concepts provide the threshold for determining whether a mediation process is successful or not. True mediation is the one that has all the above attributes and incorporates the aforesaid concepts in its process. Since the said attributes are interdependent the mediation process should have most of them in order to achieve an outcome that is enduring, long-lasting and acceptable to the parties.[32] Mediation in the political process depicts the true character of mediation. Its adoption in Kenya would go a long way in resolving a wide range of conflicts including environmental conflicts.[33]

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[27] K. Cloke, "The Culture of Mediation: Settlement vs. Resolution", The Conflict Resolution Information Source, Version IV, December 2005

[28] J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", Cardozo Journal of Conflict Resolution, op cit p.300.

[29] Ibid, pp.295-296.

[30] C. Baylis and R. Carroll, "Power Issues in Mediation", ADR Bulletin,Vol.7, No.8 [2005],Art.1, p.135

[31] K. Muigua, Resolving Environmental Conflicts through Mediation in Kenya Ph.D Thesis, 2011, op cit P.49.

[32] J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", Cardozo Journal of Conflict Resolution, op citp.293-294

[33] See K. Muigua, Resolving Conflicts through Mediation in Kenya, op cit pp. 147-155;
K. Muigua, Resolving Environmental Conflicts through Mediation in Kenya Ph.D Thesis, 2011, op cit P.67.

4.2 Mediation in the Legal Process

Mediation in the legal process arises where the conflicting parties come into arrangements which they have been coerced to live with while exercising little or no autonomy over the choice of the mediator, the process and the outcome of the process. In the legal context mediation is a settlement mechanism which is much linked to the court system. This means that the root causes of the conflict are not addressed as it relies on the power relations which keep changing.[34]

Mediation in the legal process focuses on the interests or issues of the conflict. Conflicts arising out of the interests of the parties are as a result of the power-capacities between the parties.[35] As a legal process mediation is linked to judicial settlement and arbitration and thus leads to a settlement. It is arguable that court annexed mediation is not really mediation. The voluntariness and the autonomy over the process and the outcome are not present in this kind of mediation because it is pursuant to an order of the court where the settlement has to be returned back to court for ratification.[36] The notion that mediation in the legal sense is a settlement process has been restated in the international legal context where mediation has been seen to be linked to judicial settlement and arbitration such that, it is viewed as a process that supports the courts.[37]

It has been said that in some jurisdictions including Kenya, mediation is being sacrificed at the altar of legalism, despite the fact that the courts are encouraging parties to choose other methods such as mediation rather than litigation. The argument is that the legal environment is unable to comprehend the structure and epistemology of mediation such that even after parties have been encouraged to mediate their conflict, the results of the mediation have to be tabled in court for ratification.[38]

Some of the attributes of mediation in the legal process are that parties lack autonomy in the process, the decision is not mutually satisfying ,the outcome is not enduring , parties cannot choose a judge (for example in a judicial settlement) and does not address the root causes of the conflict. Mediation in the legal process is not true mediation but is a legal process as it lacks the attributes of mediation which are: *voluntariness*; *autonomy over the forum*; *choice of the mediator*; *control over the process and the outcome* (emphasis added). It only leads to a settlement as opposed to a resolution.

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[34] Ibid; See also fig. 1in 4.4 below.
[35] D. Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op cit, p. 152.
[36] See fig. 1 in 4.4 below.
[37]J. North, Court Annexed Mediation in Australia – An Overview, Law Council of Australia, 17th November, 2005, available at, www.lawcouncil.asn.au, (accessed on 7th July 2012).
[38] M. Mwagiru, op cit, p. 119.

It has been observed that mediation in the political process leads to resolution since it has all the attributes of a true mediation. Mediation in the legal process leads to a settlement since all the attributes of mediation are not present.[39] As already noted settlement is superficial addressing the issues of the conflict only and which may later flare up again when power balances change.[40]

4.3 Attributes of Mediation

There are certain attributes that are associated with mediation. These include voluntariness, confidentiality, informality, flexibility, speed, cost-effectiveness, efficiency, autonomy and fostering of relationships. However there are attributes of mediation that are common to both the legal process and the political processes of mediation. The characteristics of mediation that ran across the board are: the presence of a third party (imposed or chosen), flexibility, confidentiality[41], speed, and the fostering of relationships. However, the legal process is less autonomous as the parties may not choose the forum and the third party.[42]

4.4 Court Sanctioned Mediation

Since the promulgation of the current constitution of Kenya 2010, new laws have been enacted and others amended. To bring them into conformity with Article 159 of the constitution which introduces the notion of justice being done to all irrespective of status and without delay, alternative forms of dispute including reconciliation, mediation and traditional dispute resolution mechanisms have been incorporated in the legal framework.[43]

The law requires reference of all suits, which in the court's opinion are not among those exempted by law and are suitable for mediation.[44] Such reference is, however, subject to the availability of mediation services and is to be conducted in accordance with the mediation rules.[45] Mediated agreements entered into with the assistance of qualified mediators are to be in written form and as such, may be registered and enforced by the court.[46]

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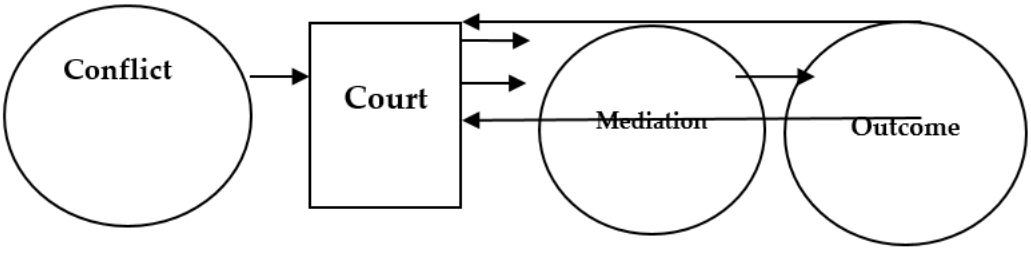
[39] K. Muigua, Resolving Environmental Conflicts through Mediation in Kenya op cit P.53.
[40] M. Mwagiru, op cit, p. 41.
[41] It is however noteworthy confidentiality may be compromised especially where the outcome has to be recorded in Court.
[42] Ibid, P.60.
[43]See also Section 20, Environment and Land Court Act 2011; section 15(4), Industrial Court Act, 2011; Section 34, Intergovernmental Relations Act; section 4, Land Act 2012; Section 17(3), Elections Act, 2011; Rule 11, Supreme Court Rules, 2011.
[44]Ibid, Section 59B (1).
[45]Ibid, Section 59B (3).
[46]Ibid, Section 59D of the Civil Procedure Act.

The aforesaid amendments to the *Civil Procedure Act* are not really introducing mediation *per se* but merely a legal process where a court can coerce parties to mediate and the outcome of the mediation taken back to court for ratification. These amendments have introduced a mediation process which is formal and annexed to the procedures governing the conduct of cases in the high court. Court Sanctioned Mediation may take the form of Court-Annexed Mediation or Court-Mandated Mediation. Court mandated mediation as envisaged in the Kenyan legal framework arises where after parties have lodged a dispute in court, the court encourages them to have their dispute mediated after which the outcome of that mediation is tabled in court for ratification.

Court-annexed mediation may arise where parties in litigation can engage in mediation outside the court process and then move the court to record a consent judgment. It has also been defined as the mediation of matters which a judicial officer has ordered to go to mediation or which are mediated pursuant to a general court direction (e.g. a procedural rule which states that parties to a matter make an attempt to settle the matter by way of mediation before the first case management conference).[47]

It is noteworthy that both court-annexed and court mandated forms of mediation have the court playing a major role either in their take off as in the case of court mandated or in ratification of the outcome as in the case of court annexed mediation. As such, the current formal framework on mediation envisages both Court-Annexed Mediation and Court-Mandated Mediation.

Mediation in the Court Process



Source: The author.

Fig. 1 shows mediation in the Court process. Mediation becomes formalized and may lose certain aspects such as confidentiality and voluntariness.

[47] Kathy, "What is court-annexed mediation?" Available at *http://www.janusconflictmanagement.com/2011/10/q-what-is-court-annexed-mediation/* [Accessed on 27/03/2015].

5. Court Sanctioned Mediation in Kenya-An Appraisal

5.1 Voluntariness of the Process

Voluntariness exists if both parties are making real and free choices based on effective participation in the mediation.[48]Mediation laws are generally based on either the voluntary or compulsory approach. Mediation may either be dependent on a party's unfettered will possibly with suggestion by the court or it may be imposed compulsorily by a court.[49] Both approaches have their advantages and reasons why they are attractive to parties. For instance, parties' voluntary submission to mediation impacts on the success of mediation as they are, in such a case, willing to find a win-win solution for all of them. If parties fail to submit to mediation voluntarily and it is imposed on them, the mediator will find it hard to get the parties to contribute to the resolution process and the result may not be a solution generated by the parties themselves.

Parties also tend to highly identify with mediated agreements reached voluntarily and which invariably enjoy unprecedented durability. But when the aim is to decongest the court system, as is the case with the amendments, compulsory mediation offers the advantage that it can be implemented immediately and does not depend on unpredictable factors such as parties' interests.[50]

There has been a long debate as to whether mediation should be compulsory. Those against compulsion say that mediation is a voluntary process; that compulsion is anathema and that some cases are unsuitable for mediation. Those in favour of compulsion say that mediation has a good success rate and should be compulsory subject to an opt–out clause. They opine that nothing is lost by attempting and that subjectively mediators feel that the rate of success is no different where cases have been vigorously pushed (but not ordered) by judges into mediation. [51]

When the law provides, that the court may on the request of the parties concerned or where it deems it appropriate to do so, direct any dispute before it be referred to mediation, it shuns voluntariness which is a cardinal principle of mediation in the political process.[52] As such the very essence of the mediation - party autonomy in the process and the outcome - is lost. This is the nature of mediation in the Kenyan context. The fact that voluntariness is lost in court mandated mediation means that the process cannot *resolve* conflicts.

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[48] K. Muigua, Resolving Environmental Conflicts through Mediation in Kenya Ph.D Thesis, 2011, op cit p.48.
[49] B. Knotzl & E. Zach, "Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act", 23(4) Arbitration International, 666, (2007). p. 665.
[50]Ibid.
[51] D. Cornes, "Commercial Mediation: the Impact of the Courts", 73 (1) Arbitration 12, (2007), p. 13.
[52] Section 59B of the Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, op.cit.

Since the aim is to resolve conflicts, mediation in the Kenyan context should have all the attributes of the political process as outlined above. What is needed in Kenya is a framework that allows parties to make the decision to negotiate, to progress with the process by inviting a third party to continue with the negotiations and the outcome to be their own. The order by the court calling for mediation interferes with a fundamental quality of mediation - its voluntary nature.

5.2 Composition of Mediation Accreditation Committee

The Chief Justice of Kenya Dr. Willy Mutunga appointed twelve members to the Mediation and Accreditation Committee.[53] The Committee is chaired by a serving Judge and it is responsible for determining the criteria for the certification of mediators, proposing rules for the certification of mediators, maintaining a register of qualified mediators, enforcing such code of ethics for mediators as may be prescribed and setting up appropriate training programmes for mediators.[54]

The membership consists of: Representatives from the Office of the Attorney General; Law Society of Kenya; Chartered Institute of Arbitrators (Kenya Branch); Kenya Private Sector Alliance; Institute of Certified Public Accountants of Kenya (ICPAK); Institute of Certified Public Secretaries of Kenya; Kenya Bankers Association; Federation of Kenya Employers; International Commission of Jurists (Kenyan Chapter); and the Central Organizations of Trade Unions.[55] The Chief Justice also appointed a Member of the Judiciary as the Acting Registrar of the Committee.[56]

It is commendable that the foregoing membership consists of experienced ADR practitioners. However, considering that true mediation also incorporates informal mediation, this composition excludes the real informal mediation practitioners who conduct mediation everyday outside court. The list is arguably elitist and it locks out the mediators at the grassroots level. This is especially reinforced by the encouragement for formal qualifications for mediators.

With the pre-determined qualifications of who can act as a mediator, this effectively bars those mediators who may be untrained in formal mediation, but are experts in informal mediation from being recognised as mediators. It is important to remember that some of the conflicts especially those with a cultural aspect to them may benefit from the vast experience and knowledge of these informal mediators. However, they may not be able to participate citing lack of the formally acceptable qualifications as mediators. Accreditation becomes tricky considering that the current membership of the Committee may not be well versed with particular traditional knowledge and may therefore leave

[53] As per Section 59 A (1) and (2) of the Civil Procedure Act.
[54]Ibid.
[55] Kenya Gazette, Vol. CXVII-No. 17, Gazette Notice No. 1088, Nairobi, 20th February, 2015, p. 348.
[56] Ibid, Gazette Notice No. 1087.

out those who hold such knowledge when it comes to accrediting mediators. Such mediators may not need any formal training as they may have gained expertise and experience from long practice and their knowledge of traditions and customs of a particular community. Again, if they are to be considered untrained in certain aspects of that community, the question that comes up is whether the Mediation Accreditation Committee has the expertise or capacity to set the relevant level of requisite expertise or even offer training for subsequent accreditation.

The Constitution of Kenya 2010 requires that communities be encouraged to settle land disputes through recognised local community initiatives consistent with the Constitution.[57]If there is a dispute filed in Court by such affected communities and the Court decides to refer the same for ADR and specifically mediation, it is not clear from the law what criteria would be used to decide whether the Community initiative is well equipped to handle the matter and then file their report back to Court.

It is also noteworthy that the Committee was appointed based on their professional qualifications and this may be out of touch with the relevant expertise that would be necessary to deal with customary or community matters. The criteria to be used in picking out and allocating such matters to the Community initiatives are also not clear. Arguably, the use of ADR mechanisms as contemplated under Article 159 of the Constitution of Kenya should be interpreted in broader terms that not only involve the Court sanctioned mediation but also informal ADR mechanisms especially mediation, negotiation and reconciliation, amongst others. This assertion is in fact buttressed by the constitutional provisions that call for the utilisation of ADR to deal with natural resource conflicts and particularly community land.[58] It is suggested that the current framework on ADR in Kenya and specifically the court sanctioned mediation is narrow and does not capture the true spirit of the Constitution on the practice of ADR in the country.

These are concerns that might need to be addressed if the Judiciary ADR Pilot Scheme is to succeed. Mediation conducted within the community context as contemplated under Article 60[59] of the Constitution of Kenya may necessitate incorporation of the informal mediators into the Committee as the carry with them invaluable experience and expertise that the formal mediators may not possess or even obtain through the formal training.

Kenya can learn and benefit from the case of Rwanda's mandatory mediation framework where carrying the agenda of local ownership of conflict resolution, the Rwandan government passed *Organic Law No. 31/2006* which recognises the role of *abunzi* or local

[57] Article 60 (1) (g); 67(2) (f).
[58] Articles 60 and 67, Constitution of Kenya 2010.
[59] One of the principles of land management in Kenya is encouragement of communities to settle disputes through ADR.

mediators in conflict resolution of disputes and crimes.[60] The Constitution of Rwanda provides for the establishment in each Sector a "Mediation Committee" responsible for mediating between parties to certain disputes involving matters determined by law prior to the filing of a case with the court of first instance.[61] The Mediation Committee comprises of twelve residents of the Sector who are persons of integrity and are acknowledged for their mediating skills.[62]

They are elected by the Executive Committee and Councils of Sectors from among persons who are not members of decentralized local government or judicial organs for a term of two years which may be extended.[63] The *abunzi*[64] deal with civil and penal cases that occur in present-day Rwanda, hence genocide cases are outside their jurisdiction. Any party to the dispute who is dissatisfied with the settlement may refer the matter to the Courts of law. Such matter is however not be admissible by the court of first instance without prior production of the minutes of the settlement proposal of the mediators.[65] Like *gacaca*[66], the *abunzi* is inspired by Rwandan traditional dispute resolution systems which encourage local capacity in the resolution of conflicts.[67] It is observed that in a way, *abunzi* can be seen as a hybrid between state-sponsored justice and traditional methods of conflict resolution, popularised by the Government of Rwanda in the post-2000 era based on the objective to decentralise justice, making it affordable and accessible.

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[60] M. Mutisi, "Local conflict resolution in Rwanda: The case of abunzi mediators", in M. Mutisi and K. Sansculotte-Greenidge (eds), Integrating Traditional and Modern Conflict Resolution: Experiences from selected cases in Eastern and the Horn of Africa, pp. 41-74at p.41, African Centre for the Constructive Resolution of Disputes (ACCORD), Africa Dialogue Monograph Series No. 2/2012
Available at http://accord.org.za/images/downloads/monograph/ACCORD-monograph-2012-2.pdf [Accessed on 28/03/2015]

[61]Article 159**,** Constitution of Rwanda, 2003.

[62]Ibid.

[63]Ibid.

[64]Literally translated, abunzi means 'those who reconcile'. Mandated by Article 159 of the Constitution of Rwanda, and the Organic Law No. 31/2006 and further by Organic Law No. 02/2010/OL on the Jurisdiction, Functioning and Competence of Abunzi Mediation Committees, the abunzi is defined as 'an organ meant for providing a framework of obligatory mediation prior to submission of a case before the first degree courts.'

[65] Article 159, Constitution of Rwanda.

[66] GACACA are traditional community courts in Rwanda set up. Sourced from "Gacaca Courts," http://www.kigalicity.gov.rw/?article71 [Accessed on 26/03/2015]; In Rwandan context, or local language, Gacaca means, "judgment on the grass". Gacaca's main objective was reconciliation through restoration of harmony, social order by punishing, shaming and requiring reparations from the offenders….. as well as giving everyone in the community an opportunity to participate in the deliberation of justice, for example on how to punish the violators as well as having a say in the reintegration of the perpetrators back into the community. Sourced from P. Manyok, "Gacaca Justice System: Rwanda Quest for Justice in the post Genocide Era," Peace and Collaborative Development Network, February 28, 2013.
Available http://www.internationalpeaceandconflict.org/profiles/blogs/gacaca-justice-system-rwanda-quest-for-justice-in-the-post#.VRl_XvCP_FQ [Accessed on 26/03/2015].

[67]M. Mutisi, "Local conflict resolution in Rwanda: The case of abunzi mediators," op cit p.41.

Despite the reduced backlog of cases in Rwandan Courts and other benefits from the *abunzi* system, it has been argued that with excessive state oversight in the *abunzi* processes, there is always the possibility of *abunzi* becoming just another state-mandated mediation where local Rwandans participate not out of will or choice, but out of need.[68] The argument is that the ultimate result could be a dramaturgical representation of reconciliation and community building while deep seated reservations, divisions and frustrations remain latent.[69]Although *abunzi* mediation committees are local just like the gacaca courts, the abunzi function according to codified laws and established procedures although their decisions often remain inspired by custom. They encourage disputing parties to reach a mutually satisfying agreement but if necessary they will issue a binding decision.[70]

Kenya can benefit from the foregoing model in incorporation of informal mediators as well as customs and rules applicable to a particular community or group of people.[71]

5.3 Enforcement of Mediation Outcome

While the formal mediation processes requires written mediation agreement or outcome, this may be problematic for informal approaches where these may not take these forms. An informal mediation outcome may take the form of shaking hands, slaughtering a bull or goat, taking solemn oath to keep the promises or just confidential agreements especially between spouses.[72]Arguably, it should be possible under the legal framework to report back to court albeit orally such informal mediation outcome for purposes of terminating the conflicts or even enforcing the outcome where such was the agreement between the parties.

This may create difficulties in recognition, enforcement or even execution of such mediation agreements. The question is therefore how broadly a mediation agreement can be defined in order to accommodate informally brokered mediation agreements. It is important to assess whether it is possible to accommodate the issues as perceived in informal ADR practice especially informal mediation. The Judiciary could also review the framework as it is and decide whether a mere recording that the matter has been settled can suffice.

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[68]Ibid, p.42.
[69]Ibid, p. 42.
[70]Ibid, p. 49.
[71] Multi-Door Courtrooms like those in Lagos, Nigeria, which provides a comprehensive approach to dispute resolution within the administrative structure of the court offering a range of options other than litigation can also be considered for the Kenyan Judiciary.
[72] See generally J. Kenyatta, Facing Mount Kenya, The Tribal Life of the Kikuyu, (Vintage Books Edition, October 1965); See also H.O. Ayot, A History of the Luo-Abasuba of Western Kenya From A.D. 1760-1940, (Kenya Literature Bureau, 1979, Nairobi).

A case in point is *Republic V Mohamed Abdow Mohamed*[73]where the accused person was charged with murder. However, the deceased's family had written to the Director of Public Prosecutions requesting that the charge be withdrawn on account of a settlement reached between the families of the accused and the deceased respectively. The two families had sat and some form of compensation had taken place wherein camels, goats and other traditional ornaments were paid to the aggrieved family. Actually one of the rituals that were performed was said to have paid for blood of the deceased to his family as provided for under the Islamic Law and customs. These two families performed the said rituals, the family of the deceased was satisfied that the offence committed had been fully compensated to them under the Islamic Laws and Customs applicable in such matters and in the foregoing circumstances, they did not wish to pursue the matter any further be it in court or any other forum. The trial was thus terminated. Evidently, there was no written agreement in this matter and it relied on the good faith and voluntariness of the parties to resolve it.

It has been observed that informal mediation results in a non-binding agreement reached from mutual participation in the designing of the agreement, where through mutual participation and self-determination, it is anticipated that both parties will adhere to the stipulations of a settlement without the need for a 'binding' agreement.[74] As such, there may be need to relook at the law to accommodate such informal agreements and recognise them under the law for purposes of ensuring matters come to an end where it is the parties' wishes to do so.

There is a need for the guarantee of enforceability of the mediated agreement to ensure that mediation competes meaningfully with formal and binding dispute settlement methods, like litigation and arbitration. It has been argued that enforcement of the mediated agreement should not be left to the goodwill of the parties, but should be conferred on a public authority and be de-linked from requirements of form or process.[75] The Civil Procedure Act provides for registration and enforcement of mediated agreements resulting from mediations presided over by *qualified* mediators.[76] In effect, the law excludes enforcement of mediated agreements entered into without the assistance of 'qualified' mediators. Indeed, this exclusion would also affect enforcement of mediated agreements entered into with assistance of 'unqualified' mediators.[77]

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[73][2013] eKLR, Criminal Case 86 of 2011.

[74] J. Rifleman, Mandatory Mediation: Implications and Challenges, December 2005. Available at *http://www.mediate.com/articles/riflemanJ1.cfm* [Accessed on 27/03/2015]

[75] B. Knotzl & E. Zach, "Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act", op. cit., p. 683.

[76] Section 59D of the Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, op.cit.

[77] The question of who a 'qualified' mediator is a hotly contested one and has no clear answer.

5.4 Addressing the Legal Framework for ADR

There are mainly two options that applicability of mediation can assume. Mediation could be given wide application so that the law provides that it applies to every dispute in commercial and civil law. The other approach is to institute mediation procedures connected to competence of particular courts. The mediation law in Kenya seems to adopt the first approach with some variations.

The amendment to the Civil Procedure Act defined mediation and mediator very precisely and also defined the role of the mediator. The definition of mediation is narrow and has restricted the mediation only to a facilitative approach. The Act is also silent on whether or not mediation carried informally and conducted by 'unqualified' mediators is included in the definition. But nothing seems to exclude such mediation as the definitions of mediator and mediation are wide and all encompassing. However, even then, registration of mediated agreements and enforcement by the court is restricted to only those entered with assistance of qualified mediators.[78] This leaves uncertainty as to the status of informally entered mediation, which arguably form the basis of mediation use in Kenya.

In the short term, there should be ongoing efforts to identify and use mediation in ways that create a bridge between traditional conflict resolution mechanisms and the more formal mechanisms like the courts as recognized in Article 159 (2) (c) of the constitution. Development in order to be authentic, must respond to the traditions, attitudes, organisations and goals of the people whose society is under consideration.[79] Elders are traditionally regarded as experienced, expert custodians of knowledge, diplomacy and the judicial system of their specific society grouping. At independence in many African countries (including Kenya) most disputes were resolved using traditional/informal justice. Despite their popularity, these justice systems were regarded as obstacles to development. It was assumed that as the countries became more and more modernized Traditional Justice Systems (TJS) would naturally die but this, according to a study by Penal Reform International (PRI) has not been the case.[80] The current land mediation system in East Timor for example, creates a bridge between traditional dispute management mechanisms and the courts.[81] The need for greater connectivity between the

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[78] Section 59D of the Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, op.cit.

[79] B. Brainch, ADR/Customary Law, a paper presented at the World Bank Institute for Distance Learning for Anglophone Africa, November 6, 2003.

[80] See Penal Reform International, "Access to justice in Sub Saharan Africa: The Role of Traditional and Informal Justice Systems", PRI, (2000), pp. 1 – 196. Sourced from http://www.gsdrc.org/docs, (accessed on 03/06/2012).

[81] D. Fitzpatrick, "Dispute Resolution; Mediating Land Conflict in East Timor", in Aus AID's Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific, (2008),Case Study No. 9, p. 175. Sourced from http://www.ausaid.gov.au/publications/pdf, (accessed on 24/03/2015).

traditional and formal systems has been widely acknowledged and to this end, we must consider the social and economic benefits of incorporating traditional institutions and mediation mechanisms, within the formal mechanisms, to bridge the gap in conflict resolution.

The author recommends the drafting of a policy to inform the contents of a legal and institutional framework for mediation. The framework should not be "top-down". It should be a framework that recognizes traditional norms, laws, customs and institutions that deal with mediation and grants them an equal place in line with the constitution. The way to go is institutionalization of mediation in the political perspective for resolution of all conflicts, to ensure an element of effectiveness in enforcement of the agreed positions/decisions.

An Alternative Dispute Resolution Act would provide for the setting up of an institutional framework within which mediation and the other ADR processes would be carried out.[82] Care has to be taken however to ensure that parties engage in mediation voluntarily, the autonomy of the process is respected and the solutions reached are acceptable and enduring. Reforms to the current system of conflict resolution would effectively address weaknesses such as delays, costs, backlog of cases and bureaucracy.

A balance needs to be struck between using mediators with local expertise and ensuring objectivity in resolution of conflicts. In striking this balance, important issues need to be addressed such as providing appropriate training and building transparency and accountability into the mediation system.[83] Local administration officials involved in peace committees for example, have local knowledge and expertise but they are more susceptible than outsiders to allegations of bias and partisanship, thus the need to have independent members of the public as commissioners in the mediation process. There should also be more resources devoted to capacity building programs for mediators.

5.5 Ethics in Mediation

Considering that mediators may come from different backgrounds, it may be important to come up with a code of ethics to regulate the mediation practice. The code should set out principles relating to competence, appointment, independence, neutrality and impartiality, mediation agreements, fairness of the process, the end of the process, fees and confidentiality, which mediators should commit to.[84] The Mediation forums and community mediators as well, should have a feedback mechanism on the measures they

[82] All ADR processes need to meet the Constitutional threshold envisaged in Article 159(3). They should not offend the Bill of Rights or be repugnant to justice or morality or be inconsistent with the Constitution.

[83] D. Fitzpatrick, "Dispute Resolution; Mediating Land Conflict in East Timor", op. cit., p. 196.

[84] See generally, The European Code of Conduct for Mediators and Directive 2008/52 [2008] OJL 136/3.

take to support respect for the code through training, evaluation and monitoring of the mediators.

Standards of training, practice and codes of ethics should be set and mediators should be trained through a strategy of participation. Capacity-building requires the transfer of quality skills and knowledge tailored to the needs of a specific group, which is adapted to local practice and benefits from existing capacity, for instance an established NGO network of community-based paralegals.[85]

5.6 Maintenance of Quality Standards in Mediation

The need for quality in any proposed mediation exercise cannot be gainsaid. In other jurisdictions, concern has been expressed on the lack of quality control and uniformity of practice in relation to the rapidly expanding number of commercial and voluntary organisations who are nurturing mediators and offering mediation services to the public and to the courts in England and Wales.[86] While discussing court – annexed mediation, Judge Kirkham observes that some judges have expressed concerns over the arrangement in place in England and Wales, where some court centres offer a court – annexed mediation service and trained lay mediators provide the service. The parties pay a nominal sum to the court and it is the court that provides the administration and the accommodation.[87]

Some judges express concern that this proximity gives rise to the perception on the part of the parties that the court in some way exercises control over the process. If a mediator is incompetent or if the process goes off the rails, the reputation of the court will suffer, yet the judges have no control at all over the process.[88] Hence, though courts are equipped with powerful weapons to help persuade parties to mediate, the concerns raised by the judge should be addressed if the benefits mediation has to offer are to be reaped.

The law now provides for the establishment of an Accreditation Committee to regulate the quality and accreditation of mediation and mediators in Kenya.[89] Listing registered mediators promises to ensure the implementation of the quality standards by the accreditation committee. A Code of Ethics for Mediators should substantively address matters of quality of mediation practice. There is, however, a need to introduce elements

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[85] See B. Brainch, ADR/Customary Law, op cit.

[86] A. Brandy, Alternative Dispute Resolution (Mediation) Development for Non-Family Civil Disputes in England and Wales, a paper presented at the World Jurist Association's 21st Biannual Conference on Law of the World (Sydney/ Adelaide: WJA Publication, August 17 – 23rd 2003).

[87] F. Kirkham, "Judicial Support for Arbitration and ADR in the Courts in England and Wales", 72 (1) Arbitration 53, (2006).

[88]Ibid, p. 56.

[89] Section 59A of the Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, op cit.

of self-regulatory processes for mediators and to further promote the proliferation of mediation centers and institutions in Kenya.

5.7 Costs of Mediation

The establishment of mediation requires an incentive scheme to encourage the parties to engage in mediation even where there are viable alternatives.[90] Referral to mediation may happen after parties have incurred legal fees in drafting pleadings and filing the same. The lack of a reimbursement system for legal fees and other expenses is likely to make litigants resistant to mediation as it implies extra costs to the parties and there might be no provision for taxation of costs even where a mediated agreement is reached. The best starting point would have been to allow parties to reclaim court fees or part of it. Generally, much more needs to be done to seal the loopholes identified so that all the positive attributes of mediation can be enjoyed.

6. Mediating the Kenyan Way

Apart from the formal mediation provided for by the Civil Procedure Act and Rules, there are informal home-grown mechanisms at community level for the resolution of conflicts, including environmental conflicts. These mechanisms include but are not limited to negotiation, mediation in the political process and reconciliation as practised in the Kenyan context. They are highly accessible and recognized at the grassroots and often compete with the formal mechanisms. They are now recognized under the constitution as some of the mechanisms that will enhance access to justice in Kenya.[91] These mechanisms are highly dynamic and tend to adapt in structure to meet the demands of the conflict at hand and their description is therefore not easy.[92] The informal systems such as the council of elders possess some attributes of mediation in the political process in that: parties have a choice of the mediator; the outcome is enduring; they are flexible; speedy; non-coercive; mutually satisfying; foster relationships; are cost effective; addresses the root causes of the conflict; the parties have autonomy about the forum and reject power-based outcomes.[93] Conflict resolution especially the use of negotiation and mediation was customary and is an everyday affair. It was thus common to see people sitting down informally and agreeing on certain issues. These practices foster broken relationships and enhance peaceful coexistence among the people ensuring conflicts were managed.[94]

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[90] B. Knotzl & E. Zach, "Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act", op cit, p. 683.

[91]Article 159 (2) (c); Article 60(1) (g); Article 67(1).

[92] P. Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," International Environmental Law Research Center (IELRC) Working Paper 2005-1, available at http://www.ielrc.org/content/w0501.pdf [accessed on 12/03/2015].

[93] See discussion in K. Muigua, Resolving Conflicts through Mediation in Kenya, Chapter Two, op cit pp. 20-35.

[94] See generally J. Kenyatta, Facing Mount Kenya, The Tribal Life of the Kikuyu, op cit.

The process of mediation refers to what takes place at the mediation table. Mediation is successful if the parties to the conflict have autonomy over the process. If the parties in conflict feel empowered or that their concerns are addressed in a respectful manner, then the outcome will be acceptable and enduring. Mediation as a conflict management episode is thus successful if it is fair and effective.[95] Success in mediation can therefore be attributed to both the process and the outcome of the mediation.[96]

Mediation in the African social setting was conducted as a political process leading to resolution and not a settlement.[97] Kenyans can still engage in this process and resolve conflicts. Societal norms, traditions, customs, religious and other practices forming part of the culture of a people do serve as a powerful force that motivates disputants to seek assistance from third parties. Before the advent of contemporary conflict management mechanisms, traditional communities developed and refined, over time, their own mechanisms for resolving local level disputes, both within their communities and with others. These were based on solid community institutions such as mediation through a Council of Elders. These institutions were respected by community members and hence those affected generally complied with their decisions.[98]

Traditional African communities had traditions, customs and norms that were pivotal in conflict management. Such traditions, customs and norms were highly valued and adhered to by members of the community. Indeed, these customs and norms still play a pivotal role in the lives of communities and have even been recognised in the constitution as such.[99] It is noteworthy that Kenyans can and still use negotiation and mediation in their communities either amongst themselves or while engaging other communities.[100]

7. Towards Access to Justice Through Mediation

Article 159 of the constitution of Kenya aims at easing access to justice through the use of reconciliation, mediation and traditional conflict management mechanisms. It is essential that a party not only accesses justice but feels satisfied by the outcome at the psychological

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[95] J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", Cardozo Journal of Conflict Resolution, op.cit, pp.291-292

[96] B. Sheppard, Third Party Conflict Intervention: A Procedural Framework, 6 RES. ORG. BEHAV.226, 226-275 (1984)

[97] See J. Kenyatta, Facing Mount Kenya, The Tribal Life of the Kikuyu, op cit; See also K. Muigua, Resolving Environmental Conflicts through Mediation in Kenya, op cit at p.58.

[98] C. Chapman and Alexander Kagaha, "Resolving Conflicts Using Traditional Mechanisms in The Karamoja and Teso Regions of Uganda", Northern Uganda Rehabilitation Programme (NUREP) Briefing, Minority Rights Group International, August 2009, p.1.

[99] Article 11, Constitution of Kenya 2010. The Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation; See also Article 44 thereof.

[100] See R. Triche, "Pastoral conflict in Kenya: Transforming mimetic violence to mimetic blessings between Turkana and Pokot communities." African Journal on Conflict Resolution, AJCR Volume 14 No. 2, 2014, pp. 81-101 at pp. 96-97.

level. The constitution now guarantees access to justice for all.[101] This can be achieved through enhanced application of informal forms of conflict management. Access to justice imperatives to wit: expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies are present in mediation in the political perspective.[102]

Reforming the judiciary to conform to the spirit of the constitution has been timely and vital. Kenyans as a people have not lost the capacity to coexist peacefully, commune together, respect one another, negotiate, forgive and reconcile in resolving their conflicts. This is essential in not only ensuring access to justice but more importantly in promoting peace.[103] The Kenyan homegrown conflict management mechanisms can achieve both. They are still the first port of call for the majority of the Kenyan society and hence the need for greater recognition and integration into the justice system while preserving the informal approaches perceived advantages over the formal system. Cultural, kinship and other ties that have always tied Kenyans together as one people have not died out. In many parts of the country Kenyans still believe in the principles of reciprocity, common humanity, and respect for one another and to the environment.

Mediation in the informal context was and has been an informal process. Informality of mediation as a conflict resolution mechanism makes it flexible, expeditious and speedier, it fosters relationships and is cost-effective. It also means that since parties exhibit autonomy over the process and outcome of the mediation process, the outcome is usually acceptable and durable. Similarly, mediation addresses the underlying causes of conflicts preventing them from flaring up later on. These positive attributes of mediation can only be realized if mediation is conceptualized as an informal process as it was in the customary, communal and informal context and not as a legal process.

In the informal set up mediation is seen as an everyday affair and an extension of a conflict management process on which it is dependent. Conflict management is thus heavily

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[101] Article 48, Constitution of Kenya.

[102] K. Muigua, Resolving Environmental Conflicts through Mediation in Kenya, op cit at p.48.

[103] See Speech by Hon. Uhuru Kenyatta, President and Commander In Chief of the Defence Forces of the Republic of Kenya during 'The State Of The Nation' Address At Parliament Buildings, Nairobi On Thursday, 26th March, 2015, paragraphs 81 and 82. The President, while commenting on the use of restorative justice to address the plight of the victims of 2007/2008 post election violence observed that the available options are not limited to retributive justice as there also exists the promise of restorative justice. He further stated that in many ways, Kenyans and humanity overall, have benefited from restorative justice, an approach that is deeply rooted in people's cultural and historical realities, particularly when such conflicts have a communal and political dimension. This was supported by the fact that many thousands of Kenyans have already reached out to reconcile with one another. Available at *http://www.kara.or.ke/Speech%20by%20H.E.%20Hon%20Uhuru%20Kenyatta%20During%20the%20State%20of%20the%20Nation%20Address%20at%20Parliament%20Builidngs.pdf [Accessed on 26/03/2015].*

embedded in the way of life of most Kenyan communities. Mediation in the customary, communal and informal setting has operated and functioned within the wider societal context in which case it is influenced by factors such as the *actor*s, *their communication*, *expectations*, *experience*, *resources*, *interests*, and *the situation in which they all find themselves* (emphasis ours). It is thus not a linear cause-and-effect interaction but a reciprocal give-and-take process. Legislation should not kill mediation by annexing it to the court system and making it a judicial process. Informal mediators may still have a big role to play in making mediation work in Kenya.

8. Conclusion

Successful utilisation of mediation in Kenya requires a customized approach where community values, traditional knowledge and modernity come together in search of true resolution of conflicts. Court Sanctioned Mediation is now part of the law of Kenya. However, a lot needs to be done to ensure that such mediation remains a vehicle through which true justice can be achieved.

Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration

Abstract

This paper explores the feasibility of commercial arbitration as a means to foster the process of Eastern Africa integration. The author proffers an argument in the context of Eastern Africa integration, that commercial arbitration offers a better platform for dealing with commercial disputes that are bound to arise considering the differing personal or state interests in the ongoing Eastern Africa integration, as compared to national Courts.

This discourse is premised on the fact that the five member countries making up the East African Community (EAC) have different legal systems and this presents a major challenge in harmonising the various legal systems. This also affects the possible use of courts in managing the potential transnational commercial disputes due to the potentially different rules of procedure and practice. The paper briefly examines the state of commercial arbitration in the EAC Member States with a view to identifying the existing frameworks and any impediments in their effectiveness. Finally, the author makes a case for utilizing commercial arbitration to build bridges and foster Eastern Africa integration for development.

1. Introduction

This paper explores the feasibility of commercial arbitration as a means to foster the process of Eastern Africa integration. The author proffers an argument in the context of Eastern Africa integration, that commercial arbitration offers a better platform for dealing with commercial disputes that are bound to arise considering the differing personal or state interests in the ongoing Eastern Africa integration, as compared to national Courts. This discourse is premised on the fact that the five member countries making up the East African Community (EAC) have different legal systems and this presents a major challenge in harmonising the various legal systems. This also affects the possible use of courts in managing the potential transnational commercial disputes due to the potentially different rules of procedure and practice. It is unlikely that any of the Member States may be willing to give up on their legal system and adopt one practised in another State, solely for the interests of EAC. Based on this, this discourse makes a case for commercial arbitration as a potent mechanism of managing commercial disputes amongst the EAC Member States and any legal persons doing business in any of these countries.

The paper briefly examines the state of commercial arbitration in the EAC Member States with a view to identifying the existing framework and any impediments in their effectiveness. Finally, the author makes a case for utilizing commercial arbitration to build bridges and foster Eastern Africa integration for development.

2. Background to the Eastern Africa Integration

The East African Community (EAC) is a regional intergovernmental organisation of the Republics of Kenya, Uganda, Tanzania, Rwanda and Burundi, with its headquarters in Arusha, Tanzania. The East African Community (EAC), first established in 1967, disintegrated in 1977, due to lack of strong political will, lack of strong participation of the private sector and civil society in the co-operation activities, the continued disproportionate sharing of benefits of the Community among the Partner States due to their differences in their levels of development and lack of adequate policies to address the situation.[1]

The EAC was re-established by the *East African Community Treaty* which was signed on 30th November1999 and entered into force on 7thJuly 2000, following its ratification by the three original Partner States, Kenya, Uganda and Tanzania. The Republic of Burundi and the Republic of Rwanda acceded to the EAC Treaty on18thJune 2007 and became full members of the Community with effect from 1stJuly 2007.[2]

The Member States stand to benefit greatly in terms of economic development from the integration of Eastern Africa region. It is noteworthy that the countries in the East African Community (EAC) are among the fastest growing economies in sub-Saharan Africa, making significant progress toward financial integration, including harmonization of supervisory arrangements and practices and the modernization of monetary policy frameworks.[3] Regional integration expands the possibility for an increased flow of both intra-regional and inter-regional Foreign Direct Investment (FDI) due to the expanded market created by the borderless (or less restricted) trade across the member countries.[4] The four Pillars of the regional integration include Customs Union, Common Market, Monetary Union and Political Federation.[5] These are meant to enhance the efficiency and

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[1]Treaty For The Establishment Of The East African Community (As amended on 14th December 2006 and 20th August 2007), Preamble.

[2] Ibid.

[3] Drummond, P, et. al., The East African Community: Quest for Regional Integration, International Monetary Fund, January 2015.

[4] Ali I. Abdi, A.I. and Seid, E.H., 'Assessment of Economic Integration in IGAD', The Horn Economic and Social Policy Institute (HESPI) Policy Papers No. 13/2, August 2013. P.7. Available at http://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH0b09.dir/doc.pdf [Accessed on 7/02/2015].

[5] Uganda 'Umoja', Quarterly Update on the East African Community. Edition 6 October – December 2014. P. 19. Available at http://www.meaca.go.ug/index.php/publications/cat_view/54-umoja.html [Accessed on 29/01/2015]. The Customs Union came into effect in 2005 and it allows East Africa to operate as a free trade area where Partner States reduce or eliminate taxes on goods originating from their countries and have a common tariff on goods imported from outside the participating Countries. The common market became effective on 1st July 2010 and objective is to provide the region with a single economic space within which business and labour will operate in order to stimulate investment. The Monetary Union was signed on November 2013 with a view to transform the East

performance of the Eastern Africa region as an economic bloc. The East African region prospects a future that will have the region operating as a regional economic bloc with a common market and possibly a common currency.

This will come with other benefits such as increased regional cross-border business and commercial investment. The EAC seeks to set up a prosperous, competitive, secure, stable and politically united East Africa; and provide platform to widen and deepen economic, political, social and cultural integration in order to improve the quality of life of the people of East Africa through increased competitiveness, value added production, trade and investments.[6]

These potential benefits may however be curtailed by the disputes, including commercial disputes, that are bound to come with the increased regional trade and investment or even conflict of interest amongst the Member States. It has been observed that for effective liberalisation of trade and investment in any region, the role of competent dispute settlement mechanisms is vital.[7] Regional integration is not an end in itself but is an instrument to support a strategy of economic growth and development.[8] Development is not feasible in a conflict situation. Conflicts and disputes ought to be managed effectively and expeditiously for development to take place.[9]

The national legal systems are usually grounded on legislation and/or policy statements, which may include judicial and regulatory frameworks. This approach mainly uses the adjudication and arbitration processes to settle arising conflicts. However, litigation has been criticized in many forums as one that does not guarantee fair administration of justice due to a number of factors. Courts in Kenya and even elsewhere in the region have encountered a number of problems related to access to justice. These include high court fees, geographical location, complexity of rules and procedure and the use of legalese.[10]

African economy to operate with a common currency. Political federation is said to be in its last stages and under this, the EAC Partner States are expected to have a regional political Union and harmonized operations.

[6]Treaty for the Establishment of the East African Community, Art.5.

[7] Maniruzzaman, A.F.M., 'International Commercial Arbitration in the Asia Pacific: Asian Values, Culture and Context', Journal of International Affairs, Vol. 6, No. 3, July-December 2002, pp. 61-63, p.61.

[8] Iglesias V.E., "Twelve Lessons from Five Decades of Regional Integration in Latin America and the Caribbean." Presentation to the Conference Celebrating the 35th Anniversary of the Institute for the Integration of Latin America and the Caribbean (INTAL), Buenos Aires, November 27-28, 2000. p. 2. Available at *http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/iglesias-12lessons.pdf* [Accessed on 09/02/2015].

[9] Muigua, K. and Kariuki F., 'ADR, Access to Justice and Development in Kenya'. Paper Presented At Strathmore Annual Law Conference 2014 held On 3rd & 4th July 2014 at Strathmore University Law School, Nairobi. P.2. Available at *http://www.kmco.co.ke/index.php/publications/138-adr-access-to-justice-and-development-in-kenya-kariuki-muigua-kariuki-francis*

[10]Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, Avoiding Litigation

The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.[11] Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. As such, national courts are not very popular with the international commercial community when it comes to settling commercial disputes due to the alien laws and fear of bias.

Arbitration is thus preferred to litigation when it comes to settlement of international commercial disputes due to its advantages over litigation, such as, parties can agree on an arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexible; cost-effective; confidential; speedy and the result is binding.[12]

In disputes involving parties with equal bargaining power and with the need for faster settlement of disputes, especially business related, arbitration offers a more viable mechanism in dealing with commercial disputes. This is informed by the international community's desire to create a multinational treaty regime for international commercial transactions that is based on the private law principle of autonomy of contract – party autonomy– and, specifically, two of the most important creations of autonomy of contract: first, agreements to submit disputes that might arise during the course of a commercial relationship to binding private arbitration; second, contractual terms designating the law that will apply to such disputes.[13]

It is against this background that this paper explores the viability of international commercial arbitration as a means to foster the Eastern Africa integration through effective management of commercial disputes in the region for enhanced economic development of the Member States.

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through the Employment of Alternative Dispute Resolution, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th& 9th March, 2012.
Available at *http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf*

[11] Ojwang, J.B., —The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development, Kenya Law Review Journal 19 (2007), pp. 19-29 at p.29

[12] Muigua, K., .Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya'. The Chartered Institute of Arbitrators-Kenya, Alternative Dispute Resolution Journal, Volume 1 Number 1 (2013), pp. 43-78 at p. 61.

[13] McConnaughay, P.J., 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles' PKU Transnational Law Review, Volume 1, Issue 1, pp. 9-31,pp. 11-12.

3. Legal and Institutional Framework on Commercial Arbitration in Eastern Africa

This section is limited to Kenya, Tanzania, Uganda, Rwanda and Burundi being the Member States of the East African Community.[14] The discussion briefly examines the legal and institutional framework on international commercial in each of these Member states. It is important to point out that all the five Member States have some form of legal and institutional framework on arbitration in place, albeit some of them underdeveloped. Most of these States' frameworks are not specifically on commercial arbitration which is the concern of this paper, but they do contemplate the practice of commercial arbitration in these countries.

3.1 Kenya

Kenya's legal system is based on the English Common Law system resultant from its British colonial history. The *Arbitration Act*[15] governs the arbitration process in Kenya. Parties to a dispute can, by way of a written agreement refer their disputes to arbitration.[16]Arbitration is international if *inter alia,* the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states.[17] Arbitration statutes generally provide for limited rights of review by superior courts from arbitral awards. For instance, the Kenyan *Arbitration Act*, 1995 provides for court intervention on limited grounds. One such instance is where the Arbitration Act expressly provides for intervention of the court under section 10.[18] The courts are however still involved in the arbitral process and can actually be used to bog down the same.[19] Courts can intervene on a number of grounds to set aside the arbitral award. The most common ground is public policy. The High Court of Kenya may set aside the award where it finds the award is in conflict with the public policy of Kenya.[20] Public policy is however vague and has not yet been clearly defined. In the Kenyan case of *Christ for All Nations vs. Apollo Insurance Co. Ltd*[21], the Court stated that although public policy is a most broad concept incapable of precise definition, an award could be set aside under section 35 (2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it was shown that either it was: Inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or inimical to the national interest of Kenya; or contrary to

[14] The Treaty for Establishment of the East African Community, Art. 3.
[15] No. 4 of 1995 (As amended in 2009)
[16] S. 4, No. 4 of 1995.
[17] Ibid, S. 3(a).
[18] Ibid, S. 10, 'Except as provided in this Act, no court shall intervene in matters governed by this Act'.
[19] See generally Muigua, K., 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and after Arbitration in Kenya'. Kenya Law Review 2008-2010. Available at http://kenyalaw.org/kl/index.php?id=1923; see also *http://www.kmco.co.ke/attachments/article/80/080_role_of_court_in_arbitration_2010.pdf*
[20] S. 35(2) (b), No. 4 of 1995.
[21] [2002] 2 EA 366

justice and morality. This therefore leaves the matter to the discretion of the courts to determine what entails public policy of Kenya.

In addition to enacting the *Arbitration Act*, 1995 for domestic and international arbitrations, Kenya is a State Party to the 1958 *New York Convention on the Recognition and Enforcement of Arbitral Awards (NYC)*[22] and to *International Convention on the Settlement of Investment Disputes* (ICSID)[23].The Kenyan *Arbitration Act,* 1995 provides that international arbitration awards are to be recognised as binding and enforced in accordance to the provisions of the *New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards*.[24] (Emphasis ours) This clears doubt as to Kenya's stand on enforcing international arbitration awards and all that remains is the national courts' goodwill.

Under the *Civil Procedure Act*[25] there are provisions dealing with the use of both mediation and arbitration.[26] The *Civil Procedure Act* gives the court jurisdiction to refer any dispute to Alternative Dispute Resolution (ADR) mechanisms where parties have agreed or where the court considers it appropriate.[27] Further, where all parties agree, the court has jurisdiction to refer any matter in difference between the parties to arbitration.[28] However, these provisions are mainly applicable to domestic arbitration.

The *Nairobi Centre for International Arbitration Act* 2012[29], which was enacted in January 2013, established an independent institution, the Nairobi Centre for International Arbitration (NCIA) for commercial arbitration based in Nairobi. Its functions are set out in the Act as *inter alia* to: to promote, facilitate and encourage the conduct of international commercial arbitration in accordance with the Act; to administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; to maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives; and to enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre achieve its objectives.[30]

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[22] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"). Adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958.
[23] 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159 / [1991] ATS 23 / 4 ILM 532 (1965) / UKTS 25 (1967).
[24] S. 36(2)
[25] Cap 21, Laws of Kenya.
[26] See generally Section 59, Civil Procedure Act, Cap 21; See also Order 46, Civil Procedure Rules 2010 (Legal Notice No. 151 of 2010.
[27] ss. 59, 59B and 59C, Cap 21.
[28] Order 46, R. 1, Civil Procedure Rules 2010.
[29] No. 26 of 2013, Laws of Kenya.
[30] S. 5.

This Centre places Kenya on a better platform to engage with other regional international commercial arbitration centres in promoting international commercial arbitration in the region and the ultimate increase in investments and trade for enhanced economic development in the region.

The Chartered Institute of Arbitrators Kenya Branch, established in 1984, is one among the branches of the Chartered Institute of Arbitrators, which was formed in 1915 with headquarters in London. It promotes and facilitates determination of disputes by Arbitration and other forms of Alternative Dispute Resolution (ADR), which includes mediation and Adjudication. It has affiliations with arbitration bodies and institutions in other countries across the world and with the London Court of International Arbitration and the International Chamber of Commerce in Paris.[31]

The Branch maintains a close relationship with the International Law Institute (ILI) Kampala and the Centre for Africa Peace and Conflict Resolution (CAPCR) of California State University to conduct courses in Mediation and other forms of ADR both locally and internationally. The branch has also been involved in training of Arbitrators in East, West and Southern Africa respectively. The institute thus plays a major role in promoting international commercial arbitration not only in the Eastern Africa region but also in Africa as a whole.[32]

The Kenyan legal and institutional framework has the potential to advance international commercial arbitration for the integration of Eastern Africa. However, this framework has not been streamlined with EAC policies on deepening integration. This needs to be done if any meaningful progress is to be achieved. Even as Courts play their role as provided for in Kenya's *Arbitration Act,* Kenyan Courts ought to have due regard to the regional interests of maximizing investment and trade in the region through attracting more foreign investors. Minimal and objective courts' intervention in international commercial arbitration in the region will go a long way in fostering regional integration through international commercial arbitration.

3.2 Tanzania

Tanzania's legal system is based on the English Common Law system derived this system from its British colonial legacy. It has been argued that although there are two arbitration bodies in Tanzania, arbitration is not yet popular among the Tanzanian business community.[33] The two arbitration bodies, each with their own set of rules on arbitration

[31] The Chartered Institute of Arbitrators Kenya Branch website, *http://www.ciarbkenya.org/About_Us.html [Accessed on 16/02/2015]*

[32] Ibid.

[33] 'Tanzania', Arbitration in Africa, June 2007. P. 2. Available at *http://www.nortonrosefulbright.com/files/tanzania-25762.pdf* [Accessed on 4/02/2015].

proceedings are equipped to deal with domestic and international arbitrations.[34]The Tanzania Institute of Arbitrators (TIA) is a Non-Governmental Organisation registered under the *Societies Act*[35] and the National Construction Council (NCC) is a statutory body created under the *National Construction Council Act*[36], which sponsors and encourages arbitration as a means of settling disputes within and outside the construction industry regardless of the subject matter of the dispute.[37]

The Tanzanian *Arbitration Act*[38] was enacted in 1931 to provide for arbitration of disputes. The Act has general provisions relating to arbitration by consent out of court[39]as well as provisions on court-annexed arbitration.[40]Further, provisions on arbitration are contained in the *Arbitration Rules of 1957*[41], made under the Arbitration Act.[42] It has been noted that the arbitration legislation in force (both the Arbitration Act and the Rules) pre-dates the UNCITRAL model law and has never been changed to take into account its provisions.[43] Tanzania is also a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) of 1965 since 17 June1992.[44]

In Tanzania, the Arbitration Act is not clear on arbitrability of subject matter under the Act.[45] It has also been observed that the Tanzanian national Courts have immense powers to intervene on any matter of law in an arbitration proceeding.[46] As such, party autonomy

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[34] Ibid, p. 5; See also Rana, R., 'The Tanzania Arbitration Act: meeting the Challenges of Today With Yesterday's Tools?', in Chartered Institute of Arbitrators, Kenya, Alternative Dispute Resolution Journal, Vol. 2, No. 1, 2014. Pp. 229-237 at p.230.
[35] cap 337, Laws of Tanzania.
[36] (No. 20 of 1979, cap 162).
[37]Ibid.
[38] Cap 15, Laws of Tanzania (2002 Revised Edition)
[39] (ss. 3-26)
[40]Tanzania's Civil Procedure Code (the Code) deals with arbitration where it arises in the course of court proceedings (see Schedule 2 of the Code).
[41] (Published in Government Notice 427 of 1957).
[42]Arbitration in Africa, June 2007, op. cit. p.5.
[43]Ibid. p.6.
[44]Kapinga, W., et. al., 'Getting the Deal through - Arbitration- Tanzania', Chapter 2014, p. 406. Available at *https://www.academia.edu/9872218/Getting_the_Deal_Through_-_Arbitration-_Tanzania_Chapter_2014 [Accessed on 4/02/2015].*
[45] Rana, R., 'The Tanzania Arbitration Act: meeting the Challenges of Today with Yesterday's Tools?' op. cit. p.231.
[46] Ibid; See also generally, Mkumbukwa, N.S., 'Is The Commercial Court Jealous Of Arbitration?' Available at *http://www.comcourt.go.tz/comcourt/wp-content/uploads/2013/08/Mkumbukwa-Nuhu-S.-Is-the-Commercial-Court-Jealous-of-Arbitration_-Commercial-Court-Roundtable-8th-Oct.-2009.pdf* [Accessed on 14/02/2015]; Kepher, K., 'Procedural Laws Of Commercial Arbitration In Tanzania: An Analysis'. ISSN 2321 – 4171. Available at http://jsslawcollege.in/wp-content/uploads/2013/12/PROCEDURAL-LAWS-OF-COMMERCIAL-ARBITRATION-IN-TANZANIA-AN-ANALYSIS.pdf [Accessed on 14/02/2015].

is restricted thus severely affecting investors'' confidence in the Tanzania's law on arbitration.

It has been argued that as a general rule: the more reliably a nation's national courts honour written arbitration agreements and refuse to hear claims within the scope of an arbitration agreement, the more clearly defined and limited the possible occasions of judicial involvement in arbitration proceedings; and the more reliably a nation's national courts recognize and enforce arbitration awards without reviewing or "second guessing" the merits of the award-the better the business climate and reputation of the nation as a preferred destination for foreign direct investment.[47] Currently, Tanzania cannot be said to have clearly defined and limited occasions of judicial involvement in arbitration proceedings. Courts do set aside arbitral awards and interfere with arbitration on grounds that are fluid and this makes the practice of international commercial arbitration in Tanzania unreliable.

The country's laws on arbitration have also been criticised as archaic and in need of urgent reforms.[48] It is perhaps the only country in the region with very outdated laws.
In light of the foregoing, Tanzanian authorities need to reform the country's laws on arbitration in line with the international best practices and harmonise them with the objectives of the Eastern Africa integration process. Arbitration practice in Tanzania ought to be afforded more autonomy and independence from unnecessary national courts interference, as this is the only way that international commercial arbitration in Tanzania can take root and spur development in the country and the region. The reforms are especially necessary due to the anticipated inflow of foreign investments in oil and gas in the region.

3.3 Uganda

Uganda was a British colony and thus English legal system and law are predominant in Uganda. Its legal system is based mainly on English Common Law. The laws applicable in Uganda are statutory law, common law, doctrines of equity and customary law when it does not conflict with statutory law.[49] The Ugandan *Arbitration and Conciliation Act*[50]was enacted to amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, to define the law relating to conciliation of disputes and to make other provision relating to the foregoing.[51]Its provisions on arbitration apply to both domestic arbitration and international

[47] McConnaughay, P.J., 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles' op. cit. p. 14.
[48] Bitekeye, A., 'TZ arbitration laws outdated, new statutes a must', The Citizen, Tuesday, April 30 2013. *Available at http://www.thecitizen.co.tz/-/1840414/1840792/-/v8bx2lz/-/index.html [Accessed on 14/02/2015].*
[49]Judicature Act, Cap 13, Laws of Uganda.
[50] CAP 4, Laws of Uganda.
[51]Ibid, Preamble.

arbitration.[52]Perhaps a little uniqueness about the Ugandan law on arbitration is its provisions on conciliation.[53] The Ugandan Act states that except as provided in the Act, no court is to intervene in matters governed by the Act.[54] The national Courts may assist in taking evidence[55], setting aside arbitral award[56] and recognition and enforcement of the arbitral award.[57]

However, the Ugandan *Arbitration and Conciliation Act,* provides for grounds upon which the High Court may set aside an arbitral award upon application by a party. The Act provides that recourse to the court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3). This may be made only if the party making the application furnishes proof that—a party to the arbitration agreement was under some incapacity; the arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda; the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case; the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; except that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of the Act from which the parties cannot derogate, or in the absence of an agreement, was not in accordance with the Act; the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators; or the arbitral award is not in accordance with the Act.[58]

The award may also be set aside where the court finds that—the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or the award is in conflict with the public policy of Uganda.[59] This presents the same hindrances as in the Kenyan jurisdiction.

The Act establishes the Centre for Arbitration and Dispute Resolution (CADRE).[60]This Centre is charged with *inter alia*: to make appropriate rules, administrative procedure and

[52]Ibid, S. 1.
[53] Part 5 (ss. 48-66).
[54]Ibid, S. 9.
[55] Ibid, s. 27.
[56] Ibid, s. 34.
[57] Ibid, ss. 35 &36.
[58] Ibid, s.34(2)(a).
[59] Ibid, s. 34(b).
[60] Ibid, s. 67.

forms for effective performance of the arbitration, conciliation or Alternative Dispute Resolution process; to establish and enforce a code of ethics for arbitrators, conciliators, neutrals and experts; to qualify and accredit arbitrators, conciliators and experts; to provide administrative services and other technical services in aid of arbitration, conciliation and alternative dispute resolution; to facilitate certification, registration and authentication of arbitration awards and conciliation settlements; to avail skills, training and promote the use of alternative dispute resolution methods for stakeholders; and to do all other acts as are required, necessary or conducive to the proper implementation of the objectives of the Act.[61]

Noteworthy are the provisions on enforcement of New York Convention awards.[62] The Act provides that when seized of an action in a matter in respect of which the parties have made an arbitration agreement referred to in section 39[63], the court is to, at the request of one of the parties, refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.[64] Further, any New York Convention award which would be enforceable under the Act is to be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, setoff or otherwise in any legal proceedings in Uganda; and any references in the Act to enforcing a foreign award is to be construed as including references to relying on an award.[65] Also important are the provisions that where the court is satisfied that a New York Convention award is enforceable under the Act, the award is to be deemed to be a decree of that court.[66]

The Act also has provisions on the enforcement of an arbitral award rendered pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention").[67] Any person seeking enforcement of an ICSID Convention award is to be entitled to have the award registered in the court subject to proof of the prescribed matters and to the other provisions of the Act.[68] Ugandan Courts

[61] Ibid, s. 68.
[62] Ibid, Part 3 (ss. 39-44).
[63] S. 39(1) is to the effect that a "New York Convention award" means an arbitral award made, in pursuance of an arbitration agreement, in the territory of a State (other than Uganda) which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") adopted by the United Nations Conference on International Commercial Arbitration on 10th June, 1958. ss. (2) thereof further states that an award is be treated as made at the seat of the arbitration, regardless of where it was signed, dispatched or delivered to any of the parties.
[64] S. 40.
[65] S. 41.
[66] S.43.
[67] Part 4 (ss. 45-47).
[68] S. 46(1).

are willing to enforce ICSID Convention awards and only stay execution of any ICSID Convention award registered under the Act if there is proof of such application.[69]

These provisions demonstrate Uganda's willingness to adopt and uphold international best practices in international arbitration. This is important for the foreign investors, who require some confidence in national courts' willingness to enforce foreign arbitral awards when called upon to do so.

Arbitration in Uganda has the potential to boost commercial arbitration for Eastern Africa integration. Uganda can benefit from regional cooperation on setting up infrastructure on international commercial arbitration. It is important to point out that CADRE in Uganda plays a more active role in domestic arbitration than possibly any other institution in any of the EAC Member countries. International commercial arbitration would however require minimal intervention by the institution especially in areas of making appropriate rules, administrative procedure and forms for effective performance of the arbitration, establishing and enforcing a code of ethics for arbitrators. This is because where Parties to an international arbitration choose the applicable rules, CADRE would seem to interfere if it imposed the Ugandan rules on the process even if one of the parties is Ugandan. Uganda can therefore cooperate with the other EAC Member States in coming up with a transnational commercial arbitration framework for the region and streamline its domestic framework with the same.

3.4 Rwanda

Rwanda has had considerable improvement in the investment climate and this has positioned the country as an ideal investment destination.[70] The implication has been that both domestic and cross border deals have increased, with an emerging need to use arbitration and other friendly ways of commercial disputes resolution.[71] Rwanda has been a party since 1979 to the *Washington Convention on the Settlement of Investment Disputes*, which provides for protection for investors and direct arbitral recourse against the State. On November 3, 2008, Rwanda became the 143rd country to accede to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention). The Convention entered into force for Rwanda on January 29, 2009.[72]

[69] S. 47.

[70] Kigali International Arbitration Center, Annual Report July 2012-June 2013. P. 4. Available at *http://www.kiac.org.rw/IMG/pdf/web_annual_report.pdf* [Accessed on 09/02/2015].

[71] Ibid.

[72] 'Rwanda Accedes to UN Convention on Commercial Arbitration', UN NEWS CENTRE, Nov. 3, 2008, available at *http://www.un.org/apps/news/story.asp?NewsID=28799&Cr=Trade&Cr1=Convention* [Accessed on 09/02/2015].

Rwanda Parliament enacted a law in February 2011 establishing Kigali International Arbitration Center (KIAC) as an independent body.[73] It is noteworthy that until the establishment of the Kigali International Arbitration Centre (KIAC), there was no formal mechanism for amicable dispute resolution, more so international commercial arbitration.[74]

Rwanda's framework on international arbitration coupled with its membership to various international instruments on international commercial arbitration places it in a favourable position. With alignment of this framework to the EAC policies, Rwanda can competitively participate in commercial arbitration in the region in a way that fosters regional integration, attracting foreign and national investors to the region.

3.5 Burundi

The Burundian legal system is largely based on German and Belgian civil codes and customary law, with the constitution guaranteeing the independence of the judiciary.[75] Commercial and investment disputes are normally settled by commercial courts, which have original and appellate jurisdiction.[76] Further, in 2005, the code on judicial competence[77] introduced provisions on arbitration.

In 2007, the Burundian Government created a centre for arbitration and mediation to deal with commercial and investment disputes.[78] In 2009, *Investment Code of Burundi*[79] was enacted with its purpose being to encourage direct investments in Burundi.[80]This Investment Code allows the competence of international arbitration chambers for disputes arising over investments made in Burundi. The Burundian Investment Code was enacted with the aim of simplifying the existing legislation and harmonising the country's investment legislation with the frameworks applicable in other countries within the East African Community (Kenya, Uganda, Tanzania and Rwanda).[81] Burundi is also a member of the *International Centre for Settlement of Investment Disputes* (ICSID).[82]

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[73] Law No 51/2010 0f 10/01/2010, Laws of Rwanda.
[74] Kigali International Arbitration Center, Annual Report July 2012-June 2013. P. 4
[75] The judiciary is regulated by the law Code of Organization and Judicial Competence of 17 March 2005, promulgated pursuant to Article 205 (3) of the 2005 Burundi Constitution.
[76] A&JN Mabushi, 'Investment Guide, Burundi'. P.27. Available at *www.africalegalnetwork.com/wp-content/uploads/2014/09/Burundi.pdf* [Accessed on 06/02/2015].
[77] Law No.1/08 of 17 March 2005, Code on the Organization and Competence of the Judiciary.
[78] Ibid.
[79] Law No. 1/24 of 10 September 2008 Establishing The Investment Code Of Burundi.
[80] Ibid, Art. 2.
[81] De Backer, S. and Binyingo, O., 'A new investment code for a new Burundi'. P. 1. Published in IFLR1000 – edition 2008. Available at *http://www.mkono.com/pdf/A%20new%20Investment%20Code%20for%20a%20new%20Burundi%20_2008.pdf* [Accessed on 08/02/2015].
[82]A&JN Mabushi, 'Investment Guide, Burundi'. Op. cit. p. 27.

In 2014, Burundi became the 150th state party to the *New York Convention* 1958. Burundi however made a "commerciality reservation" to the Convention, which means that the Convention will only apply to disputes characterized as commercial under municipal law. The Convention was to come in force in the country on 21 September 2014 thus enabling arbitral awards made in Burundi to be enforceable in all states that are party to the New York Convention, and awards made in other states to be enforceable in Burundi.[83] The implication of Burundi's ratification is that all the EAC Member States are now party to the New York Convention and it is expected to improve the confidence of foreign investors in not only Burundi, but also East Africa generally.[84]

It is also worth mentioning that Burundian Investment Code contains provisions regarding the settlement of disputes between investors and the state.[85]If such disputes are not settled, investors have the choice of litigation before a court or arbitration. If the investment has been made with Burundian capital, the choice of arbitration will be limited to internal arbitration. If, the investment does not involve the resulting from the application of the present investment code between the Government and the investor, the investor will be able to opt for internal arbitration or international arbitration.[86]However, when the investor takes recourse to international arbitration, he must do so in accordance with arbitration rules of the International Centre for the Settlement of Investment Disputes (ICSID) as applicable at the time of execution of the investment, which gave rise to the dispute.[87]

It is noteworthy that the Burundian Code does not have provisions harmonising it with the regional initiatives, which should be the case in order to reflect Burundi's entry into the EAC, which opens up major economic opportunities for investors that could be better exploited if the legal framework were modernised and harmonised.[88] This is especially important considering that the *Vision Burundi 2025*[89] provides for regional integration as

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[83] Herbert Smith Freehills Dispute Resolution, 'Burundi becomes 150th state party to the New York Convention'. Available at http://hsfnotes.com/arbitration/2014/09/03/burundi-becomes-150th-state-party-to-the-new-york-convention/ [Accessed on 06/02/2015].

[84] Ibid. The U.S. Supreme Court noted in Scherk v. Alberto-Culver, 417 U.S. 506, 520 n.15 (1973): The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. *(http://www.jdsupra.com/legalnews/revisiting-the-new-york-convention-as-bu-23338/).*

[85] Titre iv, Law No. 1/24 Of 10 September 2008 Establishing The Investment Code Of Burundi.

[86] De Backer, S. and Binyingo, O., op. cit. p. 2.

[87] Art. 17.

[88] United Nations Conference on Trade and Development, Unofficial, edited translation of Chapter IV of the Investment Policy Review of Burundi (French original), 2010. P. 4.
Available at *http://unctad.org/en/docs/diaepcb200917ch4_en.pdf*

[89] Vision Burundi 2025,
available at http://www.burundiconference.gov.bi/IMG/pdf/VisionBurundi2025_short_en.pdf

one of its main pillars in order to benefit from regional integration to increase and diversify its economy.[90] It acknowledges that Burundi's robust and speedy economic growth will necessarily result from its successful integration at both the regional and sub-regional levels.[91]

The Vision 2025 also requires that in order to make a success of its integration with the regional groups that entail hope for its population, Burundi should undertake the reforms necessary in order to rehabilitate its macroeconomic framework, to set up a favorable environment for businesses, in order to attract foreign investors and to stimulate the Burundian private sector.[92] Arguably, this can be achieved through enhancing the practice of international commercial arbitration in Burundi. Burundi can put in place legal and institutional framework on international commercial arbitration as a step towards facilitating harmonised approach to international arbitration in the region for enhanced investment and trade and ultimately economic growth.

Considering its relatively young economy, Burundi can greatly benefit from employing measures aimed at setting in place appropriate rules, administrative procedure and forms for effective performance of international commercial arbitration, qualifying and accrediting arbitrators, providing administrative services and other technical services in aid of arbitration and general sensitization of the public on international commercial arbitration. This will go a long in building capacity and afford the country the ability to engage competitively with the other EAC Members.

4. Barriers to International Commercial Arbitration in EAC

It is noteworthy that while Kenya, Uganda and Tanzania share a common legal system (Common law), Rwanda and Burundi have the civil law system. This state of affairs presents difficulties due to the different legal procedures and practices where national laws are used in settlement of commercial disputes. Further, these countries have very different economies, and levels of development. This comes with its fair share of challenges and the developing countries have been advised that they need to devise regulatory and judicial mechanisms that transcend traditional methods of economic exchange within local communities and that instead facilitate exchange with strangers from outside the countries-strangers who often bring with them very different commercial customs and legal traditions.[93]

It is suggested that developing countries need to develop legal institutions: that are not dependent on existing public institutions (which often are either nonexistent or

[90] Vision Burundi 2025, pp. 39-40.
[91] Ibid, p. 39.
[92] Ibid, p. 40.
[93] McConnaughay, P.J., 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles' op. cit. p. 11.

unreliable); that are capable of operating independently of existing public institutions; and that, preferably, are allowed to operate with a promise that national governmental and judicial institutions will not interfere unduly with their independent operation and decisions.[94]

Cross-border trade in goods and services has triggered commercial disputes across the East African region. Establishing national commercial courts alone may not be very effective in reducing delays in resolving commercial disputes due to the differing legal systems. It has been suggested in previous regional conferences that as a region, EAC needs to reform arbitration process in courts to ensure parties involved in a commercial dispute obtain justice promptly since investor confidence is bolstered if the justice system is transparent and fast.[95]

4.1 Choice of Law in Court Proceedings

Considering the different legal systems in the EAC countries, any court proceedings in a particular country presents a handicap due to the varying procedural rules and practices. It is noteworthy that different laws provide for different time frames for approaching court to have the award set aside. For instance, in Uganda, an application for setting aside the arbitral award may not be made after one month has elapsed from the date on which the party making that application had received the arbitral award.[96] However, in Kenya, the period is set at three months.[97] Such differences in domestic laws may present difficulties when it comes to transnational commercial arbitration. Therefore, even as parties make choice of applicable law such factors ought to be considered.

4.2 Limitations on the Application of National Law in Court Proceedings and in Arbitration

From the foregoing discussion, it is clear that most the countries in the region have sought to abide by the international arbitration best practices especially on limiting court intervention. However, in some countries such as Tanzania, the extent of Courts' intervention is still unclear and this may therefore hinder development of international commercial arbitration in the region. In the past Courts in Kenya have also exploited the various grounds for court intervention provided for in the Act to interfere with the arbitration process in Kenya.[98]

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[94]Ibid, p. 11.

[95] Kenya Private Sector Alliance (KEPSA) chairman Vimal Shah, as quoted in Tralac, 'Special courts expected in East Africa to arbitrate commercial disputes'. Available at *http://www.tralac.org/news/article/6342-special-courts-expected-in-east-africa-to-arbitrate-commercial-disputes.html* [Accessed on 07/02/2015].

[96] S. 34(3), the Arbitration and Conciliation Act.

[97] Act No. 4 of 1995, s. 35(3).

[98] See generally, Muigua, K., 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and Arbitration in Kenya', op. cit.

4.3 Public Policy

In almost all jurisdictions in Eastern Africa, public policy is one of the grounds for setting aside arbitral awards that a national court may consider of its own initiative. However, courts have adopted a different approach to public policy, especially with regard to national public policy. In Kenya, Public policy is not only problematic at the national level but also at the international level. For instance, it has been observed that there is a general agreement that it is even more difficult to formulate the definition of international public policy than that of national public policy.[99] In fact, international public policy plays an important function not only in the exclusion of the application of some national rules but it can also influence the decision of arbitrators when fundamental notions of contractual morality or basic interests concerning international trade are involved.[100] It is meant to protect interests, which cross borders, and is applicable in international cases.[101] To this extent, specific domestic public policy may not be applicable to international commercial arbitration.

The public policy of individual states is divided into domestic public policy and international public policy, with the latter being the (more restricted) public policy of the state as applied to international transactions.[102] Court interference intimidates investors since they are never sure what reasoning the particular national court might adopt should it be called upon to deliberate on such commercial disputes. In some or most jurisdictions around the world, "Public policy" is defined to include procedural questions as well as questions relating to substantive law.[103] One of the impediments to be overcome in using international commercial arbitration in fostering Eastern Africa integration is harmonizing what entails public policy as a ground for setting aside arbitral awards in international commercial arbitrations.

4.4 The Doctrine of Arbitrability

Arbitrability is also one of the grounds for setting aside arbitral awards that a national court may consider of its own initiative. Arbitrability refers to the determination of the type of disputes that can be settled through arbitration and those that are the domain of the national courts. It deals with the question of whether specific classes of disputes are

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[99] Harmathy, A., 'New Experiences of International Arbitration with special emphasis on legal debates between parties from Western Europe and Central and Eastern Europe'. Electronic Journal of Comparative Law, vol. 11.3 (December 2007), p. 12. Available at http://www.ejcl.org [Accessed on 16/02/2015].

[100] Ibid.

[101] Adeline, C., 'Transnational Public Policy in Civil and Commercial Matters'. Law Quarterly Review, 128, pp. 88-113, 2012.

[102] Cairns, D.J.A., 'Transnational Public Policy and the Internal Law of State Parties'. April 27, 2007. p. 2. Available at *http://www.cremades.com/pics/contenido/File634523788247688756.pdf* [Accessed on 16/02/2015].

[103]Whittaker, J. et al., Principles relating to public policy in the International Arbitration Act, 29 November 2012, Available at*www.corrs.com.au/publications/corrs-in-brief/principles-relating-to-public-policy-in-the-international-arbitration-act/* [Accessed on 16/02/2015]

barred from arbitration because of the subject matter of the dispute.[104] Courts often refer to "public policy" as the basis of the bar.[105] The problem arises when a matter that is arbitrable in one jurisdiction fails the test of arbitrability in a different jurisdiction.

Arbitrability may be either subjective or objective. National laws often restrict or limit the matters, which can be resolved by arbitration. Subjective arbitrability refers to a situation where states or state entities may not be allowed to enter into arbitration agreements at all or may require a special authorization. Objective arbitrability refers to restrictions based on the subject matter of the dispute[106]. Certain disputes may involve such sensitive public policy or national interest issues that it is accepted that they might be dealt only by the courts, for instance criminal law.[107]

It has been argued under Kenyan law, that arbitrability might have acquired a broader definition after the passage of the current Constitution of Kenya, 2010[108], which elevates the status of Alternative Dispute Resolution (ADR). In this respect, the scope of arbitrability is broad under the Constitution of Kenya, 2010 as opposed to its scope under the *Arbitration Act.*[109] Article 159 of the Constitution provides that in the exercise of judicial authority by Courts and tribunals are to be guided by the principle that *inter alia* alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3). Clause (3) provides that the traditional dispute resolution mechanisms are not be used in a way that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law.

However, this remains to be seen especially due to the subjection of the same to repugnancy clause. In 2014, while ratifying the *New York Convention* 1958, Burundi made a "commerciality reservation" to the Convention, which means that the Convention will only apply to disputes characterized as commercial under municipal law. The arbitrability

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[104] Laurence Shore "Defining 'Arbitrability'-The United States vs. the rest of the world", New York Law Journal,
2009, available at *http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf, [* Accessed on 16/02/2015].

[105] Ibid, page 1

[106] Available at *www.paneurouni.com/files/sk/fp/ulohy.studentor/2rocnikmgr/arbitrability-students-version.pdf*

[107] Katarína Chovancová, Arbitrability, Extract, page 1, Institute of International and European Law, Available at *http://www.paneurouni.com/files/sk/fp/ulohy-studentov/2rocnikmgr/arbitrability-students-version.pdf*

[108] Government Printer, 2010, Nairobi, Kenya

[109] Kariuki, F, "Redefining "Arbitrability": Assessment of Articles 159 & 189 (4) of the Constitution of Kenya", Alternative Dispute Resolution, The Chartered Institute of Arbitrators, Kenya Journal, Volume 1, Number 1, 2013. ISBN 978-9966-046-02-4

of non-commercial matters under international arbitration in Burundi is therefore debatable.

The issue is how the parties to an arbitration agreement would deal with the question of arbitrability while exercising their party autonomy. What would happen where a subject matter is arbitrable in one jurisdiction and non-arbitrable in another? Would the courts uphold the arbitration agreement in such circumstances? This is especially difficult where either of the parties did not know that the subject matter for which they intend to subject to arbitration is non-arbitrable in another jurisdiction. It is therefore important that the question of arbitrability of a subject matter be addressed to ensure that when parties are entering an arbitration agreement they have the correct information. One of the factors contributing to this state of affairs is the lack of uniformity in the laws, application and indeed application of arbitration laws in different countries as well as different arbitral tribunals and institutions.[110]

It is noteworthy that in Uganda, the Centre for Arbitration and Dispute Resolution (CADRE) makes available to individuals and their legal counsel, at no charge, pre-drafted model arbitration and mediation clauses for inclusion in their contracts.[111] This is a positive step towards helping parties avoid difficulties that may arise if they were to have their subject matter declared non-arbitrable when the dispute has already arisen. A harmonised legal and institutional framework would go a long way in ensuring that arbitrability does not become a hindering factor in conducting international commercial arbitration in Eastern Africa region. The other option would be to go the Burundian way of having express provisions to the effect that only commercial disputes of certain nature are to be subjected to arbitration.[112]

4.5 Scope of the Courts' Control of Arbitral Awards/Governments' Interference

In the Ugandan case of *East African Development Bank vs Ziwa Horticultural Exporters Ltd*[113] it was observed that: "Sec. 6[114] of the *Arbitration and Conciliation Act*, provides for mandatory reference to arbitration of matters before court which are subject to an arbitration agreement; where court is satisfied that the arbitration agreement is valid, operative and capable of being performed, it may exercise its discretion and refer the

[110] Muliisa, P., 'Arbitrability of tax disputes in international commercial arbitration: The case of Uganda, The'. The Centre for Energy, Petroleum and Mineral Law and Policy.
Available at *http://www.dundee.ac.uk/cepmlp/gateway/index.php?news=32229* [Accessed on 16/02/2015].

[111] Kakooza, A.C., 'Arbitration, Conciliation and Mediation in Uganda: A Focus on the Practical Aspects' op. cit. p. 5.

[112] In 2014, while ratifying the New York Convention 1958, Burundi made a "commerciality reservation" to the Convention, which means that the Convention will only apply to disputes characterized as commercial under municipal law.

[113] High Court Misc. Appln. No. 1048 of 2000 arising from Companies Cause No. 11 of 2000.

[114] (present sec. 5)

matter to arbitration." This shows the Ugandan courts' support for arbitration although at the risk of such discretion being misused. Under section 5(1) of the Ugandan Act on Arbitration and Conciliation, the Court should exercise its discretion to satisfy itself that the arbitration agreement is valid, operative and capable of being performed.

Sometimes matters will be litigated all the way to the highest court on the law of the land in a bid to set aside what are considered unsatisfactory awards by either of the parties. Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending[115]**.** This delays justice and waters down the perceived advantages of arbitration and ADR in general. Setting up tribunals or courts with finality in their arbitral decisions and operating free of national courts interference can effectively deal with this impediment.

4.6 Institutional Capacity

There exists a problem on the capacity of existing institutions to meet the demands for international commercial arbitration. There is still much more needs to be done in order to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitating international commercial arbitration. The East Africa Court of Justice (EACJ) also needs to be better equipped to enable it handle international commercial arbitration, as its status currently cannot arguably handle such matters especially in light of the conflicting laws and policies in the Member countries.

5. Opportunities for International Commercial Arbitration in Fostering Eastern Africa Integration

Due to the legal hurdles associated with national courts, international commercial arbitration, with its potential advantages, emerges as a viable mechanism of handling the potential commercial disputes that may arise in the course of commercial transactions amongst the EAC Member States.

Experience in other regional economic communities is a demonstration that international commercial arbitration can be used foster Eastern Africa integration and to enhance the regional harmonisation of disputes management mechanisms in commercial practices among the Member States. The Organization for the Harmonization of Corporate Law in Africa[116] is a regional international organisation that groups together 16 African states,

[115] Muigua, K., Role Of The Court Under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration In Kenya, Kenya Law Review (2010), Available at *http://www.kenyalaw.org/klr/index.php?id=824*
For instance, the Arbitration between Kanyotta Holdings Limited and Chevron Kenya Limited (CALTEX) made its way to the Kenya High Court and Court of Appeal after the award was challenged (2012 eKLR)

[116] (Organisation pour l'harmonisation du droit des affaires en Afrique (OHADA)

mainly of the Francophone area. Its aim is to harmonize the legal and judicial systems specifically in the field of business and corporate law of member States.[117]

The OHADA seeks to restore the confidence of foreign investors and facilitate economic exchanges among the member States by providing them with a set of common and simple laws that suit modern economies, promoting arbitration as a discrete and speedy dispute settlement system in trade-related disputes, improving the training of the judges and the court clerks, preparing for future regional economic integration.[118]

The Common Court of Justice and Arbitration (CCJA) is both a judicial court and an arbitration institution responsible for supervising the administration of arbitration proceedings in OHADA member states.[119] In cases concerning OHADA law, the CCJA takes precedence over member states' courts.[120] The *Uniform Act on Arbitration* (the Uniform Act) governs any arbitration in an OHADA member state, whether the arbitration involves parties from an OHADA country or from a foreign State, and it is framed on the UNCITRAL Model Arbitration Law.[121] Its purpose is to promote arbitration as an efficient means to settle disputes. However, it is noteworthy that the Uniform Act does not limit arbitration to commercial and professional matters; individuals and corporate bodies alike may refer their dispute to arbitration.[122]

Indeed, there are jurisdictions where domestic courts support international commercial arbitration. This was demonstrated in the Mauritian case of *Mall Of Mont Choisy Limited v Pick 'N Pay Retailers (Proprietary) Limited & Ors*[123] where the Supreme Court of Mauritius was to decide on the validity of an arbitration agreement. The Claimant brought an action in the Supreme Court seeking sums under an agreement to develop and lease a shopping Centre in Mauritius. The defendant made an application under section 5 of *International Arbitration Act* 2008 to refer the matter to arbitration, because an arbitration clause in the lease over the property covered the dispute. Section 5 provides that where proceedings are started in a Mauritian court and it is asserted that the dispute is covered by an arbitration agreement, the matter is to be referred immediately to the Supreme Court. Unless the party denying the arbitration agreement can show before the Supreme Court,

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[117] OHADA, Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa, available at *http://www.pict-pcti.org/courts/OHADA.html [Accessed on 10/02/2015]*

[118] Ibid.

[119] Girard Gibbs LLP and Lazareff Le Bars AARPI, 'The Organization for the Harmonization of Business Law in Africa (OHADA) & the Common Court of Justice and Arbitration (CCJA)'. Available at *http://www.internationalarbitrationlaw.com/arbitral-institutions/ohada/ [Accessed on 10/02/2015]*

[120] Ibid.

[121] Girard Gibbs LLP and Lazareff Le Bars AARPI, OHADA Uniform Act of Arbitration. Available at *http://www.internationalarbitrationlaw.com/ohada-uniform-act/ [Accessed on 10/02/2015]*

[122] Ibid.

[123] 2015 SCJ 10.

on a prima facie basis, a very strong probability that the arbitration agreement is null and void, inoperative or incapable of being performed, the Supreme Court will refer the case to arbitration.[124]

The Claimant asserted that the lease, including the arbitration clause, had not become binding because it had been signed only as a holding measure by one director, while negotiations continued. The Supreme Court decided to refer the dispute to arbitration. The court decided that a non-interventionist approach should be taken on a section 5 application. The test of a "very strong probability" in section 5 is "a very high one". If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration.[125] Courts in Mauritius are thus supportive of international arbitration in Mauritius and do not seem eager to interfere with the process. This is just an example of how regional judicial bodies and in some instances domestic courts can be utilized in fostering regional integration through international arbitration of trade and investment disputes. The EACJ jurisdiction on arbitration[126] needs to be enhanced to enable the Court effectively handle international commercial arbitration in the region. Arbitration through EACJ would be cheaper considering that it does not charge fees for arbitration matters lodged from the Eastern Africa region. The other viable option would be to set up an independent body similar to OHADA with a unique uniform law that would apply to transnational commercial arbitration matters from the region. This may help overcome the legal barriers arising from the differing legal systems in the region and bring about certainty as to what rules and procedures would be applicable to a transnational commercial dispute subjected to arbitration.

6. Building Legal Bridges

It has been argued that regional integration alone is not enough to spur growth but the EAC needs an investment climate—including a business regulatory environment—that is well suited to scaling up trade and investment and can act as a catalyst to modernize the regional economy.[127] Improving the investment climate in the EAC has therefore been seen as an essential ingredient for successful integration—the foundation for expanding business activity, boosting competitiveness, spurring growth and, ultimately, supporting human development.[128] Weak judicial systems can undermine trust, reducing the scope of commercial activity while efficient and transparent courts encourage new business

[124] Bagshaw, D., 'Mauritius Supreme Court hands down two judgments on international arbitration', February 2015. Available at http://www.lcia-miac.org/news/mauritius-supreme-court-hands-down-two-judgments.aspx [Accessed on 18/02/2015].
[125] Ibid.
[126] Art. 32.
[127] World Bank, Doing Business in the East African Community 2013: Smarter Regulations for Small and Medium-Size Enterprises. Washington, DC: World Bank Group, 2013. P. 1.
[128] Ibid.

relationships; speedy trials are essential for small enterprises because they may lack the resources to stay in business while awaiting the outcome of a long court dispute.[129]

Harmonisation of trade laws and commercial practices has been hailed as an important ingredient of regional integration, without which meaningful economic integration cannot be achieved.[130] In fact, in relation to the Southern African Development Community (SADC), it has been argued that conflicts and divergences arising from the laws of different SADC States in matters relating to trade, arbitration and enforcement of judgments would rank among the major barriers to intra-regional cooperation and integration that SADC countries would confront as they moved towards establishing a free trade are in the region.[131] SADC Member States were able to overcome these barriers and today SADC may arguably be said to be a success.

It has been noted that international Commercial Arbitration is highly relevant to business and trade, because investors prefer to put capital into countries with high political stability, legal certainty, and strong markets. Without these three conditions, investors lack assurance that contractual arbitration clauses will lead to nationally enforceable resolutions of any disputes that may arise in the course of business supported by internationally accepted legal norms and principles.[132]

Indeed, the important role of international commercial arbitration in international market integration has been acknowledged and it is capable of being used as an important means of confidence building among foreign investors and the host countries in the context of economic cooperation at the regional level.[133]

Apart from boosting trade and investment in the Eastern Africa region, international commercial arbitration if used as the preferred mode of dispute settlement can also be a useful tool in fostering mutual trust, peaceful co-existence and good neighbourliness and cooperation for mutual benefit. This is because a 'good' dispute settlement mechanism prepares the basis for consultation and arbitration, and makes sure that 'sanctions are

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[129] Ibid, p. 55.
[130] Ndulo, Muna, "The Need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)" in A.A. Yusuf (ed.), African Yearbook of International Law, Volume 4, Issue 1, Paper 60. pp.195-225 at p.211.
[131] Ibid, p.196.
[132] Organization of American States Secretariat for Legal Affairs Department of International Law, 'International Commercial Arbitration: Training Judicial Officers in Cross-Border Decision Enforcement'. Available at *http://www.oas.org/en/sla/dil/docs/International_Commercial_Arbitration_BROCHURE_En.pdf* [Accessed on 3/02/2015].
[133] Maniruzzaman, A.F.M., op. cit. p.61.

used only as a measure of last resort'.[134] Such a mechanism also provides a way of preventing disputes being settled by expression of political and economic power.[135]

6.1 East Africa Court of Justice and International Commercial Arbitration

Effective regional judicial institutions are believed to perform two core tasks that can stimulate economic activity: they settle disputes in efficient and impartial ways and they coordinate the interpretation of laws and treaties. This could in turn also have broader effects on regional cooperation such as improving incentives for compliance, increasing the perceived commitment of parties to a regional integration project, and contributing to the implementation of agreements.[136]

It is noteworthy that the EAC Treaty provides for the establishment of organs of the Community, which include the East African Court of Justice (EACJ).[137] The Court is a judicial body, which is to ensure the adherence to law in the interpretation and application of and compliance with the Treaty.[138] Initially, the Court is to exercise jurisdiction over the interpretation and application of the Treaty: provided that the Court's jurisdiction to interpret under this paragraph is not to include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.[139] The Treaty provides that a Partner State that considers that another Partner State or an organ or institution of the Community has failed to fulfill an obligation under the Treaty or has infringed a provision of the Treaty, may refer the matter to the Court for adjudication.[140]

Relevant to this discussion is the Court's jurisdiction on arbitration. The Court has jurisdiction to hear and determine any matter: *arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or arising from a dispute between the Partner States regarding the Treaty*

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[134] Zorob, A., 'The Potential of Regional Integration Agreements (RIAs) in Enhancing the Credibility of Reform:
The Case of the Syrian-European Association Agreement'. GIGA German Institute of Global and Area Studies, GIGA Working Papers No. 51, May 2007. P. 11.
Available at *http://www.giga-hamburg.de/en/system/files/publications/wp51_zorob.pdf* [Accessed on 10/02/2015]

[135] Ibid, p. 24.

[136] Voeten, E., 'Regional Judicial Institutions and Economic Cooperation: Lessons for Asia?' Asian Development Bank Working Paper Series on Regional Economic Integration, No. 65, November 2010. p.22. Available at *http://aric.adb.org/pdf/workingpaper/WP65_Voeten_Regional_Judicial_Institutions.pdf* [Accessed on 10/02/2015]; See also 'COMESA Court of Justice', available at *http://about.comesa.int/index.php?view=article&catid=43%3Ainstitutions&id=83%3Acomesa-court-of-justice&format=pdf&option=com_content&Itemid=133*

[137] Art. 9.

[138] Art. 23(1).

[139] Art. 27(1).

[140] Art. 28.

if the dispute is submitted to it under a special agreement between the Partner States concerned; or arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court (Emphasis ours).[141] Such jurisdiction must be specifically conferred upon the Court as the Treaty provides that except where jurisdiction is conferred on the Court by the Treaty, disputes to which the Community is a party cannot on that ground alone, be excluded from the jurisdiction of the national courts of the Partner States.[142]

Furthermore, decisions of the Court on the interpretation and application of the Treaty are to have precedence over decisions of national courts on a similar matter.[143] Perhaps as an attempt to reconcile the decisions of the national courts and the East Africa Court of Justice, the Treaty states that where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.[144] The East African Court of Justice, which is the main East African regional Court, needs to be supported in terms of finances and Member States' political goodwill in order to equip it for handling commercial disputes.

The EACJ jurisdiction on arbitration can be used to further the harmonisation of law and trade practices within the Community. Indeed, establishment of regional courts has been supported on grounds that it is *inter alia*, a manifestation of the role of law and judicial functions within regional integration processes in developing countries.[145] Also noteworthy is the Treaty's provision that in order to promote the achievement of the objectives of the Community as set out in the Treaty, the Partner States are to take steps to harmonise their legal training and certification; and should encourage the standardisation of the judgments of courts within the Community.[146]The EACJ can follow in the footsteps of European Court of Justice (ECJ), which has been very active in expanding European Union Community competences and enhancing the effectiveness of Community law, whilst it also has actively promoted the integration of Community law into national legal systems.[147]

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[141] Art. 32.
[142] Art. 33(1).
[143] Art. 33(2).
[144] Art. 34.
[145] Kiplagat, P.K., 'Dispute Recognition and Dispute Settlement in Integration Processes: The COMESA Experience', Northwestern Journal of International Law & Business, Volume 15, Issue 3, 1994-1995. pp. 437-490 at pp. 449-450.
[146] Art. 126(1).
[147] Vos, E., 'Regional Integration through Dispute Settlement: The European Union Experience'. Maastricht Faculty of Law, Working Paper No. 2005-7, October 2005. P. 4; Osiemo, O., 'Lost in

These initiatives are to be hailed considering that they are aimed at ensuring minimal or no conflicts among the Member States. However, the current state of affairs in the region presents hurdles to the effective integration of the region and utilisation of court systems in managing disputes. There are economic, legal, social and political barriers that need to be addressed if the contemplated measures are to be successful.

Before the realisation of the Treaty's objectives on harmonised legal systems and equipping EACJ for international commercial arbitration, there is need to ensure that business does not come to a stop. Currently, the EACJ is more involved in handling non-economic disputes, and the State Parties may consider making use of other existing international commercial tribunals for commercial disputes in the region. The use of existing regional international commercial arbitration centres such as NCIA and KIAC presents a viable option that would be easier to address interstate commercial disputes faster and efficiently, even as the Court gets on its feet in its capacity to deal with matters of transnational commercial nature. Deeper integration in EAC cannot be effectively achieved without the establishment of a stronger institutional structure with a better enforcement mechanism for international commercial arbitration in the region. The EAC Treaty provides for the fundamental principles that are to govern the achievement of the objectives of the Community by the Partner States as including *inter alia*: mutual trust, political will and sovereign equality; peaceful co-existence and good neighbourliness; peaceful settlement of disputes; equitable distribution of benefits; and co-operation for mutual benefit.[148] The principles of political will and sovereign equality however ought to be treated carefully as they may hinder the State Parties from pursuing policies that would promote regional integration citing conflict with their national sovereignty.

7. Conclusion

International commercial arbitration is a powerful tool that can foster Eastern Africa integration through effective management of commercial disputes and this eventually translates to enhanced development in the region. Building legal bridges that facilitate the regional integration is an imperative whose time has come.

Translation: The Role of African Regional Courts in Regional Integration in Africa' Legal Issues of Economic Integration, Vol. 41, Issue 1, 2014, pp. 87–121.

[148]EAC Treaty, Art. 6.

Promoting International Commercial Arbitration in Africa

Abstract

This paper examines the state of international commercial arbitration in Africa. It explores the legal and institutional framework governing international commercial arbitration in Africa and the extent to which such framework has provided the requisite infrastructure needed for the successful practice of international Arbitration in Africa. The paper also discusses the place of international commercial arbitration in the Kenyan context and the role it can play in enhancing economic development of the country. The challenges facing the legal and institutional framework are examined; opportunities for improvement are analyzed. The discourse ends with an analysis of what Kenya and generally the African continent needs to do to enhance the practice of international commercial arbitration and to make it a centre for the same.

1. Introduction

In the face of globalization, the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions has not only become desirable but also invaluable.[1] Arbitration has thus gained popularity over time as the choice approach to conflict management especially by the business community due to its obvious advantages over litigation. Perhaps the most outstanding advantage of arbitration over litigation is its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties confidence of realizing justice in the best way achievable. Countries and various regions around the world have thus embarked on promoting international arbitration as the best dispute settlement approach in international disputes.[2]

However, Africa as a continent has not been quite at par with the rest of the world as far as international commercial arbitration is concerned. This is due to a number of factors as identified by various writers, which this write-up discusses in brief herein below. However, it is imperative to note at the earliest that the importance of international commercial arbitration as the most viable approach to international disputes is being recognized and basic structures/institutions for arbitration are being established across the continent. This paper addresses the issue of international commercial arbitration in Africa, the challenges facing the same and the opportunities that exist for its promotion.

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[1] Alternative Dispute Resolution Methods, Document Series No. 14, page 2, Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000), Available at *http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf*

[2] Karl P. Sauvant and Federico Ortino, Improving the international investment law and policy regime: Options for the future, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at *http://www.formin.finland.fi/public/download.aspx?ID=113259&GUIDE*

2. The Ideal of Arbitration in Africa

Commercial disputes are unavoidable. Because of this, efficient mechanisms for their management are essential. International trade disputes are also as unavoidable. The mechanisms now universally used for their management are negotiation, mediation, arbitration and conciliation. These mechanisms work best when a well-resourced, neutral and credible body administers the process.[3] The recognized international arbitral institutions were initially based in Europe, but in recent years, there has been considerable growth of such institutions throughout the world. Some recent examples are China, Russia, India, Singapore and Dubai. International trade and commerce is enhanced by the growth of these institutions.[4] International commercial arbitration in Africa exists through institutions such as Africa ADR which is the arbitral link between those who invest in Africa, and those who trade in Africa; between the business communities of Africa and abroad and between the international community[5]. Africa ADRs mandate is to foster the culture of alternative dispute resolution in Africa and will oil the wheels of international trade and commerce[6].

The referral of African disputes to European arbitral authorities for settlement is prohibitively expensive and unsatisfactory. Such referral also points to an explicit admission that the structure of arbitration in Africa has failed. International trade agreements take the initiative of adopting a clause that sees any arising disputes referred to arbitration in Africa. The business and investment community stands to benefit from international commercial arbitration in Africa as the same provides a viable system offering a proper mechanism for the settlement of international and regional disputes. The system is cost efficient with venues in close proximity thus offering convenience. International commercial arbitration in Africa should thus be credible and efficient. The existence of such a system has the capacity to boost cross-border trade and investment.[7]

3. Challenges Facing the Practice of International Commercial Arbitration in Africa

3.1 The Choice/Appointment of International Arbitrators by Parties

Despite there being individuals with the relevant knowledge, skill and experience needed for international dispute resolution and the institutions, which specialize in, or are devoted to, facilitating alternative dispute resolution (ADR), there has been a general tendency by parties to a dispute doing business in Africa to go back to their home turfs to appoint arbitrators. This is further complicated by the fact that most disputants prefer to

[3] "Africa ADR – a new African Arbitration Institution", available at *http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution Accessed on 1st* November, 2013

[4] Ibid

[5] *http://www.africaadr.com/* Accessed on 1st November, 2013

[6] Ibid

[7] Africa ADR – a new African Arbitration Institution, Op. Cit.

appoint their non-nationals as arbitrators in international disputes, thus resulting in instances where even some Africans go for non-Africans to be arbitrators. This is so because parties are given the autonomy to appoint their arbitrators, conciliators or representatives and cannot be forced to accept the choice of arbitrator involuntarily unless under very limited and special circumstances. Arbitration is intended to be a voluntary process. However, it is not uncommon to see parties disagree on the appointment of an arbitral tribunal or attempt to obstruct the appointments to delay the arbitration[8]. This factor thus portrays Africa to the outside world as a place where there are no arbitrators with sufficient knowledge and expertise to be appointed as international arbitrators.

3.2 Lack of or Inadequate Legal and Institutional Framework/Capacity on Arbitration

There have been inadequate legal regimes and infrastructures for the efficient and effective organization and conduct of international commercial arbitration in Africa. Some African states have for a long time lacked an established legal framework on international commercial arbitration.[9] The existing one annexed arbitration to court, a factor that cannot promote international commercial arbitration. The existing provisions if any barely mentioned international commercial arbitration with a specified framework on the same. Some of those states may also not be parties to all or some important multilateral treaties relevant to international dispute resolution. This has denied the local international arbitrators the fora to showcase their skills and expertise in international commercial arbitration. For instance, the arbitration law in South Africa is not drafted along the UNICITRAL[10] model law lines and varies substantively with laws in other jurisdictions[11]. Another example of a country with archaic arbitration laws is Tanzania, whose Principal Arbitration Act was enacted on 22 May 1932. It is also not drafted in line with UNCITRAL model law.[12] These two jurisdictions are an example of the situation in some African countries and this discourages foreigners from seeking arbitration services in Africa.

There exists a challenge on the capacity of existing institutions to meet the demands for ADR mechanisms introduced by the constitution as well as handling the commercial arbitration matters. Much needs to be done to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitation of ADR.

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[8] Lew, J., 'Comparative International Commercial Arbitration', 237, [London: Kluwer Law International, 2003]

[9] Amazu A. Asouzu, 'Some Fundamental Concerns and Issues about International Arbitration in Africa' Available at http://www.mcgill.ca/files/isid/LDR.2.pdf

[10] UNCITRAL Model Law on International Commercial Arbitration (1985)

[11] Arbitration in Africa, August 2011, South Africa, Available at *http://www.nortonrosefulbright.com/files/south-africa-25761.pdf*

[12] *Arbitration in Africa, Tanzania, June 2007*. Available at *http://www.nortonrosefulbright.com/files/tanzania-25762.pdf*

3.3 Varying Cultures between Disputants

Non-African disputants have always been wary of the African international commercial arbitrators especially where one of the disputants is African due to cultural differences. These differences may be in reference to economic, political and/or legal developments thus creating varying opinion of issues, prejudices and conflicts of interests especially in international economic relations. Some may seek to subject their dispute to another arbitrator who may not share a culture with either of the disputants but one aware of international best practices in arbitration.[13]

3.4 Lack of or Inadequate Marketing

There has not been zealous marketing of Africa as a centre for international commercial arbitration. Many people outside Africa still carry with them the perception that Africa does not have adequate/any qualified international commercial arbitrators. They have therefore not sought to know whether this is the position as there has also not been much effort from Africans themselves to refute this assumption.[14]

3.5 Uncertainty in Drafting

There is the need to draft the arbitration clause in an unambiguous manner to avoid misinterpretation of same as this have always drawn the attention of courts leading to unnecessary interference. This interference intimidates the foreigners thus making them shy away from African centres.[15]

3.6 Interference by National Courts

Courts exercise authority over arbitration matters either as a matter of statutory or inherent powers. There are the instances when the Arbitration Act gives the national courts the powers to intervene in arbitration proceedings. However, these powers sometimes are exercised far beyond what the Act provides. This often happens where the courts decide that there existed illegality, fraud, incapacity or the award is against public policy. Court interference intimidates investors since they are never sure what reasoning the court might adopt should it be called upon to deliberate on such commercial disputes. Courts have, in the recent past, enforced the provisions of the Arbitration Act with exceptional diligence thus lending more credence to the arbitral process. However, this

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[13] See Russell J. Leng and Patrick Regan, 'Social and Political Cultural Effects on the Outcome of Mediation in Militarized Interstate Disputes', Available at *http://cdp.binghamton.edu/papers/socialeffects-full.pdf*

[14] Hogan Lovells, 'Arbitrating in Africa'. Available at *http://www.hoganlovellsafrica.com/_uploads/Publications/Arbitrating_in_Africa_-_Hogan_Lovells_March_2013.pdf*

[15] Drafting of arbitration clause will depend on what law informs it. For instance jurisdictions that have embraced UNCITRAL Model Law will adopt this law while those that are not signatories may have different laws informing the same. This may result in conflict in the understanding of such a clause.

alone cannot enhance arbitration.[16] Section 10 of the Kenyan Arbitration Act provides that except as provided in the Act, no court shall intervene in matters governed by this Act. This provision echoes Article 5 of the UNCITRAL Model Law on international commercial arbitration. In effect, the article limits the scope of the role of the court in arbitration only to situations that are expressly contemplated under the Model Law. However, courts have increasingly interfered in arbitration on grounds of public policy. The Act provides for international arbitration and this places Kenya in a favorable position as far as international arbitration is concerned. However, it is not very clear to foreigners as to when the Courts may interfere as the Act is too general in stating that the courts will not interfere except as it is provided for under the Act.[17] The Act does not however define clearly the instances of such intervention and it leaves such interpretation to the courts. For instance, one of the instances of court intervention is where the arbitral award is against public policy. However, the definition of such public policy is not clear and it's subject to court interpretation.[18] In Kenya, public policy was defined by Ringera J (as he then was), in ***Christ For All Nations vs. Apollo Insurance Co. Ltd***[19] in the following words: -

"Although public policy is a most broad concept incapable of precise definition…an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:

> *a)Inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or*
> *b)inimical to the national interest of Kenya; or*
> *c)Contrary to justice and morality."*

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[16] Gakeri, J, Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR, International Journal of Humanities and Social Science, Vol. 1 No. 6; June 2011 Available at *http://ir.library.strathmore.edu/fileDownloadForInstitutionalItem.action;jsessionid=9E5FF2EC6DBB95D872EA5AD81AAB740A?itemId=375&itemFileId=329* Accessed on 12th November, 2013

[17] S.10, No. 4 of 1995

[18] This was discussed and upheld in the Kenyan case of Anne Mumbi Hinga V Victoria Njoki Gathara (Court of Appeal at Nairobi, Civil Appeal 8 of 2009 [2009] eKLR). Indeed, the Court of Appeal made an important observation that most of the applications going to court to have the award set aside will be on grounds of public policy. It however stated that one of the underlying principles in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards. Secondly, public policy can never be defined exhaustively and should be approached with extreme caution. Failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised.

[19] [2002] 2 EA 366

Though public policy has been defined in the Kenyan context[20], the lack of a clear cut definition of the same can sometimes be applied with disastrous results. This is not only a problem of Kenya but the world all over. For instance, in the Indian case of *Phulchand Exports Ltd v OOO Patriot,* [21] the Supreme Court decided that a foreign award can be set aside under section 48(2) of the Act if it is considered to be patently illegal. They gave the meaning of public policy a wider meaning to include morality and justice as a test. This is another controversial concept and thus it complicates the understanding of what is to be regarded as being against public policy.[22] Nearer home, the Ugandan *Arbitration and Conciliation Act,* 2000 (Ch 4)[23] provides under section 34 for grounds upon which the High Court may set aside an arbitral award. It provides that the Court may set aside the award if it finds that it is against the public policy of Uganda.

The lack of a clear meaning of public policy gives courts more opportunities to interfere with arbitration proceedings. This uncertainty in court intervention discourages and intimidates local as well as foreign investors who carry on business in Kenya from settling their commercial disputes in Kenya but instead opt for foreign jurisdictions. In some or most jurisdictions around the world, "Public policy" is said to include procedural questions as well as questions relating to substantive law.[24]

Justice Murphy in the Australian case of *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (No 2) [2012] FCA 1214 (2 November 2012) laid out some guiding principles in relation to "public policy". These included *inter alia*: Under the Model Law, the expression "public policy" has a greater and different role in relation to setting aside an award in the court of supervisory jurisdiction (art 34(2)(b)(ii)), than it does in relation to refusal to enforce an award in the court of enforcement (art 36(1)(b)(ii)), in that an order refusing enforcement is effective only in the State where enforcement is sought, whereas an order setting aside an award prevents its enforcement in all countries which have signed up to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (**Convention**); The plain words of s19(b) of the International Arbitration Act of 1974 of Australia unambiguously declare that if *any* breach of natural justice occurs in connection with the making of an award then, for the purposes of arts 34(2)(b)(ii) and 36(1)(b)(ii), the

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[20] Ibid

[21] Civil Appeal 3343/2005 - 12 October 2011

[22] Robert Cutler, et al., India: a widening scope to avoid enforcement of foreign awards, Clayton Utz Insights, 08 December 2011, Available at *http://www.claytonutz.com/publications/edition/08_december_2011/20111208/india_a_widening_scope_to_avoid_enforcement_of_foreign_awards.page* Accessed on 18th October, 2013

[23]Available at *http://arbitrationlaw.com/files/free_pdfs/Uganda%20Arbitration%20and%20Conciliation%20Act.pdf* Accessed on 23rd October, 2013

[24] James Whittaker, et al., Principles relating to public policy in the International Arbitration Act, 29 November 2012, Available at *www.corrs.com.au/publications/corrs-in-brief/principles-relating-to-public-policy-in-the-international-arbitration-act/* Accessed on 23rd October, 2013

award is in conflict with or contrary to the public policy of Australia. This is despite authority around the world indicating that a Convention award is only in conflict with or contrary to public policy if it offends fundamental notions of justice and fairness; Nonetheless, it is important to keep in mind that arts 34(2)(b)(ii) and 36(1)(b)(ii) provide that a court *may* set aside an award or refuse enforcement if it finds that the award is in conflict with or contrary to public policy. That is, the powers to set aside an award or refuse enforcement are discretionary; and The proper exercise of the court's discretion requires that it has regard to the objects of the IAA set out in s2D and the matters set out in s39 (2), namely the fact that arbitration is intended to be an efficient, enforceable and timely method of settling commercial disputes, and that arbitral awards are intended to provide certainty and finality; Although the decisions of the courts in Convention countries are not binding, there is an obvious importance to taking them into account, in order to achieve some international uniformity in the meaning and operation of "public policy".[25]

Until and unless internationally accepted criterion for determining public policy is agreed upon, public policy as a ground for setting aside arbitral awards in international commercial arbitrations remains an obstacle to the blossoming of international arbitration in Africa.

3.7 Taking Care of Fundamentals

The concern has been that there are some countries in Africa that were/are not parties to the international laws on arbitration and particularly the New York Convention on the Recognition and Enforcement of Arbitral Awards (NYC) of 1958 which would guarantee the enforcement of arbitral awards and the International Convention on the Settlement of Investment Disputes (ICSID).[26] This impedes the practice of international commercial arbitration.

3.8 Control of Costs

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. This is because the issue is more often than not left to the particular institutional guidelines,

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[25] Ibid

[26] The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). It was opened for signature on March 18, 1965 and entered into force on October 14, 1966.
The Convention sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. ICSID was created by the Convention as an impartial international forum providing facilities for the resolution of legal disputes between eligible parties, through conciliation or arbitration procedures. Recourse to the ICSID facilities is always subject to the parties' consent.

which institution may not be favorable to the parties. For instance, the Kenyan branch of Chartered Institute of Arbitrators has its own rules and guidelines on the remuneration of its arbitrators. However, these are only applicable to those who practice arbitration under the Institute and thus have limited applicability.[27]

3.9 Keeping the Process Moving

International commercial disputants often resort to arbitration for its advantages over litigation which include speed. However, due to the other concerns as already discussed above, foreigners are not usually sure whether and how fast the process would be. This may make them be wary of engaging African arbitrators since they are out to save on time.

3.10 Perception of Corruption/ Government Interference

At times governments are also perceived to be interfering with private commercial arbitration matters. For instance, the government may try to influence the outcome of the process especially where there are its interests at stake and put forward the argument of grounds of public policy.

The Global Corruption Barometer 2013 is the world's largest public opinion survey on corruption. According to a Transparency International (TI) survey released in Berlin, Kenya ranked number 4 among countries with the highest cases of bribery in the world. The survey concluded that 7 out of 10 Kenyans interviewed by TI-Kenya had given a bribe in the preceding 12 months.[28] The report cited corruption to be especially rampant in dealings with key public institutions and services. According to the report, the police lead in the list of the most corrupt institution in Kenya. They are then followed by Parliament, Judiciary, the civil service and political parties. A grim image is painted to the international community regarding the governance system in place in Kenya. This hinders the expansion of the scope of international commercial arbitration as the view is propagated that justice is impossible to achieve in Africa.

3.11Bias against Africa

Without a shred of doubt, racism still exists in society. It rears its ugly head in day to day life. Recently, South Korea's top tobacco firm, KT&G was forced to pull down adverts for its new "This Africa" brand of cigarettes. This happened after complaints were presented that the use of images of apes dressed as humans was racist. The African Tobacco Control Alliance called for the posters to be withdrawn citing their offensive nature.[29]

An American Court ruled recently that Kenya is insecure and unsafe while determining the issue of a Kenyan mother who intended to travel into the country with her 22-month

[27] See CIArb Kenya Website Available at www.ciarbkenya.org Accessed on 12th November, 2013
[28] Available at http://www.the-star.co.ke/news/article-127501/kenya-ranks-fourth-bribery-index-ti Accessed on 2nd November, 2013
[29] "Korea firm to remove chimp ad", Daily Nation, Thursday October 24, 2013, Nairobi, Kenya

old daughter. The application to bar her from travelling with her child was made by her former husband and granted by the court. The husband cited the terrorist attack at Westgate shopping mall. The husband even went further to state that Kenya is home to child traffickers, kidnappers and malaria outbreaks.[30]

The existent bias as briefly outlined above renders Africa's image as a corrupt and uncivilized continent. The business association and interaction of Africa with the outside world is thus downplayed and kept at a minimum. The end result is a weaker business environment culminating in a weaker international arbitration environment.

3.12 Institutional Capacity

There exists a challenge on the capacity of existing institutions to meet the demands for ADR mechanisms introduced by legal frameworks as well as handling the commercial arbitration matters. Much need to be done to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitation of ADR.

3.13 Endless Court Proceedings

Sometimes matters will be appealed all the way to the highest court on the law of the land in search of setting aside of awards. Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending[31]**.** This delays finalization of the matter as well as watering down the perceived advantages of arbitration and ADR in general. This can only be corrected through setting up tribunals or courts with finality in their decisions and operating free of national courts interference.

3.14 The Challenge of Arbitrability

Arbitrability is used to refer to the determination of the type of disputes that can be resolved through arbitration and those which are the domain of the national courts. It deals with the question of whether specific classes of disputes are barred from arbitration because of the subject matter of the dispute.[32] Courts often refer to "public policy" as the

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[30] "Kenya unsafe for US child, rules court", Daily Nation, Tuesday October 22, 2013, Nairobi, Kenya Available at *http://mobile.nation.co.ke/News/Kenya-unsafe-for-US-child--rules-court/-/1950946/2043586/-/format/xhtml/-/qbkqh7z/-/index.html Accessed* on 2nd November, 2013

[31] Kariuki Muigua, Role Of The Court Under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration In Kenya, Kenya Law Review (2010), Available at *http://www.kenyalaw.org/klr/index.php?id=824*

For instance, the Arbitration between Kanyotta Holdings Limited and Chevron Kenya Limited (CALTEX) made its way to the Kenya High Court and Court of Appeal after the award was challenged (2012 eKLR)

[32] Laurence Shore "Defining 'Arbitrability'-The United States vs. the rest of the world", New York Law Journal,

2009, available at *http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf,* Accessed on 15th October, 2013

basis of the bar.[33]

The challenge arises when a matter that is arbitrable in one jurisdiction fails the test of arbitrability in a different jurisdiction.

Arbitrability may either be subjective or objective. National laws often restrict or limit the matters, which can be resolved by arbitration. Subjective arbitrability refers to a situation where states or state entities may not be allowed to enter into arbitration agreements at all or may require a special authorization. Objective arbitrability refers to restrictions based on the subject matter of the dispute[34]. Certain disputes may involve such sensitive public policy or national interest issues that it is accepted that they may be dealt only by the courts, for instance criminal law.[35]

It has been argued under Kenyan law, that arbitrability might have acquired a broader definition after the passage of the current Constitution of Kenya, 2010[36], which elevates the status of Alternative Dispute Resolution (ADR). In this respect, the scope of arbitrability is broad under the Constitution of Kenya, 2010 as opposed to its scope under the Arbitration Act No. 4 of 1995 (As amended in 2009)[37]. Article 159 of the Constitution provides that in the exercise of judicial authority by Courts and tribunals shall be guided by the principle that *inter alia* alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3). Clause (3) provides that the traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law. However, this remains to be seen especially due to the subjection of the same to repugnancy clause.

4. International Commercial Arbitration Under Kenyan Law

In addition to enacting the *Arbitration Act*, 1995 for domestic and international arbitrations, in legislation that was promulgated in 1995, Kenya has acceded to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (NYC)[38]

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[33] Ibid, page 1

[34]Available at *www.paneurouni.com/files/sk/fp/ulohy.studentor/2rocnikmgr/arbitrability-students-version.pdf,* Accessed on 8th November, 2013

[35] Katarína Chovancová, Arbitrability, Extract, page 1, Institute of International and European Law, Available at *http://www.paneurouni.com/files/sk/fp/ulohy-studentov/2rocnikmgr/arbitrability-students-version.pdf* Accessed on 22nd October, 2013

[36] Government Printer, 2010, Nairobi, Kenya

[37] Kariuki, F, "Redefining "Arbitrability": Assessment of Articles 159 & 189 (4) of the Constitution of Kenya", Alternative Dispute Resolution, The Chartered Institute of Arbitrators, Kenya Journal Volume 1, Number 1, 2013. ISBN 978-9966-046-02-4

[38] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.

and to International Convention on the Settlement of Investment Disputes (ICSID). Kenya became a signatory to ICSID on May 24, 1966, deposited its instruments of ratification on Jan. 3, 1967 and subsequently, the Convention came into force on Feb. 2, 1967.[39]

The 1958 New York Convention is an important convention in the recognition and enforcement of foreign arbitral awards and this is an important factor in giving legitimacy to such arbitral awards regardless of state boundaries. This is usually achieved through providing common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.[40]

The *Arbitration Act*, No. 4 of 1995 (As amended in 2009) governs the arbitration process in Kenya. Under this law parties to a dispute can by way of a written agreement refer their disputes to arbitration.[41] This can be done in agreements via an arbitration clause which stipulates that any dispute arising therefrom shall be referred to arbitration. An arbitration is international if *inter alia* the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states[42].

The importance of an arbitration clause in an agreement is that any court proceedings commenced are stayed pending the settlement of the dispute by arbitration. An arbitral award can be enforced by the leave of the High Court of Kenya in the same way any court order or decree is enforced.[43]

Section 36(2) of the Kenyan *Arbitration Act,* 1995 provides that international arbitration awards shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards. If applied correctly, Kenyan law therefore has the potential to further international commercial arbitration.

5. Way Forward

There is a need to employ mechanisms that will help promote and demonstrate Africa to the outside world as a place endowed with international commercial arbitrators with sufficient knowledge and expertise to be appointed to arbitrate international arbitrators.

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[39] International Centre for Settlement of Investment Disputes, 'List Of Contracting States And Other Signatories Of The Convention' (as of May 20, 2013), Available at *https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English Accessed on* 23rd October, 2013

[40] See international Council for Commercial Arbitration (ICCA), ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (with the assistance of the Permanent Court of Arbitration Peace Palace, The Hague (2011)

[41] Section 4, No. 4 of 1995

[42] Section 3(a), No. 4 of 1995

[43] Section 36, No. 4 of 1995

Promotion of arbitration alongside tourism would also be one effective strategy (Arbi-tourism).

There is also the need to put in place adequate legal regimes and infrastructure for the efficient and effective organization and conduct of international commercial arbitration in Africa. This ranges from legislating comprehensive law on international commercial arbitration as well as setting up world class arbitration centres around Africa. However, all is not lost as recently Kenya set up the Nairobi Centre for International Arbitration (NCIA). This was established under the *Nairobi Centre for International Arbitration Act*, No. 26 of 2013[44]. Its functions are set out in section 5 of the Act as *inter alia* to: first, to promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act; second, to administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; third, to ensure that arbitration is reserved as the dispute resolution process of choice; fourth, to develop rules encompassing conciliation and mediation processes.

Further functions include: to organize international conferences, seminars and training programs for arbitrators and scholars; to coordinate and facilitate, in collaboration with other lead agencies and non-state actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation; to maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives; to in collaboration with other public and private agencies, facilitate, conduct, promote and coordinate research and dissemination of findings on data on arbitration and serve as repository of such data; to establish a comprehensive library specializing in arbitration and alternative dispute resolution; to provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties; to provide advice and assistance for the enforcement and translation of arbitral awards; to provide procedural and technical advice to disputants; to provide training and accreditation for mediators and arbitrators; fourteenth, educate the public on arbitration as well as other alternative dispute resolution mechanisms; and, to enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre achieve its objectives, *inter alia*.

There is also the Kigali International Arbitration Centre (KIAC)[45]. These together with the existing institutions are a step in the right direction towards promoting Africa as a choice international arbitration centre. In Kenya, there is the Centre for Alternative Dispute

[44] Government Printer, 2013, Nairobi, Kenya

[45] See Kigali International Arbitration Centre Website available at www.kiac.org.rw/ Accessed on 11th November, 2013

Resolution (CADR) that is a company limited by guarantee. CADR is an initiative by The Chartered Institute of Arbitrators, Kenya and was incorporated in May, 2013. Its objective is to establish and maintain a regional Dispute Resolution Centre in the country. Under CADR, referred disputes may be settled by arbitration, or conciliation or mediation. Further to this, CADR provides a channel of communication between arbitrators and parties to the arbitration and also between the parties themselves. In relation to the notion of international commercial arbitration, CADR is mandated organize, supervise, run and operate international arbitrations, conciliations and related dispute settlement in Kenya or elsewhere. The incorporation of CADR is undoubtedly a further initiative towards promoting international commercial arbitration in Kenya as well as Africa as a whole.[46]

This will not only afford the local international commercial arbitrators the fora to showcase their skills and expertise in international commercial arbitration but may also attract international clients from outside Africa. It has been noted that there should be basic minimum standards for international commercial arbitration centres or institutions. These include: modern arbitration rules; modern and efficient administrative and technological facilities; Security and safety of documents; Expertise within its staff; and some serious degree of permanence.[47]

There is a need to set up more regional centres for training of international commercial arbitrators in Africa. This will not only ensure a bigger number of qualified international commercial arbitrators in Africa but will also deal with the challenges that might come with a situation where some African countries are not parties to international treaties on arbitration and the model law, a factor that might otherwise be a disadvantage to international commercial arbitrators from such countries. The Kenyan Chapter of Chartered Institute of Arbitrators trains arbitrators across Africa and has trained arbitrators in countries like Nigeria, Zambia, Uganda and even Malawi. If more African institutions take up such roles, then this would greatly enhance international commercial arbitration in Africa.[48]

Joint annual conferences would also be a good marketing tool for African international commercial arbitrators as well as African arbitration centres. This should be backed by a joint website (or any other viable platform) where the existing regional arbitration centres in Africa are listed with their full description for the world to see. The profiles of all qualified international arbitrators (names forwarded by home country member institutions) should also be displayed in such platforms. There is also need for the existing

[46] See CIArb Kenya Website, Op. Cit.
[47] Emilia Onyema, Effective Utililization of Arbitrators and Arbitration, Institutions in Africa by Appointors, 4th Arbitration and ADR in Africa Workshop, Empowering Africa in the 21st Century through Arbitration & ADR Conrad Hilton Hotel, Cairo Egypt 29-31 July 2008,
Available at < *http://eprints.soas.ac.uk/5300/1/Arbitrators_and_Institutions_in_Africa.pdf*>
[48] See CIArb Kenya Website, Op. Cit.

institutions to seek collaboration with more international commercial arbitration institutions since this will work as an effective marketing tool for the exiting institutions. For instance, the Kenyan Chartered Institute of Arbitrators Branch maintains a close relationship with the International Law Institute (ILI) Kampala and the Centre for Africa Peace and Conflict Resolution (CAPCR) of California State University to conduct Courses in Mediation and other forms of ADR both locally and internationally. There is need for all African centres and institutions to do the same to promote international commercial arbitration in Africa.

The law of arbitration recognizes that the role of the court in arbitration is inevitable and almost universally provides for it. The law also appreciates the need to limit court intervention in arbitration to a basic minimum.[49] This will subsequently boost the confidence of foreigners in the African Arbitration institutions. Effective and reliable application of international commercial arbitration in Africa has the capacity to encourage investors to carry on business with confidence knowing their disputes will be settled expeditiously. This will not only enhance international commercial arbitration in Africa but also economic development for Africa as a continent.

6. Conclusion

International commercial arbitration in Africa has been at a minimum over time compared to more advanced continental jurisdictions. This paper has examined the challenges facing the practice of international commercial arbitration in Africa. The fundamental concerns and issues about international commercial arbitration in Africa have been critically examined in the pursuit of promoting the practice. Issues relating directly to arbitration have been analyzed and in addition, peripheral matters that seem to hamper international commercial arbitration in Africa have been scrutinized. There is need for a clear framework within Africa within which international commercial arbitration can be further promoted. There are arbitral institutions already in place and this paper has discussed the same. The presence of such institutions in the continent points to an acceptance of alternative dispute resolution modes as well as the need to promote the practice of international commercial arbitration other than exporting commercial disputes to foreign countries for settlement. Indeed, these foreign countries and/or jurisdictions may be better endowed in alternative dispute resolution frameworks but the only way for Africa to achieve growth in terms of international arbitration begins when corporations and international businesses embrace the notion of conducting arbitration locally within the continent. There is a need to promote arbi-tourism and to put up adequate legal regimes and infrastructure for more arbitration centres in Africa as well as training centres for purposes of training international arbitrators in the continent. Africa definitely has the

[49] For a further discussion on the role of court, see Kariuki Muigua, Settling Disputes Through Arbitration in Kenya, 2012 chapter Ten (pp.166-195), Glenwood Publishers, 2012

capacity to conduct rigorous and impeccable international commercial arbitration in its own right as a continent. Promoting international commercial arbitration in Africa is an imperative that is achievable. The time to showcase Africa as an ideal centre for the settlement of commercial disputes in now.

Effective Justice for Kenyans: Is ADR Really Alternative?

Abstract

In this paper, the author critically examines whether ADR is really an alternative method of managing conflicts in the search for effective justice for Kenyans. Further, this paper seeks to critically analyse the place of Alternative Dispute Resolution (ADR) in the management of disputes and conflicts in Kenya. The writer briefly looks at the earliest development or practice of ADR in various regions across the world including Africa and Kenya in particular. Also examined is whether the now common notion that ADR is alternative to the formal court process is a fallacy and if this perception has continually affected its effective application in conflict management in the country. ADR is a broad term used to refer to the use of negotiation, mediation, conciliation, or arbitration in conflict management.

This discourse posits that successful incorporation of ADR and Traditional Dispute Resolution Methods (TDRM) mechanisms in conflict management calls for a change in attitude towards the same. They ought to be treated as mechanisms that are the most appropriate in the effective resolution of certain kinds of conflicts. As such, ADR and TDRM mechanisms should be viewed as complementary to the court system; working together to ensure that access to justice is achieved for all through employment of the most appropriate mechanism for the particular dispute or conflict.

1. Introduction

The author critically examines whether Alternative Dispute Resolution (ADR) is really an alternative method of managing conflicts in the search for effective justice for Kenyans. Further, this paper seeks to critically analyse the place of ADR in the management of disputes and conflicts in Kenya. The writer briefly looks at the earliest development or practice of ADR in various regions across the world including Africa and Kenya in particular. Also examined is whether the now common notion that ADR is alternative to the formal court process is a fallacy and if this perception has continually affected its effective application in conflict management in the country. ADR is a broad term used to refer to the use of negotiation, mediation, conciliation, or arbitration in dispute management.

This discourse posits that successful incorporation of ADR and Traditional Dispute Resolution Methods (TDRM) mechanisms in conflict management calls for a change in attitude towards the same. They ought to be treated as mechanisms that are most the appropriate in the effective resolution of certain kinds of conflicts. As such, ADR and TDRM mechanisms should be viewed as complementary to the court system; working together to ensure that access to justice is achieved for all through employment of the most appropriate mechanism for the particular dispute or conflict. Indeed, it has been argued that these techniques are not necessarily mutually exclusive in any particular conflict, but

can be used sequentially or in a customized combination with other adjudicative methods for resolving disputes.[1]

2. Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution Mechanisms (TDRM) in Pre-Colonial Era

Before the arrival of Colonialists in Africa, African communities had their own ways of dealing with day to day challenges of life. Africans led a communal way of living and this, naturally informed their approach to handling different issues of life.[2] A good example is the land tenure system which was communal with no single person claiming ownership of the land, apart from user rights and holding the same in trust for future generations.[3] Any group of people living together is bound to have disagreements over various issues, and Africans were no different. Thus, they had mechanisms of resolving conflicts as they arose amongst them. They understood very well what approach was applicable to what kind of dispute or conflict.[4]

For instance, in the Kalahari Desert in Botswana and Namibia the Bushmen have lived traditional lives for many thousands of years, without sophistication in dispute resolution practices which have evolved without courts and a formal state system and are suited to the needs of a collective hunter-gatherer society.[5] The Bushmen's disputes occur over food, land and mates. Those in conflict bring other members of the tribe together to hear out both sides and where passions rise, senior tribal members hide the disputants' poisoned hunting arrows to prevent resort to violence.[6] If resolution is not reached in the small group the larger community is brought together where everyone is able to talk through every aspect of the dispute over a number of days until the dispute has been 'talked out'. Economic reality and social dependence preclude the easy resort to violence over individual problems.[7]

As such, these approaches to conflict resolution were aimed at ensuring continued co-existence of the communities and sought to ensure that the conflicts were fully addressed

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[1] G. Hamilton, Rapporteur Report: Alternative Dispute Resolution (ADR) —Definitions, Types and Feasibility, p. 1, Joint Symposium, International Investment and ADR. Available at http://investmentadr.wlu.edu/deptimages/Symposium%202010/Rapparteur%20Report%20%20ADR%20DEFINITION%20-%2019%20March.pdf [Accessed on 16 May 2014].

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

[3] Ibid, pp. 21-51.

[4] See generally L.J. Myers and D. H. Shinn, (2010) Appreciating Traditional Forms of Healing Conflict in Africa and the World, available at s*cholarworks.iu.edu/journals/index.php/bdr/article/download/.../1220* [Accessed on 20 May 2014].

[5] L. Boulle, A History of Alternative Dispute Resolution, ADR Bulletin: Vol. 7: No. 7, Article 3, 2005. p. 1. Available at: *http://epublications.bond.edu.au/adr/vol7/iss7/3* [Accessed on 16 May 2014].

[6] Ibid, p. 2.

[7] Ibid.

to prevent their re-emergence in future.[8] The traditional approaches therefore effectively addressed the conflicts making them appropriate for the management of the particular problem. This presents a sharp contrast with the formal justice systems which seeks to settle the disputes without necessarily addressing the real cause of the conflict, thus creating a likelihood of re-emergence of the problem in future with even more severe consequences. The Missionaries and the colonial masters spread western ideas, customs, and religions to people in Africa.[9] Africans were made to believe that unless they resorted to court, there was no other way of achieving justice. Even where they used the traditional conflict resolution mechanisms, their decisions could be appealed to the formal systems. [10] This fallacy became so well entrenched in the system that Courts were elevated to a position that potrayed the TDRM and any other out of court approach to dispute management as either totally ineffective or simply undesirable. However, this is not to say that all disputes are capable of being addressed through the TDRM and any other out of court approach, especially in the wake of the human rights movement, but it is also not true to say that all disputes are capable of being adequately and satisfactorily addressed through the formal court system.

The introduction of foreign legal systems in Kenya and Africa in general thus saw the beginning of the end of active application of the informal justice systems due to their perceived inferiority in the face of imperialism, thus eroding the confidence that they had gained from the people over the years. However, as much as there was emergence of new kinds of disputes, mostly commercial in nature, the day to day types of conflicts amongst people never went away. The formal legal system could not address most of these and the more Informal Justice Systems (IJS) remained the most applicable, applying hand in hand in areas where the formal system failed or could not reach. They were therefore part of everyday life of the people thus making them appear more like the most appropriate disputes mechanisms as compared to the foreign and often complicated formal justice system.

3. Emergence of Formal Justice System in Kenya

With the Colonial incursion in Africa came the introduction of the formal justice systems that before then were non-existent and even unknown. The colonial masters came with the mindset of amassing as much wealth as they could, not only for themselves, but also for their countries of origin. Wit
h the private ownership of property by the colonialists especially the settlers, there arose the need for protection of their rights to the property and also enforcing the same against

[8] See M. Mwagiru, Conflict in Africa: Theory, Processes and Institutions of Management (Nairobi: Centre for Conflict Research, 2006). pp. 36-45.
[9] J. Kenyatta, op cit pp. 259-269.
[10] Mars Group Kenya, Historical Background of the Judiciary in Kenya, available at *http://judiciary.marsgroupkenya.org/index.php?option=com_content&view=article&id=45&Itemid=37* [Accessed on 20 March 2014].

others. The colonialists frowned upon the African communal way of life, and especially with regard to ownership of property including land. This was not favourable to their policy of sourcing raw materials for their countries and settling their people in Africa. Indeed, it has been correctly argued that even if it weakly described actual systems of property-holding, the rhetoric of absolute private property was politically important.[11] The idea that absolute private property was the best way to incentivize owners and maximize productivity was used not only to legitimate the enclosing of commons, but also, to legitimate the taking of land from foreign peoples with different systems of property.[12]

It has also been rightly pointed out that the Classical-Christian legalistic tradition in which disputes over colonial property were embedded dictated that land appropriations be legitimated by appeal to some pre-existing law, which was complicated by the fact that the lands in question were patently inhabited by peoples thought to be outside the civic history of the Old World.[13] The foreigners sought to inculcate their way of life into Africans either openly or through subtle ways such as using Christianity to condemn the African cultural practices without due regard to the positive aspects of the same. The Africans, together with their ways of life, were considered barbaric, and the colonialists embarked on importing not only their notion of civilisation, but also all other aspects of their system including dispute management mechanisms namely formal courts of law. Civilisation was equated to the rule of law.[14] They were bent on engendering and protecting the perceived exclusive right to property acquired in Africa by the colonialists. Capitalism and imperialism took root at the expense of the African way of doing things. It is arguable that the most damaging impact of imperial rule in Africa was not only economic and political, but was also psychological.[15]

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[11] J. Brewer and S. Staves, "Introduction," in Early Modern Conceptions of Property, ed. Brewer and Staves, p. 18. [As quoted in O. U. Ince, 'John Locke and Colonial Capitalism', PhD Candidate, Department of Government, Cornell University, p. 16,
available at *http://government.arts.cornell.edu/assets/psac/fa12/Ince_PSAC_Sep28.pdf [Accessed on 17 March 2014].* See also H.W.O Okoth Ogendo, Tenants of the crown: The Evolution of Agrarian Law and Institutions in Kenya (Acts Press 1995); G. Hardin, The Tragedy of the Commons, Science, New Series, Vol. 162, No. 3859. (Dec. 13, 1968), pp. 1243-1248. Available at *http://links.jstor.org/sici?sici=0036-8075%2819681213%293%3A162%3A3859%3C1243%3ATTOTC%3E2.0.CO%3B2-N* [Accessed on 17 May 2014].

[12] Ibid.

[13] A. Pagden, "The Struggle for Legitimacy and the Image of Empire in the Atlantic to c. 1700," in OHBE Vol. 1, ed. Canny, pp. 37-8 [As quoted in O.U. Ince, op cit p. 15].

[14] See M. Mamdan, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism (Princeton University Press; 1st ed., April 1, 1996).

[15] Imperialism in Africa, p. 1, available at http://www.ocs.cnyric.org/webpages/phyland/files/imperialism%20in%20africa.pdf [Accessed on 17 May 2014]. ; See also M. Mamdan, op.cit.

In order to subdue the purportedly inferior African way of life, including their approaches to conflicts and disputes management mechanisms, there was put in place qualifications for the African customary law in the name of a 'repugnancy clause'. Every customary law practice had to be subjected to this subjective test of repugnancy to morality or justice.[16] It is important to note that the concepts of morality and justice were defined, not according to the African conception of the same, but according to the colonial masters' perception of what was moral or just. Africans had little if anything to say on what they considered morally right or just. African values and ways of doing things were so severely undermined that the Africans began to see themselves as inferior and conditioned to see Westerners and their culture as superior. Africans were expected, as a matter of law, to submit all their disputes to the newly introduced formal legal systems, without any recourse to use of their more familiar ways of addressing any disputes or conflicts. For as long as the Africans viewed everything through the prism of Western concepts, ideals, values and policies, anything African was regarded as either second class or an inferior alternative to the Western ways of doing things. It is not therefore difficult to see why traditional justice systems were regarded as capable of being only alternative to Court system even in the independent Africa, including Kenya. Unfortunately, this has continued to the present African countries' legal systems and particularly Kenya. It is only recently that there have been spirited efforts by a section of Kenyans to ensure legal recognition of what are now known as ADR and TDRM mechanisms. However, much still needs to be done to change people's perceptions instead of waiting for the courts to mandatorily refer people for ADR.

4. Place of Traditional Justice Systems in Kenyan Legal System

The Kenyan *Judicature Act*[17] under Section 3(2) outlines the formal sources of law in the country. These are listed as follows: the Constitution; Statutory law or Acts of Parliament, including foreign laws named in the First Schedule of the *Judicature Act*; Subsidiary legislation; the substance of the common law, doctrines of equity, English Statutes of general application, and procedure and practice observed in courts in England until 12 August 1897; and African customary laws, including certain religious laws (Islamic and Hindu). However, section 3(2) of the *Judicature Act* provides that customary law will apply to the extent that it is not repugnant to justice and morality.

Customary law is applicable in a numerous areas, including: Land held under customary tenure, marriage, divorce, maintenance of children, dowry, matters affecting the status of women, widows, guardianship, custody, adoption, legitimacy of children, and

[16] See Section 3(2), Judicature Act, Cap 8, laws of Kenya and Section 2, Magistrate's Act, Cap 10, Laws of Kenya.
[17] Cap 8, Laws of Kenya.

succession.[18] The *Magistrates' Act*[19] provides under section 17 thereof that a magistrate's court may call for and hear evidence of the African customary law applicable to any case before it.[20] Section 2 thereof also specifies the areas and matters upon which the court shall be guided by customary law. The Act provides that "claim under customary law" means a claim concerning any of the following matters under African customary law: land held under customary tenure; marriage, divorce, maintenance or dowry; seduction or pregnancy of an unmarried woman or girl; enticement of or adultery with a married woman; matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy; and intestate succession and administration of intestate estates, so far as not governed by any written law. This for a long time relegated customary law affecting its appreciation across other areas. For instance, in the case of *Kimani v Gikanga*[21] the Court of Appeal for Eastern Africa was dealing with an action involving questions as to title of land and other rights in Kenya.

The Respondents became the registered proprietors of land which under land consolidation replaced the land left by Gikanga, their father and the registration was originally done under the *Native Land Tenure Rules*, 1956. The Plaintiff claimed that he had lived and assisted Gikanga in his life, something that made him acquire 30 acres from the estate as well as becoming the *Muramati* (head of family in charge of land) upon the death of Gikanga. The issue was how the Court would establish customary laws as facts before it. The Court held that any person seeking to rely on customary law must prove the same in court. In other words, the Court will not take judicial notice of customary law and agreements as the one portrayed in the foregoing case would not just be recognised.

It is noteworthy that the current Constitution of Kenya, 2010[22] does not expressly refer to customary law as one of the sources of law in Kenya. This notwithstanding, it is apparent that the Constitution recognises customary law as a source of law in Kenya. It states under Article 2(4) that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. This is in line with the statutes that have made express reference to customary law.[23] Under Article 11, the Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and the nation. The state is mandated with promoting all forms of national and

[18] F.K, Gitonga, Provisions Of The General Laws, The International Journal of Not-for-Profit Law, Volume 12, Issue 2, February 2010, International Center for Not-for-Profit Law, available at *http://www.icnl.org/research/journal/vol12iss2/special_3.htm* [Accessed on 17 May 2014].
[19] Cap 10, Laws of Kenya [Revised Edition 2012 [2010].
[20] Section 17, Cap 10.
[21] Court of Appeal for Eastern Africa, [1965] E.A. 735.
[22] Government Printer, 2010, Nairobi.
[23] See Magistrates Act, Cap 10 and Judicature Act, Cap 8.

cultural expression through literature and other media. To this extent, customary law is applicable as a source of law in Kenya.

The Constitution also provides under Article 44 that every person has a right to enjoy their language and culture though no one should be compelled to perform, observe or undergo any cultural practice or right. It is also noteworthy that Article 45(4) provides that the Parliament shall enact legislation that recognises: marriages concluded under any tradition, or system of religious, personal or family law; and any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with the Constitution.

Regarding management of disputes and conflicts, the Constitution of Kenya has several provisions seeking to promote ADR as well as TDRM mechanisms in the resolution of conflicts and settlement of disputes. One of the principles of land Policy as provided for under the Constitution is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.[24] Further, the National Land Commission is tasked with *inter alia* encouraging the application of traditional dispute resolution mechanisms in land conflicts.[25] One of the guiding principles in the exercise of judicial authority by the courts and tribunals is the promotion of alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms* [Emphasis ours], subject to repugnancy to morality or justice.[26] It is important to note that even under the current Constitution of Kenya, the repugnancy test for ADR and TDRM has been retained.[27] In relation to governance related disputes, Article 189(3) state that in any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation. Clause (4) therefore is to the effect that national legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. Where the two Houses of National Assembly fails to agree on a single version of a Bill, the Constitution allows the Speakers of both Houses to appoint a mediation committee consisting of equal numbers of members of each House to attempt to develop a version of the Bill that both Houses will pass.[28]

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[24] Article 60(1) (g).
[25] Article 67(2) (f); See also sec. 5(1) (f), National Land Commission Act, No. 5 of 2012.
[26] Article 159(2) (c).
[27] Article 159(3). This provision is to the effect that Traditional dispute resolution mechanisms shall not be used in a way that— contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law.
[28] See Article 112 and 113.

These are the major provisions that directly vouch for application of ADR as well as TDRM mechanisms in the resolution of conflicts and settlement of disputes. These provisions demonstrate the paradigm shift in the way ADR is perceived in the mainstream legal system.

5. Are ADR Mechanisms Alternative?

ADR and TDRM mechanisms have been associated with a number of advantages over litigation. Generally, ADR mechanisms are hailed as expeditious, cost effective and lenient on procedural rules. Specifically, ADR mechanisms, perhaps with the exception of arbitration, seek to address the root causes of the dispute or the conflict. Justice is a highly subjective notion and the justice needs of one person in a certain situation are totally different from those of another. Justice must demonstrate fairness, affordability and flexibility. Fairness includes both substantive and procedural fairness. Procedural fairness, also known as rules or principles of natural justice, is said to consist of two elements namely: The right to be heard which includes- the right to know the case against them; the right to know the way in which the issues will be determined; the right to know the allegations in the matter and any other information that will be taken into account; the right of the person against whom the allegations have been made to respond to the allegations; the right to an appeal, and the right to an impartial decision which includes- the right to impartiality in the investigation and the decision making phases; the right to an absence of bias in the decision maker.[29] Lord Hewart, in the English case of *Rex v Sussex Justices; Ex parte McCarthy* rightly held that "… it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[30]

Article 159 (1) of the Constitution provides that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and that it is administered without undue regard to procedural technicalities.[31] It emphasises the right of all persons to have access to justice as guaranteed by Article 48 of the constitution. It also reflects the spirit of Article 27 (1) which provides that "*every person is equal before the law and has the right to equal protection and equal benefit of the law*" [Emphasis ours].[32]

Article 159 can be construed as generally encouraging application of both formal court systems and ADR and TDRM in the pursuit of justice.[33] As already noted, ADR comprises

[29]Rex v Sussex Justices; Ex parte McCarthy, ([1924] 1 KB 256, [1923] All ER Rep 233); See also Articles 47 and 50, Constitution of Kenya, 2010.
[30] ([1924] 1 KB 256, [1923] All ER Rep 233).
[31] Ibid, Article 159(2) (d).
[32] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[33] Article 159(2).

several mechanisms which vary in their application and the advantages that go with each of them. Litigation is classified under dispute settlement mechanisms while ADR mechanisms are classified under the conflict resolution ones. Settlement is an agreement over the issue(s) of the conflict which often involves a compromise.[34] Litigation usually leaves broken relationships and there is a possibility of the problem recurring in future or even worse still the dissatisfied party may seek to personally administer 'justice' in ways they think was the most appropriate. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed. However, it is noteworthy that in matters of protection of human rights, litigation offers the best channel to ensure protection and enforcement of the same.[35] Further, where there is need for an injunction, litigation offers best solution. To this extent, litigation would be useful especially if there is no incentive for preserving relationships.

Resolution of conflicts gives rise to an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.[36]A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.[37] Resolution is based on the belief that the causes of conflicts in the society are needs of the parties which are non-negotiable and inherent to all human beings.[38]

The ADR mechanisms are mainly intended for conflict resolution and have, as their major selling point, their attributes of flexibility, low cost, lack of complex procedures, mutual problem solving, salvaging relationships and their familiarity to the common people. For instance, negotiation allows parties to fully control both the process and the outcome

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[34] D. Bloomfield, Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, Journal of Peace Research, vol. 32 no. 2 May 1995, pp. 151-164.
Available at *http://jpr.sagepub.com/content/32/2/151.short* [Accessed on 18 May 2014]; See also generally M. Mwagiru, Conflict in Africa; Theory, Processes and Institutions of Management, op cit pp. 36-41.

[35] Article 22(1) of the Constitution of Kenya 2010 provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

[36] K. Cloke, The Culture of Mediation: Settlement vs. Resolution, The Conflict Resolution Information Source, Version IV, December 2005, op.cit; See also K. Muigua, 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010', p. 7,
available at Available at *http://www.chuitech.com/kmco/attachments/article/111/Paper%FINAL.pdf* [Accessed on 17 May 2014].

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

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

through a mechanism which will not impose any outcome which is not mutually acceptable.[39]

Conflict resolution mechanisms are usually preferred to settlement for their effectiveness in addressing the root causes of the conflict and negate the need for future conflict or conflict management.[40] They are suitable for certain types of conflicts especially those that involve intense emotions but at the same time require preservation of relationships. In such situations, settlement mechanisms such as litigation are inappropriate. It is only resolution mechanisms such as ADR that are capable of addressing such instances of conflicts. This therefore begs the question whether ADR would be an alternative to litigation in such a scenario or the more appropriate means of resolving the conflict. ADR is arguably more 'appropriate' than alternative in the management of some of the everyday disputes among the people of Kenya. Courts and the law makers in general seem to have recognised this fact. For instance, Statutes and courts have required disputants to employ ADR mechanisms in handling their disputes before going to courts. This is evident in provisions of various statutes.[41] Indeed, in some instances, the Courts may send the parties away if it emerges that they did not make any attempts to resolve their disputes or conflicts through ADR mechanisms before approaching the Courts. This court practice takes us back to the question whether ADR mechanisms are really alternative to the Court process or complementary.

While it is to be acknowledged that in some jurisdictions such as the United Kingdom ADR is purely alternative to litigation, ADR mechanisms form an important part of conflict management mechanisms in Kenya and Africa in general. The actualization of Article 48 of the Constitution on the right of access to justice by all in Kenya requires various instruments and institutions. These include both formal and informal mechanisms of conflict management and access to justice. Article 48 is to the effect that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Despite these provisions, access to justice especially through litigation is usually hampered by some challenges as highlighted in the previous section.

To the ordinary *mwananchi*[42] 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

[39] K. Muigua, Resolving Conflicts through Mediation in Kenya, p. 11, (Nairobi: Glenwood Publishers, 2012).
[40] Ibid
[41] Such as Environment and Land Court Act, 2011, National Land Commission Act, 2012 and Labour Relations Act, 2007.
[42] Mwananchi is the Swahili word for "Citizen" used to connote the people of Kenya.

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. If parties in a negotiation hit a deadlock, then they invite a third party of choice to help them resolve their matter and this becomes mediation.[43] Mediation is associated with same advantages as negotiation. However, it suffers from its non-binding nature so that where compliance is required, one would have to resort to courts to obtain the same since mediation does not have enforcement mechanism but relies on parties' goodwill. Conciliation on the other hand 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. It therefore follows that where there are already severed relationships which need restoration, conciliation would work best instead of litigation or any other mechanism such as arbitration which would exacerbate the situation.

For instance, transitional justice is defined as 'that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'.[44] It entails two aspects of justice namely *retribution* (punishment and corrective action for wrongdoings) and *restoration* (emphasizing the construction of relationships between the individuals and communities).[45] While formal justice system may effectively achieve retributive justice, restorative justice may arguably only be effectively achieved through ADR/TDRM mechanisms.

Traditional conflict resolution processes are said to be 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.[46] Indeed, it is contended that conflicts must be understood in their social context, involving values and beliefs, fears and suspicions, interests and needs, attitudes and actions, relationships and networks in order to ensure that their root causes are addressed.[47]

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[43] M. Mwagiru, op cit p. 115.
[44] Kenya Human Rights Commission, (2010) Transitional Justice in Kenya: A Toolkit for Training and Engagement, p. 14. Available at *www.khrc.or.ke/.../7-transitional-justic...* [Accessed on 19 May 2014].
[45] Ibid
[46] 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.
[47] Ibid, pp. 35-36.

This is not always possible or necessary in all scenarios. However, it should be appreciated that where this is the case, then the most appropriate dispute management mechanisms should be used. In this case, it would be ADR as opposed to the formal justice system.[48] For example, it has been documented in a study of non-formal dispute resolution processes in a slum area in Nairobi that these processes operate in a wider socio-economic context and are integrated into the social and economic fabric of life. Thus, for instance, the mandate of the village committees extend beyond hearing disputes to other important aspects of community life such as security, environmental management, health and civic education.[49] This is a clear indication that the formal and informal justice systems are not antagonistic but are indeed capable of complimenting each other in promoting access to justice for all not only in Kenya but also across Africa.[50]

From the foregoing, it is apparent that it is hard to dismiss ADR/TDRM mechanisms as merely alternative to litigation. They cannot be dispensed with as yet due to their utmost appropriateness in handling certain kinds of conflicts in the society. The debate that remains thus is whether ADR mechanisms are really alternative to formal justice systems.

6. Conclusion

With adequate legal and policy framework on the application of ADR in Kenya, it is possible to create awareness on ADR mechanisms for everyone, including the poor who may be aware of their right of access to justice but with no means of realizing the same, as well as consolidating and harmonizing the various statutes relating to ADR including the Arbitration Act with the constitution to ensure access to justice by all becomes a reality.

There is also a need for continued sensitization of the key players in the Government, the judiciary, legal practitioners, business community and the public at large so as to support ADR mechanisms in all possible aspects. It is apparent that ADR has not lost its relevance in the society and what it requires is mainstreaming without necessarily formalizing it in a way that takes away all the benefits that come with its application to a dispute. The answer to the question whether ADR is really alternative is not a straightforward one. However, it is clear that ADR can play a key role in the realisation of the right to access justice in society, which is a human right. If justice can be effectively realised through ADR, it can no longer be viewed solely as alternative. The time to debate the question whether ADR is really alternative is now ripe.

[48] ADR mechanisms are also at times referred to as Alternative Justice Systems (AJS).
[49] W.W. Kamau, Law, Family and Dispute Resolution: Negotiating Justice in a Plural Legal Context, PhD Dissertation, York University, 2007, p. 5.
[50] Informal justice systems are also referred to as Alternative Justice Systems by some scholars.

Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya

Abstract

This paper casts a critical look at the state of the legal and institutional framework governing arbitration in Kenya. It further explores the extent to which the said framework has provided the requisite infrastructure needed for the successful practice of Arbitration. The paper also discusses the place of International Commercial Arbitration in the Kenyan context and the role it can play in enhancing economic development of the country. The challenges facing the legal and institutional framework are examined; opportunities for improvement are analysed. The discourse ends with an analysis of what Kenya and indeed the East African region needs to do to enhance the practice of International Commercial Arbitration and to make it a regional hub for the same.

1. Introduction

This paper casts a critical look at the state of the legal and institutional framework governing arbitration in Kenya. It further explores the extent to which the said framework has provided the requisite infrastructure needed for the successful practice of Arbitration. The paper also discusses the place of International Commercial Arbitration in the Kenyan context and the role it can play in enhancing economic development of the country. The challenges facing the legal and institutional framework are examined; opportunities for improvement are analysed. The discourse ends with an analysis of what Kenya and indeed the East African region needs to do to enhance the practice of International Commercial Arbitration and to make it a regional hub for the same.

2. Background

Arbitration is one of the Alternative Dispute Resolution (ADR) Mechanisms which involve a neutral third party in the settlement of disputes. Arbitration has been described as a private consensual process where parties in dispute agree to present their grievances to a third party for settlement.[1] Perhaps more descriptive is Lord Justice Raymond's definition in which he defined an arbitrator as 'a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them and arbitrators are so called because they have arbitrary power: for if they observe the submission and keep within their due bonds their sentences are definite from which there lies no appeal.[2]

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

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

Arbitration matters in Kenya are mainly governed by the *Arbitration Act*[3] and the Rules therein. However, arbitration is also conducted under the *Civil Procedure Act*[4]. Section 59C (1) of the Act provides that *a suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral*.[5] The provision also provides that where an award is reached under the section and the same is entered as the court's judgement, no appeal shall lie against it. Further, Order 46 of the Civil Procedure Rules, 2010 provides for arbitration under order of a court and other alternative dispute resolution mechanisms. It provides that parties can apply to court to have a matter referred to arbitration.[6] It provides for the procedural guidelines therein. Section 59D of the Act further demonstrates the courts' supportive role in arbitration and ADR mechanisms in the pursuit of justice. It provides that *all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court*.[7] This is an appreciation of ADR mechanisms in facilitating access to justice by ensuring that parties get to settle their matters.

The practice of arbitration in Kenya has also been enhanced through Article 159 of the current Constitution of Kenya, 2010 (hereinafter the constitution)[8] which provides for promotion of alternative forms of dispute resolution as one of the guiding principles of the Kenyan courts while exercising judicial authority. These forms include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The above move is aimed at the realization of Article 48 of the constitution which places a mandatory obligation on the State to ensure access to justice for all persons and, if any fee is required, such should be reasonable and should not impede access to justice. One of the ways that this objective can be achieved is through the promotion and practice of arbitration as one of the means of access to justice by the public.

Arbitration as one of the Alternative Dispute Resolution Mechanisms (ADR) is not a new concept to the Kenyan People and Kenyan legal regime in general. Indeed the current law on Arbitration, *Arbitration Act*[9], has had two predecessors which are the colonial Arbitration Ordinance of 1914 which was more or less a replica of the English Arbitration Act of 1889 and the now repealed *Arbitration Act*, Cap 49. These two Acts gave immense powers to courts with little or no regard to the parties' autonomy.

[3] 1995, Act No. 4 of 1995(Amended in 2009)
[4] Cap 21, Laws of Kenya.
[5] S.59C(1), Cap 21, Laws of Kenya
[6] R. 46, Civil Procedure Rules, 2010
[7] Section 59D, Cap 21
[8] Government Printer, Nairobi, 2010

In 1968, a locally drafted Act was enacted in the form of *Arbitration Act*, Cap 49 and was drafted along the English *Arbitration Act* of 1950. This was later repealed by the current *Arbitration Act*, Act No. 4 of 1995. This Act was substantially amended in 2009 and now it reflects the main principles of the UNCITRAL Model law to which Kenya is a signatory[10]. These are amongst others, minimal court intervention in matters of arbitration.[11]

3. Legal and Institutional Framework on Arbitration in Kenya

3.1 Arbitration Act, No. 4 of 1995

As already noted elsewhere in this paper, the substantive law governing arbitration matters in Kenya is the *Arbitration Act* [12](hereinafter the Act). The preamble to the Act provides that it is an 'Act of Parliament to repeal and re-enact with amendments the Arbitration Act and to provide for connected purposes'. Regarding the scope of the Act, section 2 thereof provides that except as otherwise provided in a particular case, the provisions of this Act shall apply to domestic arbitration and international arbitration. 'Arbitration' is defined under section 2 to mean any arbitration whether or not administered by a permanent arbitral institution.

Arbitration between states has been defined as the procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.[13] Parties must voluntarily agree to be bound by the decision to be given by the arbitrator according to the law or if so agreed other considerations after a full hearing, such decision is enforceable at law.

In Kenya, arbitration is generally subject to statutory control to the extent provided for in the Act. For a dispute to be settled through arbitration there must be a prior arbitration agreement. Section 3 of the Act defines 'arbitration Agreement' to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.'

The parties in arbitration therefore need not have any pre-existing contractual relationship under the Act. Section 4(1) provides for the forms of arbitration agreement. It recognises that the agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. However, it is mandatory that the agreement be in writing as per section 4(2) of the Act. The section attempts a definition of "writing". It could be contained in a document signed by the parties or an exchange of letters, telex, telegram, facsimile,

[10] Kenya acceded to the law in 1989 but with reservation on reciprocity.
[11] Section 10, Arbitration Act, No. 4 of 1995
[12] Act No. 4 of 1995
[13] R.M.M Wallace, International Law; A student Introduction, (Sweet and Maxwell, London, 1997), p. 282

electronic mail or other means of telecommunications which provides a record of the agreement. An agreement could also be contained in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.[14]

3.1.1 Powers of Courts under the Act: Theory and practice

Section 10 of the Act provides for the extent of court intervention in arbitration proceedings. It provides that *except as provided in this Act, no court shall intervene in matters governed by this Act*. On the face of it, the Act seems to keep to the minimal the number of instances when the national courts will intervene in arbitral matters. However, there are exceptions provided for under the Act where courts will come in either to determine issues where parties fail to agree or to assist the arbitral tribunal in some other way. Herein below is a summary of some of the other powers that have been granted to the national court with regard to arbitration proceedings:

(a) Power to determine the number of arbitrators

Section 11(1) of the Act gives High court the power to determine the number of arbitrators if parties fail to agree on the same.

(b)Power to set aside appointment of arbitrator and to appoint an arbitrator

Section 12 of the Act gives the court the power to appoint the arbitrator(s) where parties fail to agree on the procedure of appointing the arbitrator(s).

(c) Power to grant Interim Measures of Protection

Section 7 of the Act gives the High Court the power to grant interim measures of protection where a party so requests. However, the section provides that where the arbitral tribunal has already ruled on such an application, then the High court will treat such a ruling as a conclusive outcome of that application.

(d) Power to decide on an application by a party for challenging an arbitrator

Section 14(1) of the Act grants the High Court the power to decide on an application by a party in arbitration proceedings challenging an arbitrator.

(e) **Power to decide on the termination of the mandate of an arbitrator**

Section 15(2) grants the High Court powers to decide on the termination of the mandate of an arbitrator who fails to act or whom it becomes impossible to act, where party are unable to do so.

[14] S. 4(2), No. 4 of 1995

(f)Powers to stay legal proceedings

Section 6 of the Act confers the High court powers to stay legal proceedings and refer the matter to arbitration where there is pre-existing agreement to refer the matter for arbitration.

(g) Determination of jurisdiction of tribunal

Section 17 gives the High court the powers to make the final decision on the question of jurisdiction of the arbitral tribunal.

(h) Court assistance in taking evidence

Section 28 provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court assistance in taking evidence, and the High Court may execute the request within its competence and according to its rules on taking evidence.

(i) Power to set aside arbitral awards

Section 35 confers the High court powers to set aside an arbitral award under the circumstances provided under that provision. Section 35(1) is to the effect that recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3). This implies that the Court will not act in such matters unless a discontented party invites it to do so. Subsection (2) sets out the grounds upon which the High Court will set aside an arbitral award. The grounds which the applicant must furnish proof for the arbitral award to be set aside are: incapacity of one of the parties; an invalid arbitration agreement; Lack of proper notice on the appointment of arbitrator, or of the arbitral proceedings or where the applicant was unable to present its case; where the award deals with a dispute not contemplated by or one outside the terms of reference to arbitration or matters beyond the scope of reference; where the composition of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties except where such agreement was in conflict with provisions of the Act and the parties cannot derogate from such; or where fraud, undue influence or corruption affected the making of the award.

Apart from the above, the High Court may also set aside arbitral awards where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with the public policy of Kenya.[15] The Act however limits the time frames within which the disgruntled party may lodge their applications with the High Court for setting aside of arbitral awards. Section 35(3) of the Act provides that where three months have lapsed since the award was entered the court will not entertain any applications to set the same aside. This limitation may serve to

[15] S. 35(2) (b), Act No. 4 of 1995

prevent such applications to be made in bad faith and also to ensure that such decided matters are put to rest. This was also observed in the Kenyan case of *Nancy Nyamira & Another V Archer Dramond Morgan Ltd*[16], where it was observed that '*...Given the objectives of the Arbitration Act stated above, it is important that Courts enforce the time limits articulated in that Act – otherwise Courts would be used by parties to underwrite the undermining of the objectives of the Act*'.

(j) Power to determine questions of law arising in domestic arbitration

Section 39(1) of the Act confers the High Court the power to determine any question of law arising in the course of the arbitration if a party makes an application in that regard. Further, an appeal by any party may be made to the court on any question of law arising out of the award for determination. However, this section is to the effect that prior to any application being made, parties must have agreed that such applications can be made to the court. This is an illustration of limited court powers in the matter and the court will rarely act on its own motion.

3.1.2 Recognition and Enforcement of arbitral awards

Section 36(1) confers the High Court powers to recognize and enforce domestic arbitral awards as binding upon application by parties for the same. Section 36(2) provides for the recognition of international arbitral awards as binding and enforceable in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.[17] The Convention, in principle, applies to all arbitral awards (Article I, paragraphs (1) and (2)). However, Article I paragraph (3) allows states to make reservations:

> *When ... acceding to this Convention ... any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.*[18]

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[16] Civil Suit 110 of 2009, [2012]eKLR

[17] Section 36 (5), Act No. 4 of 1995, (Act No. 11 of 2009, s. 27) "(5) In this section, the expression "**New York Convention"** means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.

[18] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Reservations, Available at *http://interarb.com/nyc/reservations* Accessed on 11th May, 2013

The effect of the above are the two reservations commonly referred to as the reciprocity reservation and the commercial reservation.[19]

In the Kenyan case of *Glencore Grain Ltd V TS.S.S Grain Millers Ltd*,[20] an international award that was entered in England and the applicant sought to have it recognised and enforced by Kenyan Courts. However, the courts were not willing to enforce the same on technical grounds of non compliance. The award took more than ten years before recognition and enforcement could be realized.

3.1.3 Grounds for refusal of recognition or enforcement

Section 37 provides for grounds upon which the High Court may decline to recognise and/or enforce an arbitral award at the request of the party against whom it is invoked, if that party furnishes to the High Court proof of: party's incapacity; legally invalid arbitration agreement; party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration; the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made. The High Court may also decline recognition and/enforcement of an award if its making was affected by fraud, corruption or undue influence. Further, an award arising out of matter not capable of settlement by arbitration under the Kenyan law or one whose recognition or enforcement would be against public policy will not be recognised or enforced by the Court. [21]

3.1.4 Court Practice

Although the Act provides for minimal intervention or interference by courts, the situation on the ground has been a mixed one where on the one hand courts seem to recognise and acknowledge that arbitration should bear minimum court interference while on the other hand they appear to violate this important objective of the Act of minimal court interference. This is especially well demonstrated when it comes to the issue of recognition and enforcement of arbitral awards.

[19] Ibid.

[20] Civil Case 388 of 2000 [2012] eKLR

[21] S. 37(1)(vii), No. 4 of 1995

The court has no legal right to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act. This was observed and upheld in the Kenyan case of *Anne Mumbi Hinga V Victoria Njoki Gathara*.[22] Indeed, the Court of Appeal made an important observation that most of the applications going to court to have the award set aside will be on grounds of public policy. It however stated that one of the underlying principles in the *Arbitration Act* is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards. Secondly, although public policy can never be defined exhaustively and should be approached with extreme caution. Failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised.[23]

The court of Appeal in this case held that it was wrong for the High court to have entertained a challenge to an arbitral award aimed at reviewing or setting aside an award outside the provisions specifically set out in the Arbitration Act 1995. The position clearly indicates that courts will not interfere with arbitration unnecessarily. Courts in their facilitative role have affirmed that the provisions of section 36 are mandatory. However, other cases give conflicting signs. This is especially where courts decline enforcement of awards on grounds of public policy. This may cause delay in enforcement of awards. In the foregoing case of Hinga, the Court of Appeal observed that had the superior court played a supportive role as contemplated in Section 10 of the Arbitration Act and the other provisions in the Act which invite courts intervention, the consequential delay of close to 10 years in enforcing the award the subject matter of this appeal would have been avoided. The Court also stated that

'*it follows therefore all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court suo moto because jurisdiction is everything as so eloquently put in the case of* ***Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd 1989 KLR 1.'***

In the Indian case of *Renusagar Power Company Ltd vs. General Electric Company* (1994) AIR 860, the Supreme Court of India observed;

[22] Court of Appeal at Nairobi, Civil Appeal 8 of 2009 [2009] eKLR
[23] Ibid.

> *"While observing that "from the very nature of things the expressions 'public policy', 'opposed to public policy' or 'contrary to puplic(*sic*) policy' are incapable of precise definition", this court has laid down: . . . Public Policy is some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time."(*Emphasis added)

In Kenya, public policy was defined by Ringera J (as he then was), in ***Christ For All Nationals vs. Apollo Insurance Co. Ltd*** **in** the following words: **-**

> *"Although public policy is a most broad concept incapable of precise definition…an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:*
>
> *d)Inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or*
> *e)inimical to the national interest of Kenya; or*
> *f)Contrary to justice and morality."*

The lack of a clear meaning of public policy gives courts more opportunities to interfere with arbitration proceedings. This uncertainty in court intervention discourages and intimidates local as well as foreign investors who carry on business in Kenya from settling their commercial disputes in Kenya but instead opt for foreign jurisdictions. It has been argued that arbitration is the backbone for protecting international commercial arrangements. In case of a dispute commercial parties can resolve their differences without having to resort to the courts in the other party's country of residence or incorporation.[24] Further, International arbitration has been regarded as being very effective in the international business arena since arbitral awards are readily enforceable under the New York Convention in most of the world's key economic nations and the awards can only be challenged on very limited grounds.[25]

Effective and reliable application of international commercial arbitration has the capacity to encourage investors to carry on business with confidence knowing their disputes will be settled expeditiously. This can enhance economic development for Kenya and the region. However, all is not lost because as recently as January, 2013 a new Act was enacted as an effort to lay a further legal framework for international arbitration in Nairobi, Kenya.[26]

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[24] Leah Ratcliff, Investors beware - Indian Supreme Court asserts jurisdiction to set aside foreign arbitral awards, International Arbitration Insights, 18 June 2008,
Available at *http://www.claytonutz.com/publications/newsletters/international_arbitration_insights/2008*
[25] Ibid.
[26] Nairobi International Centre for Arbitration Act, No 26 of 2013

3.2 Nairobi International Centre for Arbitration Act, No 26 of 2013

Nairobi International Centre for Arbitration Act, No 26 of 2013 is an Act of Parliament to provide for the establishment of a regional centre for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes.[27]

This legislation may have been borne out of the recognition that Nairobi is yet to become an attractive destination for foreign investors seeking the services of international institutional arbitrators. Lack of an elaborate legal and institutional framework on arbitration and excessive court interference in arbitration matters may be cited as some of the contributory factors to this phenomenon. To correct this situation, the *Nairobi International Centre for Arbitration Act* was enacted. It establishes the Nairobi Centre for international arbitration.[28]

As an attempt to safeguard the spirit and purpose of this Act, section 3 of the Act provides that '*where there is any conflict or inconsistency between this Act and the provisions of any other Act in matters relating to the purpose of this Act, this Act shall prevail*'. This purpose is set out in the preamble to the Act. Section 5 of this Act provides for the functions of the established Centre as inter alia to: firstly, promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act;[29] secondly, administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices;[30] and thirdly, maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives.[31]

On the issue of independence from interference by national courts, this Act establishes an independent tribunal whose decisions on matters of arbitration under the Act shall be final and binding. Section 21(1) provides for the establishment of a Court to be known as the Arbitral Court. Section 22(1) of the Act provides that the Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with this Act or any other written law. Section 22(2) further provides that a decision of the Court in respect of a matter referred to it shall be final.

Regarding the applicable law to matters before the Arbitral Court, Section 23 of the Act provides for the application of Arbitration Rules of the United Nations Commission on

[27] See preamble to the Act.
[28] S. 4(1), No. 26 of 2013, 'There is established a centre to be known as the Nairobi Centre for International arbitration'
[29] Section 5(a), No. 26 of 2013
[30] Section 5(b), No. 26 of 2013
[31] Section 5(g), No. 26 of 2013

International Trade Law, with necessary modifications in line with the rules of procedure of the arbitral Court.

Section 24 of the Act provides that *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*. This Section 24 is advantageous in a number of ways. Firstly, the court as a result is able to oversee the exercise of a wider number of ADR mechanisms thus enhancing party autonomy. Where the Court sends the parties away at the request of one of them, it is a sign of recognition of the autonomy of the parties in the process with regard to reaching a consensus on the matter. Secondly, the cost involved may be minimized since the charges applicable to the various ADR services are different depending on the professionals involved. Less serious matters can therefore be referred to less formal processes. Thirdly, the time spent in reaching a consensus may be reduced thus enhancing expediency in settlement of disputes. Some of these mechanisms are non coercive and may thus lead to 'win win' solutions to commercial disputes and eventual resolution on terms that parties can live with.[32]

3.3 Institutional Framework

There are a few institutions in the country that have been established under specific regimes and are therefore mandated with conducting arbitration under such laws. It is noteworthy that the *Arbitration Act*, 1995 does not establish a sole arbitral institution and its provisions therefore apply to institutional and sole arbitrators operating under other Rules. However, other institutions exist under different regimes of law in Kenya.

3.3.1 Chartered Institute of Arbitrators-Kenya Branch

The Chartered institute of Arbitrators (Kenya Chapter) was established in 1984, as one of the branches of the Chartered Institute of Arbitrators, which was founded in 1915 with headquarters in London. It promotes and facilitates the determination of disputes by arbitration and other forms of Alternative Dispute Resolution (ADR), which includes mediation and adjudication. The Kenya Branch, now with over 300 registered members, has a wide pool of knowledgeable and experienced Arbitrators and facilitates their appointment. The Institute also runs a secretariat with physical facilities for Arbitration and other forms of ADR.

To further support the process of Arbitration and ADR, the Branch has published the Arbitration, Adjudication and Mediation Rules. The arbitrators are governed by the Chartered Institute of Arbitrators' Rules when conducting the arbitral proceedings.

[32] Kariuki Muigua, Resolving Conflicts Through Mediation in Kenya (Glenwood Publishers Ltd, Nairobi, 2012), Chapter six, pp79- 88

This Institute thus plays an important role in the promotion of ADR in Kenya and the region.

3.3.2 Nairobi Centre for International Arbitration

This was established under the Nairobi Centre for International Arbitration Act as seen earlier in this paper. Its functions are set out in section 5 of the Act as inter alia to: first, promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act;[33]second, administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices;[34] third, ensure that arbitration is reserved as the dispute resolution process of choice;[35] fourth, develop rules encompassing conciliation and mediation processes.[36] Further functions include: to organize international conferences, seminars and training programs for arbitrators and scholars;[37] to coordinate and facilitate, in collaboration with other lead agencies and non-state actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation;[38] to maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives;[39] to in collaboration with other public and private agencies, facilitate, conduct, promote and coordinate research and dissemination of findings on data on arbitration and serve as repository of such data;[40] to establish a comprehensive library specializing in arbitration and alternative dispute resolution;[41] to provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties;[42] to provide advice and assistance for the enforcement and translation of arbitral awards;[43] to provide procedural and technical advice to disputants;[44] to provide training and accreditation for mediators and arbitrators;[45] fourteenth, educate the public on arbitration as well as other alternative dispute resolution mechanisms;[46] and, to enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre achieve its objectives[47], *inter alia*.

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[33] S.5(a), No. 26 of 2013
[34] Ibid, S. 5(b)
[35] Ibid, s.5(c)
[36] Ibid, s. 5(d)
[37] Ibid, s.5(e)
[38] Ibid, s. 5(f)
[39] Ibid, s.5(g)
[40] Ibid, s. 5(h)
[41] Ibid, S.5(i)
[42] Ibid, S.5(j)
[43] Ibid, S.5(k)
[44] Ibid, S.5(l)
[45] Ibid, S.5(m)
[46] Ibid, S.5(n)
[47] Ibid, S.5(o)

The Centre is administered by a Board of Directors provided for under section 6 of the Act. Section 9 of the Act provides for the appointment of a Registrar by the Board of Directors. Section 9 (3) mandates the Registrar to oversee the day to day management of the affairs and staff of the Centre and shall be the secretary to the Board.

There is also an Arbitral Court established under section 21 of the Act which court has exclusive original and appellate jurisdiction to hear matters that are referred to it under the Act.[48] Section 10 of the Act confers the Registrar with the powers to oversee the business of the court including enforcement of decisions of the Court. The Court has a President and two Deputy Presidents and the Registrar. The Court also has fifteen other members all of whom are leading international arbitrators.[49] This greatly enhances its competence in handling international arbitration.

3.3.3 Centre for Alternative Dispute Resolution

The Centre for Alternative Dispute Resolution is another registered institution that is aimed at enhancing settlement of disputes through ADR Mechanisms. With the recognition of ADR in Article 159 of the current Constitution of Kenya, 2010, it is hoped that this Centre will enhance the services of ADR mechanisms in dispute settlement in Kenya.

4. Commercial and International Arbitration in Kenya and the Eastern Africa Region

Arbitration of international commercial disputes has become a popular practice amongst business persons and corporations. This has tremendously grown with the development of the commercial industry internationally and the concept of globalisation. Indeed it has rightly been observed that the increasing importance of arbitration and dispute resolution in the African context is a reflection of the global growth in international business and the preferred methods of resolving international disputes, a trend that is likely to continue into the 21st Century.[50]

We have already mentioned in this paper that the scope of the Kenya's *Arbitration Act* extends to cover both domestic and international arbitration. This is provided for under section 2 of the Act which provides that *except as otherwise provided in a particular case the provisions of this Act shall apply to domestic arbitration and international arbitration*.

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[48] S. 22, No. 26 of 2013

[49] Ibid, S. 21(2)

[50] Vinod K. Agarwal, 'Alternative Dispute Resolution Methods' in Document No. 14 Alternative Dispute Resolution Methods, Chapter 1, page 2 , A Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000). Available at *http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.p*df Accessed on 3rd May, 2013

Section 3(2) defines what arbitration is domestic arbitration while section 3(3) stipulates the requisite conditions for an arbitration to qualify as an international one.

Arbitration is domestic if the arbitration agreement provides expressly or by implication for arbitration in Kenya: and at the time when proceedings are commenced or the arbitration is entered into; where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya; or where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya; or where the arbitration is between an individual and a body corporate firstly, the party who is an individual is a national of Kenya or is habitually resident in Kenya; and secondly, the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject-matter of the dispute is most closely connected, is Kenya[51]

Arbitration is international if the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or one of the following places is situated outside the state in which the parties have their places of business firstly, the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or secondly, any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.[52]

The *Nairobi Centre for International Arbitration Act* also provides for both domestic and international arbitration under section 5 which provides for the functions of the established Centre as indicated elsewhere in this paper.

4.1 Recognition of International Arbitral Awards

The *Arbitration Act*,1995 under section 36 (2) notably provides that an international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.[53] This is a show of Kenya's commitment to adopting international best practices in arbitration and consequently existence of requisite legal infrastructure for promotion of international arbitration in the country. The Kenyan Act on Arbitration was drafted along the lines of the Model Law. Article 35 (1) of the Model Law provides that an arbitral award, irrespective of the country in which it was

[51] Sec. 3 (2) of the 1995 Act as amended by the Amending Act.

[52] Section 3(3) (Act No. 11 of 2009, s. 2)

[53] This was included in the Act through the Act No. 11 of 2009, s. 27. (2009 amendment to the Arbitration Act, 1995)

made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

The *Nairobi Centre for International Arbitration Act* provides under section 23 that subject to any other rules of procedure by the Court, the Arbitration Rules of the United Nations Commission on International Trade Law, with necessary modifications, shall apply.

The foregoing provisions which recognise international legal instruments on arbitration therefore place Kenya in a competitive position to engage with the other regional players in the promotion of Eastern Africa as a hub for International Commercial Arbitration.

5. Challenges Facing the Practice of International Commercial arbitration

The challenges facing enforcement of foreign and international arbitral awards are what these provisions seek to address. These challenges are discussed herein below:

5.1 National Courts Interference

Courts exercise authority over arbitration matters either as a matter of statutory or inherent powers. As seen in the foregoing discussion, there are the instances when the Arbitration Act gives the national courts the powers to intervene in arbitration proceedings. However, these powers sometimes are exercised far beyond what the Act provides. This often happens where the courts decide that there existed illegality, fraud, incapacity or the award is against public policy. Though public policy has been defined in the Kenyan context[54], the lack of clear cut definition of the same can sometimes be applied with disastrous results. This is not only a problem of Kenya but the world all over. For instance, in the Indian case of Phulchand *Exports Ltd v OOO Patriot* Civil Appeal 3343/2005 - 12 October 2011), the Supreme Court decided that a foreign award can be set aside under section 48(2) of the Act if it is considered to be patently illegal. They gave the meaning of public policy a wider meaning to include morality and justice as a test. This is another controversial concept and thus it complicates the understanding of what is to be regarded as being against public policy.[55] Court interference intimidates investors since they are never sure what reasoning the court might adopt should it be called upon to deliberate on such commercial disputes.

5.2 Perception of Corruption/ Government Interference

At times governments are also perceived to be interfering with private commercial arbitration matters. For instance, the government may try to influence the outcome of the

[54] Christ for all Nations v Apollo Insurance Company ltd, Civil Case No. 477 of 1999

[55] Robert Cutler, et al., India: a widening scope to avoid enforcement of foreign awards, Clayton Utz Insights, 08 December 2011, 'The move towards widening the possibilities for rejecting claims for enforcement of foreign arbitral awards means that there is less certainty for those who contract with Indian companies.'

process especially where there are its interests at stake and put forward the argument of grounds of public policy.

5.3 Institutional capacity

There exists a challenge on the capacity of existing institutions to meet the demands for ADR mechanisms introduced by the constitution as well as handling the commercial arbitration matters. Much need to be done to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitation of ADR.

5.4 Endless court proceedings

Sometimes matters will be appealed all the way to the highest court on the law of land in search of setting aside of awards. **Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending**[56]**.** This delays finalisation of the matter as well as watering down the perceived advantages of arbitration and ADR in general. This can only be corrected through setting up tribunals or courts with finality in their decisions and operating free of national courts interference.

6. Prospects

If the foregoing challenges are fully addressed, then Nairobi and indeed the whole region have a promising future as a regional hub for international commercial arbitration. This is especially so with the expansion of regional trade and the revival of the East African Community.[57] The major selling point of the ADR approaches of dispute resolution is their attributes of flexibility, low cost and lack of complex procedures. These attributes are no longer tenable in arbitration as it is gradually becoming as expensive as litigation, especially when the arbitral process is challenged in court. If the regional players can come up with common regional arbitral bodies that handle arbitration matters from any of the countries and deliver decisions with finality of their awards, then arbitration will become faster as much of the time is usually lost in applications to national courts for review of the award.

The arbitration laws in the region can successfully be harmonized especially through ensuring the full incorporation and enforcement of the favourable principles found in the international arbitration Instruments. This way, the challenge of complex laws will have been dealt with. The region should also be marketed aggressively as an international hub for international arbitration. The marketing should be done both within and beyond the

[56] Kariuki Muigua, Role Of The Court Under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration In Kenya, Kenya Law Review (2010), Available at *http://www.kenyalaw.org/klr/index.php?id=824* Accessed on 10th May, 2013.

[57] Kariuki Muigua, Settling Disputes Through Arbitration in Kenya, Op cit. page 221.

region. In the region, a campaign should be launched to sensitize the key players in the Government, the judiciary, legal practitioners and business community so as to support arbitration in all possible aspects.

7. Conclusion

Making East Africa a Hub for International Commercial Arbitration is a dream that is realizable. The legal and institutional frameworks to support international commercial arbitration must be strengthened to meet the foregoing challenges that bedevil the system. It is important to promote international arbitration in the region as a means of strengthening the rule of law in the region and beyond.[58] The practice is also likely to boost business in the region as parties will feel that their interests are well protected in any of the countries in the region that they choose to settle any disputes in through arbitration. What is required now is the political goodwill to ensure that the legal instruments are fully implemented. The time to realize that dream is now. The time to harness the opportunities that international commercial arbitration can deliver is now.

[58] Patricia O'Brien, Keynote speech, The Mauritius International Arbitration Conference, Balaclava, Mauritius, 10 December 2012 page 1

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

Abstract

Land resources are considered as an important part of the social, economic and cultural aspects of the lives of many Kenyan communities especially in the rural areas. However, these resources are finite in nature while the population of these people is growing by the day. This, coupled with other challenges such as poverty and climate change, often leads to conflicts arising from the threatened access and control of the land and its resources. The resultant threat to peace and instability means that these conflicts should be effectively managed. However, due to the sensitive nature of the conflicts, Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) mechanisms have often been proposed as some of the most viable means of managing the conflicts as their perceived advantages are believed to be capable of balancing the delicate nature of the interests involved. This paper discusses the challenges and prospects involved in the application of these mechanisms in management of land conflicts in Kenya. The author argues that unless these challenges are dealt with first, these mechanisms may not achieve the desired outcome.

1. Introduction

Land is considered to be one of the most important economic resources in Kenya.[1] However, it has not only economic importance attached to it but also has social, cultural and even sentimental value to many people in the country. The fact that Kenya is largely an agricultural based economy with many communities still relying on land to take care of their livelihoods.[2] This means that the ownership and control of land often comes with conflicts owing to the fact that such land is also a finite resource especially with the ever growing population with non-corresponding national economic growth figures.[3] If not well managed, these conflicts are likely to not only lead to instability in the country but also may result in casualties as disagreeing factions resort to unorthodox means of dealing with these conflicts.[4] The law has thus set out mechanisms that should be used in

[1] See Hermunen, T., "Land use policy in Kenya: Experiences from Taita Taveta district," University of Helsinki, Department of Geography (2004). Available at *http://www.helsinki.fi/science/taita/reports/Land_use_policy_Kenya_Taita_Hermunen.pdf* [Accessed on 5/10/2019].

[2] Ibid; see also Quan, J., Tan, S., & Toulmin, C., "Land in Africa: market asset or secure livelihood?" (2004), Proceedings and summary of conclusions from the Land in Africa Conference held in London, November 8-9, 2004. Available at *https://pubs.iied.org/pdfs/12516IIED.pdf [Accessed on 5/10/2019].*

[3] Kennedy Jr, B., "Environmental scarcity and the outbreak of conflict," Population Reference Bureau (2001). Available *https://www.prb.org/environmentalscarcityandtheoutbreakofconflict/* [Accessed on 5/10/2019]; Republic of Kenya, Kenya Population Situation Analysis, (National Council for Population and Development (NCPD), July, 2013). Available at *https://www.unfpa.org/sites/default/files/admin-resource/FINALPSAREPORT_0.pdf* [Accessed on 5/10/2019].

[4] See Alao, A., Natural resources and conflict in Africa: the tragedy of endowment, Vol. 29, University Rochester Press, 2007; Muigua, K., 'Managing Natural Resource Conflicts in Kenya

managing these conflicts. The Constitution envisages formal and informal mechanisms to address land conflicts. Chapter Ten (Article 159) of the Constitution designates Judiciary as the main arm of the Government to address civil and criminal matters in the country to ensure that justice is done to all.[5]

The Constitution requires that, in exercising judicial authority, the courts and tribunals must be guided by the principles of, inter alia — promotion of alternative forms of dispute resolution including *reconciliation, mediation, arbitration* and *traditional dispute resolution mechanisms*, subject to clause (3) (emphasis added).[6] It is noteworthy that these mechanisms form part of the traditional knowledge since when they are applied in the community setting, they mostly rely on such knowledge for their effectiveness.[7]

In addition to this, Article 60 of the Constitution also provides that one of the principles of land holding in the country is encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.[8] The other principles on how land in Kenya should be held, in addition to being used and managed in a manner that is equitable, efficient, productive and sustainable, are — equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; and elimination of gender discrimination in law, customs and practices related to land and property in land.[9] These principles are to be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.[10]

In addition to the foregoing, the functions of the National Land Commission include, inter alia: to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; and to encourage the

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through Negotiation and Mediation,' Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution, Volume 4, No 2, (2016), pp. 1-63; Humphreys, M., "Natural resources, conflict, and conflict resolution: Uncovering the mechanisms," Journal of conflict resolution, vol.49, no. 4 (2005): 508-537.

[5] 159. Judicial authority
(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.

[6] Ibid, Art. 159(2) (c).

[7] Castro, A.P. & Ettenger, K., 'Indigenous Knowledge And Conflict Management: Exploring Local Perspectives And Mechanisms For Dealing With Community Forestry Disputes,' Paper Prepared for the United Nations Food and Agriculture Organization, Community Forestry Unit, for the Global Electronic Conference on "Addressing Natural Resource Conflicts Through Community Forestry," 2000.

[8] Article 60 (1)(g), Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

[9] Ibid, Article 60 (1).

[10] Article 60(2).

application of traditional dispute resolution mechanisms in land conflicts.[11] This is a significant provision considering that land conflicts form the bulk of natural resource conflicts reported in the country, and the land issue is an emotive one.[12]

This paper mainly focuses on the edict of encouraging communities to settle land disputes through recognised local community initiatives consistent with this Constitution.[13] The paper discusses the viability of this approach to management of land disputes in Kenya and the practical and legal challenges that are likely to arise in the implementation of these provisions. Considering that these constitutional provisions may be given force by the proposed *Alternative Dispute Resolution (ADR) Bill, 2019*[14] *(ADR Bill, 2019)*, this paper makes reference to the Bill in an attempt to point out not only the inconsistencies in the Bill but also to highlight the challenges that arise in applying Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) mechanisms in management of land conflicts and disputes in the country.

2. Land Conflicts in Kenya

As already pointed out, land ownership and control is an emotive subject in Kenya which means different things to different people hence more often results in conflicts over control and ownership.[15] People may perceive land ownership and control in accordance with social, cultural, ethnic, class and family dimensions. To farmers and pastoralists land is a source and a key element of living while to the elite land is a marketable commodity and access to profits.[16] The implication of this is that land disputes that arise may take different forms according to the underlying causes.

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[11] Ibid, Art. 67(2) (f).

[12] Government of Kenya, Report on the Commission of Inquiry into Land Law Systems in Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration (Government Printer Nairobi, 2002); See also Akiwumi, A.M., et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.

[13] 60. Principles of land policy

(1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—

(g) encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.

67. National Land Commission

(2) The functions of the National Land Commission are—

(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;

[14] Senate Bills No. 19 (Government Printer, Nairobi, 2019).

[15] See Hermunen, T., "Land use policy in Kenya: Experiences from Taita Taveta district," University of Helsinki, Department of Geography (2004), p. 1. Available at *http://www.helsinki.fi/science/taita/reports/Land_use_policy_Kenya_Taita_Hermunen.pdf* [accessed on 30/9/2019].

[16] Ibid, p.1.

In many African cultures, the tribe is at the top of the hierarchy of traditional African communities' socio-political organization. It is the custodian of the community land, resources and customary law. It also brokers inter-community peace pacts, negotiate for peace, grazing land, water and other resources and in compensation arrangements.[17]
Despite the existence of the formal conflict management mechanisms, there has been perennial land and natural resource conflicts in the country, hence the need to explore the use of ADR and TDR mechanisms in the management of these conflicts in peaceful way owing to the importance of these resources to majority Kenyan communities.

3. Management of Land Conflicts in Kenya

Land conflicts management may either be managed through formal mechanisms such as courts and tribunals or through informal mechanisms which include Alternative Dispute Resolution Mechanisms (ADR) and Traditional Dispute resolution Mechanisms (TDRMs). Natural resource based conflicts can, arguably, involve three broad themes: actors (or stakeholders, groups of people, government structures and private entities), resource (land, forests. rights, access, use and ownership) and stakes (economic, political. environmental and socio-cultural).[18] As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.[19] Despite this, there are key principles such as, inter alia, participatory approaches[20], equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.[21]

This section explores both the formal mechanisms and the informal mechanisms.

3.1 Management of Land Conflicts through Courts and Tribunals

The Constitution envisaged the establishment of and Environment and Land Court with the status of the High Court to hear and determine disputes relating to the environment

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[17] See generally, Rabar, B. & Karimi, M. (Eds), Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities, (ITDG, Nairobi, 2004), p.45; See also Kenyatta, J., Facing Mount Kenya: The Tribal Life of the Gikuyu, (Vintage Books, New York, 1965).

[18] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' Annex C - Summary of Discussion Papers, (FAO), available at *http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage [Accessed on 2/10/2019].*

[19] Ibid.

[20] Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process. (Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' Land Use Policy, Vol. 23, Issue 1, January 2006, PP. 10–17.

[21] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

and the use and occupation of, and title to, land.[22] In order to give effect to Article 162(2)(b) of the Constitution, the Environment and Land Court Act 2011[23] to establish a superior court to be known as the environment and land court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.

Under the Environment and Land Court Act 2011, the jurisdiction of the Court which has and exercises jurisdiction throughout Kenya includes: original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.[24] In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court has power to hear and determine disputes: relating to environmental planning and protection, climate matters, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; relating to compulsory acquisition of land; relating to land administration and management; relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.[25] In addition to this, the Act provides that nothing in the Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.[26]

Apart from the matters referred to in subsections (1) and (2), the Court is empowered to exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.[27] Furthermore, in exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including— interim or permanent preservation orders including injunctions; prerogative orders; award of damages; compensation; specific performance; restitution; declaration; or costs.[28] Notably, courts have held that 'under Section 13(7) (a) of the Environment and Land Court Act, this court has jurisdiction to issue preservatory orders relating to both civil and criminal processes. That jurisdiction is however limited to matters relating to environment and the use and occupation, and title to land.'[29]

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[22] Article 162 (2) (b).
[23] Act No. 19 of 2011, Laws of Kenya.
[24] Sec. 13(1), Environment and Land Court, 2011.
[25] Sec. 13(2), Environment and Land Court, 2011.
[26] Sec. 13 (3).
[27] Sec. 13 (4).
[28] Sec. 13 (7).
[29] Para 10, National Land Commission v Afrison Export Import Limited& 10 others [2019] eKLR, ELC Reference No. 1 of 2018; Regarding the possibility of concurrence of High Court and the

The *Community Land Act 2016*[30] which was enacted to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes[31] also specifically provides for judicial proceedings in community land disputes alongside other mechanisms, though as the last resort. Section 42(1) thereof provides that 'Where all efforts of resolving a dispute under this Act fail, a party to the dispute may refer the matter to court'. The Court may- confirm, set aside, amend or review the decision which is the subject of the appeal; or make any order in connection therewith as it may deem fit.[32]

3.2 Management of Land Conflicts through Alternative Dispute Resolution and Traditional Dispute Resolution Mechanisms

Although the Environment and Land Court Act 2011 establishes the environment and land court, it also provides for the use of ADR in management of land disputes. It provides that 'nothing in the Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.[33] In addition, where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court should stay proceedings until such condition is fulfilled.[34]

The use of ADR mechanisms in managing land disputes is also provided for under the *Land Act, 2012*[35]. The Act provides that in the discharge of their functions and exercise of their powers under this Act, the National Land Commission and any State officer or public officer shall be guided by some values and principles which include— encouragement of communities to settle land disputes through recognized local community initiatives; and alternative dispute resolution mechanisms in land dispute handling and management.[36]

Environment and Land Court jurisdictions, see **Ifdid Ole Tauta & others vs Attorney General (2015) eKLR**; **Patrick Musimba vs. National Land Commission & 4 others (2015) eKLR**; and **Christopher Ngusu Mulwa & 28 others v County Government of Kitui & 2 others [2017] eKLR**.

[30] Community Land Act, No. 27 of 2016, Laws of Kenya.

[31] Ibid, preamble.

[32] Ibid, sec. 42 (2).

[33] Sec. 20 (1).

[34] Sec. 20 (2).

[35] No. 6 of 2012, Laws of Kenya.

[36] Ibid, sec. 4 (2) (g)(m).

The applicability of ADR and TDR mechanisms in community land disputes is envisaged under the *Community Land Act 2016*[37]. Section 39(1) thereof provides that 'a registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land'.

Indeed, the Act requires that 'any dispute arising between members of a registered community, a registered community and another registered community should, at first instance, be resolved using any of the internal dispute resolution mechanisms set out in the respective community by-laws'.[38] Where a dispute or conflict relating to community land arises, the registered community should give priority to alternative methods of dispute resolution.[39]

In addition, subject to the provisions of the Constitution and of this Act, a court or any other dispute resolution body should apply the customary law prevailing in the area of jurisdiction of the parties to a dispute or binding on the parties to a dispute in settlement of community land disputes so far as it is not repugnant to justice and morality and inconsistent with the Constitution.[40] Apart from the applicability of TDRMs, the Community Land Act 2016 also has specific provisions for the application of mediation[41] and/or arbitration[42].

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[37] Community Land Act, No. 27 of 2016, Laws of Kenya.
[38] Ibid, sec. 39 (2).
[39] Ibid, sec. 39 (3).
[40] Ibid, sec. 39 (4).
[41] Ibid, sec. 40.
40. Mediation
(1) Where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to mediation.
(2) The mediation shall take place in private or in informal setting where the parties participate in the negotiation and design the format of the settlement agreement.
(3) The mediator shall have the power to bring together persons to a dispute and settle the dispute by—
(a) convening meetings for the hearing of disputes from parties and keep record of the proceedings;
(b)establishing ground rules for the conduct of parties;
structuring and managing the negotiation process and helping to clarify the facts and issues; and
(c) helping the parties to resolve their dispute.
(4) If an agreement is reached during the mediation process, the agreement shall be reduced into writing and signed by the parties at the conclusion of the mediation.
[42] Ibid, sec. 41.
41. Arbitration
(1) Where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to arbitration.
(2) Where the parties to an arbitration agreement fail to agree on the appointment of an arbitrator or arbitrators, the provisions of the Arbitration Act (No.4 of 1995) relating to the appointment of arbitrators shall apply.

The *Draft Alternative Dispute Resolution Policy 2019*[43] was meant '*to strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) in the Country in order to achieve optimal delivery of access to justice for all Kenyans. It is intended to create a well-coordinated, well capacitated and cohesive ADR system that is strategically linked to the formal system, while at the same time maintaining its autonomy as an informal system and providing quality justice services to Kenyans across the country*' (emphasis added).[44] This Draft ADR Policy 2019 together with the ADR Bill, 2019 are meant to formalize the use of ADR and TDR mechanisms in Kenya in management of conflicts including natural resources and land conflicts.

4. Challenges and Prospects

4.1 Recognition and Enforcement of Alternative Dispute Resolution and Traditional Dispute Resolution Mechanisms Outcomes

Considering the diversity of ADR and TDR mechanisms based on the different communities as well as the informality that comes with the, enforcement of their outcomes is going to prove difficult. This is also likely to be complicated by the non-binding nature of these mechanisms such as mediation. For instance, in the case of *Sahara Ahmed Hillow (Suing as administrator ad litem of the Estate of the late Ahmed Hillow Osman (Deceased) v Mohamed Hassan Jillo & 2 others [2018] eKLR*[45], the ELC Court at Garissa was called upon by the defendant/applicant to determine an application seeking orders that the proceedings be stayed and that the dispute be referred to the local community elders for resolution.[46] The Court observed that '*Under Article 159 (2) (c) the courts and tribunals are to ensure that there is promotion of Alternative Dispute Resolution mechanism, mediation reconciliation, arbitration and traditional dispute resolution as a means of bringing cohesion and co-existence amongst the people. However, parties have to consent and be willing to be bound by the decision of the decision makers. In this case, the parties had initially agreed to refer the dispute to a panel of elders but the plaintiff later abandoned the process and elected to bring the dispute for resolution to this court*' (emphasis added). This case illustrates the first challenge that arises when applying ADR and TDR mechanisms in land disputes; the unenforceability of the outcomes of mediation outcomes in land matters.

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[43] Draft developed through the joint efforts of the Judiciary, the IDLO, USAID, and the Nairobi Center for International Arbitration (NCIA). Available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf

[44] *Draft Alternative Dispute Resolution Policy 2019 (Zero draft), p.7. Available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf*

[45] Sahara Ahmed Hillow (Suing as administrator ad litem of the Estate of the late Ahmed Hillow Osman (Deceased) v Mohamed Hassan Jillo & 2 others [2018] eKLR, Environment and Land Case 30 of 2017 (Formerly 77 of 2017, Embu).

[46] Ibid, para. 1.

It is therefore to be seen how outcomes in land matters, are to be enforced by the courts. The only exception would be where both parties mutually agree on the outcome under the law of contract or under some other agreed arrangements and then approach the court to record it as consent. In such instances, it would be easier for the courts to record and adopt such agreed outcomes as an order of the court.[47]

4.2 Recourse to Court and Recognition and Enforcement of Settlement Agreement

Clause 32 of the proposed *Draft ADR Bill, 2019*[48] provides that all the parties and their advocate(s) should file a certificate with the Court for confirmation that ADR has been considered. While this provision is drafted in broad terms, it is silent on what would be the effect of any of the parties or their advocates failing to file the relevant certificate(s) at the appropriate time. It fails to clarify on whether the Court would send them back in order to comply or whether it would invoke clause 28 (2) (a) of the Bill. Considering that land matters are sensitive, it is critical that it is clarified on what the Courts would do in such instances as the one described above in order to avoid an outcome that one of parties/groups consider invalid.

Clause 33 of the Bill that provides for resort to judicial proceedings is not clear on whether the decision of the High Court or the Court that referred the dispute for resolution through ADR is final or whether the dissatisfied party may move to Court of Appeal. It is important to clarify this since any party or group losing some rights to what they consider

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[47] See Law of Contract Act, Cap 23, Laws of Kenya, sec. 3(3);
see also Civil Procedure Rules 2010, Order 13, rule 2.] Judgment on;

> "2. Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

Civil Procedure Rules 2010, Order 25, rule 5;

[Order 25, rule 5.] Compromise of a suit.

> 5. (1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.
> (2) The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.

[48] Draft Alternative Dispute Resolution Bill, 2019, Senate Bills No. 19 (Government printer, Nairobi, 2019). Available at
http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/AlternativeDisputeResolutionBill_2019.pdf

their land may resort to other unconventional and non-peaceful means if they feel that justice was not served by the courts.

Notably, clause 36 of the Bill which outlines the grounds for referral of recognition or enforcement of settlement agreement provides that:

> *The recognition or enforcement of a settlement agreement may be refused where –*
> *(a) at the request of the party against whom it is invoked, that party furnishes to the High Court or the court referring the dispute to alternative dispute resolution proof that –*
> *(i) a party to the alternative dispute resolution process was under some incapacity;*
> *(ii) the settlement agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the country where the settlement agreement was made;*
> *(iii) the party against whom the settlement agreement is invoked was not given proper notice of the appointment of a conciliator, mediator or traditional dispute resolver;*
> *(iv) the party against whom the settlement agreement is invoked was not given proper notice of the alternative dispute resolution process or was otherwise unable to present its case;*
> *(v) the settlement agreement deals with a dispute not contemplated by or not falling within the terms of the referral to alternative dispute resolution, or it contains decisions on issues beyond the scope of the referral to alternative dispute resolution, provided that if the decisions on issues referred to alternative dispute resolution can be separated from those not so referred, that part of the settlement agreement which contains decisions on issues referred to alternative dispute resolution may be recognized and enforced;*
> *(vi) the appointment of the conciliator, mediator or traditional dispute resolver was not in accordance with the alternative dispute resolution clause, this Act or any other law or the law of the country where the alternative dispute resolution took place;*
> *(vii) the alternative dispute resolution process was not conducted in accordance with the alternative dispute resolution clause, this Act or any other law or the law of the country where the alternative dispute resolution took place;*
> *(viii) the settlement agreement has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which that settlement agreement was made; or*
> *(ix) the making of the settlement agreement was induced or affected by fraud, bribery, corruption or undue influence;*
> *(b) if the High Court or the court finds that –*
> *(i) the subject-matter of the dispute is not capable of settlement by alternative dispute resolution under the law of Kenya; or*
> *(ii) the recognition or enforcement of the settlement agreement would be contrary to the public policy* (emphasis added).

The underlined portions raise a number of concerns. To begin with, it is notable that in the definitions/interpretation section, the definitions of the terms 'conciliation' 'mediation' and 'traditional dispute resolution' do not mention anything on the potential international nature of these processes. Unlike the Arbitration Act which defines arbitration to include both domestic and international arbitration, the current ADR Bill 2019 is quiet on this as far as the said processes are concerned. It is therefore questionable whether the given definitions should be inferred to include the international aspects of these processes, especially conciliation and mediation. Secondly, the scope of the Bill as envisaged under clause 4(1) is that Bill shall apply to certain civil disputes including a dispute where the National government, a county government or a State organ is a party. What is not clear is whether this includes disputes involving foreign parties transacting with the National government, a county government or a State organ. Considering that there may be other laws that may oust the jurisdiction of this Bill in as far as resolving disputes with foreign parties is concerned, the Bill should not include the international aspects of the processes in question. Thirdly, it is an established fact TDR mechanisms *are highly subjective and unique to communities and cultures* (emphasis added). It is therefore not viable to contemplate an international TDR decision under the Bill. It may be imperative to reconsider these provisions to avoid the obvious challenges in attempting to enforce such decisions, even assuming that they may exist.

In ADR or TDR referrals which were done by the Court and/or parties filed their respective certificates as contemplated under clause 32 of the Bill, it is not clear as to whether a party would still have the liberty to challenge the decision under some grounds such as "*the settlement agreement deals with a dispute not contemplated by or not falling within the terms of the referral to alternative dispute resolution, or it contains decisions on issues beyond the scope of the referral to alternative dispute resolution*". The Bill is also silent on what happens where the referring court and the parties in their certificates agreed that the dispute in question could be referred for ADR or TDR. It does not address the question on whom the error, if any, is to be revisited. Arguably, it is possible for a 'losing' party to avoid filing the certificate or challenging the decision to refer the same for ADR or TDR at the relevant stage and wait until the outcome and use these provisions to delay the process of recognition and enforcement. Again, the Bill does not have any provisions on how these issues are to be reconciled.

Again, even though the outcome of ADR and/or TDR process is binding on the parties, where parties challenge the enforcement and recognition, clause 36 of the Bill is silent on whether a dissatisfied party may appeal the decision of enforcement and recognition to a higher court. This may present challenges as has been the case with arbitration outcomes.

4.3 Determination of the Expertise of the ADR and TDR Practitioners

The formal recognition of traditional dispute resolution mechanisms in the *Draft ADR Bill, 2019* is commendable as these mechanisms have often faced challenges in their application as they mostly depend on particular and differing customs of the different communities. Having a formal basis for their application as envisaged in the Constitution is thus to be lauded.

However, TDR mechanisms still have to face one more hurdle: determination of the expertise of the practitioners. It is assumed that it is under the provisions of this Bill, once enacted that the constitutional provisions on application of ADR and TDR mechanisms to land disputes will be applied.

Clause 27 of the Bill which provides for the competence of a traditional dispute resolver provides at sub clause (1) that "A person shall not act as a traditional dispute resolver unless acquainted with the customary law to be applied in resolving the dispute". Sub clause (2) (ought to be corrected on the bill to read (3) provides that "the Committee may, in as far as is reasonably practicable, prepare and maintain a list of traditional dispute resolvers". These provisions may present a challenge to the Committee. For instance, it is not clear on the criteria to be used when determining whether the potential candidate is acquainted with the customary law to be applied in resolving the dispute. The law has been that anyone who seeks to rely on customary law especially in African customary marriages has the onus of proving the same as was held in the celebrated case of ***Kimani v. Gikanga [1965] EA 735,*** where ***Duffus JA*** explained the position thus:

> *"To summarize the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case"* **(***emphasis added).*

The question that arises therefore is how, under the above provisions of the Bill, the Committee will decide that an applicant is competent and acquainted with the customary law to be applied in resolving the dispute. It is possible that in the Committee, there may be nobody acquainted with the customary law in question. In ensuring that the Committee does not face challenges in coming up with the register, these clauses may need to be reconsidered. The other potential risk is locking out potential candidates where the process and criteria of selection is too formalized. It is possible that the most qualified

candidates may not have the formal education or the 'requisite papers' to put in during application. It is not clear how the Committee will overcome this potential hurdle. What makes TDR mechanisms attractive is their informality and this ought to be preserved as much as possible in legislating on these processes. It should also not be lost on the drafters that TDR mechanisms include a number of processes just as is the case in ADR mechanisms and various communities may use different approaches or processes in dealing with diverse cases.

This process of determining the applicability of TDR mechanisms may also arise under Clause 28 (2) (a) which provides that "A court before which a dispute is filed or pending may refer a dispute for resolution through a traditional dispute resolution process at any time where— (a) the court determines that traditional dispute resolution will facilitate the resolution of the dispute or a part of the dispute". Again, the Bill is silent on what procedure or evidence the Court will rely on to assist it in making this decision. It is not yet clear whether the communities involved, in the case of community land under *Community Land Act 2016*[49], will have a chance to appoint the preferred experts in such TDR process.

Clause 29 (2) of the Bill provides that the traditional dispute resolver must submit to the court a written down settlement agreement as swell as a report at the conclusion or termination of the TDR process. Considering that some of the customary experts (mostly elders) may not have formal knowledge of reading and writing, it is debatable as to whether there should be a provision for them to work with an assistant or a court appointed clerk to assist them in coming up with the settlement agreement or the report. Alternatively, they can appear in open court to 'report' on the outcome and the magistrate or judge puts it down in writing and records it as the decision of the Court. In other words, such settlements or reports can be treated the same way as provided under clause 29 (3) which states that "Except where a dispute was referred for resolution through traditional dispute resolution or at the request of the parties, a settlement agreement need not be in writing". The drafters and policy makers may include other viable options to address such challenges. The Bill can include court appointed assistant(s) to work with the resolvers in order to capture in writing what the dispute resolvers conclude.

5. Making Traditional Dispute Resolution Mechanisms work in Managing Land Conflicts in Kenya

ADR and TDR mechanisms when applied in management of disputes and conflicts can create viable channels for public participation in meaningful decision-making processes. Notably, the objects of the devolution of government are, inter alia— to give powers of self-governance to the people and enhance the participation of the people in the exercise

[49] Act No. 27 of 2016, Laws of Kenya.

of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their development; and to protect and promote the interests and rights of minorities and marginalised communities.[50]

While the foregoing provisions are laudable in view of the fact that they have envisaged traditional knowledge in terms of traditional dispute resolution mechanisms within the legal framework, the real task lies in implementing these provisions and creating opportunities for incorporation of such knowledge in decision-making and conflict management as far as land is concerned. There is a need to move beyond the formality of the proposed Bill to come up with procedures that can actually work. This is especially important in the application of traditional dispute resolution mechanisms in land conflicts (Art. 67) as well as dealing with the inter-community and intra community conflicts that are mostly natural resource based.

Traditional conflict resolution practices reflect principles of reconciliation based on long-standing relationships and values.[51] They tend to be effective in addressing intra-community and even inter-community conflict, where relationships and shared values are part of the reconciliation process.[52]

However, there is a need to integrate traditional and formal approaches to conflict management in a way that ensures that the informality of these mechanisms is not lost. Including communities and the affected parties in appointment of these traditional dispute resolvers may help in not only lending credence to the process but also may help in repositioning the traditional authority especially as far as resolution of land conflicts within communities, as contemplated under Article 60(1) (g) of the Constitution, is concerned.

There is also a need to consider and carefully capture the spirit of the *Alternative Dispute Resolution Policy (Zero Draft), 2019*[53] which may be useful in capturing the spirit of the Constitution, ADR and TDR mechanisms as well as the other relevant laws that deal with these mechanisms. The policy-makers are wary of the risks involved in formalization of ADR processes and the implementation of the ADR Policy which include: over-formalisation of the ADR sector which will undermine its utility as a more flexible, faster, informal mechanisms for justice; technology disruption of working models in ADR;

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[50] Art. 174.

[51] Myers, L.J. & Shinn, D.H., 'Appreciating Traditional Forms of Healing Conflict in Africa and the World,' Black Diaspora Review, Vol. 2(1), Fall 2010.

[52] Ibid.

[53] Draft developed through the joint efforts of the Judiciary, the IDLO, USAID, and the Nairobi Center for International Arbitration (NCIA). Available at *https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pd*f

resistance to change by stakeholders and users of ADR; inadequate resources to implement the policy; and competition between formal and ADR mechanisms, and legal and non-legal practitioners.[54] These precautions are necessary considering that the ADR and TDR mechanisms are perceived to be better off than formal approaches in managing some disputes due to the advantages that they have over the formal processes. Any formalisation approach that takes away these advantages thus defeats the very essence of their use in managing disputes.

In a bid to strengthen the legal framework for ADR in the country, the Draft ADR Policy recommends that there be enacted an Alternative Dispute Resolution Act, which shall be the framework legislation for ADR in the country. The Act should among other things: provide for establishment of mechanisms for linkage and coordination between the formal justice system and ADR system; sector governance; regulation; standards setting; enforcement of decisions; among other things.[55] The National Council (to be established under the Act) in liaison with stakeholders should promote the full implementation of existing laws that promote ADR, and advocate for similar legal provisions in other needy sectors.[56] The assumption is that various laws require different mechanisms as well as varying procedural needs. The Council is thus expected to work closely with other stakeholders to identify and address the special needs under each of the laws and approaches.

As a way of strengthening linkages, coordination and harmonisation in the ADR sector, the Draft Policy also: adopts the principle of subsidiarity in regard to linkage between the ADR systems and the formal court system. This is intended to stem the hegemony of the judiciary, and to allow autonomous operation and growth of ADR without the trappings of judicial conceptions of justice, procedures, retributive approaches, and the individual interests that underpin the method and goals of the formal justice sector; The linkage between the formal justice system and non-court ADR mechanisms are therefore meant to be in areas of mutual benefit such as enforcement, research, and accountability systems; mechanisms and modalities are also to be developed for promotion of coordination and harmonisation between the formal justice system and the ADR sector, and also between actor in the ADR sector itself.[57]

As already pointed out, there is a need to ensure that the legislation process does not defeat the merits of the ADR and TDR processes thus rendering them inapplicable or ineffective when it comes to the specific disputes and conflicts. The drafters of the ADR

[54] Alternative Dispute Resolution Policy (Zero Draft), 2019.
[55] Ibid, p. 41.
[56] Ibid, p.41.
[57] Ibid, p.42.

Bill 2019 should thus revisit the above listed aims of the draft Policy to ensure that they capture these goals and aspirations.

Some of the above listed potential challenges in the application of TDR mechanisms in management of land conflicts can be overcome if these policy goals are well captured and implemented through the ADR Bill. It is important to ensure that the informality and potentially inexpensive and/or cost effectiveness of the ADR and TDR is preserved. The purpose of the ADR policy is to strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) in the Country in order to achieve optimal delivery of access to justice for all Kenyans. It is intended to create a well-coordinated, well capacitated and cohesive ADR system that is strategically linked to the formal system, while at the same time maintaining its autonomy as an informal system and providing quality justice services to Kenyans across the country.[58] It is important that the legal framework on ADR and TDR mechanisms not only captures but also promotes this purpose of the policy framework. This is especially important in order to ensure that communities appreciate and remain in touch with the legal framework on the regulation and application of ADR and TDR mechanisms in management of their everyday disputes and conflicts such as the ones that relate to land and natural resources.

6. Conclusion

ADR and TDR mechanisms are associated with many advantages when appropriately used in management of land and other natural resource conflicts. However, as discussed in this paper, while these processes may have many intrinsic values that make them preferable to the formal mechanisms in management of land conflicts and disputes, there are procedural and appropriateness challenges that should be addressed to make them legally and practically applicable. It is hoped that the challenges discussed in this paper will be considered by the Kenyan policy and decision makers in mainstreaming the use of ADR and TDR in management of land conflicts and disputes in the country.

Effective application of TDRMs in the management of land conflicts in Kenya is possible. However, a lot needs to be done before this goal is realised.

[58] Alternative Dispute Resolution Policy (Zero Draft), 2019, p. 7.

Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation

Abstract

With the promulgation of the 2010 Constitution of Kenya, the use of Alternative Dispute Resolution (ADR) mechanisms and Traditional Dispute Resolution Mechanisms (TDRMs) in managing natural resource conflicts was formalised. The Constitution envisages a situation where conflicts, and specifically the natural resource ones, should first be dealt with using ADR and TDRMs and only resort to court where necessary. Communities are required to make legitimate attempts to resolve the matter using the most appropriate mechanisms available to them. Despite this, there has not been evidence of genuine attempts at taking up these processes in managing natural resource conflicts, which are still prevalent and a cause of concern. While singling out negotiation and mediation, the author examines the opportunities that ADR mechanisms, and particularly negotiation and mediation, present in realising the goal of effective management of natural resource conflicts in Kenya, through discussing the advantages associated with the processes, and why they may be the most preferred means of natural resource conflict management.

1. Introduction

In this paper, the author critically discusses the effective management of natural resource conflicts through the use of negotiation and mediation. The paper contends that the existing national legal and institutional framework for the management of natural resource conflicts has been insufficient to effectively deal with the natural resource conflicts.

With the promulgation of the 2010 Constitution of Kenya, the lawmakers created an opportunity for exploring the use of ADR mechanisms and Traditional Dispute Resolution Mechanisms (TDRMs) in managing natural resource conflicts.[1] Notably, one of the principles of land policy, as envisaged in the Constitution, is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.[2] The implication of such provisions is that before a matter is referred for court adjudication, communities are required to make legitimate attempts to resolve the matter using the most appropriate mechanisms available to them. This is also reinforced by the fact that one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.[3] This is a significant provision, considering that land conflicts form the bulk of natural resource conflicts reported in the country, and the land issue is an emotive one.[4] There have been frequent and well documented reports of violent conflicts over

[1] Art. 159(2) (c), Constitution of Kenya 2010, Government Printer, Nairobi.
[2] Art. 60 (1) (g).
[3] Art. 67(2) (f).
[4] Government of Kenya, Report on the Commission of Inquiry into Land Law Systems in Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration (Government Printer Nairobi, 2002); See also

access to, and use of land in Kenya.[5] For example, recently, Narok and Kwale Counties suffered natural resource conflict albeit in varying degrees. In Narok, Kenya, there were clashes between the Maasai and Kipsigis in Olposimoru in December 2015, over what is believed to be natural resource related conflict, which resulted in human casualties and displacement.[6] In Kwale County, there have also been cases of violence related to natural resource exploitation.[7] In such instances, one may find that a few herdsmen may have been accused of 'trespassing' by grazing in another community's territory and were thus attacked. The resultant chaos in retaliation affects the whole community. For them, it is not about arresting the involved individuals and arraigning them in court. It is about protecting the interests of the whole community and thus, any approaches to managing the conflict must involve the whole community or their representatives, and must address all of their concerns.

Despite the fact that the existence of legal and institutional framework in the country is meant to deal with natural resource conflicts, it has not offered much in stemming natural resource conflicts, due to inadequacies within the structure. Natural resource conflicts in Kenya are still prevalent and a cause of much concern. It has been noted that the contribution of the issue of land to violent conflicts in Kenya is due to the way land is 'treated with fervent sentimentality and sensitivity and in many ways considered

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A.M. Akiwumi, et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.

[5] The Akiwumi Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya (31st July, 1999) notes the contribution of the issue of land to violent conflicts in Kenya due to the way it is treated with fervent sentimentality and sensitivity and in many ways, considered explosive. The Report at pg. 53 notes that "Whereas, the constitution guarantees the right of ownership of property anywhere in the country, the peaceful co-existence of the forty two tribes that live within our national borders, appears to have been profoundly undermined by diverse man-made problems that are either directly or indirectly connected to land."

[6] Agutu, N., 'GSU deployed in Narok after two killed in Maasai, Kipsigis clashes,' The Star Newspaper, Dec. 26, 2015, 3:00 pm, Nairobi, available at *http://www.the-star.co.ke/news/2015/12/26/gsu-deployed-in-narok-after-two-killed-in-maasai-kipsigis-clashes_c1265922* [Accessed on 2/01/2016]; see also AfriQua, 'Narok land disputes threaten water resources,' 18/03/2015, available at *http://onesafedrop.org/192/narok-land-disputes-threaten-water-resources/* [Accessed on 2/01/2016]; Khamadi, S., 'Counties struggle to gain control over local natural resources in Kenya,' Wednesday January 9th, 2013, available at *http://landquest.internewskenya.org/counties-struggle-to-gain-control-over-local-natural-resources-in-kenya/* [Accessed on 2/01/2016].

[7] Musyoka, A., 'Kenya: Four Killed at Kinango in Clash Over Grazing Land,' The Star Newspaper, Dec. 19, 2014, Nairobi, available at *http://allafrica.com/stories/201412190701.html [Accessed on 2/01/2016]; See also generally, Constitution and Reform Education Consortium (CRECO), Building a Culture of Peace in Kenya: Baseline Report On Conflict-Mapping and Profiles of 47 Counties in Kenya, April, 2012, ISBN: 978-9966-21-158-3.* Available at *https://www.humanitarianresponse.info/system/files/documents/files/CRECO_2012.pdf* [Accessed on 3/01/2016].

explosive.'[8] The emergence of multi-party politics in Kenya was perceived by many communities as a move to marginalize and dispossess them of land. The multi-party politics were thus influenced by tribal considerations, with their roots in economic considerations, making it easier to incite politically based tribal violence.[9]

Land clashes that occurred in Kenya in 1992 and 1997 have been attributed to inequitable allocation of land resources, poor government policies and programmes perceived as favouring some factions at the expense of others. The issues of the use of environmental resources underlie numerous conflicts that have occurred in Kenya. The post-election violence in 2007-08 can be traced, to a large extent, to contests over access to and use of natural resources in Kenya, and the harboured feelings of alienation and discrimination in access and benefit sharing of the accruing benefits.[10]

It is against this background that the author examines the opportunities that ADR mechanisms and particularly, negotiation and mediation, present in realising the goal of effectively managing natural resource conflicts in Kenya.

2. Defining Concepts in Conflict Management

Conflict is viewed as a process of adjustment, which itself can be subject to procedures to contain and regularize conflict behaviour and assure a fair outcome.[11] Notably, conflicts can be managed, transformed, resolved or settled, depending on the approach adopted. While this paper is written with a bias towards conflict management through negotiation and mediation, it is important to explain the other concepts for purposes of clarity.

Conflict management is defined as the practice of identifying and handling conflicts in a sensible, fair and efficient manner that prevents them from escalating out of control and becoming violent.[12] Conflict management is seen as a multidisciplinary field of research,

[8] Government of Kenya, et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.
[9] Ibid.
[10] See Machel, G. & Mkapa, B., Back from the Brink: the 2008 mediation process and reforms in Kenya, (African Union Commission, 2014).
[11] Rummel, R.J., 'Principles of Conflict Resolution,' Chapter 10, Understanding Conflict and war: Vol. 5: The Just Peace.
[12] Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' Prepared in the framework of the Livelihood Support Programme (LSP), An interdepartmental programme for improving support for enhancing livelihoods of the rural poor, (Food And Agriculture Organization Of The United Nations, Rome, 2005), available at http://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement_FAO2005.pdf [Accessed on 9/01/2016].

and action that addresses how people can make better decisions collaboratively.[13] Thus, the roots of conflict are addressed by building upon shared interests and finding points of agreement.[14]

Conflict transformation focuses on long-term efforts, oriented towards producing outcomes, processes and structural changes. It aims to overcome revealed forms of direct, cultural and structural violence, by transforming unjust social relationships and promoting conditions that can help to create cooperative relationships.[15] Conflict settlement deals with all the strategies that are oriented towards producing an outcome in the form of an agreement among the conflict parties that might enable them to end an armed conflict, without necessarily addressing the underlying conflict causes.[16] Settlement is an agreement over the issues(s) of the conflict, which often involves a compromise.[17] Parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in the relationship. Basically, power is the defining factor for both the process and the outcome.[18]

Settlement may be an effective immediate solution to a violent situation, but will not thereof address the factors that instigated the conflict. The unaddressed underlying issues can later flare up when new issues or renewed dissatisfaction over old issues or the third party's guarantee runs out.[19] Settlement mechanisms may not be very effective in facilitating satisfactory access to justice (which relies more on people's perceptions, personal satisfaction and emotions). Litigation and arbitration are coercive and thus lead to a settlement. They are formal and inflexible in nature and outcome.[20]

Conflict resolution deals with process-oriented activities that aim to address and resolve the deep-rooted and underlying causes of a conflict.[21] Conflict resolution mechanisms

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[13] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' available at *http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage* [Accessed on 17/01/2016].
[14] Ibid.
[15] Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' op cit.
[16] Ibid.
[17] Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", Journal of Peace Research, Vol. 32, No. 2(May, 1995), P.152.
[18] Baylis, C., and Carroll, R., "Power Issues in Mediation", ADR Bulletin, Vol. 1, No.8 [2005], Art.1, p.135.
[19] Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit. p. 153; See also Mwagiru, M., Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), p. 42.
[20] See generally Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management, op. cit.
[21] Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' op cit.

include negotiation, mediation in the political process and problem solving facilitation.[22] It has rightly been observed that whereas concerns for justice are universal, views of what is just and what is unjust are not universally shared, and as such, divergent views of justice often cause social conflicts.[23] This is attributed to the fact that frequently, the parties involved in conflicts are convinced that their own view is the solely valid one.[24] It is, thus, suggested that since there is no access to an objective truth about justice, conflicts may be reconciled by the judgement of an authority accepted by all parties or by a negotiated agreement between the parties: agreements are just when the parties are equally free in their decision and equally informed about all relevant facts and possible outcomes.[25]

Natural resource conflicts are defined as social conflicts (violent or non-violent), that primarily revolve around how individuals, households, communities and states control or gain access to resources within specific economic and political frameworks.[26] They are the contests that exist as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests. Natural resource conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development factors such as population growth and socio-economic advancement.[27]

Natural resource conflicts can, arguably, involve three broad themes: actors (or stakeholders, groups of people, government structures and private entities), resources (land, forests. rights, access, use and ownership) and stakes (economic, political. environmental and socio-cultural).[28] As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.[29] Despite this, there are key principles such as, inter alia, participatory approaches[30], equitable representation, capacity building, context

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[22] Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", The Conflict Resolution Information Source, Version IV, December 2005.

[23] Montada, L., 'Justice, Conflicts, and the Justice of Conflict Resolution,' International Encyclopaedia of the Social & Behavioural Sciences (Second Edition, 2015), pp. 937–942.

[24] Ibid.

[25] Ibid.

[26] Funder, M., et al, 'Addressing Climate Change and Conflict in Development Cooperation Experiences from Natural Resource Management,' p. 17, (Danish Institute for International Studies, DIIS, 2012), available at https://www.ciaonet.org/attachments/20068/uploads [Accessed on 10/01/2016].

[27] Toepfer, K., "Forward", in Schwartz, D. & Singh, A., Environmental conditions, resources and conflicts: An introductory overview and data collection (UNEP, New York, 1999). p.4

[28] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' Annex C - Summary of Discussion Papers, (FAO), available at http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage [Accessed on 2/01/2016].

[29] Ibid.

[30] Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process. (Hove, SVD, 'Between consensus and compromise:

of the conflict and increased access and dissemination of information, that must always be considered.[31]

Natural resource conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.[32] To them, justice would mean affording them an opportunity to get what they feel entitled to and anything less, which means that they resort to other means of possessing the same. This way, conflicts become inevitable. Conflict resolution mechanisms such as negotiation and mediation affords the parties an opportunity to negotiate and reach a compromise agreement, where all sides get satisfactory outcome.[33] This is particularly important in ensuring that there will be no future flare-up of conflict due to unaddressed underlying issues.[34]

It is, therefore, arguable that resolution mechanisms have better chances of achieving parties' satisfaction when compared to settlement mechanisms. However, it is important to point out that these approaches should not be used in a mutually exclusively way, but instead, there should be synergetic application of the above approaches. Further, conflict management processes are not mutually exclusive and one can lead to another.[35] Each of the approaches has their success story where they have been effectively applied to achieve the desired outcome. The scope of this paper is, however, limited only to conflict resolution mechanisms, namely negotiation and mediation.

3. Causes and Effects of Conflicts

There are many factors that determine the emergence, persistence, and even management of conflicts. The understanding of these factors is essential in developing policies that effectively limit and manage conflict. The factors range from internal to relational and contextual factors.[36]

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acknowledging the negotiation dimension in participatory approaches,' Land Use Policy, Vol. 23, Issue 1, January 2006, PP. 10–17.

[31] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

[32] FAO, 'Negotiation and mediation techniques for natural resource management,' available at *http://www.fao.org/3/a-a0032e/a0032e05.htm* [Accessed on 07/02/2016].

[33] Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' Working Paper No. 135, (Overseas Development Institute, April, 2000), p. 16.

[34] See generally Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management, op. cit.

[35] Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas, (Southern Alliance for Indigenous Resources).

[36] Louis, K., "Factors Shaping the Course of Intractable Conflict." Beyond Intractability. Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: October 2003. <*http://www.beyondintractability.org/essay/factors_shaping_intractable_conflict/*>.

It has rightly been observed that in the majority of cases of resource conflicts, one or more of the following drivers are usually at play: conflict over resource ownership; conflict over resource access; conflict over decision making associated with resource management; and conflict over distribution of resource revenues as well as other benefits and burdens.[37] These conflict drivers have contributed to most of the natural resource conflicts in Kenya, and should therefore be adequately addressed in managing the conflicts.[38]

The structure of relations between parties to the conflict and the way parties interpret the same may affect the course of the conflict and its management. The relation factors include differences in sizes (group conflicts), economic endowment (resources), coerciveness between the parties, and cultural patterns of conduct. They also include the nature and degree of integration between adversaries in economic, social, and cultural domains. A conflict between groups that depend on each other's produce will be easy to manage because each party is feeling the strain of the conflict resulting from scarcity of the produce from the other party.[39] However, abundance of resources, just like scarcity, can also cause conflicts. The African continent is awash with examples of countries that have suffered from the "curse of natural resources" – where countries with great natural resource wealth tend to grow more slowly than resource-poor countries.[40]

It has been argued that conflicts associated with natural resources are often due to different perceptions regarding who should benefit from the conflicts, and are an indicator of resource availability, evolution of tenure rights and systems, accessibility and

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[37] The United Nations Department of Political Affairs and United Nations Environment Programme, Natural Resources and Conflict: A Guide for Mediation Practitioners, (2015, UN DPA and UNEP), p. 11.

[38] Campbell, D.J., et al, 'Land use conflict in Kajiado District, Kenya,' Land Use Policy, Vol.17, Issue 4, October 2000, pp. 337–348; Yamano, T, et al, 'Land Conflicts in Kenya: Causes, Impacts, and Resolutions,' FASID Discussion Paper 2005-12-002, available at *www3.grips.ac.jp/~yamanota/Land Conflicts in Kenya (FASID DP).pdf* [Accessed on 17/01/2016].

[39] See Aylinga, R.D. & Kelly, K., 'Dealing with conflict: natural resources and dispute resolution,' The Commonwealth Forestry Review, Vol. 76, No. 3, 15th Commonwealth Forestry Conference Papers (1997), pp. 182-185.

[40] Sachs, J.D & Warner, A.M, 'Natural Resources and Economic Development: The curse of natural resources,' European Economic Review, Vol. 45, Issues 4–6, May 2001, PP. 827–838 AT P. 827. For instance, there have been internal natural resource conflicts that may be attributed to resource abundance: South Sudan, Liberia, Sierra Leone, Democratic Republic of Congo, Congo -Brazzaville, Central African Republic, amongst others; See also generally, G. King & V. Lawrence, Africa, "A Continent in Crisis: The Economic and Social Implications of Civil War and Unrest among African Nations," EDGE, Final Spring 2005, June, 2005; see also, M. Jenkins & E. Umoh, Africa in Conflict and Crisis: Critical Perspectives on the Role of Conflict Diamonds and Oil on the Livelihood of Sierra Leone and Nigeria.' Autumn, 2002; Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941(2001); Institute for Environmental Security, "What is Environmental Security?"
Available at http://www.envirosecurity.org/activities/What_is_Environmental_Security.pdf [Accessed on 17/1/2016].

control over the resource.[41] They are believed to result from an imbalance in the power structure, where these power imbalances can exhibit themselves through unequal distribution of natural resource use and tenure rights.[42] Further, it is asserted that conflicts show transition within societies, which can be positive if it expresses need for change or the ability of institutions to adapt to social, economic and/or environmental conditions. On the other hand, conflicts can have a negative impact if the changes that result from them cause further marginalisation of certain groups of society, such as the poor, women and minorities.[43]

Where conflict cannot be contained in a functional way, it can erupt in violence, war, and destruction, loss of life, displacements, long-term injuries, psychological effects as a result of trauma suffered, especially in case of violent conflicts, and deep fear, distrust, depression, and sense of hopelessness.[44]

Conflict also often produces significant environmental degradation.[45] It is difficult to justify environmental protection when other more immediate concerns exist as a result of the conflict. Therefore, environmental damage from accelerated resource extraction may be severe. Scholars have stressed that human needs are among the major causes of conflicts. It is argued that deep-rooted conflicts are caused by the absence of the fundamental needs of security, identity, respect, safety, and control, which many find non-negotiable.[46] As such, if they are absent, the resulting conflict will remain intractable until the structure of society is changed to provide such needs to all. For instance, the need for identity has been described as a fundamental driver of intractable conflict.[47] Threats to identities often invite very negative responses from people who see the same as a way of protecting their essence.[48]

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[41] Traore, S. & Lo, H., 'Natural Resource Conflicts and Community Forestry: A West African Perspective,' in FAO, Annex C - Summary of Discussion Papers, available at *http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage* [Accessed on 2/01/2016].

[42] Ibid.

[43] Ibid.

[44] See G. Machel & B. Mkapa, Back from the Brink: the 2008 mediation process and reforms in Kenya, (African Union Commission, 2014).

[45] Ballet, J., et al, 'Social Capital and Natural Resource Management: A Critical Perspective,' The Journal of Environment & Development, Vol. 16 No. 4, December 2007, pp. 355-374, p. 367.

[46] John Burton, Conflict: Human Needs Theory (New York: St. Martin's Press), 1990; Herbert Kelman, International Behavior: A Social Psychological Analysis (New York: Holt, Rinehart and Winston), 1965.

[47] Jay Rothman, Resolving Identity-Based Conflicts (San Francisco: Jossey Bass), 1997. See also John Paul Lederach, Building Peace: Sustainable Reconciliation in Divided Societies (United States Institute of Peace), 1998.

[48] Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' op cit, p. 202.

The clash of interests can take many forms. For instance, it could be over resources such as land, food, territory, water, energy sources, and natural resources.[49] Such conflicts range from whom the resources should be distributed to, to whether the resources should be distributed, and how the distribution should be undertaken. Conflict could also arise over power and control of the resources.[50] There are also conflicts over identity.[51] These concern the cultural, social and political communities to which people feel tied. Conflicts over status may arise and have to do with whether people believe they are treated with respect and dignity and whether their traditions and social position are respected.[52] In addition, the conflicts could be caused by differences of values, particularly those embodied in systems of government, religion, or ideology.[53] Further, conflicts have been associated with the changing norms, values, and world views about property rights within formerly subsistence-based (or pastoralist) communities.[54]

Indeed, this scenario is not new to Kenya, where recently, there was witnessed violence in areas around Kajiado town with, Maasai community seeking to 'evict foreigners' in the area.[55] The alleged foreigners are people who had bought land for residential homes and commercial purposes, through real estate land developers. They felt that their land was being taken away. Such incidences require collaborative conflict management techniques, considering that there are deep-rooted issues and harboured feelings of alienation and discrimination that need to be adequately addressed. There is need to strike a balance between community interests and national interests on development. Otherwise, without such a balance, erupting conflicts subsequently affect the course of development in the country.

There is also a school of thought that believes that public policy can also lead to natural resource conflicts. It is argued that specific policies, government programs, and their

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[49] Buckles, D & Rusnak, D, 'Conflict and collaboration in natural resource management,' (International Development Research Centre, 2005), p. 2.

[50] Ibid, p. 2.

[51] See Rothman, J., Resolving Identity-Based Conflict: In Nations, Organizations, and Communities. (San Francisco: Jossey-Bass Publishers, 1997).

[52] EAIM, 'Peace and Stability Are Prelude to Economic Development and Prosperity,' available at *http://www.togoruba.org/togoruba1964/mainTogorubamap/mainMap/headingMap/English/2006/articlesFeb-2006/1802EAIM06-06EA.html* [Accessed on 10/02/2016].

[53] Adamu, A & Ben, A., 'Migration and Violent Conflict in Divided Societies: Non-Boko Haram violence against Christians in the Middle Belt region of Nigeria,' Nigeria Conflict Security Analysis Network (NCSAN) Working Paper No. 1, (World Watch Research, Abuja, Nigeria, March 2015).

[54] Armitage, D., 'Adaptive Capacity and Community-Based Natural Resource Management,' Environmental Management, Vol. 35, No. 6, pp. 703–715, p. 710.

[55] Sayagie, G., 'Tension as different clans from Narok, Kajiado both claim Nguruman,' Sunday Nation, November 9, 2014, (Nation media Group, Nairobi, 2014). Available at *http://www.nation.co.ke/counties/Narok-Kajiado-clans-Nguruman/-/1107872/2516170/-/c6b4t5/-/index.html* [Accessed on 10/02/2016]; Daily Nation, 'Clashes in Kitengela as traders fight over market,' (Nation media Group, Nairobi, September 8, 2015). Available at *http://www.nation.co.ke/photo/-/1951220/2865112/-/faabnp/-/index.*html [Accessed on 10/02/2016].

implementation have, in some areas, generated or aggravated conflicts, even when the intention was to reduce the conflict.[56] A good example of such policies would be those touching on property ownership, especially land, and where there is need to balance conservation and access to the resources by communities. A government policy to relocate people forcefully may degenerate into conflicts as witnessed in the Mau forest eviction in Rift Valley Kenya.[57] There may be accusations of discriminatory relocation by the Government where some communities feel alienated. Indeed, such views may not be alien to the Kenyan scenario. For instance, according to the Business and Human Rights Resource Centre, an independent international human rights organisation, when Kenya discovered oil, there were fears that the legal regime was inadequate to regulate the industry and ensure that it does not fuel conflict within Kenya.[58] However, with the enactment of the current Constitution 2010, it was expected that this would change, as it makes provisions for natural resource management and calls for community participation in the management of natural resources.[59]

In homogenous societies, constitutional provisions on natural-resource ownership are expected to address national development or how natural resources are shared between governments and private interests. However, in divided societies, the constitutional treatment of natural resources is more concerned with how natural-resource wealth is shared among often antagonistic communities.[60] Conflicts do not occur in vacuum and to a large extent, they are dependent on the context. Indeed, it has been argued that the governance of natural resources is especially important in the context of divided societies, because control over the benefits from local natural resources is often a chief motivator of ethnic or identity-based conflicts.[61] Natural resource conflicts also are, directly and indirectly connected to and/or impact human development factors and especially the quest for social-economic development.[62]

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[56]Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' available at *http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan022237.pdf* [Accessed on 10/01/2016].

[57]Amnesty International, et al, 'Nowhere to go: Forced Evictions in Mau Forest, Kenya,' Briefing Paper, April 2007; Sang J.K., Case study 3-Kenya: The Ogiek in Mau Forest, April 2001.

[58] Business and Human Rights Resource Centre, 'Steep Rise in Allegations of Human Rights Abuse as Boom in Investment Brings Hope of Prosperity Business and Human Rights in Eastern Africa: A Regional Briefing Paper,'April 2014, p. 7. Available at http://business-humanrights.org/sites/default/files/media/documents/eastern-afr-briefing-bus-human-rights-apr-2014.pdf [Accessed on 19/01/2016].

[59] Ibid, p. 7.

[60] Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 8.

[61] Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' op cit, p. 5.

[62] Wilson, C. & Tisdell, C., 'Conflicts over Natural Resources and the Environment: Economics and Security,' Working Papers on Economics, Ecology and the Environment, Working Paper No. 86, September 2003; Lumerman, P., et al, 'Climate Change Impacts on Socio-environmental Conflicts: Diagnosis and Challenges of the Argentinean Situation,' (Initiative for Peacebuilding 2011).

The Sustainable Development Goals (SDGs) recognise this connection and provide that sustainable development cannot be realized without peace and security, and peace and security will be at risk without sustainable development.[63] The SDGs go ahead to state that the new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda. The aim is to redouble the efforts to resolve or prevent conflict and to support post-conflict countries, including through ensuring that women have a role in peacebuilding and State building.[64] They also call for further effective measures and actions to be taken, in conformity to international law, to remove the obstacles to the full realization of the right of self-determination of peoples living under colonial and foreign occupation, which continue to adversely affect their economic and social development as well as their environment.[65] Thus, conflicts management should be one of the key issues that should be addressed in the quest for sustainable development.

Within the Kenyan context, one of the most important natural resources is land. The Constitution provides that land in Kenya is to be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles: equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.[66] This is in recognition of the fact that Kenya is a divided society with different communities who hold different values, attitudes and beliefs towards the land and its resources.

Further, it has also been observed that conflicts between biodiversity conservation and other human activities are intensifying as a result of growing pressure on natural resources and concomitant demands by some for greater conservation.[67] Consequently, approaches to reducing conflicts are increasingly focusing on engaging stakeholders in

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[63] United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, para. 35.
[64] Ibid.
[65] Ibid.
[66] Constitution of Kenya 2010, Art. 60(1).
[67] Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' Biological Conservation, Vol. 195, March 2016, pp. 196–202.

processes that are perceived as fair, i.e. independent stakeholders and where stakeholders have influence, which in turn can generate trust between stakeholders. [68] It is thus believed that increased trust through fair participatory processes makes conflict resolution more likely.[69] Arguably, central governments which are genuinely concerned about the sustainable use of their country's natural resources must, at a minimum, involve local communities in their management.[70] This means taking local communities into confidence and having confidence in them; it means engaging with their ideas, experiences, values, and capabilities and working with them, not on their behalf, to achieve resource-conservation objectives and community benefits.[71] It means being prepared to adjust national policies so that they can accommodate local interests, needs, and norms that are compatible with the long-term preservation of national ecosystems and their biological diversity.[72]

The Constitution of Kenya requires the States to, inter alia: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; encourage public participation in the management, protection and conservation of the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.[73] Further, every person has a constitutional duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[74]

It is, therefore, arguable that one of the ways of stemming natural resource conflicts would be striking a balance between conservation measures and access to resources by communities, through employing approaches that help in understanding the needs of particular people and responding appropriately and consequently building trust within communities and between communities and the national government. It has also been argued that for conflict management to be successful, there is need to conduct a historical analysis (with the participation of local people) so that the major issues can be identified, analysed and discussed.[75]

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[68] Ibid.
[69] Ibid.
[70] Buckles, D. (ed), Cultivating Peace: Conflict and Collaboration in Natural Resource Management, (International Development Research Centre 1999), pp. vii-viii.
[71] Ibid.
[72] Ibid.
[73] Constitution of Kenya 2010, Art. 69(1).
[74] Ibid, Art. 69(2).
[75] Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas, (Southern Alliance for Indigenous Resources).

While conflicts cannot be avoided, there is a need to effectively manage them so as to ensure harmony amongst people and to prevent violence and the potential loss of lives and property. Management of natural resource conflicts also ensures security in terms of a guarantee of continued access to and use of the environmental resources necessary for to survival from generation to generation.

4. Natural Resource Conflicts Management in Kenya

Over the years, Kenya has been faced with conflicts over natural resources such as water, forests, minerals and land among others. Natural resource conflicts are unique and require being resolved expeditiously since they involve livelihoods of people. Communities depend heavily on natural resources for their livelihoods.[76] Renewable and non-renewable natural resources have conflict generating potential. Renewable resources include crop land, fresh water, free wood and fish. Non-renewable resources include petroleum and minerals.[77] Scarcities of agricultural land, forests, fresh water, and fish are those which contribute to the most violence. This can be partly attributed to lack of effective conflict management mechanisms that are respected by the people who are involved in the se and access to the resources aforesaid. Various groups, communities, developers, government and other organisations have differing ideas of how to access and utilize environmental resources. The conflicts, if not addressed, can escalate into violence, cause environmental degradation and undermine livelihoods.[78]

There is a legal and institutional framework in Kenya that is supposed to deal with natural resource conflicts and either resolve or manage them. These institutions include the courts of law, tribunals under various Acts,[79] the National Environmental Management Authority,[80] National Environmental Complaints Committee, Environment Tribunal and

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[76] Tyler, S. (ed), Communities, Livelihoods, and Natural Resources: Action Research and Policy Change in Asia, (International Development Research Centre, 2006), available at *http://www.idrc.ca/EN/Resources/Publications/openebooks/230-9/index.html* [Accessed on 17/01/2016]; Gomes, N., 'Access to water, pastoral resource management and pastoralists' livelihoods: Lessons learned from water development in selected areas of Eastern Africa (Kenya, Ethiopia, Somalia),' (Food and Agriculture Organization of the United Nations, 2006), available at ftp://ftp.fao.org/docrep/fao/009/ah247e/ah247e00.pdf [Accessed on 17/01/2016].

[77].Gizewski, P (1997) Environmental Scarcity and Conflict, Toronto, Canadian Security Intelligence Service p. 1.

[78] See generally Matiru V. (2000) Conflict & Natural Resource Management, Food & Agriculture Organisation (FAO); Buckles D & Rusnak D(1999) "Cultivating Peace: Conflict and collaboration in Natural Resource Management" IDRC/World Bank 1999 p. 3 & 4; Thayer DM (2003) "Nature of Conflict over nature: Protected Areas, Transfrontier Conservation and the meaning of Development" Saratunga Skidmore College-The School for International Training .

[79] They include the Central Land Appeals Board under the Land Control Act (Cap 302), amongst others.

[80] Established under S.7 of the EMCA (Cap 8 of 1999)

other various informal community based resource governance bodies.[81] The existing legal mechanism for managing natural resource conflicts as enshrined in the environmental law statutes includes the courts of law, both under civil and criminal law,[82] the National Environment Tribunal (NET),[83] National Environmental Complaints Committee (NECC),[84] Arbitral tribunals,[85] Statutory tribunals set up under various laws (such as the Land Adjudication Boards)[86] and customary law systems of conflict management.[87]

Some of the above conflict management mechanisms and institutions have not been very effective in managing natural resource conflicts. Courts, for instance, are formal, inflexible, bureaucratic and expensive to access. They address strict legal rights rather than the interest of the parties. The court system is adversarial in nature with limited room for negotiation and agreement on issues of interest to the parties. Law itself, has at times been a source of conflict rather than a conflict solver, since it insists on pursuing personal rights rather than reaching agreed compromise and implementation of various laws may also lead to conflicting outcomes.[88] This is not to say that personal rights are to be ignored for what would be seen as the greater good of the community. However, there are instances where realisation of such personal rights may compromise the general stability of the society.

For instance, in the traditional community setup, there was need to balance community interests with that of individuals, especially where such rights are claimed against the interests of an entirely different community. In such instances, the concerned communities will not look at those rights as accruing to individuals, but to the community as a whole. Even where a threat arises, they perceive it as a threat to the whole community.[89]

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[81] Some communities like the Meru, Maasai, Giriama etcetera still have councils of elders who sit and resolve disputes that erupt within their respective communities.

[82] Environmental Management and Co-ordination Act, Act. No. 8 of 1999, Part XIII Section 137-146

[83]Ibid, Part. XII sections 125-136

[84] Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, S. 20.

[85] These are mainly established under Arbitration Act, Act. No. 4 of 1995

[86] Established under Land Adjudication Act, Cap. 284, Laws of Kenya

[87] Patricia Kameri-Mbote, Towards greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention, IELRC Working 2005-1, available at http://www.ielrc.org/content/w0501.pdf <last Accessed on 01/08/2008>

[88] Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' 2006, available at http://www.idrc.ca/

[89] Ejizu, C.I., 'African Traditional Religions And The Promotion of Community-Living in Africa,' available at http://www.afrikaworld.net/afrel/community.htm [Accessed on 10/02/2016]; See also Baland, J.M & Platteau, J.P., 'Compensations and Customary Rights in the Context of the Concessionaire Companies: An Economic Approach,' (International Growth Centre, September 25, 2013).

A bottom-top approach to natural resource management, including conflict management, creates an opportunity to involve the local people who may have an insider's grasp of the issues at hand. It is for this reason that this paper advocates for use of conflict management approaches that incorporate public participation. Litigation, which is a state-sponsored approach to conflict management, does not afford the affected parties a reasonable and fair opportunity to participate in finding a lasting solution. This is because, apart from the coercive nature of the process, litigation is also subject to other procedural technicalities which may affect its effectiveness.[90]

The national legal systems have been associated with a number of limitations which include, inter alia: inaccessibility to the poor, women, marginalized groups and remote communities because of cost, distance, language barriers, political obstacles, illiteracy and discrimination; failure to consider indigenous knowledge, local institutions and long-term community needs in decision-making; use of judicial and technical specialists who lack the expertise, skills and orientation required for participatory natural resource management; use of procedures that are generally adversarial and produce win - lose outcomes; providing only limited participation in decision-making for conflict parties; likely difficulty to reach impartial decisions if there is a lack of judicial independence, corruption among State agents, or an elite group that dominates legal processes; and use of highly specialized language of educated elite groups, favouring business and government disputants over ordinary people and communities.[91]

Conflicts need to be managed through interactive, participatory and inclusive approaches for the sake of balancing interests, power and adjusting parties' expectations, in order to avoid the potentially negative effects of conflict in a society. There is a need to strike a balance among the three component parts of a conflict, namely, goal incompatibility, attitudes and behaviour, in order to ensure a peaceful society where groups do not unduly use their power to suppress the perceivably weak groups or individuals.

5. Alternative Dispute Resolution (ADR) and Natural Resource Conflicts Management

Article 33 of the *Charter of the United Nations* outlines the conflict management mechanisms in clear terms and it forms the legal basis for the application of Alternative Dispute Resolution (ADR) mechanisms in disputes between parties, be they States or individuals. It outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to. It provides that the parties to any dispute should, 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).[92] Despite this, ADR mechanisms have not been adequately utilized in

[90] Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), pp. 19-29, p. 29.
[91] FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.
[92] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

management of natural resource conflicts in Kenya. The phrase '*alternative dispute resolution*' refers to all those decision-making processes other than litigation, including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others. To some writers, however, the term '*alternative dispute resolution*' is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is arguably not true.[93]

Alternative Dispute Resolution (ADR) mechanisms include mediation, conciliation, negotiation and traditional/community based dispute management mechanisms. ADR methods have the advantages of being cost effective, expeditious, informal and participatory. Parties retain a degree of control and relationships can be preserved. Conflict management mechanisms such as mediation encourages "win-win" situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal, flexible and attempts to bring all parties on board.[94]

As such, ADR mechanisms allow public participation in enhancing access to justice, as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and voluntariness in conflict management. Some, like mediation and negotiation, are informal and not subject to procedural technicalities as the court process is subject to it. They are effective to the extent that they will be expeditious and cost-effective compared to litigation.[95] The use of mediation in natural resource conflicts management is especially common in Canada.[96]

ADR Mechanisms are arguably most appropriate in enhancing access to justice as they allow the public to participate in the managing of their conflicts. This way, less disputes will get to the courts and this will lead to a reduction of backlog of cases.

TDRMs include informal mediation, negotiation, problem-solving workshop, council of elders, consensus approaches among others. It has been observed that where traditional community leadership was strong and legitimate, it had positive impacts in promoting

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[93] P. Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, (CIArb, London, 2002), pp. 50-52.
[94] Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.10.
[95] Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.
[96] Dorcey, A.H.J. & Riek, C.L., 'Negotiation-Based Approaches to the Settlement of Environmental Disputes in Canada,' Workshop on Political Theory and Policy Analysis, 1987; Berkes, F., et al, 'Co-Management: The Evolution Of The Theory And Practice of Joint Administration Of Living Resources,' TASO Research Report, Second Series, No. 1, Paper Presented at the Second Annual Meeting of IASCP University of Manitoba, Winnipeg, Canada, Sept. 26-29, 1991.

local people's priorities in natural resource management.[97] The traditional and customary systems for managing conflict are associated with a number of strengths, which include: they encourage participation by community members, and respect local values and customs; are more accessible because of their low cost, their flexibility in scheduling and procedures, and their use of the local language; they encourage decision-making based on collaboration, with consensus emerging from wide-ranging discussions, often fostering local reconciliation; they contribute to processes of community empowerment; informal and even formal leaders may serve as conciliators, mediators, negotiators or arbitrators; and finally, long-held public legitimacy provides a sense of local ownership of both the process and its outcomes.[98]

In light of Article 159 (2) (c) and in relevant cases, the ADR mechanisms should be used in managing certain community disputes, such as those involving use and access to natural resources among the communities in Kenya, for enhanced access to environmental justice and environmental democracy. While most of the foregoing ADR mechanisms can effectively be applied in the management of natural resource conflicts management, this paper is biased towards negotiation and mediation and explores at a greater length the application of the two mechanisms in conflicts. This is because the author is not keen on settlement mechanisms, but resolution mechanisms and the two main approaches in resolution are negotiation and mediation.

The process of managing natural resource conflicts is an off-shoot of the right to access to environmental justice and by extension, environmental democracy. The right of access to justice is essential as it affords the means by which the public challenge application of and implementation of environmental laws and policies.[99]

Natural resource conflicts are unique as they involve people's lives. Left to escalate, suffering and death may be the undesirable result. The conflict management mechanisms referred to herein as ADR have certain advantages that make them suitable for use in resolution of natural resource conflicts. For example, the mechanisms that allow for maximum party autonomy such as negotiation, conciliation and mediation are cost effective flexible, informal and leave room for parties to find their own lasting solutions to problems. They are thus particularly suitable for the resolution of natural resource conflicts.

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[97] Shackleton, S., et al, 'Devolution And Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' Overseas Development Institute Natural Resource Perspectives, No. 76, March 2002, p.4.
[98] FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.
[99] Ibid.

Courts and formal tribunals are sometimes inflexible, bureaucratic and do not foster the maintenance of cordial relations between the parties. Parties come out of the proceedings before such courts and tribunals bitter and discontented. It has been argued that through ADR, multiparty "win-win" options are sought by focusing on the problem (not the person) and by creating awareness of interdependence among stakeholders.[100] This is justified on the fact that among the issues that influence negotiation attitudes, interdependence is of central importance, as actors' attitudes and behaviour are shaped by the fact that they will need to coexist after the period of negotiation.[101] Notably, it can be said that the attributes of party autonomy, flexibility, all-inclusiveness, informality and acceptability by all parties can be exploited to come up with acceptable solutions to environmental problems and natural resource conflicts. It has compellingly been suggested that mediation, through the intervention of an impartial third party into a dispute, deals well with significant value differences, which are considered extremely difficult to resolve, where there is no consensus on appropriate behaviour or ultimate goals.[102] Further, ADR, drawing on the strengths of mediation techniques such as identification and reframing, can address value conflict, through specific techniques which include: transforming value disputes into interest disputes; identifying superordinate goals (both short- and long-term); and avoidance.[103]

5.1 Negotiation and Natural Resource Conflicts Management

Negotiation is a process that involves parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. This refers to a process where parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation. It is also described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.[104] Negotiation is also defined as a process by which states and other actors communicate and exchange proposals in an attempt to agree on the dimensions of conflict termination and their future relationship.[105]

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[100] Buckles, D. (ed), Cultivating Peace Conflict and Collaboration in Natural Resource Management, (International Development Research Centre 1999), p.5.

[101] Ibid, p. 110.

[102] Daniels, S.E. & Walker, G.B., 'Collaborative Learning And Ecosystem-Based Management,' Environ Impact Asses Rev, Vol. 16, 1996, pp. 71-102, p. 82.

[103] Ibid.

[104] Negotiations in Debt and Financial Management 'Theoretical Introduction to Negotiation: What Is Negotiation?' Document No.4, December 1994, Available at http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document4/3Theoretical.htm [Accessed on 13/12/2015].

[105] Bercovitch, J. & Jackson, R., 'Negotiation or Mediation? An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict,' Negotiation Journal, January 2001, Vol. 17, Issue 1, pp 59-77, p. 60.

There are various approaches to negotiation which include: positional negotiation; principled negotiation; and interest-based negotiation.[106] Positional negotiation is associated with firstly, separating the people from the problem; secondly, focusing on interests, not positions; thirdly, inventing options for mutual gain; and finally, insisting on objective criteria.[107] As such, the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests.[108] Principled negotiation on the other hand, decides issues on their merits rather than through a haggling process focused on what each side says it will and will not do. It suggests that a negotiator should look for mutual gains whenever possible, and that where various interests conflict, negotiators are encouraged to have a result based on some fair standards independent of the will of either side.[109]

Interest-based negotiation shifts the focus of the discussion from positions to interests, raising a discussion based on a range of possibilities and creative options, for the parties to arrive at an agreement that will satisfy the needs and interests of the parties.[110] Since the aim of negotiation, as discussed within the context of this paper, is to arrive at "win-win" solutions, positional bargaining is not recommended as the general approach to negotiation, because arguing over hard-line positions may produce unwise agreements, prove inefficient, endanger an ongoing relationship and also lead to formation of coalition among parties whose shared interests are often more symbolic than substantive.[111]

Negotiations are seen as preferable due to their unstructured, often lack of formal procedures, suggesting a format which caters to the uniqueness of each negotiation.[112] The import of this is that due to the flexibility nature of the process, it is possible for parties to agree to settle on what works for them in a given scenario. Negotiation affords parties autonomy in the process and over the outcome, for purposes of ensuring that they come up with creative solutions. By taking a collaborative rather than a competitive approach to negotiation, parties can attempt to find a solution satisfactory to both parties, making

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[106] R. Fisher, et al, Getting to Yes: Negotiating an Agreement without Giving In, op cit, pp. xxvi-xxvii.
[107] Roger Fisher and Ury,W.,, Getting to Yes-Negotiating Agreement Without Giving in Op cit., p. 42; See also Ireland Law Reform Commission, Consultation Paper on Alternative Dispute Resolution, July 2008, p. 43.
[108] Ibid.
[109] Ibid.
[110] UNESCO-IHP, "Alternative Dispute Resolution Approaches And Their Application In Water Management: A Focus On Negotiation, Mediation And Consensus Building" Abridged version of Yona Shamir, Alternative Dispute Resolution Approaches and their Application, Accessible at http://unesdoc.unesco.org/images/0013/001332/133287e.pdf [Accessed on 19/01/2016]
[111] Ibid, p.23.
[112] FAO, 'Alternative Conflict Management: The Role of Alternative Conflict Management in Community Forestry,' available at http://www.fao.org/docrep/005/x2102e/X2102E02.htm

both sides feel like winners.[113] The outcome of a collaborative approach to negotiations is: improved relationships; a better chance of building trust and respect; self-confidence; more enjoyment; less stress; and more satisfactory results.[114]

As a vital first step in negotiation, it is important that the parties have conceptual clarity of the different issues, especially the difference between ownership issues, regulatory-authority control issues, and issues relating to the treatment of natural-resource revenues.[115] Separating people from the issues allows the parties to address the issues without damaging their relationship and also helps them to get a clearer view of the substantive problem.[116]

With regard to natural resource management, public participation has been described as a form of negotiation, where there is joint decision-making among parties with interdependent yet incompatible interests.[117] Principled negotiation has advantages that can facilitate mutual agreement on issues and consequently achieve conflict resolution. Negotiation is hailed as a process that can lead to empowerment of village-level and government participants, and increased awareness of the conflicts and their causes.[118] Through participation of communities in decision-making through negotiation, conflicts can be resolved or averted since each party is afforded an opportunity to raise their concerns in a joint forum where they can all be addressed with the aim of reaching a consensus or compromise.

It has been pointed out that in a conflict-oriented natural resources situation, one must learn and communicate about: technical, legal, and financial issues at hand; procedural issues; perceptions, concerns, and values of the other participants; one's own goals, and those of others; personalities; communication styles; one's own set of options; and relative benefits of different strategies.[119] Thus, the lead negotiators ought to have a good grasp of the issues at hand. This is one of the ways that they can adequately address not only their needs and interests but also those of opponents so as to facilitate a win-win situation.[120]

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[113] A. French, Negotiating Skills, (Alchemy, 2003), p. viii.
[114] Ibid.
[115] Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 26.
[116] Fisher,R. and Ury,w., Getting to Yes-Negotiating Agreement Without Giving in, op cit., pp. 10-11
[117]Daniels, S.E. & Walker, G.B., 'Collaborative Learning And Ecosystem-Based Management,' Environ Impact Asses Rev, Vol. 16, 1996, pp. 71-102, pp. 78-79.
[118] Castro, A.P. & Nielsen, E. (eds), 'Natural resource conflict management case studies: an analysis of power, participation and protected areas,' (Food and Agriculture Organization of the United Nations, 2003), p. 224.
[119] Ibid, p. 79.
[120] Ury, W., Getting to Yes with Yourself and Others, (HarperThorsons, 2015), pp. 147-148.

Negotiation may not always work and as such, parties may be required to try another approach by inviting a third party where they have reached a deadlock and cannot work out a consensus or a compromise. They third party comes in to help the parties clarify issues, interests and needs. Negotiation with the help of a third party is called mediation. Negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.[121]

5.2 Mediation and Natural Resource Conflicts Management

Mediation is a voluntary collaborative process where individuals who have a conflict with one another identify issues, develop options, consider alternatives and reach a consensual agreement.[122] Trained and untrained mediators open communications to resolve differences in a non-adversarial confidential manner. It can also refer to a private and non-binding form of conflict management, where an independent third party (neutral) facilitates the parties reaching their own agreement to settle a dispute. It is a structured process where the settlement becomes a legally binding contract.[123]

Mediation is also defined as the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power, but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute. Within this definition, mediators may play a number of different roles, and may enter conflicts at different levels of development or intensity.[124] Mediation can be classified into two forms namely: Mediation in the political process and mediation in the legal process.

Mediation in the political process is informed by resolution as against settlement. It allows parties to have autonomy over the choice of the mediator, the process and the outcome. The process is also associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control, addressing root causes of the conflict, non-coerciveness and enduring outcomes. With these perceived advantages, the process is more likely to meet each party's expectations as to achievement of justice through a procedurally and substantively fair process of justice.[125]

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[121] M. Mwagiru, Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.
[122] J.G. Merrills, International Dispute settlement, (Cambridge University Press, Cambridge, 1991).
[123] Fenn, P., "Introduction to Civil and Commercial Mediation," op cit p. 10.
[124] Moore, C., The Mediation Process: Practical Strategies for Resolving Conflict, 3rd, (San Francisco: Jossey-Bass Publishers, 2004).
[125] See generally Muigua, K., "Resolving Environmental Conflicts through Mediation in Kenya" Ph.D. Thesis, 2011, Unpublished, University of Nairobi.

In relation to natural resource conflicts, it is arguable that an approach that seeks to eliminate the root causes of conflict is to be preferred, considering the great importance attached to these resources. Human needs and desires are continuous and therefore, there is need to ensure that the unavoidable conflict that is bound to arise is controlled or eliminated altogether. Scholars believe that participatory and collaborative planning is useful in preventing conflicts resulting from government actions or policies.[126] This view may be validated in relation to Kenya, where the Constitution recognises the significance of public participation in decision-making and governance matters. For instance, among the national values and principles of governance that are binding on all State organs, State officers, public officers and all persons whenever any of them–– applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions, include inter alia, democracy and participation of the people; equity, social justice, inclusiveness, equality, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability.[127]

Mediation in the legal process is a process where the conflicting parties come into arrangements which they have been coerced to live or work with, while exercising little or no autonomy over the choice of the mediator, the process and the outcome of the process. This makes it more of a settlement mechanism that is attached to the court, as opposed to a resolution process, and defeats the advantages that are associated with mediation in the political process.[128]

The salient features of mediation (in the political process) are that it emphasizes on interests rather than (legal) rights and it can be cost - effective, informal, private, flexible and easily accessible to parties to conflicts. These features are useful in upholding the acceptable principles of justice: *expedition*; *proportionality*; *equality of opportunity*; *fairness of process*; *party autonomy*; *cost-effectiveness*; *party satisfaction* and *effectiveness of remedies (*emphasis added).[129] This makes mediation a viable process for the actualization of the right of access to justice. While both processes may be recommended for use in resolving natural resource conflicts in Kenya, mediation in the political process is to be preferred due to its obvious advantages, as highlighted above.

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[126] Ibid.

[127] Art. 10, Constitution of Kenya 2010.

[128] Ibid, Chapter4; See also sec.59A, B, C& D of the Civil Procedure Act on Court annexed mediation in Kenya; See also Mediation (Pilot Project) Rules, 2015.

[129] See Maiese, M., "Principles of Justice and Fairness," in Burgess, G. and Heidi Burgess, H. (Eds.) Conflict Information Consortium, Beyond Intractability, University of Colorado, Boulder (July 2003).

Kenya resorted to mediation coupled with negotiation after the post-election conflict through the Koffi Annan initiative[130]. Mediation offers a conflict management mechanism where all parties come to the table and with the help of the mediator find their own solutions. It was ADR that saved Kenya from the brink of total anarchy. However, mediation often works best in a conflict in which the parties have had a significant prior relationship or when the parties have an interest in continuing a relationship in the future.[131]

In the Koffi Annan initiative, mediation was used in the face of the apparent failure or impotence of the legal and institutional mechanisms for the resolution of political conflict in Kenya. A critical look at ADR methods in the resolution of natural resource conflicts is worthwhile, considering the many positive attributes and potential for involving the public and reaching of acceptable solutions that can withstand the test of time. Mediation is democratic and ensures public participation in decision making, especially in matters relating to natural resources management.

Mediation in the informal context leads to a resolution and in environmental management, it involves parties' participation in development planning, decision making and project implementation. The parties must be well informed so as to make sound judgements on environmental issues. Indeed, it has been observed that natural-resource negotiations are often a high-stakes, high-risk game, and one important role the mediator can therefore play, is to empower the parties by providing them with the knowledge to have the confidence to negotiate.[132] The import of this is that they must be well versed with mediation as a process but also the needs of each of the parties. This way, they would be able to know the appropriate approaches and skills to put into play.

It is also important to identify the correct interest groups who are regarded as stakeholders in the allocation of resources and the extent of their respective rewards against the overall importance of natural resources to financing national development must be determined.[133] It is argued that to be successful, a process will need to engage a broad range of actors, including not only those who have legitimate claims to ownership of the resource, but also those who could be affected by the allocation of authorities over

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[130] Koffi Annan, the former Secretary General of the United Nations mediated the all-out conflict that was labeled the 'post-election' violence in 2007 – 08 in Kenya. Essentially the long-term causes of the conflict were issues relating to access to and use of natural resources. The initiative resulted in the signing of the peace agreement formalized in the National Accord & Reconciliation Act.

[131] J.S. Murray, Alan Scott Rau & Edward F. Sherman, Processes of Dispute Resolution: The Role of Lawyers, University casebook series, Foundation Press, 1989, p. 47.

[132] Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 27.

[133] Ibid, p. 28.

the resource or the distribution of its revenues.[134] In the case of Kenya, it would therefore mean going beyond the community, especially where the resource in question is of national importance, such as water bodies.

The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship.[135] In conflict resolution processes like mediation, the goal, then, is not to get parties to accept formal rules to govern their relationship, but to help them to free themselves from the encumbrance of rules and to accept a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.[136]

One criticism, however, is that in mediation, power imbalances in the process may cause one party to have an upper hand in the process, thus causing the outcome to unfavourably address his or her concerns or interests at the expense of the other.[137] Nevertheless, in any type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party. However, it may be claimed that inequality in the relationship does not necessarily lead to an exercise of that power to the other party's disadvantage.[138] Another weakness of mediation is that it is non-binding. It is thus possible for a party to go into mediation to buy time or to fish for more information. However, in *Thakrar V Cir Cittero Menswear plc (in administration), {2002} EWHC 1975 (ch),* the English High Court held that a mediated settlement was an enforceable contract.[139] To deal with the problem of unenforceability, it has been affirmed before the parties go into mediation, there must be firstly, a mediation agreement binding the parties to mediation. After mediation, there is an agreement containing the terms of mediation. This agreement must be signed by all the parties to the mediation. In the agreement the parties agree that they were bound with the resolutions reached by the mediator. This final agreement is a document which can be tabled in court to show that one party is reneging from the agreed resolutions.[140] The

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[134] Ibid.

[135] Lon L. Fuller, Mediation—Its Forms and Functions, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases' Utah Law Review, No. 3, 2009, pp.802-803.

[136] Lon L. Fuller, Mediation—Its Forms and Functions, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases' Utah Law Review, No. 3, 2009, pp.802-803.

[137] See generally, Fiss, O., "Against Settlement" 93 Yale Law Journal, 1073 (1984).

[138] Abadi, S.H., The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration, p. 3, Effectius Newsletter, Issue 13, (2011)

[139] As quoted in Kenya Plantation & Agricultural Workers Union V Maji Mazuri Flowers Ltd [2012] eKLR, Cause 1365 of 2011.

[140] Greenhouse Management Limited v Jericho Development Company Limited [2015] eKLR, Civil Case 49 of 2015.

results of mediation must be a mutual agreement between the parties to the dispute.[141] To achieve this, the mediator may consider incorporation of consensus building into the mediation, which seeks to build the capacity of people to develop a dialogue with each other, either directly or indirectly, to find a way forward based on consensus which generates mutual gains for all parties with the minimum of compromise and trade-off.[142] This can ensure that even when they reach the final stage, chances of having an outcome acceptable to all sides are enhanced.

6. Enhancing the Use of Negotiation and Mediation in Natural Resource Conflicts Management in Kenya

Whereas natural resource conflicts may not be fully eliminated, they can be managed in such a way that Kenya avoids the violence that has been witnessed in the recent past in contests involving access to and use of natural resources. Peace can be achieved through the use of negotiation and mediation to facilitate conflict resolution and transformation.

It is also noteworthy that ADR can only work in appropriate cases. There is a need to strengthen the existing legal and institutional framework for the resolution of natural resource conflicts so as to make it effective in the face of the ever increasing natural resource conflicts. Kenya should learn from other jurisdictions that have combined the legal and institutional frameworks with the tenets of ADR and gone on to manage natural resource conflicts effectively.[143] Kenya can learn and benefit from the case of Rwanda's mandatory mediation framework, where carrying the agenda of local ownership of conflict resolution, the Rwandan government passed *Organic Law No. 31/2006* which recognises the role of *abunzi* or local mediators in conflict resolution of disputes and crimes.[144] The Constitution of Rwanda provides for the establishment in each Sector of a "Mediation Committee" responsible for mediating between parties to certain disputes involving matters determined by law prior to the filing of a case with the court of first instance.[145] The Mediation Committee comprises of twelve residents of the Sector who are persons of integrity and are acknowledged for their mediating skills.[146]

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[141] Ibid; See also Stephen Kiprotich Saina v Francisco Okutoyi Ayot & another [2014] eKLR, E&L 348 of 2013.

[142] Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' op cit, p. 16.

[143] For example, Canada where it is provided under Rule 24.1 for Mandatory Mediation under Regulation 194 of the Revised Regulations of Ontario of 1990 made under the courts of Justice Act.

[144] M. Mutisi, "Local conflict resolution in Rwanda: The case of abunzi mediators", in M. Mutisi and K. Sansculotte-Greenidge (eds), Integrating Traditional and Modern Conflict Resolution: Experiences from selected cases in Eastern and the Horn of Africa, pp. 41-74at p.41, African Centre for the Constructive Resolution of Disputes (ACCORD), Africa Dialogue Monograph Series No. 2/2012 Available at http://accord.org.za/images/downloads/monograph/ACCORD-monograph-2012-2.pdf [Accessed on 20/01/2016]

[145]Article 159**,** Constitution of Rwanda, 2003.

[146] Ibid.

In other jurisdictions, there has been adoption of management approaches which attempts to mitigate resource development conflict involving disputed territory known under several names, such as *co-management, joint management,* or *joint stewardship* (emphasis added).[147] Co-management is an inclusionary, consensus-based approach to resource use and development. Through this approach, there is sharing of decision-making power with nontraditional actors in the process of resource management, which nontraditional actors include those other than either state managers or industry, such as local resource users, environmental groups, or aboriginal people.[148] This approach is also lauded for the fact that it stresses negotiation rather than litigation as a means to resolve conflict and its ability to combine western scientific knowledge and traditional environmental knowledge for the purpose of improving resource management.[149] Arguably, this can create feelings of mutual trust and participation, with room to raise and address concerns from all the involved parties. Natural resource conflicts are thus minimized or eliminated. Indeed, communities have often asserted their rights in natural resource exploitation and participation, and with success.[150] Trust does not however emerge simply through increased interactions (interpersonal trust), but from a genuine willingness to share power, in terms of knowledge and decision implementation, especially in situations where local stakeholders are dependent on and knowledgeable about natural resources.[151] Such trust-building, it is argued, requires effort and resources however, as well as developing opportunities for appropriate dialogue between stakeholders to identify shared problems and in turn shared solutions.[152]

Lessons from various jurisdictions can be used to enhance our conflict management capabilities. However, it is noteworthy that currently, there are efforts by the legal fraternity in Kenya to enhance legal and institutional frameworks governing mediation in

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[147] Campbell, T., 'Co-management of Aboriginal Resources,' (Adopted from Information North, Vol 22, no.1 (March 1996), Arctic Institute of North America), available at *http://arcticcircle.uconn.edu/NatResources/comanagement.html* [Accessed on 20/01/2016]

[148] Ibid.

[149] Ibid.

[150] Loon, J.V., 'Canada Natives Block Energy Projects: 'We Own It All',' Bloomberg Markets, January 27, 2014. Available at http://www.bloomberg.com/news/articles/2014-01-27/harper-collides-with-native-canadians-natural-resources-claims [Accessed on 20/01/2016]; See also Amnesty International, et al, 'Nowhere to go: Forced Evictions in Mau Forest, Kenya,' Briefing Paper, April 2007; Sang J.K., Case study 3-Kenya: The Ogiek in Mau Forest, April 2001; Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010.

[151] Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' op cit.

[152] Ibid, p. 202.

general.[153] The *Civil Procedure Act*[154] provides for mediation of disputes.[155] There are also the *Mediation (Pilot Project) Rules*, 2015[156] which are meant to apply to all civil actions filed in the Commercial and Family Divisions of the High Court of Kenya at Milimani Law Courts, Nairobi, during the Judiciary's Pilot Project.[157] The Rules provide that every civil action instituted in court after commencement of the Rules, should be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable and may be referred to mediation.[158]

Non-Governmental Organisations (NGOs) have played an important facilitative and capacity building role in other jurisdictions, helping to bridge divergent views between local people and government agencies, and manage conflict within or among communities.[159] NGOs working with local communities often have good will from the local people and hence, it is recommended that where there are negotiation and mediation talks, such organisations can play a major role in enhancing the communities' participatory capacity and boost the chances of reaching a mutually agreed outcome. They can achieve this through enhancing communities' access to information for informed decision-making as well as helping the community to understand the complex aspects of the law. [160]

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[153] W. Mutunga, Chief Justice & President Of The Supreme Court Of Kenya, 'Alternative Dispute Resolution and Rule of Law' For East African –Prosperity,' remarks By The Chief Justice At The East African Arbitrators Conference September 25, 2014. pp. 3-4. Available at http://www.judiciary.go.ke/portal/assets/files/CJ%20speeches/Cjs%20Speech%20ADR%20-%20Sept.%2025,%202014,%20Windsor.pdf [Accessed on 20/01/2016]; "Judiciary to adopt alternative dispute resolution mechanism," People Correspondent, People Daily Newspaper, 10 March, 2015. Available at http://mediamaxnetwork.co.ke/peopledaily/139823/judiciary-adopt-alternative-dispute-resolution-mechanism/ [Accessed on 20/01/2016]. The Chief Justice of Kenya Dr. Willy Mutunga appointed twelve members to the Mediation and Accreditation Committee. The Committee is chaired by a serving Judge and it is responsible for determining the criteria for the certification of mediators, proposing rules for the certification of mediators, maintaining a register of qualified mediators, enforcing such code of ethics for mediators as may be prescribed and setting up appropriate training programmes for mediators.

[154] Cap 21, Laws of Kenya.

[155] Sections 2 and 59 Civil Procedure Act as Amended by the Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, Government Printer, Nairobi, 2012, at pp.1092-1097.

[156] Legal Notice No. 197 of 2015, Kenya Gazette Supplement No. 170, 9th October, 2015, pp. 1283-1291 (Government Printer, Nairobi, 2015).

[157] Rule 2. "Pilot project" means the mediation program conducted by the court under these Rules. (R. 3).

[158] Rule 4(1).

[159] Shackleton, S., et al, 'Devolution And Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' op cit., p.4.

[160] See Maia, M., 'NGOs as Mediators: Their role in expertise, language and institutional exemption in urban development planning,' Working Paper No. 77, May 1996; See also Ahenkan, A., et al, 'Improving Citizens' Participation in Local Government Planning and Financial Management in Ghana: A Stakeholder Analysis of the Sefwi Wiawso Municipal Assembly,' Journal of Public Administration and Governance, Vol. 3, No. 2, 2013.

Environmental democracy which involves giving people access to information on environmental rights, easing access to justice in environmental matters and enabling public participation in environmental decision making, inter alia, is desirable in the Kenyan context.[161] With regard to public participation in natural resource management, it has been argued that since most resource issues today are less dependent on technical matters than they are on social and economic factors, if a state is to maintain the land's health, they must learn to balance local and national needs.[162] It is argued that the state must learn to better work with the people who use and care about the land, while serving their evolving needs.[163] *In The Matter of the National Land Commission [2015] eKLR,* the Supreme Court observed that the dominant perception at the time of constitution-making was that the decentralization of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people, thus giving more fulfilment to the concept of democracy.[164]

Sustainable development will need to draw upon the best knowledge available from the relevant scientific and stakeholder communities.[165] Public participation is required as it provides a forum whereby the scientific information and values of the publics and the agency can be integrated so that the final decision is viewed as both desirable and feasible by the broadest portion of society.[166] However, there should be fairness in public participation which means that all those affected by certain decisions are represented and,

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[161] See generally, Hazen, S., Environmental Democracy, (<http.www.ourplanet.com). [Accessed on 18/01/2016]. Washington DC. Csaba Kiss and Michael Ewing (eds), "Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries." European Regional Report (published by The Access Initiative Europe.) available at http://www.accessinitiative.org [Accessed on 18/01/2016]; See also Art. 69(1) (d) of the Constitution of Kenya, 2010. The Constitution supports the notion of environmental democracy by providing that one of the obligations of the State in relation to the environment is to encourage public participation in the management, protection and conservation of the environment.

[162] Daniels, SE & Walker, GB, 'Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches,' p. 2.
Available at http://dev.mtnforum.org/sites/default/files/publication/files/260.pdf [Accessed on 3/01/2016].

[163] Ibid; Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 5.

[164] In The Matter of the National Land Commission [2015] eKLR, para. 21; See also Muigua, K., et al, (2015) Natural Resources and Environmental Justice in Kenya, (Glenwood Publishers Limited, 2015, Nairobi).

[165] Daniels, SE & Walker, GB, 'Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches,' op cit, p. 4.

[166] Ibid, p.4.

importantly, that procedures enable them to have an input into the format and content of discussions.[167]

The traditional approaches, which were mostly based on top down resource management approaches may leave out the necessary elements of meaningful public participation. This is because, they provide for formal public participation process in which it is assumed that a government agency makes decisions and the general public can give their comments without necessarily affording them a meaningful opportunity to do so.[168] An example of such approaches is what is provided in the Environmental Management and Coordination Act, 1999 (EMCA).[169] These include such tools as the use of Environmental Impact Assessment (EIA)[170] in environmental management and conservation efforts. While acknowledging that an EIA can be a powerful tool for keeping the corporate, including corporations, in check, the general public should be empowered through more meaningful and participatory ways such as negotiation and mediation. This is the only way that the affected sections of population appreciate their role in conflict management and decision-making processes. The general public should also be involved in Strategic Environmental Assessment (SEA), which is the process by which environmental considerations are required to be fully integrated into the preparation of policies, plans and programmes and prior to their final adoption.[171] The objectives of the SEA process are to provide for a high level of protection of the environment and to promote sustainable development by contributing to the integration of environmental considerations into the preparation and adoption of specified policies, plans and programmes.[172] Public participation in Strategic Environmental and Social Assessment (SESA) ought to be a more effective tool since it integrates the social issues that are likely to emerge and not just the

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[167] Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' op cit, p. 197. Young, J.C., et al, argue that in situations where values or interests conflict, for example over conservation objectives, two aspects of fairness are important: 'independence' and 'influence.' In the context of conservation conflicts, they define an 'independent' participatory process as one which is unbiased, i.e. where certain participants are not imposing their interests at the expense of others. Thy define 'influence' as a process that allows those involved to have an input that has a genuine impact on the process and outcomes of participation, one potential outcome being conflict resolution (p. 297).

[168] Ibid, p. 4.

[169] Act No. 8 of 1999, Laws of Kenya.

[170] EIA is defined as an environmental management tool aiming at identifying environmental problems and providing solutions to prevent or mitigate these problems to the acceptable levels and contribute to achieving sustainable development (N.M. Al Ouran, 'Analysis of Environmental Health linkages in the EIA process in Jordan,' International .Journal of Current Microbiology and Applied Sciences, (2015) Vol. 4, No. 7, 2015, pp. 862-871, p. 862.)

[171] Environmental protection Agency, 'Strategic Environmental Assessment,' available at http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA [Accessed on 26/10/2015].

[172] Ibid; see also the Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003, Regulations 42, 43 & 47.

environmental considerations.[173] These exercises, where conducted properly, should not be done as a mere formality and paper work.[174] The affected communities should be afforded an opportunity to meaningfully participate and give feedback on the likely effects on social, economic and environmental aspects of the community. Engaging them through negotiation and mediation where necessary, would avert future conflicts and allow any developmental activities enjoy social acceptance in the community. Thus, government activities and policies would not clash with the community expectations.

Under Principle 10 of the Rio Declaration, the member states are obligated to facilitate the rights of access to information, public participation in decision making and access to justice in environmental matters. Access to justice through litigation is also a potent remedy when access to environmental information or public participation have been wrongly denied or are incomplete. It guarantees citizens the right to seek judicial review to remedy such denial and/or depravation.[175] The Rio Declaration in principle 10

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[173] Notably, the proposed law, Energy Bill, 2015, requires under clause 135 (1) (2)(d) that a person who intends to construct a facility that produces energy using coal shall, before commencing such construction, apply in writing to the Authority for a permit to do so. Such an application must be accompanied by, inter alia, a Strategic Environment Assessment and Social Impact Assessment licenses. Also notable are the provisions of s. 57A(1) of the Environmental Management Co-ordination (Amendment) Act 2015 which are to the effect that all policies, plans and programmes for implementation shall be subject to Strategic Environmental Assessment. If fully implemented, this is a positive step towards achieving environmental security for all.

[174] See generally, United Nations, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, (UNEP, 2004). Available at http://www.unep.ch/etu/publications/textONUbr.pdf [Accessed on 10/02/2016]; See also The World Bank, 'Strategic Environmental Assessment,' September 10, 2013. Available at http://www.worldbank.org/en/topic/environment/brief/strategic-environmental-assessment [Accessed on 10/02/2016]. The World Bank argues that policy makers in are subject to a number of political pressures that originate in vested interests. The weaker the institutional and governance framework in which sector reform is formulated and implemented, the greater the risk of regulatory capture. The World Bank observes that in situations such as these, the recommendations of environmental assessment are often of little relevance unless there are constituencies that support them, and with sufficient political power to make their voices heard in the policy process. While strong constituencies are important during the design of sector reform, they are even more important during implementation. It follows that effective environmental assessment in sector reform requires strong constituencies backing up recommendations, a system to hold policy makers accountable for their decisions, and institutions that can balance competing and, sometimes, conflicting interests. The World Bank thus affirms its recognition of the strategic environmental assessment (SEA) as a key means of integrating environmental and social considerations into policies, plans and programs, particularly in sector decision-making and reform.

[175] See Migai Akech, "Land, the environment and the courts in Kenya," A background paper for The Environment and Land Law Reports, February 2006, 1 KLR (E&L) xiv-xxxiv. Available at http//:www.kenyalaw.og [Accessed on 09/01/2016]; The Fair Administrative Action Act, 2015 (No. 4 of 2015) which an Act of Parliament to give effect to Article 47 of the Constitution provides under s. 6(1) that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with s. 5. S. 5(1) provides that in any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a

emphases the importance of public participation in environmental management through access to justice thus: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.… Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[176] Participatory approaches have been increasingly advocated as effective decision-making processes to address complex environment and sustainable development issues.[177]

The provision of effective avenues for resolution of natural resource conflicts is thus far, the most practical way of ensuring access to justice, and by extension adhering to public participation principle. Scholars have asserted that participatory approaches should be thought of as located somewhere on a continuum between consensus-oriented processes in the pursuit of a common interest and compromise-oriented negotiation processes aiming at the adjustment of particular interests.[178]

Cultural, kinship and other ties that have always tied Kenyans together as one people have not died out. In many parts of the country Kenyans still believe in the principles of reciprocity, common humanity, and respect for one another and to the environment. However, it has been observed that the success of customary natural resource management strategies in managing conflict often depends on the enforcement capacities of traditional authorities. When the authority of traditional elite groups is declining, the capacities of those groups to render or enforce a decision may also be reduced.[179] It is also argued that customary practices institutionalized within broader national legal

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group of persons or the general public, an administrator shall- issue a public notice of the proposed administrative action inviting public views in that regard; consider all views submitted in relation to the matter before taking the administrative action; consider all relevant and materials facts; and (d) where the administrator proceeds to take the administrative action proposed in the notice- (i) give reasons for the decision of administrative action as taken; (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and (iii) specify the manner and period within which such appeal shall be lodged. In relation to access to information, Art. 35(1) (b) of the Constitution guarantees every person's right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom. In addition to the foregoing, the proposed law, Access to Information Bill, 2015, seeks to to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers. Notably, clause 2 defines "private body" to mean any private entity or non-state actor that, inter alia, is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.

[176] United Nations Conference on Environment and development, Rio Declaration on Environment and Development, Rio de Janeiro, Brazil, 1992.

[177] Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' Land Use Policy, Vol. 23, Issue 1, January 2006, p.10.

[178] Ibid, p.16.

[179] FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

frameworks may provide a good starting point to enhance traditional authorities' ability to deal with the challenges of contemporary natural resource management.[180] With regard to this, Kenya may be better positioned due to the Constitutional recognition for the application of TDRMs.[181] This may, therefore, help reposition the traditional authority especially as far as resolution of land conflicts within communities, as contemplated under Art. 60(1) (g) of the Constitution, is concerned.

Mediation in the informal context was and has been an informal process. Informality of mediation as a conflict resolution mechanism makes it flexible, expeditious and speedier, it fosters relationships and is cost-effective. It also means that since parties exhibit autonomy over the process and outcome of the mediation process, the outcome is usually acceptable and durable. Similarly, mediation addresses the underlying causes of conflicts, preventing them from flaring up later on. These positive attributes of mediation can only be realized if mediation is conceptualized as an informal process as it was in the customary, communal and informal context, and not as a legal process.

In the informal set up, mediation is seen as an everyday affair and an extension of a conflict management process on which it is dependent. Conflict management is thus heavily embedded in the way of life of most Kenyan communities. Mediation in the customary, communal and informal setting has operated and functioned within the wider societal context, in which case it is influenced by factors such as the *actor*s, *their communication*, *expectations*, *experience*, *resources*, *interests*, and *the situation in which they all find themselves* (emphasis added).[182] It is thus not a linear cause-and-effect interaction, but a reciprocal give-and-take process.[183] Legislation should not kill mediation by annexing it to the court system and making it a judicial process, but should instead strive towards creating a more conducive environment to make it more effective and receptive to the needs of the people. Informal mediators may still have a big role to play in making mediation work in Kenya especially in relation to resolution of natural resource conflicts.

It has been suggested that government policies can create opportunities for mediation during disputes.[184] However, they must include mechanisms for judging the prospects of success at the outset and adopting contingencies to ensure the mediators' security, if

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[180] Ibid.
[181] Art. 159.
[182] United Nations Development Programme, et al, 'Informal Justice Systems: Charting A Course For Human Rights-Based Engagement,' 2012; see also Albrecht, P., et al (eds), 'Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform,' (International Development Law Organization, 2011).
[183] See Eilerman, D., 'Give and Take - The Accommodating Style in Managing Conflict,' August 2006, available at *http://www.mediate.com/articles/eilermanD5.cfm* [Accessed on 10/02/2016].
[184] Castro, A.P. & Nielsen, E. (eds), 'Natural resource conflict management case studies: an analysis of power, participation and protected areas,' op cit, p. 272.

situations deteriorate.[185] It is also contended that the community also needs the authority of the state to strengthen its ability to deal with large and powerful external interests, such as multinational corporations.[186] This is why there is need for the informal conflict mechanisms to work in synergy with the formal systems, to ensure that the parties engage constructively. For instance, it has been observed that national legal systems may carry with them the following strengths: use of official legal systems strengthens the rule of State law, empowers civil society and fosters environmental accountability; they are officially established with supposedly well-defined procedures; they take national and international concerns and issues into consideration; they involve judicial and technical specialists in decision-making; where there are extreme power imbalances among the disputants, national legal systems may better protect the rights of less powerful parties because decisions are legally binding; and decisions are impartial, based on the merits of the case, and with all parties having equity before the law.[187]

It has been observed that the role, tasks, required skills, and modus operandi of a successful mediator will depend on the specific context of any dispute.[188] However, there is need for the mediators to acquire broad scale skills to enable them handle a wide range of issues in natural resource conflicts. The crucial characteristic of an effective mediator-facilitator in natural resource conflicts is said to be credibility with the main parties in the dispute, whether that credibility comes from technical expertise, professional experience, social status, kinship, or wisdom ("authority" is usually a poor criterion for selecting mediators).[189]

As for negotiation processes, it is also important to enhance capacity building within the communities. Capacity building is believed to be integral to developing a level-playing field, so less powerful stakeholders can participate equitably in a process of consensual negotiation.[190] It has been noted that successful problem-solving is a satisfying experience on a human level. Since the intended outcome of the negotiation is a win-win result,' the accomplishment of creating an innovative solution that maximizes joint as well as individual gains can be shared with the other side.[191] The process of reaching this goal is

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[185] Ibid.
[186] Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' op cit.
[187] FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.
[188] Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' op cit, p. 272.
[189] Ibid, p. 273.
[190] Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' Working Paper No. 135, (Overseas Development Institute, April, 2000), p. 30.
[191] Murray, JS, 'Understanding Competing Theories of Negotiation,' Negotiation Journal, April, 1986, pp. 179-186 at pp. 183-184.

psychologically unifying, rather than divisive. Negotiation is thus an enjoyable and challenging personal experience, rather than a highly stressful battle of wits and words.[192]

Communication is seen as capable of only taking place within an interactive process of participation that brings together those holding different standpoints.[193] In Kenya, devolution was designed and has been hailed as capable of opening channels for rural dwellers to communicate their priorities to government decision-makers and in some places improved community-government relations.[194] However, it has been observed that more powerful actors in communities tend to manipulate devolution outcomes to suit themselves.[195] As such, checks and balances need to be in place to ensure that benefits and decision-making do not become controlled by élites.[196]

Participatory approaches for environment and sustainable development decision-making should extend beyond the realms of advocacy, academic focus and institutional discourses into the realm of real life implementation.[197]

7. Conclusion

Sustainable development is not possible in the context of unchecked natural resource conflicts. As a recognition of this fact, Sustainable Development Goal (SDGs) 16 aims to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.[198] It is also noteworthy that SDGs seek to promote participation of local communities in natural resource management.[199] Negotiation and mediation have more value to the local communities than just being means of conflict management. At least, they are means of sharing information and participating in decision-making. The two mechanisms have the unique and positive attributes which include their participatory nature that can be used to manage natural resource conflicts and ensure that Kenyans achieve sustainable development. Furthermore, the affected communities, in cases of decision making, can have guaranteed and meaningful participation in the decision making process by

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[192] Ibid.

[193] Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' op cit, p.12.

[194] Shackleton, S., et al, 'Devolution And Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' op cit., p.2; See also Muigua, 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,' Paper Presented at the CIArb Africa Region Centenary Conference 2015, held on 15-17 July, 2015 at Victoria Falls Convention Centre, Zambezi Sun Hotel, Livingstone, Zambia, (www.kmco.ke)

[195] Ibid, p.1.

[196] Ibid, p.1.

[197] Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' op cit, p.15.

[198] United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

[199] Ibid, Goal 6b.

presenting proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.[200]

Natural resource conflicts continue to negatively affect Kenyans owing to the many weaknesses of the present legal and institutional framework. It is noteworthy that most of the sectoral laws mainly provide for conflict management through the national court system. As already pointed out, national legal systems governing natural resource management are based on legislation and policy statements that are administered through regulatory and judicial institutions, where adjudication and arbitration are the main strategies for addressing conflicts, with decision-making vested in judges and officials who possess the authority to impose a settlement on disputants.[201] Further, decisions are more likely to be based on national legal norms applied in a standardized or rigid manner, with all-or-nothing outcomes. Thus, contesting parties often have very limited control over the process and outcomes of conflict management.[202] In Kenya, where these conflicts may be clan-based or community based, courts offer little help in terms of achieving lasting peace due to the settlement nature of the outcome. Thus, conflicts are likely to flare up later.[203]

Even where the use of ADR and TDR mechanisms is contemplated, there barely exists effective framework to oversee their utilisation. There is need to actualise the use of ADR and particularly negotiation and mediation, in managing natural resource conflicts as envisaged in the Constitution. ADR is not fully utilised in the Kenyan context. Therefore, the attributes of cost effectiveness, party autonomy, flexibility, amongst others, are hardly taken advantage of in the environmental arena. There is need to ensure that there is put in place a framework within which communities are actively involved in achieving peace for sustainable development. The Government efforts evidenced by bodies such as the National Cohesion and Integration Commission[204] should actively involve communities in addressing natural resource conflicts in the country. While acknowledging that negotiation and mediation may not provide holistic solutions to the problem, they can still be used in tandem with other methods of conflict management to address problem of

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[200] Ristanić, A., 'Alternative Dispute Resolution And Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,' (Lund University, April 2015), available at *https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf* [Accessed on 08/01/2016].

[201] FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

[202] Ibid.

[203] See generally Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management, op. cit.

[204] This is a Commission established under s. 15 of the National Cohesion and Integration Act, 2008, No. 12 of 2008, Revised Edition 2012 [2008]. One of the functions of the Commission is to promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace (s.25 (2) (g).

natural resource conflicts in Kenya. Alternative Dispute Resolution mechanisms (ADR) and particularly negotiation and mediation, have intrinsic advantages that can facilitate effective management of natural resource conflicts. They are expeditious, cost effective, participatory and all-inclusive and thus, can be used to manage natural resource conflicts in way that addresses all the underlying issues affecting the various parties.

Natural resource conflicts, like all other kinds of conflicts, are inevitable in human interactions and if left unmanaged, they tend to degenerate into disputes that ruin the relations between persons or communities and yield undesired costs. The use of ADR in the resolution of natural resource conflicts is viable and should be exploited to its fullest. ADR is not a panacea to all the natural resource conflicts and environmental problems as it has many limitations and is also faced with many challenges. However ADR is worth working with in the environmental arena. The benefits accruing from ADR processes should be fully utilised in the Kenyan context to minimise or at least manage natural resource conflicts and ensure Kenya realises its goals of sustainable development and the Vision 2030.

ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, have been effective in managing conflicts where they have been used. Their relevance in natural resource conflicts has been recognized in the constitution.[205] They are mechanisms that enhance Access to Justice. Some mechanisms such as mediation and negotiation bring about inclusiveness and public participation of all members of the community in decision-making. Their effective implementation as suggested herein and in line with the constitution will bring about a paradigm shift in the policy on resolution of conflicts towards enhancing access to justice and the expeditious resolution of conflicts without undue regard to procedural technicalities.[206] This is especially so where natural resource-related conflicts are involved, unless the same are intractable and violent conflicts, where the coercive mechanisms, such as court system, may come in handy. These mechanisms should thus be applied and linked up well with courts and tribunals to promote access to justice and public participation.

Managing natural resource conflicts in Kenya through the enhanced use of negotiation and mediation is an exercise worth pursuing for the sake of attaining Environmental Justice and ultimately sustainable development.

[205] See Art. 60(1) (g); Art. 159.
[206] Constitution of Kenya, Art. 159(2).

Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies

1. Introduction

With the promulgation of the Constitution in 2010, the dream of realizing access to justice has become more evident than ever before. Access to justice has been enshrined as a fundamental right under the Constitution[1].The constitution creates various avenues for enhancing access to justice in Kenya through courts and Alternative Dispute Resolution strategies[2].

In this paper the author discusses access to justice and how the same can be enhanced through alternative dispute resolution mechanisms and public participation. The obligation of the different arms of government in enhancing access to justice through public participation will be examined and the key issues the government has to consider in giving effect to the principle of public participation. The author will also outline opportunities for enhancing access to justice through public participation in the judiciary and ADR and the areas in need of reform in that regard.

2. Access to Justice and Public Participation

Access to justice in Kenya has been hampered by many factors. Some of these factors are high court fees, geographical location, complexity of rules and procedure and the use of legalese.[3] The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves[4].' There is also limited uptake of ADR mechanisms with many Kenyans still preferring to settle their dispute through the court process. The judiciary has witnessed an increase in cases filed in courts each year with most of these cases taking years to be decided[5]. These reasons make access to justice in Kenya difficult for many people.

However, with the Constitution of Kenya 2010 access to justice is now a right enshrined therein. Under the constitution, the State is obligated to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to

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[1] Constitution of Kenya, 2010, Article 48, Government Printer, Nairobi

[2] Ibid, chapter ten.

[3]Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol.III, May, 2002; Jackton B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), pp. 19-29: 29.

[4] Muigua. K., 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' available at*http://kmco.co.ke/wp-content/uploads/2018/09/ACCESS-TO-JUSTICE-AND-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA-23rd-SEPTEMBER-2018.pd*f (accessed on 24/03/2022)

[5] Judiciary, 'State of the Judiciary and Administration of Justice Annual Report 2020/21' available at *https://www.judiciary.go.ke/download/state-of-the-judiciary-and-administration-of-justice-annual-report-2020-21-sojar/* (accessed on 24/03/2022)

justice.[6] The content and scope of this right has been said to be far reaching, infinite and encompasses *inter alia*, the recognition of rights, public awareness, understanding and knowledge of the law, protection of those rights, the equal access to all of judicial mechanisms for such protection; the respectful, fair, impartial and expeditious adjudication of claims within the judicial mechanism; easy availability of information pertinent to ones rights; equal right to the protection of one's rights by the legal enforcement agencies; easy entry into the judicial justice system; easy availability of physical legal infrastructure; affordability of the adjudication engagement; cultural appropriateness and conducive environment within the judicial system; timely processing of claims and timely enforcement of judicial decisions.[7]

Access to justice has further been enhanced by the recognition of public interest litigation in environmental matters which overcomes the limitations of demonstrating *locus standi*. This is aimed at removing hurdles facing realizing access to justice in environmental matters under the doctrine of *locus standi* which requires a person to demonstrate a personal interest in a matter before bringing a suit in court. Article 70 (3) of the Constitution provides that an applicant who alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened does not have to demonstrate that any person has incurred loss or suffered injury in an application to court. Moreover, Article 159 (2) (c) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by certain principles. These principles are that justice shall be done to all irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); justice shall be administered without undue regard to procedural technicalities; and that the purpose and principles of the Constitution shall be protected and promoted.[8]

It can thus be seen that so as to realize access to justice public participation is essential. Public participation has been enshrined as a national value and principle of governance in Kenya.[9]The Constitution obligates all state organs, state officers, public officers and all other persons to apply, among others, the national principle of public participation, when developing policy or enacting a law or in the interpretation of laws and the constitution[10].

Article 159 (1) of the Constitution provides that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the

[6] Article 48 of the Constitution of Kenya 2010, Government Printer, Nairobi

[7]Available at *http://kenyanjurist.blogspot.com/2011/07/kituo-cha-sheria-and-access-to-justice.html, accessed on 24/03/2022*

[8] Article 159 (2) (c) of the Constitution of Kenya 2010, op.cit.

[9] Constitution of Kenya, 2010, Article 10 (2) (a)

[10] Ibid

constitution. In that role therefore, public participation is essential in enhancing access to justice. Mechanisms that involve the public in decision-making processes have to be used in that regard. ADR mechanisms have the potential of increasing public participation in management of disputes.[11] These mechanisms are participatory in nature and give parties considerable control and involvement in the dispute management process.

Further, article 35 of the Constitution grants every citizen the right of access to information held by the State and information held by another person and required for the exercise or protection of any right or fundamental freedom[12]. It also entitles the citizen the right to the correction or deletion of untrue or misleading information that affects the person and also obligates the State to publish and publicise any important information affecting the nation.[13] It is arguable that the right to access information will be essential in the promotion of public participation in decision-making. This right grants the public the right to access all the information they may need so as to institute a suit and in a way is geared towards enhancing access to justice.

3. ADR and Access to Justice

The phrase alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others[14]. To some writers however the term '*alternative dispute resolution*' is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is not true.[15]Article 33 of the Charter of the United Nations outlines these conflict management mechanisms in no unclear terms and is the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they States or individuals. It outlines 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.[16]

Some conflict management mechanisms are resolution mechanisms while others are settlement mechanisms[17]. Litigation and arbitration are coercive and thus lead to settlements[18]. They are formal and inflexible. Whereas mediation, negotiation and the

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[11] See generally Muigua.K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Glenwood Publishers Limited, 2015

[12] Constitution of Kenya, 2010, Article 35

[13] Ibid

[14] Muigua.K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Op Cit

[15] P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, (CIArb, London, 2002), pp. 50-52

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

[17] Muigua.K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Op Cit

[18] Ibid, pg 17

traditional dispute resolution mechanisms are resolution mechanisms which mean they are informal, voluntary, allow party autonomy, expeditious and their outcomes are mutually satisfying[19].

Under article 159 of the Constitution, it is provided that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall all be promoted as long as they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.[20] The scope for the application of ADR has also been extensively widened by the constitution with Article 189 (4) stating that national laws shall provide for the procedures to be followed in settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. These are the key provisions that form the constitutional basis for the application of ADR in dispute management in Kenya, whose import is that ADR can apply to all disputes and hence broadening the applicability of ADR and enhancing access to justice. It is also a clear manifestation of the acceptance of ADR as a means of conflict management in all disputes.

Alternative dispute resolution mechanisms such as mediation, negotiation and conciliation allow maximum party autonomy and are flexible, informal and leave room for parties to find their own lasting solutions to their problems.[21] For example in environmental conflicts, mediation encourages public participation and "environmental democracy" in the management of environmental resources[22]. Conflict management mechanisms such as mediation encourages "win-win" situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal, flexible and attempts to bring all parties on board.[23] Mediation is democratic and ensures public participation in decision making, especially in matters relating to natural resources management. Public participation is a tenet of sound environmental governance and is envisaged in the constitution. Mediation in the informal context leads to a resolution (court-annexed mediation as envisaged under Section 159A-159D of Cap.21 is a settlement process) and in environmental management it involves parties' participation in development planning, decision making and project implementation. The parties must be well informed so as to make sound judgements on environmental issues.

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[19] Ibid

[20] Constitution of Kenya 2010, op.cit

[21] P. Fenn, "Introduction to Civil and Commercial Mediation", op. cit, p.10.

[22] Muigua. K., 'Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya' available at http://kmco.co.ke/wp-content/uploads/2018/08/Managing-Environmental-Conflicts-through-Participatory-Mechanisms-for-Sustainable-Development-in-Kenya-Kariuki-Muigua-August-2018.pdf (accessed on 25/03/2022)

[23] Ibid.

As such inclusion of ADR mechanisms as some of the mechanisms to be employed by courts in the exercise of the judicial authority is thus a recognition of the role of public participation towards realizing access to justice in Kenya. This is because ADR mechanisms such as arbitration, mediation and negotiation are predicated on the principles of party autonomy and voluntariness which give the parties wider roles in decision-making and in resolution of their disputes. Alternative dispute resolution, and particularly mediation, is a reflection of customary jurisprudence and under customary law conflict resolution was people driven and a consensual process involving a party, usually an elder, who acted as a mediator. In this way ADR mechanisms have a lot to do with the public participating at the making of decisions affecting them. This is unlike in the formal court process.

ADR mechanisms allow public participation in enhancing access to justice as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and voluntariness in conflict management[24]. Some like mediation and negotiation are informal and not subject to procedural technicalities as does the court process. They are thus effective to the extent that they will be expeditious and cost-effective compared to litigation.[25]

Traditional dispute resolution mechanisms are flexible, cost-effective, expeditious, foster relationships, are non-coercive and result to mutually satisfying outcomes[26]. They are thus most appropriate in enhancing access to justice as they allow the public to participate in the managing of their conflicts[27]. This way less disputes will get to the courts and this will lead to a reduction of backlog of cases. Traditional dispute resolution mechanisms include informal mediation, negotiation, problem-solving workshop, council of elders, consensus approaches among others[28]. The council of elders is a common institution in almost all communities in Kenya. Some refer to it as the institution of *Wazee*. It is ordinarily the first point of call when any dispute arises in a community and since most Kenyans' lives are closely linked to environmental resources, it is not surprising that most of the issues the elders deal with touch on the environment.[29] In light of Article 159 (2) and in relevant cases the institution of council of elders should be used in resolving certain community

[24] Muigua.K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Op Cit

[25] Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.

[26] Muigua. K., 'Traditional Dispute Resolution Mechanisms Under Article 159 of the Constitution of Kenya 2010' available at http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf (accessed on 25/03/2022)

[27] Ibid

[28] Ibid

[29] Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," IELRC Working Paper 2005-1, p. 3, available at http://www.ielrc.org (accessed on 30/08/2012). p. 8.

disputes such as those involving use and access to natural resources among the pastoral communities in Kenya.

4. Challenges and Opportunities for enhancing Access to Justice through Public Participation and ADR

Before the promulgation of the Constitution of Kenya 2010 which has enhanced the recognition and uptake of ADR mechanisms one of the main barriers that hindered the right of access justice in Kenya was the lack of awareness and recognition of ADR and traditional dispute resolution mechanisms.[30] Traditional dispute resolution mechanisms are now recognized by the Constitution. This provides a platform for management of disputes through these mechanisms which encourage public participation rather than taking them to court. So as to realize access to justice these mechanisms must be effectively embedded within the justice system. A legal and policy legal structure should be developed to effectively link these mechanisms with the formal court systems. Currently, there is progress towards achieving this goal through the *Alternative Dispute Resolution Bill*[31] However, caution should be taken in linking these mechanisms to the court system to ensure that they are not completely merged with the formal system as is the case with arbitration.

The legal environment has swallowed arbitral practice in Kenya. It has become more like a court process in which lawyers use court technicalities to derail the process[32]. The same is true of the practice of mediation in Kenya which been linked to the court process through court annexed mediation[33]. There is thus a need to create awareness especially among the judicial officers on the effective use of these mechanisms to realize access to justice. Judges, magistrates, lawyers and even the public need to be made aware that ADR mechanisms are effective and that their application will enhance access to justice. They will need training on ADR mechanisms and operationalisation of the same. As such the decisions, negotiated settlements and awards made by ADR practitioners should be given a similar publicity to that given to court judgments by the National Council for Law Reporting to promote public confidence in these mechanisms.

A framework should also be formulated providing that before parties file a case in court, they should first exhaust ADR and other traditional dispute resolution mechanisms in

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[30] Ibid

[31] Alternative Dispute Resolution Bill, 2021, available at *http://www.parliament.go.ke/sites/default/files/2021-06/34-The%20Alternative%20Dispute%20Resolution%20Bill%2C%202021%20%281%29.pdf accessed on 25/03/2022.*

[32] See generally Muigua. K., 'Settling Disputes through Arbitration in Kenya' Glenwood Publishers Limited, 3rd Edition, 2017

[33] The Judiciary, 'Court Annexed Mediation' available at http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf (accessed on 25/03/2022)

appropriate disputes. This way there will be enhanced access to justice since parties will explore the avenue of ADR as a tool of access to justice in addition to courts. This will facilitate reduction of backlog of court cases thus enhancing access to justice. For instance, a boundary dispute should first be looked into at the local level by the elders or recognized council of elders through negotiations and informal mediations before they are brought to court. Mediations conducted in such a forum are distinguishable from court-annexed mediation as envisaged under section 59A-59D of the Civil Procedure Act. Whereas court-annexed mediation is a legal process leading to a settlement, informal mediations result in a resolution because of their flexibility, informality, voluntariness, autonomy and the fact that they foster rather than destroy relationships[34].

The policy and legal framework on the use of traditional dispute mechanisms should also come up with a criterion for the selection and accreditation of traditional dispute resolution practitioners, their areas of jurisdiction and the types of disputes that they are to handle and community dispute resolution committees. Such dispute resolution committees should take cognizance of the devolved units.

Laws and regulations on the effective implementation of ADR and traditional dispute resolution mechanisms should be developed, designed and entrenched well to ensure public participation and enhance access to justice. They should be well linked with the courts to avoid conflicts. As such mapping ADR mechanisms and all traditional dispute resolution mechanisms should be done to be able to determine the most applicable ones in the circumstances.

Funding from the government and the development partners should be directed towards operationalisation of Article 159 of the constitution and implementation of ADR and traditional dispute resolution mechanisms due to their suitability to enhance access to justice and involve the public in decision-making processes. In this regard guidelines should be developed on the best way forward on working ADR to ensure adequate training of arbitrators and mediators. This could also include accreditation of ADR practitioners to ensure quality control, disciplinary mechanisms and the necessary accreditation of institutions thereof. Funding should also be directed towards creating public awareness on the ADR mechanisms and the opportunities they offer in enhancing access to justice and public participation. This should be in addition to funding directed towards the setting up of courts in rural areas to address the geographical limitations that hinder access to justice.

[34] See Generally Muigua. K., 'Resolving Conflicts through Mediation in Kenya', Glenwood Publishers, Nairobi, 2013.

The laws contemplated by Article 189 (4) should be well designed and entrenched in the national and county systems to facilitate the expeditious resolution of disputes therein with maximum participation of the public at both levels of government.

5. Conclusion

ADR and Traditional dispute resolution mechanisms have been effective in managing conflicts where they have been used. Their relevance in the conflict continuum has been recognized in the Constitution. They are mechanisms that enhance access to justice. Some like mediation and negotiation bring about inclusiveness and public participation of all members of the community in decision-making. Their effective implementation as suggested herein and in line with the constitution will be a paradigm shift in the policy on resolution of conflicts towards enhancing access to justice and the expeditious resolution of disputes without undue regard to procedural technicalities.

A comprehensive policy and legal framework to operationalise ADR mechanisms is needed. It should be realized that most of the disputes reaching the courts can be resolved without resort to court if members of the public are involved in decision-making and resolution of their own disputes using ADR and traditional conflict resolution mechanisms. These mechanisms should thus be applied and linked up well with courts and tribunals to promote access to justice and public participation.

Alternative Dispute Resolution and Article 159 of the Constitution

Abstract

This paper is a critical appraisal of Alternative Dispute Resolution (ADR) mechanisms in Kenya in relation to Article 159 of the Constitution. It proceeds in three parts as indicated herein;

Part I:Alternative Dispute Resolution Mechanisms and Article 159 of the Constitution: *This part is a critical examination of Alternative Dispute Resolution mechanisms in Kenya popularly known as ADR in relation to Article 159 of the constitution and the legal framework governing ADR in particular.*

Part II: Traditional Dispute Resolution Mechanisms and Article 159 of the Constitution: *This part discusses traditional dispute resolution mechanisms in view of Article 159 of the constitution.*

Part III:Alternative Dispute Resolution Mechanisms and Article 159 of the Constitution: Understanding the Social Context and Cultural Setting:

This part of the paper deals with the social and cultural dimension of conflict. It sets out to investigate the role, if any, that the cultures of different communities play in resolution of conflicts.

1. Introduction

This part is a critical examination of Alternative Dispute Resolution mechanisms in Kenya popularly known as ADR in relation to Article 159 of the constitution and the legal framework governing ADR in particular. The opportunities and challenges in the application of ADR mechanisms are explored in view of the need to enhance access to justice, reduce backlog of cases and resolve dispute expeditiously. The author reflects on his own experiences as an ADR practitioner and proposes certain measures that in his view would make ADR in Kenya serve the purpose it is supposed to serve to wit, making access to justice easier, lowering costs, resolving conflicts expeditiously, retaining party autonomy, maintaining the parties relationships and arriving at amicable solutions that ensure co-existence between the parties.

2. Brief Overview of Alternative Dispute Resolution

The phrase alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others. To some writers however the term '*alternative dispute resolution*' is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is not true.[1]Article 33 of the Charter of the United Nations outlines these conflict management mechanisms in no unclear terms

[1] P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, (CIArb, London, 2002), pp. 50-52

and is the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they States or individuals. It outlines 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.[2] These conflict management mechanisms are discussed hereunder;

3. Arbitration

Arbitration is a process subject to statutory controls, whereby formal disputes are determined by a private tribunal of the parties' choosing. It arises where a third party neutral is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award. Section 59 of the Civil Procedure Act[3] provides that all references to arbitration by an order in a suit, and all proceedings there under, shall be governed in such manner as may be prescribed by rules. Order 46 of the Civil Procedure Rules, inter alia, provides that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court for an order of reference wherever there is a difference.

The Arbitration Act, 1995 defines arbitration to mean "any arbitration whether or not administered by a permanent arbitral institution."[4] This is not very elaborate and regard has to be had to other sources. According to Khan[5], arbitration is a private consensual process where parties in dispute agree to present their grievances to a third party for resolution. It is an adversarial process and in many ways resembles litigation.

Its advantages are that parties can agree on an arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexibility; cost-effectiveness; confidentiality; speed and the result is binding. Proceedings in Court are open to the public, whereas proceedings in commercial arbitration are private, accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration. The other disadvantage of this mechanism is that similar cases cannot be consolidated without the consent of the parties. Precedents are also not set as happens in court. Arbitration practice in Kenya is increasingly becoming more formal and cumbersome as lawyers enter the practice of arbitration applying delaying tactics and importation of complex legal arguments and procedures into the arbitral process. In essence arbitration is really a court process since once it is over an

[2] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[3] Civil Procedure Act, Revised Edition 2010(2008), Government Printer, Nairobi.
[4] The Arbitration Act, Act No. 4 of 1995 (as Amended in 2009), Government Printer, Nairobi.
[5] Farooq Khan, Alternative Dispute Resolution, A paper presented at Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

award has to be filed in court and thus the shortcomings of the court system apply to the arbitration process.

3.1 Some Key Provisions of the Arbitration Act

i. Role of the Court in Arbitration

In Kenya, the general approach on the role and intervention of the court in arbitration in Kenya is provided in section 10 of the Arbitration Act 1995. The section provides:

"10. Except as provided in this Act, no court shall intervene in matters governed by this Act."[6]

The section, clearly in mandatory terms, restricts the jurisdiction of the court to only such matters as are provided for by the Act. This section epitomizes the recognition of the policy of parties autonomy which underlie the arbitration generally and in particular the Arbitration Act, 1995. The section articulates the need to restrict the court's role in arbitration so as to give effect to that policy.[7] The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense.

ii. Stay of Legal Proceedings

Generally, the courts have no direct power, and of their own motion, to compel arbitration. However, courts can do so indirectly, and upon application of a party to an arbitration agreement. This is possible where the court, after an application for stay of proceedings for reference to arbitration, refuses the claimant audience and/or remedy through the court process. Under the Act an order for stay of proceedings has the effect that if aggrieved party wants to pursue his claims, he can only do so by arbitration.[8]

The necessity of stay of proceedings arises where the parties have a valid arbitration agreement and upon a dispute arising on a matter covered by the same, one party goes to the court in breach of the Arbitration agreement.[9] An application for stay of the legal proceedings is what Section 6 of the Arbitration Act avails the other party if it is to give effect to the arbitration agreement.

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[6] This section was not affected by the 2009 Amendments.

[7] Sutton D.J et al (2003), Russell on Arbitration (Sweet & Maxwell, London, 23rd Ed.) p. 293

[8]The justification is that agreements to refer disputes to arbitration are mainly contractual undertaking by parties to settle disputes out of the court and with the help of an arbitrator. The courts exist to enforce and give force of law what parties, exercising their freedom to contract, choose to agree to be bound by.

[9] Parties commence court action despite arbitration agreement for a number of reasons. The action may be inadvertent, because s/he challenges the existence or validity of the arbitration agreement or merely to breach the arbitration agreement.

iii. Interim Measures of Protection

The courts have wide powers to make orders relating to interim orders for the purpose of preserving the status *quo* pending and during arbitration. Section 7 of the Act limits parties' freedom to contract any arbitration agreement that limits and/or bars seeking interim measures of protection in court. The jurisdiction to make such orders is the preserve of the High Court of Kenya. The courts have jurisdiction to make such orders as preserve the status quo of the subject matter of the arbitration. The powers could include those of making orders for preservation like attachment before judgement; interim custody or sale of goods (e.g. perishables) the subject matter of the reference or for detention or preserving of any property or thing concerned in the reference, appointing a receiver and interim injunctions.

iv. Determining The Arbitral Tribunal's Jurisdiction

As per the doctrine of "*kompetenz kompetenz* ", the arbitral tribunal may rule on its own jurisdiction. Such ruling may encompass matters including existence or validity of the arbitration agreement.[10] The fact that a party has appointed or participated in appointing an arbitrator is not a bar to challenging the jurisdiction of the arbitral tribunal.[11]

v. Interim Orders Of Protection During Arbitration

Save where parties have otherwise agreed, the arbitral tribunal may at request of a party order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject of the dispute.[12] In that connection, the tribunal may require a party to provide security for the measure requested for [13]or order any party to provide security in respect of any claim or any amount in dispute[14] or order a claimant to provide security for costs.[15]

The Act gives the High Court power to enforce the peremptory orders of protection given by the arbitral tribunal. In order to enforce such protective measure or generally to exercise the power associated with the interim protective measures, the tribunal or a party with approval of the arbitral tribunal may apply for assistance of the High Court.[16] The High Court has equal powers as possessed by the arbitral tribunal with regard to interim measures of protection under the Act. In particular, the High Court's power shall be the equivalent the one it wields in civil proceedings before it. However, the arbitral proceedings shall continue regardless of the fact that such an application is pending in the High Court except where the parties agree otherwise.[17]

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[10] Section 17 (1) of the Act
[11] Section 17 (4) of the Act
[12] Section 18 (1) (a) of the Act as amended by the Act of 2009.
[13] Ibid.
[14] Sec. 18 (1) (b).
[15] Sec. 18 (1) (c).
[16] Section 18 (2) of the Act
[17] Section 18 (3) of the Act

vi. Setting Aside Arbitral Award

This is the only recourse in the High Court against an arbitral award permitted by the Arbitration Act, 1995.[18] The instances when the High court may set aside an arbitral award are specifically stipulated in the act.[19] They include where it is proved that a party to the arbitration agreement was under incapacity, invalidity of the arbitration agreement under the laws governing the dispute, if proper notice of appointment of an arbitrator or arbitral proceedings was not given, if it deals with a dispute not contemplated by or falling within scope of the terms of reference to the arbitration and if the composition of the arbitral tribunal or the procedure during the proceedings was not as per the parties' agreement furnish a ground for setting aside arbitral awards. However, if the agreement was in conflict with a provision of the Act which the parties are not allowed to derogate from or there was no agreement on derogation, then the award shall not be set aside.[20]

vii. Recognition and Enforcement of Arbitral Awards

Generally, an arbitral award is recognised as binding regardless of the state in which it was made. Thus on application to High Court, a domestic arbitral award shall be enforced subject to relevant provisions of the Arbitration Act, 1995.[21] An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.[22] Any party may apply for enforcement of arbitral award.[23] But often application for enforcement is made by the party in whose favour the arbitral award was made and the other party will reply to the application.

The law requires that the High Court be furnished with a duly authenticated original arbitral award or duly certified copy thereof.[24] In addition, the parties should supply the original arbitration agreement or a certified copy of it to the superior court. However, the High Court may order otherwise where a party seeks indulgency on compliance with these requirements to supply those documents. The arbitration award furnished must be in English and if the original was not English, the law requires a duly certified translation to be availed to the court.[25]

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[18] Section 35(1) of the Act
[19] Section 35(2) of the Act
[20] Ibid
[21] Section 36 (1) of the Act
[22] Sec. 36 (2) of the Act as amended by the Act of 2009.
[23] Ibid.
[24] Ibid.
[25] Ibid.

3.2 Negotiation

Negotiation is an informal process and one of the most fundamental methods of conflict resolution, offering parties maximum control over the process. It involves the parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.[26] As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests. The most common form of negotiation depends upon successfully taking and giving up of a sequence of positions. They argue that positional bargaining is not the best form of negotiation because arguing over positions produces unwise agreements, is inefficient, endangers an ongoing relationship and also leads to formation of coalition among parties whose shared interests are often more symbolic than substantive.[27] Accordingly the aim in negotiations is to arrive at "win-win" solutions to the dispute at hand.

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. It has been said that negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.[28] The pros and cons of this process are similar to those discussed under mediation.

3.3 Mediation

Mediation is one of the alternative dispute resolution mechanisms which has been practised since antiquity and is thus a restatement of customary jurisprudence. It existed even before the other alternative dispute resolution mechanisms were invented. Both mediation and the other alternative dispute resolution mechanisms focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by common law and statutory measures.[29]

Mediation is also recognized as one of the mechanisms for managing conflicts in Kenya. Article 159 of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by certain principles. One of these principles is that

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[26] See generally, "Negotiations in Debt and Financial Management", United Nations Institute of Training and Research, (UNITAR), (December 1994).

[27] Roger Fischer and William Ury, Getting to Yes: Negotiating Agreement Without Giving In, (Penguin Books, New York, 1981), p.4.

[28] Makumi Mwagiru, Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), p. 115

[29] Paul Obo Idornigie, "Overview of ADR in Nigeria", 73 (1) Arbitration 73, (2007), p.73.

alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted provided that they do not contravene the Bill of Rights, they are not repugnant to justice and morality or results to outcomes that are repugnant to justice or morality and if they are not inconsistent with the constitution or any written law.[30] The constitution has therefore elevated the importance of mediation and the other traditional conflict resolution mechanisms in resolving conflicts in the Kenyan context. Constitutionalisation of mediation means that there will be a paradigm shift in the policy on resolution of conflicts towards encouraging mediation and the other traditional means of conflict management as opposed to the formal mechanisms.

Mediation is a voluntary, informal, consensual, strictly confidential and non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated solution.[31] It can also be defined as the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of the issues in dispute.[32] Greenhouse[33] says that;

> "*Mediation is simple enough to describe: it is a triadic mode of dispute settlement, entailing the intervention of a neutral third party at the invitation of the disputants, the outcome of which is a bilateral agreement between the disputant...*"

The above definitions are not entirely correct as they connote that the mediator must be neutral and impartial. However, the truth of the matter is that a mediator may not be a neutral and impartial third party but must be acceptable to the parties. The fact that the mediator possesses certain resources valued by the parties, then the latter are less concerned with the impartiality of the mediator. Psychological factors are alternative reasons for a mediator's lack of impartiality.[34]

Perhaps the best definition of mediation is offered by Bercovitch who defines it as a method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussion and the flow of information, and thus aiding in the processes of reaching an agreement. Since mediation

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[30] Article 159 (2) (c) of the Constitution of Kenya 2010, Government Printer, Nairobi.
[31] P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, op. cit, p.10
[32]Christopher Moore, The Mediation Process: Practical Strategies for Resolving Conflict, (Jossey-Bass Publishers, San Francisco, 1996), p. 14
[33] Carol J. Greenhouse, "Mediation; A Comparative Approach", Man, New Series, Vol. 20, No. 1, Royal Anthropological Institute of Great Britain and Ireland, (Mar., 1985), pp. 90-114, pg. 90.
[34] Makumi Mwagiru, Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), pp.53-54

is, in essence, a form of "assisted negotiation" it does not have any direct legal basis.[35] The agreement reached does not have to be in writing. It is binding because the parties have undertaken to negotiate the conflict voluntarily.

The underlying point in the mediation process is that it arises where the parties to a conflict have attempted negotiations, but have reached a deadlock. In such circumstances, they agree to involve a third party to assist them continue with the negotiations and ultimately break the deadlock. This whole notion of agreeing on a third party to assist in the negotiations shows that mediation is a voluntary process since both parties to the conflict have to agree to the mediation process and the mediator.[36] Mediation is a continuation of the negotiation process by other means whereby instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the negotiations between the parties.[37] Mediation is thus a continuation of the negotiation process in the presence of a third party

A mediator is one "who comes between the conflicting parties with the aim of offering a solution to their dispute and/or facilitating mutual concessions." He must be acceptable to both parties and should have no interest in the dispute other than achievement of a peaceful settlement.[38] The presumed effectiveness of the mediator derives from the diverse functions he can serve in a conflict situation. For instance he can change for the better the behaviour of the disputants just by being present.[39] Arthur Meyer who observes that;

> *"The mediator is a catalytic agent. The mere presence of an outsider, aside from anything he may do or say, will cause a change, and almost certainly a change for the better, in the behaviour of the disputing parties. . . Progress has been made through the mediator's presence, though that presence has brought nothing more than temperate speech."*[40]

Though approached from differing perspectives, all the definitions seem to agree that mediation is a negotiation process in which parties (disputants) are assisted by a third party known as a mediator. It would seem from the above discussion therefore that

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[35] J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", Cardozo Journal of Conflict Resolution, Vol.7.289, p.290

[36] Makumi Mwagiru, Conflict in Africa; Theory, Processes and Institutions of Management, op.cit, pp. 115-116

[37] Ibid.,p.115

[38]Michael Barkun, "Conflict Resolution through Implicit Mediation," Journal of Conflict Resolution, VIII (June, 1964), p. 126

[39] Marvin C. Ott, "Mediation as a Method of Conflict Resolution: Two Cases", International Organization, Vol. 26, No. 4, The University of Wisconsin Press, Autumn, 1972, pp. 595-618, at p. 597.

[40] Arthur Meyer, "Function of the Mediator in Collective Bargaining," Industrial and Labor Relations Review, XIII, No. 2 (January, 1960), p. 161.

mediation can only be understood as an aspect of the general structure and process of negotiation. Its widespread application in the management of conflicts and disputes in the contemporary world is because it is a flexible, confidential, cost-effective and speedier process of settling disputes. It affords the parties in dispute autonomy over the mediator, *fora* for mediation, over the process and over the outcome.

3.3.1 Advantages and Disadvantages of Mediation

Due to the above cited attributes mediation and especially mediation in the political process has the advantages, *inter alia,* that it is a fast process compared to the other processes as the timing of the process is within the control of the parties, is informal, cost-effective, flexible, efficient, confidential, preserves relationships, provides a range of possible solutions and there is autonomy over the process and the outcome. On confidentiality it is argued that any admissions, proposals or offers for solutions will not have any consequences beyond the mediation process and cannot, as a general rule, be used in subsequent litigation or arbitration.[41]

It is expeditious and time saving since it is often possible to schedule mediation around work schedules or on the weekend. Mediations are thus often marketed as being both economically and time efficient[42]. However, that marketing assumes that both parties are honestly willing to mediate the dispute. If one party (or both parties) do not enter the mediation with the intention to make concessions and reach a compromise then the mediation is likely to fail. While mediations are less expensive and take less time than court cases, they still cost money and can last anywhere from a few hours to a few days. The cost of the mediation, and obviously the time it took, are not refundable and the parties to a failed mediation typically need to incur the costs of litigation after the failed mediation is over.[43]

Mediation in the political process is also non-coercive in that parties have autonomy over the forum, the process, and the outcome. There are no sanctions such as are applied in courts and in arbitration.

Despite possessing the above positive attributes mediation has some drawbacks.[44] Firstly, is the issue of power imbalance. Power is a major concern in mediation. Where there is a significant power difference, the concern is that one party may dominate the process and the resulting outcome such that the agreement reflects largely only that party's needs and

[41]Sourced from *http://resources.lawinfo.com/en/Articles/mediation/Federal/the-pros-and-cons-of-mediation.html*, accessed on 3rd September 2012.

[42] **"**Beyond the Myths; Get the Facts about Dispute Resolution", American Bar Association, Washington DC, 2007, p. 8, sourced from www.abanet.org/dispute, accessed on 30th August 2012.

[43] Sourced from *http://resources.lawinfo.com/en/Articles/mediation/Federal/the-pros-and-cons-of-mediation.html, op. cit.*

[44] See generally Owen Fiss, "Against Settlement", 93 Yale Law Journal 1073(1984).

interests. Power also has broader repercussions in mediation as it may affect the legitimacy of the process itself. As such for a mediation process to be legitimate, it must be able to deal fairly with disputes involving significant power differences.[45]A power differential may originate from a variety of sources which include those derived from financial resources, knowledge and skill in negotiating, access to decision makers, personal respect and friendships.[46] Rarely, if ever, will power be equally balanced between the parties to a dispute. Even if it were desirable, there is no way a mediator would be able to measure the distribution of power between parties, and then intervene to redistribute power more equally.[47]

Secondly, mediation suffers from its non-binding nature. This means that, even though parties have agreed to submit a dispute to mediation, they are not obliged to continue with the mediation process after the first meeting. In this sense, the parties remain always in control of the mediation process. The continuation of the process depends on their continuing acceptance of it.[48] It is a process that requires the goodwill of the parties. The non-binding nature of mediation also means that a decision cannot be imposed on the parties.[49]

Thirdly mediation may lead to endless proceedings. Moreover, and unlike in litigation there are no precedents that are set in mediation hence creating uncertainty in the way decisions will be made in future. Lastly, mediation may not be suitable when one party needs urgent protection like an injunction and hence viewed against litigation this could be a demerit.

3.4 Conciliation

Conciliation is a process in which a third party, called a *conciliator*, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions. The difference between mediation and conciliation is that the conciliator, unlike the mediator who is supposed to be neutral, may or may not be totally neutral to the interests of the parties. Successful conciliation reduces tension, opens channels of communication and facilitates continued negotiations. Frequently, conciliation is used to restore the parties to a pre-dispute *status quo*, after which other ADR

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[45] Claire Baylis and Robyn Carroll, "Power Issues in Mediation", ADR Bulletin,Vol.7, No.8 [2005],Art.1, p.135

[46]Carolyn Manning, Power Imbalance in Mediation, an unpublished paper sourced from *www.dialmformediation.com.au*, accessed on 30th August 2012.

[47]Power Imbalances in Mediation, SCMC Briefing Papers, Scottish Community Mediation Centres, Edinburg, sourced from www.scmc.sacro.org.uk, accessed on 30/08/2012.

[48]Sourced from *http://resources.lawinfo.com/en/Articles/mediation/Federal/the-pros-and-cons-of-mediation.html*, accessed on 3rd September 2012.

[49] Ibid.

techniques may be applied. Conciliation is also used when parties are unwilling, unable, or unprepared to come to the bargaining table.

3.4.1 Use of Conciliation in Labour Disputes

Section 47 of the Employment Act[50] provides for complaints of summary dismissal or unfair termination. It is provided under subsection 2 that;

> *"A labour officer who is presented with a claim under this section shall, after affording every opportunity to the employee and the employer to state their case, recommend to the parties what in his opinion would be the best means of settling the dispute in accordance with the provisions of section 49."*

Though not expressly stated, the practice alluded to therein is conciliation.
Section 12 (9) of the **Labour Institutions Act**[51] provides that;

> *"The Industrial Court may refuse to determine any dispute before it, other than an appeal or review, if the Industrial Court is not satisfied that an attempt has been made to resolve the dispute through* ***conciliation****."*

It can be seen that this Act encourages parties to conciliate their differences.

Section 58 of the Labour Relations Act[52] provides that;
"(1) An employer, group of employers or employers' organisation and a trade union may conclude a collective agreement providing for-

> (a) the conciliation of any category of trade disputes identified in the collective agreement by an independent and impartial conciliator appointed by agreement between the parties; and
> (b) the arbitration of any category of trade disputes identified in the collective agreement by an independent and impartial arbitrator appointed by the agreement between the parties.

(2) ….

(3) An award in an arbitration in terms of a collective agreement contemplated in subsection (1) is final and binding and –
(a) is subject to appeal on points of law to any court;
(b) may be set aside by the Industrial Court on any ground recognised in law; or
(c) may be enforced by the Industrial Court.

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[50] Act No. 11 of 2007.
[51] Act No. 12 of 2007.
[52] ACT No. 14 of 2007.

(4) An application to review an arbitration award shall be made to the Industrial Court within thirty days of the award.

Further the Act[53] provides that; "Within twenty-one days of a trade dispute being reported to the Minister as specified under section 62, the Minister shall appoint a conciliator to attempt to resolve the trade dispute…" Persons who may be appointed as conciliators include a public officer, any other person drawn from a panel of conciliators or a conciliator from the conciliation and mediation commission.[54]

Section 67 of the Act provides for the conciliator's powers to resolve a dispute. It provides in **subsection 2** that for the purposes of resolving any trade dispute, the conciliator or conciliation committee may –

a) Mediate between the parties
b) Conduct a fact finding exercise; and
c) Make recommendations or proposals to the parties for settling the dispute.

The conciliator or conciliation committee shall have power to summon and question any person to attend a conciliation.[55]

Section 68 of the Act provides that;

"(1) **If a trade dispute is settled in conciliation the terms of the agreement shall be –**

(a)recorded in writing; and

(b)signed by the parties and the conciliator.

(2) A signed copy of the agreement shall be lodged with the Minister as soon as it is practicable.

Section 69 provides that **a trade dispute is deemed to be unresolved after conciliation** if the-

(a) conciliator issues a certificate that the dispute has not been resolved by conciliation; or
(b) thirty day period from the appointment of the conciliator, or any longer period agreed to by the parties, expires.

[53] Under section 65 (1)
[54] See section 66 (1) of the Act.
[55] See section 67(3) of the Act.

Section 70 of the Act provides that the minister may appoint a conciliator or conciliation committee in public interest to prevent the dispute from arising or to resolve a dispute. The minister may also appoint a committee of inquiry to investigate any trade dispute and report to the minister.[56]

3.5 Convening

Convening serves primarily to identify the issues and individuals with an interest in a specific controversy. The neutral, called a *convenor*, is tasked with bringing the parties together to negotiate an acceptable solution. This technique is helpful where the identity of interested parties and the nature of issues are uncertain. Once the parties are identified and have had an opportunity to meet, other ADR techniques may be used to resolve the issues.

3.6 Early Neutral Evaluation

Early Neutral Evaluation involves an informal presentation by the parties to a neutral with respected credentials for an oral or written evaluation of the parties' positions. The evaluation may be binding or non-binding. Many courts require early neutral evaluation, particularly when the dispute involves technical or factual issues that lend themselves to expert evaluation. It may also be an effective alternative to formal discovery in traditional litigation.

3.7 Adjudication

Adjudication is defined under the Chartered Institute of Arbitrators (K) Adjudication Rules as the dispute settlement mechanism where an impartial, third-party neutral person known as an adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract.[57] It is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision within 28 days or the period stated in the contract)[58], flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation.[59]Adjudication is thus effective in simple construction disputes that need to be settled within some very strict time schedules.

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

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[56] Under section 71 of the Labour Relations Act.
[57] The CIArb (K) Adjudication Rules, Rule 2.1
[58] Ibid, Rule 23.1.
[59] Ibid., Rule 29

3.8 Facilitation

Facilitation improves the flow of information within a group or among disputing parties. The neutral, called a *facilitator*, provides procedural direction to enable the group to effectively move through negotiation towards agreement. The facilitator's focus is on the procedural assistance to conflict resolution, compared to a mediator who is more likely to be involved with substantive issues. Consequently, it is common for a mediator to become a facilitator, but not the reverse.

3.9 Fact-Finding or Neutral Fact-Finding

Fact-Finding or Neutral Fact-Finding is an investigative process in which a neutral "fact finder" independently determines facts for a particular dispute usually after the parties have reached an impasse. It succeeds when the opinion of the neutral carries sufficient weight to move the parties away from impasse, and it deals only with questions of fact, not interpretations of law or policy. The parties benefit by having the facts collected and organized to facilitate negotiations or, if negotiations fail, for traditional litigation.

3.10 Mediation-Arbitration (Med-Arb)

Mediation Arbitration (Med-Arb) is a combination of mediation and arbitration. Initially, a neutral third party mediates a dispute until the parties reach an impasse. After the impasse, a neutral third party issues a binding or non-binding arbitration decision on the cause of the impasse or any unresolved issues. The disputing parties agree in advance whether the same or a different neutral third party conducts both the mediation and arbitration processes. Use of the same person for both processes creates a problem since when the mediator turned arbitrator must ignore previously acquired confidential information.[60]

3.11 Mini-trial

Mini-trial is a dispute resolution technique which provides an opportunity for a summary presentation of evidence by lawyer or other fully informed representative for each side to decision makers, usually a senior executive from each side. After receiving the evidence, the decision makers privately discuss the case. "Mini-trial" is not a small trial; it is a sophisticated and structured settlement technique used to narrow the gap between the parties' perceptions of the dispute and which "facts" are actually in dispute.

This hybrid technique can occur with or without a neutral's assistance, but neutrals frequently facilitate the processes for presentation of evidence and discussion among the decision makers, and serve as a mediator to reach a settlement. Mini-trials can be more expensive than most other ADR techniques because the cost of presenting even summary evidence to senior executives is high. Therefore, this process is generally reserved for

[60] See generally Chapter One in Kariuki Muigua, "Settling Disputes through Arbitration in Kenya", (Ladona Publishers, Nairobi, 2012)

significant cases involving potential expenditure of substantial time and resources in litigation.[61]

3.12 Ombudsman (Ombudsperson)

Ombudsman (Ombudsperson) is an organizationally designated person who confidentially receives, investigates, and facilitates resolution of complaints. The ombudsman may interview parties, review files, and make recommendations to the disputants, but normally is not empowered to impose solutions. Ombudsmen often work as management advisors to identify and recommend solutions for systemic problems in addition to their focus on disputes from individual complainants.[62]

3.13 Peer Review Panels or Dispute Resolution Panels

Peer Review Panels or Dispute Resolution Panels use groups or panels to conduct fact-finding inquiries, assess issues, and present a workable resolution to resolve disputes. The panel is often composed of two or more neutral subject matter experts selected by the disputing parties. Decisions of the panel may or may not be binding, depending on the advance agreement of the parties. This method attempts to resolve disputes at their inception to avoid traditional litigation.

3.14 Private Judging

Private Judging, also called "rent-a-judge", is an approach midway between arbitration and litigation in terms of formality and control of the parties. The parties typically present their case to a judge in a privately maintained courtroom with all the accoutrements of the formal judicial process. Private Judges are frequently retired or former "public" judges with subject matter expertise. This approach is gaining popularity in commercial situations because disputes can be concluded much quickly than under the traditional court system.[63]

3.15 Hybrid ADR[64]

Hybrid ADR is any creative adaptation of ADR techniques for dispute resolution. ADR has found its niche as an adjunct to traditional litigation because of the financial and emotional cost as well as the other aggravations of formal litigation. Processes leading to less litigation cost or risk may be considered ADR, regardless of the labels used to identify them. The distinguishing characteristic is that the techniques enable parties to acquire sufficient information to evaluate litigation risk and voluntarily negotiate resolution directly with each other. The techniques can be applied in any sequence as long as the parties are moving in good faith toward resolution of all or part of a dispute.

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[61] Ibid
[62] Ibid
[63] Ibid
[64] Ibid

3.16 Expert Determination

This is where the parties submit their dispute to an expert in the field of dispute for determination. The expert determinant gives his decision based on his expertise e.g., accountants valuing shares in a company, a jeweler assessing the carat content of a gold bracelet etc[65] It is a fast, informal and cost efficient technique which is applicable where there are disputes of a technical nature for example between the contractor and the architect or employer. It has become a popular method of resolving disputes in the building and construction industry involving qualitative or quantitative issues, or issues that are of a specific technical nature or specialized kind, because it is generally quick, inexpensive, informal and confidential. Expert determination is an attractive method of resolving disputes in building and construction contracts as it offers a binding determination without involving the formalities and technicalities associated with litigation and arbitration; and at the same time it assists in preserving relationships where litigation would not.[66]

3.17 Traditional Dispute Resolution Mechanisms

These are mechanisms that have always existed amongst communities for the management of conflicts. They include what is known today as mediation, negotiation, Med-Arb and other norms. (These mechanisms will be discussed separately later in Part II of this Paper)

4. Alternative Dispute Resolution in the Kenyan Context

Alternative Dispute Resolution is now recognized in the Kenyan legal framework. Recognizing ADR as a one of the main conflict resolution mechanisms in Kenya is thus encouraging. The status of ADR has been elevated and its applicability to a wide array of disputes will thus be seen in the near future. In the ensuing discussion I will assess court annexed ADR in light of the current legal framework.

4.1 Constitution

Under article 159 of the Constitution, it is provided that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall all be promoted as long as they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.[67] The scope for the application of ADR has also been extensively widened by the constitution with Article 189 (4) stating that national laws shall provide for the procedures to be followed in settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. These are the key provisions that form the constitutional basis for the application of ADR in dispute

[65] P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, op. cit, p.16

[66] Kariuki Muigua, "Settling Disputes through Arbitration in Kenya", op.cit.

[67] Constitution of Kenya 2010, op.cit

resolution in Kenya, whose import is that ADR can apply to all disputes and hence broadening the applicability of ADR. It is also a clear manifestation of the acceptance of ADR as a means of conflict resolution in all disputes.

3.2 Civil Procedure Act

There are numerous provisions under the Civil Procedure Act, Cap. 21, Laws of Kenya, on the use of ADR in conflict management. In July 2009, Parliament passed a raft of proposals for amendment to the Civil Procedure Act to introduce ADR. There were proposed amendments to sections 1 and 81 of the Civil Procedure Act which have so far been enacted into law.[68] The upshot of these provisions is that, once the necessary practice notes and/or directions are issued, the practice of court-annexed mediation may take off in Kenya.

Section 1A (1) of the Civil Procedure Act provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The judiciary is enjoined to exercise its powers and interpretation of the civil procedure to give effect to the overriding objective.[69] In effect, this implies that the court in its interpretation of laws and issuance of orders will ensure that the civil procedure shall, as far as possible, not be used to inflict injustice or delay the proceedings and thus minimize the litigation costs for the parties. This provision can also serve as a basis for the court to employ rules of procedure that provide for use of Alternative Dispute Resolution mechanisms, to ensure that they serve the ends of the overriding objective.

3.3 Court annexed arbitration

Court-annexed arbitration can arise as a result of the application of the Arbitration Act (As Amended in 2009) and also under supervision of the court under the Civil Procedure Act. Under the Civil Procedure Act, the courts involvement in the arbitral process is specifically provided for in Section 59 and Order 46 of the Civil Procedure Rules, 2010. Section 59 of the Act provides for references of issues to arbitration, which references are to be governed in a manner provided for by the rules. Order 46 rule 1 provides that;

> *"Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference."*

Under Order 46 Rule 2, the arbitrator is to be appointed in a manner that the parties have agreed upon. However, where no arbitrator or umpire (under rule 4) has been appointed the court under rule 5 may, on application by the party who gave the notice to the other

[68] Section 1A (1) and section 81 (2) (ff) of Civil Procedure Act, op. cit.
[69] Section 1A (2) of Civil Procedure Act, op. cit.

to appoint, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire, or make an order superseding the arbitration and in such case the court shall proceed with the suit. Where an award has been made pursuant to arbitration under the Rules, rule 10 requires that that the persons who made it shall sign it, date it and cause it to be filed in court within 14 days together with any depositions and documents which have been taken and proved before them.

A court has the power to modify or correct an award under rule 14 if it is imperfect or contains an obvious error, if a part of the award is upon a matter not referred to arbitration or if it contains a clerical mistake or error from an accidental slip or omission. The court also has power to remit an award for reconsideration by the arbitrator under rule 15. Rule 18 provides that the court shall, upon due notice to the other parties, enter judgment according to the award and upon such that judgment a decree shall follow thereof. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award. Order 46 rule 20 of the Civil Procedure Rules provides that;

> *"Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act."*

Order 46 Rule 20 read together with Sections 1A and 1B of the Civil Procedure Act therefore obligates the court to employ ADR mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. Court-annexed ADR will thus go a long way in tackling the problem relating to backlog of cases, enhance access to justice, and result in the expeditious resolution of disputes and lower costs.

Under Order 46 rule 20 (2) it is provided that a court may adopt any ADR mechanism for the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism. Judges will thus need to be adeptly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the particular mechanism and that will lead to the attainment of the overriding objective under sections 1A and 1B of the Act.

4.4 Mediation and other ADR Mechanisms

The clamor to introduce court-annexed mediation has borne fruit and is now evident under section 81 (2) (ff) of the Civil Procedure Act, as amended by the Statute Law (Miscellaneous Amendment) Act No. 6 of 2009. Section 81 (2) (ff) provides for the selection of mediators and the hearing of matters referred to mediation under this Act. Thus, parties who have presented their cases to court may have their matter referred to mediation by the court for resolution.

The Statute Law (Miscellaneous Amendments) Act has amended sections 2 and 59 of the Civil Procedure Act to provide for mediation of disputes.[70] Section 2 of the Civil Procedure Act has been amended to define mediation as an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings. This definition depicts mediation in the political process but then the context within which mediation is to take place makes the whole process legal.[71]

Section 59 of the Civil Procedure Act has also been amended to introduce the aspect of mediation of cases as an aid to the streamlining of the court process. This will involve the establishment of a Mediation Accreditation Committee to be appointed by the Chief Justice which will determine the criteria for the certification of mediators, propose rules for the certification of mediators, maintain a register of qualified mediators, enforce such code of ethics for mediators as may be prescribed and set up appropriate training programmes for mediators.[72]

The law now requires the court either at the request of the parties, where it deems appropriate to do so or where the law provides so, to refer a dispute presented before it to mediation.[73] Where a dispute is referred to mediation under subsection (1), the parties thereto shall select for that purpose a mediator whose name appears in the mediation register maintained by the Mediation Accreditation Committee.[74] Such reference should, however, be conducted in accordance with the mediation rules.[75] Section 59B (4) provides that an agreement between the parties to a dispute as a result of mediation under this part shall be recorded in writing and registered with the court giving direction under sub section (1), and shall be enforceable as if it were a judgment of that court. No appeal shall lie against an agreement referred to in subsection (4).[76]

Under Section 59C, a suit may be referred to **any other method of dispute resolution** where the parties agree or where the court considers the case suitable for referral.[77] Under Section 59C (2), any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order. Any settlement arising from a suit referred to any other alternative dispute

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[70] Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 12 of 2012, Government Printer, Nairobi, 2012, whose date of commencement is 12th July 2012.
[71] Section 2 of the Civil Procedure Act.
[72] Section 59A of the Civil Procedure Act.
[73] Section 59B (1) of the Civil Procedure Act
[74] Section 59B (2)
[75] Section 59B (3)
[76] Section 59B (4)
[77] Section 59C (1).

resolution method by the Court or agreement of the parties shall be enforceable as a judgment of the Court.[78] No appeal shall lie in respect of any judgment entered under this section.[79] Further, all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court.[80] Pursuant to Order 46 rule 20 (3) it is only after a court-mandated mediation fails that the court shall set the matter down for hearing and determination.

The aforesaid amendments to the Civil Procedure Act are not, in my view, really introducing mediation *per se,* but merely setting up a legal process where a court can coerce parties to mediate and the outcome of the mediation taken back to court for ratification. These amendments have introduced a mediation process which is formal and annexed to the procedures governing the conduct of cases in the high court. Informal mediation which may not require the use of writing is not provided for. The codification of mediation rules in the Civil Procedure Act merely reflect the concept of mediation as viewed from a westerner's perspective and not in the traditional, political and informal perspective where it could lead to a resolution of the conflict.

4. Challenges and Opportunities

Despite the strides made in coming up with a framework for the use of ADR in Kenya, there still are certain challenges in the effective application of the same to enhance access to justice, reduce backlogs and expedite dispute resolution. These challenges relate to lack of capacity in terms of insufficient personnel who can handle disputes using ADR mechanisms and lack of understanding on the working of some mechanisms such as mediation. Equally, parties may lose their autonomy when ADR is court-mandated; the fundamental quality of mediation, that is, its voluntary nature, is interfered with through the court order calling for mediation; enforcement of mediated agreements entered into with the assistance of unqualified mediators is excluded; the lack of a reimbursement system for legal fees and other expenses is likely to make litigants resistant to mediation as it implies extra costs to the litigants and there is no provision of taxation of costs even where a mediated agreement is reached.

Mediation in the legal process is temporal and may not deal with the negative elements of the underlying inter-disputant-relationship. Mediation also risks being a court process because even after the parties have negotiated and even reached a solution to the conflict, they nevertheless have to go back to court for enforcement of the mediated agreement. Power imbalances in mediation may cause one party to dominate the process with the result that the outcome largely reflects that party's needs and interest and may also affect the legitimacy of the process itself.

[78] Section 59C (3)
[79] Section 59C(4)
[80] Section 59D of the Civil Procedure Act.

The effective operationalisation of the Arbitration law and court supervised ADR faces challenges as there is an overlap of some provisions. Moreover the public have not been fully made aware of ADR methods of conflict management and their usefulness. Nevertheless, the adoption of ADR may have the effect of lowering the costs of accessing justice as ADR mechanisms are cheaper compared with the court process. Some ADR methods such as negotiation and mediation address underlying psychological dimensions which cannot be addressed in courts and hence where ADR mechanisms are utilized, the dispute may not flare up again.

5. Conclusion

There is now in place a comprehensive legal framework governing ADR in Kenya. With the passage of the constitution of Kenya 2010, ADR has now been explicitly recognized by Kenyan law. ADR mechanisms can now be effectively applied in resolving a wide range of commercial disputes, family disputes and natural resource based conflicts, among others thus easing access to justice. It is essential that in the application of ADR and to achieve a just and expeditious resolution of disputes, the Bill of Rights as enshrined in the constitution must at all times be kept in mind and upheld. The future of Alternative Dispute Resolution in Kenya is bright and really promising in bringing about a society where disputes are disposed of more expeditiously and at lower costs, without having to resort to judicial settlements.

Court Annexed ADR in the Kenyan Context

1. Introduction

Court annexed ADR arises where after parties have presented their case to court, the same is referred by the court to one of the ADR mechanisms for resolution. Prior to the enactment of the Constitution of Kenya 2010, Kenya did not have a comprehensive framework for the application of ADR in the resolution of disputes. Recently, the role of ADR in the expeditious resolution of disputes has been recognized and the gamut of legislation that has been passed hitherto makes specific reference to the use of ADR mechanisms to enhance access to justice and reduce backlogs in courts.

Recognizing ADR as a one of the main conflict resolution mechanisms in Kenya is thus encouraging. The status of ADR has been elevated and its applicability to a wide array of disputes will thus be seen in the near future. In the ensuing discussion I will assess court annexed ADR in light of the current legal framework.

2. Constitution

Under article 159 of the Constitution, it is provided that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall all be promoted as long as they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.[1]

The scope for the application of ADR has also been extensively widened by the constitution with Article 189 (4) stating that national laws shall provide for the procedures to be followed in settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. These are the key provisions that form the constitutional basis for the application of ADR in dispute resolution in Kenya, whose import is that ADR can apply to all disputes and hence broadening the applicability of ADR. It is also a clear manifestation of the acceptance of ADR as a means of conflict resolution in all disputes.

2.1 Civil Procedure Act

There are numerous provisions under the Civil Procedure Act, Cap 21, Laws of Kenya, on the use of ADR in conflict management. In July 2009, Parliament passed a raft of proposals for amendment to the Civil Procedure Act to introduce ADR. There were proposed amendments to sections 1 and 81 of the Civil Procedure Act which have so far been enacted into law.[2] The upshot of these provisions is that, once the necessary practice notes and/or directions are issued, the practice of court-annexed mediation may take off in Kenya.

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[1] Constitution of Kenya 2010, Government Printer, Nairobi

[2] Section 1A (1) and section 81 (2) (ff) of Civil Procedure Act, Government Printer, Nairobi.

Section 1A (1) of the Civil Procedure Act provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The judiciary is enjoined to exercise its powers and interpretation of the civil procedure to give effect to the overriding objective.[3] In effect, this implies that the court in its interpretation of laws and issuance of orders will ensure that the civil procedure shall, as far as possible, not be used to inflict injustice or delay the proceedings and thus minimize the litigation costs for the parties. This provision can also serve as a basis for the court to employ rules of procedure that provide for use of Alternative Dispute Resolution mechanisms, to ensure that they serve the ends of the overriding objective.

2.2 Court annexed arbitration

Court-annexed arbitration can arise as a result of the application of the Arbitration Act (As Amended in 2009) and also under supervision of the court under the Civil Procedure Act. Under the Civil Procedure Act, the courts involvement in the arbitral process is specifically provided for in Section 59 and Order 46 of the Civil Procedure Rules, 2010. Section 59 of the Act provides for references of issues to arbitration, which references are to be governed in a manner provided for by the rules. Order 46 rule 1 provides that;

> *"Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference."*

Under Order 46 Rule 2, the arbitrator is to be appointed in a manner that the parties have agreed upon. However, where no arbitrator or umpire (under rule 4) has been appointed the court under rule 5 may, on application by the party who gave the notice to the other to appoint, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire, or make an order superseding the arbitration and in such case the court shall proceed with the suit.

Where an award has been made pursuant to arbitration under the Rules, rule 10 requires that that the persons who made it shall sign it, date it and cause it to be filed in court within 14 days together with any depositions and documents which have been taken and proved before them.

A court has the power to modify or correct an award under rule 14 if it is imperfect or contains an obvious error, if a part of the award is upon a matter not referred to arbitration or if it contains a clerical mistake or error from an accidental slip or omission. The court also has power to remit an award for reconsideration by the arbitrator under rule 15. Rule

[3] Section 1A (2) of Civil Procedure Act, op. cit.

18 provides that the court shall, upon due notice to the other parties, enter judgment according to the award and upon such that judgment a decree shall follow thereof. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award.

Order 46 rule 20 of the Civil Procedure Rules provides that;

> *"Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act."*

Order 46 Rule 20 read together with Sections 1A and 1B of the Civil Procedure Act therefore obligates the court to employ ADR mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. Court-annexed ADR will thus go a long way in tackling the problem relating to backlog of cases, enhance access to justice, and result in the expeditious resolution of disputes and lower costs.

Under Order 46 rule 20 (2) it is provided that a court may adopt any ADR mechanism for the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism. Judges will thus need to be adeptly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the particular mechanism and that will lead to the attainment of the overriding objective under sections 1A and 1B of the Act.

3. Mediation and other ADR

The clamor to introduce court-annexed mediation has borne fruit and is now evident under section 81 (2) (ff) of the Civil Procedure Act, as amended by the Statute Law (Miscellaneous Amendment) Act No. 6 of 2009. Section 81 (2) (ff) provides for the selection of mediators and the hearing of matters referred to mediation under this Act. Thus, parties who have presented their cases to court may have their matter referred to mediation by the court for resolution. The Statute Law (Miscellaneous Amendments) Act has amended sections 2 and 59 of the Civil Procedure Act to provide for mediation of disputes.[4] Section 2 of the Civil Procedure Act has been amended to define mediation as an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings.

[4] Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 12 of 2012, Government Printer, Nairobi, 2012, whose date of commencement is 12th July 2012.

This definition depicts mediation in the political process but then the context within which mediation is to take place makes the whole process legal.[5]

Section 59 of the Civil Procedure Act has also been amended to introduce the aspect of mediation of cases as an aid to the streamlining of the court process. This will involve the establishment of a Mediation Accreditation Committee to be appointed by the Chief Justice which will determine the criteria for the certification of mediators, propose rules for the certification of mediators, maintain a register of qualified mediators, enforce such code of ethics for mediators as may be prescribed and set up appropriate training programmes for mediators.[6]

The law now requires the court either at the request of the parties, where it deems appropriate to do so or where the law provides so, to refer a dispute presented before it to mediation.[7] Where a dispute is referred to mediation under subsection (1), the parties thereto shall select for that purpose a mediator whose name appears in the mediation register maintained by the Mediation Accreditation Committee.[8] Such reference is, however, is to be conducted in accordance with the mediation rules.[9] Section 59B (4) provides that an agreement between the parties to a dispute as a result of mediation under this part shall be recorded in writing and registered with the court giving direction under sub section (1), and shall be enforceable as if it were a judgment of that court. No appeal shall lie against an agreement referred to in subsection (4).[10]

Under Section 59C, a suit may be referred to **any other method of dispute resolution** where the parties agree or where the court considers the case suitable for referral.[11] Under Section 59C (2), any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order. Any settlement arising from a suit referred to any other alternative dispute resolution method by the Court or agreement of the parties shall be enforceable as a judgment of the Court.[12] No appeal shall lie in respect of any judgment entered under this section.[13] Further, all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court.[14] Pursuant to Order

[5] Section 2 of the Civil Procedure Act.
[6] Section 59A of the Civil Procedure Act.
[7] Section 59B (1) of the Civil Procedure Act
[8] Section 59B (2)
[9] Section 59B (3)
[10] Section 59B (4)
[11] Section 59C (1).
[12] Section 59C (3)
[13] Section 59C(4)
[14] Section 59D of the Civil Procedure Act.

46 rule 20 (3) it is only after a court-mandated mediation fails that the court shall set the matter down for hearing and determination.

The aforesaid amendments to the Civil Procedure Act are not, in my view, really introducing mediation *per se,* but merely setting up a legal process where a court can coerce parties to mediate and the outcome of the mediation taken back to court for ratification. These amendments have introduced a mediation process which is formal and annexed to the procedures governing the conduct of cases in the high court. Informal mediation which may not require the use of writing is not provided for. The codification of mediation rules in the Civil Procedure Act merely reflect the concept of mediation as viewed from a westerner's perspective and not in the traditional, political and informal perspective**.**

4. Challenges and Opportunities

Despite the strides made in coming up with a framework for the use of ADR in Kenya, there still are certain challenges in the effective application of the same to enhance access to justice, reduce backlogs and expedite dispute resolution.

These challenges relate to lack of capacity in terms insufficient personnel who can handle disputes using ADR mechanisms and lack of understanding on the working of some mechanisms such as mediation. Equally, parties may lose their autonomy when ADR is court-mandated; the fundamental quality of mediation, that is, its voluntary nature, is interfered with through the court order calling for mediation; enforcement of mediated agreements entered into with the assistance of unqualified mediators is excluded; the lack of a reimbursement system for legal fees and other expenses is likely to make litigants resistant to mediation as it implies extra costs to the litigants and there is no provision of taxation of costs even where a mediated agreement is reached.

Mediation in the legal process is temporal and may not deal with the negative elements of the underlying inter-disputant-relationship. Mediation also risks being a court process because even after the parties have negotiated and even reached a solution to the conflict, they nevertheless have to go back to court for enforcement of the mediated agreement. Power imbalances in mediation may cause one party to dominate the process with the result that the outcome largely reflects that party's needs and interest and may also affect the legitimacy of the process itself.

The effective operationalisation of the Arbitration law and court supervised ADR faces challenges as there is an overlap of some provisions. Moreover the public have not been fully made aware of ADR methods of conflict management and their usefulness. Nevertheless, the adoption of ADR may have the effect of lowering the costs of accessing justice as ADR mechanisms are cheaper compared with the court process. Some ADR methods such as negotiation and mediation address underlying psychological

dimensions which cannot be addressed in courts and hence where ADR mechanisms are utilized, the dispute may not flare up again.

5. Conclusion

There is now in place a comprehensive legal framework governing ADR in Kenya. With the passage of the constitution of Kenya 2010, ADR has now been explicitly recognized by Kenyan law. ADR mechanisms can now be effectively applied in resolving a wide range of commercial disputes, family disputes and natural resource based conflicts, among others thus easing access to justice. It is essential that in the application of ADR and to achieve a just and expeditious resolution of disputes, the Bill of rights as enshrined in the constitution must at all times be kept in mind and upheld. The future of Alternative Dispute Resolution in Kenya is bright and really promising in bringing about a society where disputes are disposed of more expeditiously and at lower costs, without having to resort to judicial settlements.

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

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 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

[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*

[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.

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 though 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 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

[6] Ibid.
[7] Ibid.
[8] Ibid.
[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.

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 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]

i. 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

[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.

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

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 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]

ii. 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]

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[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*

[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.

iii. 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 children. There are few wheel chair rumps 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

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[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.kelinkenya.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/ACCESSTOJUSTICEUNDPPRACTICENOTE.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 *fromhttps://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).

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

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]

iv. 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. 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.[36] In a survey conducted to assess whether the 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.[37]

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.[38] This

[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://kelinkenya.org/wp-content/uploads/2010/10/Ensuring-justice-for-the-Vunlerable.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] Mbote, P.K, &Aketh M., "Kenya: justice sector and the rule of law," African Minds, 2011, pp. 158

[37] Ibid.

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

leaves the majority of the Kenyans without legal representation since they do not have a choice to pick even cheap legal representation. [39] 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.[40] 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 venerate disputes thus enhancing the access to justice.[41]

v. 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 settling disputes.[42] 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.[43] 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.[44] This, however, is not the case as

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[39] Ibid.

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

[41] 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).

[42] 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*

[43] Article 50, Constitution of Kenya, 2010.

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

a research conducted in 2004 by Kenya AIDS Consortium revealed that on average, civil matters take between two to six years to be resolved.[45]

In reality, the court system is facing a problem of backlog of cases that has hindered access to justice.[46] 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.[47] 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.[48] 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 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.[49] 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.

vi. 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.[50] 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

[45] 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).

[46] 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;*

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

[48] Ibid pp. 20.

[49] Ibid pp. 21.

[50] 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.

chair mediation and arbitration sittings. This is also evident in the low number of women arbitrators in Kenya.[51]

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.[52] 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 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.[53]

Further, women in ADR processes have suffered the negative effects of gender stereotyping and perceived expectations and bias in their role within dispute resolution.[54] 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.[55] 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.[56]

It has been opined that Arbitration is gender sensitive and must incorporate the inclusion of all people.[57] 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

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

[52] 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.

[53] Ibid, p. 206.

[54] 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.

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

[56] 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.

[57]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.*

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.[58]

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.[59] 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.[60]

vii. Gaps within Pilot Court-Annexed Mediation Project

There are certain gaps that exist within the court annexed mediation pilot project.[61] 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 refereed 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?

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[58] Ibid.

[59] 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.*

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

[61] 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

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

viii. 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.[62] 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,[63] 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 Uganda. These rules require that all

[62] 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.

[63] S1. No. 55 of 2007.

matters be referred to mediation within 60-days and there is no appeal or review of any orders obtained from the mediation process.[64]

ix. 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.[65] 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.[66] 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.[67]

x. 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.[68] The increasingly high cost of the arbitration has made it inaccessible to many disputants.[69] 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:[70]

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[64] 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*

[65] 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.

[66] Ibid.

[67] Ibid.

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

[69] 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*

[70] 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.

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 Nations[71] 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 alternative dispute resolution mechanisms72. These mechanisms and their use in access to justice are also captured across different sectoral laws and statutes.

4. 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.[73]

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.[74] 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.

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[71] Art 33 (1), 24th October 1945.
[72] Article 159(2)(c), Constitution of Kenya, 2010.
[73] 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.
[74] Ibid.

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.[75]

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.[76]

xi. 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.[77]

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.[78] The NCIA can work closely with the AJS Taskforce and community elders in such a task.

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[75] 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.

[76] 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.

[77] 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*

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

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 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.[79]

xii. 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.[80] 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.

xiii. 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);
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

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

[80] 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.

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.[81] 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.

[81] S. 5, Nairobi Centre for International Arbitration, No. 26 of 2013, Laws of Kenya.

Avoiding Litigation through the Employment of Alternative Dispute Resolution

Abstract

This paper grapples with the question of how parties to a conflict/dispute can avoid litigation through the employment of ADR mechanisms. The paper uses a case study to illustrate and appraise various conflict management mechanisms in the conflict resolution discourse. It looks at the range of dispute settlement mechanisms available to parties in disputes in the corporate world in Kenya. Such mechanisms include adjudication, arbitration, conciliation, expert determination, mediation, neutral evaluation among others. Their various merits and demerits are examined. It will also inform corporate decision-makers of the risks associated with a particular ADR mechanism. Above all it will succinctly show how a mutually beneficial solution can be achieved with the assistance of a neutral third party and investigate the role of Alternative Dispute Resolution in settlements other than pursuing litigation. The challenges facing the legal and institutional infrastructure for management of conflicts in Kenya are discussed. These challenges are likely to have a negative impact on the rapidly changing corporate and economic sector. The paper examines the opportunities offered by various ADR mechanisms in dealing with conflicts expeditiously. It also seeks to create awareness among legal counsels so as to adapt them with a wide range of applicable dispute settlement mechanism in the corporate world.

1. Case Study[1]

The complaint regarding XX Company is a classic example of how ADR mechanisms can be used to avoid litigation and its attendant challenges. XX a company based in Athi River region in Nairobi started a sewerage treatment project in Nairobi. Its financier was ZZ Corporation since 1990. Total Compliance Advisor (TCA) was the independent recourse mechanism for the financier. Disputes arose regarding the environmental suitability of the company's project. There were also internal management wrangles in the company. One faction of the directors instituted a suit seeking an injunction to restrain the other faction from running the affairs of the company. The National Environmental Management Authority (NEMA) and the local residents also sued the company seeking, *inter alia*, that it be restrained from continuing with the project as it raised a series of social and environmental issues. In both cases the court granted injunctions which were disobeyed by the respective parties against whom they were issued and so the complainants had to go back to court to file contempt proceedings. This would take some time (like two years) to be finalized. In the meantime, KKP a local NGO lodged a complaint with the TCA on behalf of the residents of Athi river region which was accepted.

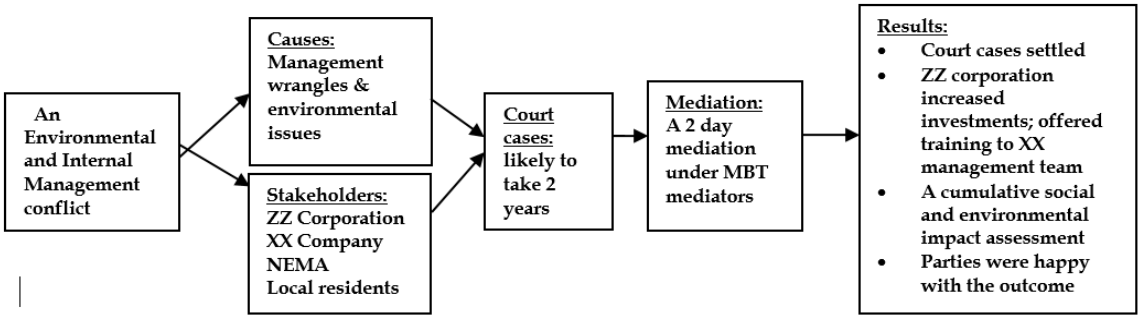
[1] Based on an actual case study. The names of some of the parties have been changed to protect their identity as mediation proceedings were confidential.

Following an assessment report by TCA, the stakeholders started negotiations to discuss the specific complaints, regarding the social and environmental impacts of the project, and broader issues of community and economic development. The negotiations did not address all the complaints raised, and the Company had to close permanently. In essence the negotiation process had hit a deadlock. However, ZZ Corporation and the other stakeholders realized that shutting down the company would affect both of them adversely. They thus opted to continue negotiating with the assistance of a mediator. Thereafter, the stakeholders concerned voluntarily appointed, MBT, [as mediators] and who in a two day mediation session managed to bring the warring factions to the negotiation table, calmed down tension and gave them an opportunity to communicate their grievances freely. This allowed the parties to accommodate one another and continue with the stalled process of negotiation.

In two days, the parties had agreed to mark the cases in court as settled and ZZ corporation notified the company that it would increase its investments in the company and facilitate training programmes on corporate governance to the senior management of the company, to fund a general environmental audit, and to generate a cumulative social and environmental impact assessment. [***See Fig. 1.1***]

After the completion of the mediation the concerned parties realized that the mediation had achieved a much more effective outcome which was mutually acceptable, expeditious, cost effective, flexible, durable and addressed the root causes of the conflict. The mediation process led them to solutions that were mutually beneficial which they did not receive and could not get in court. It also worked towards fostering the relationships among the stakeholders. The case reveals that ADR mechanisms are expeditious, flexible, allow the parties to have autonomy over the forum, process and the outcome unlike litigation which is time consuming, expensive and subject to strict rules of procedure. The parties in this case study could also have explored other ADR mechanism such as adjudication, conciliation, expert determination, negotiation and neutral evaluation whose appropriateness in the context of this case study will be assessed later.

Fig. 1.1Conflict Map for the Case Study



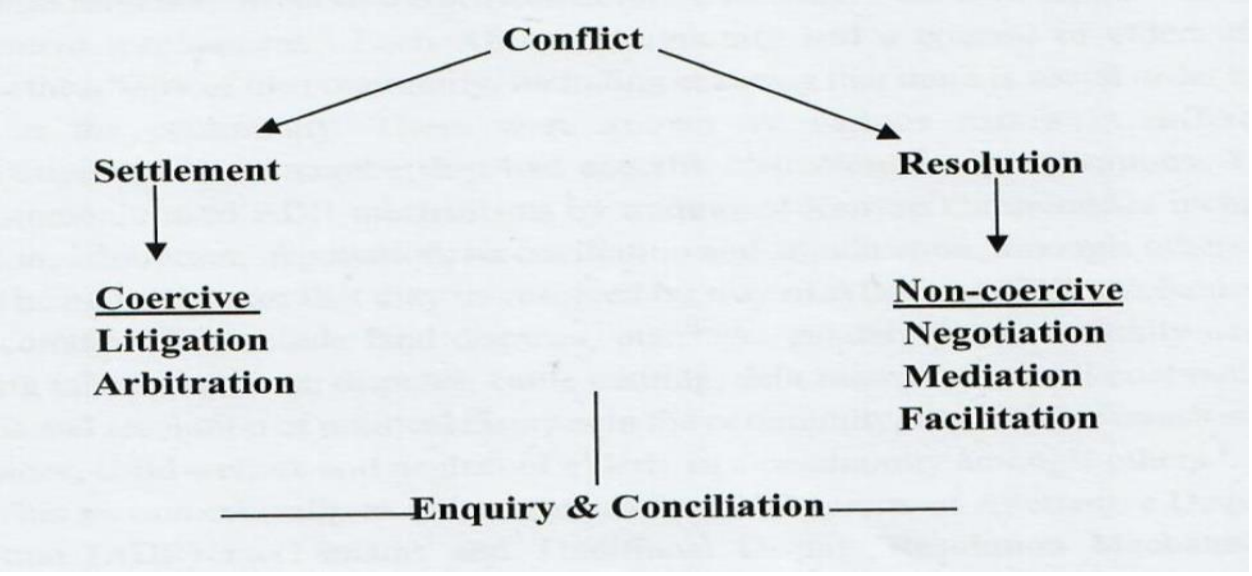
*Source: The author

Fig. 1.1 shows the causes of the conflict, the stakeholders or parties to the conflict and the mechanisms employed to address the said conflict. From the figure it is also evident that the 2 day mediation resulted into a durable and mutually acceptable outcome to all parties within a very short time.

2. Appraising Conflict Management Mechanisms

There is a range of conflict management mechanisms available to parties in dispute. [*See Fig 1.2*] In the widest sense conflict management mechanisms include any process which can bring about the conclusion of a dispute ranging from the most informal negotiations between the parties themselves, through increasing formality and more directive intervention from external sources, to a full court hearing with strict rules of procedure.[2]

Fig. 1.2 Methods of Conflict Management



*Source: The author

As *Fig. 1.2* clearly shows there are certain conflict management mechanisms that can lead to a settlement[3] only while others have been effective in bringing about a resolution. A *settlement* is attained when the parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. On the other hand a *resolution* prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their

[2] Sourced from, <*http://www.buildingdisputestribunal.co.nz/.html*> *accessed on 05/01/2012*.

[3] David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", Journal of Peace Research, Vol.32, No. 2 (May, 1995), p. 153. Bloomfield argues that a settlement is temporal and does not eliminate the underlying causes of the inter-disputant relationship whereas a resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based out-comes.

conflict and their relationship.[4] The Conflict resolution methods that lead to a settlement fall into the category of *coercive methods* where parties have little or no autonomy over the forum, choice of the judges and the outcome. The coercive methods are litigation or judicial settlement and arbitration. The *non-coercive methods* (negotiation, mediation and facilitation) lead to resolution. In the non-coercive conflict management methods the parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome. Article 33 of the Charter of the United Nations outlines the various conflict management mechanisms as follows;

> *"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."*[5]

ADR mechanisms also form part of the principles that shall guide the courts and tribunals in their exercise of judicial authority under the Constitution. Under article 159, the Constitution of Kenya 2010 now provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted as long as they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law. These conflict management mechanisms are discussed hereunder;

i. Litigation

Litigation is a coercive dispute settlement mechanism that is adversarial in nature where parties in the dispute take their claims to a court of law to be adjudicated upon by a judge or a magistrate. The judge/ magistrate gives a judgment which is binding on the parties subject to rights of appeal. As shown in Fig. 1.3, in litigation, the parties to the dispute have minimum or no control at all over the forum, the process and outcome of the process and as such the outcome may not satisfy both parties.

The judicial authority in Kenya is exercised by the courts and tribunals.[6] Litigation has its advantages in that Precedent is created and issues of law are interpreted. It is also useful where the contract between the parties does not stipulate for a consensual process and the parties cannot agree on one, the only alternative is litigation. Through litigation it is possible to bring an unwilling party into the process and the result of the process is enforceable without further agreement.[7] The constitution postulates that the courts and tribunals shall do justice to all irrespective of status; justice shall not be delayed; alternative forms of dispute resolution shall be promoted and justice shall be administered

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[4] Ibid

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

[6] See Article 159 of the Constitution of Kenya, Government Printer, Nairobi.

[7]See generally, Dispute Resolution Guidance at *http://www.ogc.gov.uk/documents/dispute resolution.pdf,* accessed on 05/01/2012.

without undue regard to procedural technicalities.[8] With such a reformed judiciary litigation may become an efficacious process once again and parties to a contract may resort to it. Litigation should not be entirely condemned as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary.

Courts in Kenya have encountered many problems related to access to justice for instance high court fees, geographical location, complexity of rules and procedure and the use of legalese.[9] The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves.'[10] Dispute resolution through litigation takes years before the parties get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice, litigation is so slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world. It is against this backdrop of a myriad of challenges associated with litigation that we interrogate how litigation can be avoided through the use of ADR mechanisms. Even though litigation was available to the parties, it was not the most appropriate mechanism in the above case study as it is expensive, time consuming and would also destroy relationships.

ii. Arbitration

Arbitration in Kenya is governed by the Arbitration Act, 1995, the Arbitration Rules, the Civil Procedure Act (Cap. 21) and the Civil Procedure Rules 2010. Section 59 of the Civil Procedure Act provides that all references to arbitration by an order in a suit, and all proceedings there under, shall be governed in such manner as may be prescribed by rules. Order 46 of the Civil Procedure Rules, inter alia, provides that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court for an order of reference wherever there is a difference. Arbitration arises where a third party neutral is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award. The Arbitration Act, 1995 defines arbitration to mean "any arbitration whether or not administered by a permanent arbitral institution." This is not very elaborate and regard has to be had to other sources. According to Khan[11], arbitration is a private consensual process where parties in dispute agree to present their grievances to a third party for resolution. It is an adversarial process and in many ways resembles litigation.

[8] See Article 159 (2) of the Constitution of Kenya 2010, Government Printer, Nairobi.

[9]Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol.III, May, 2002.

[10] Jackton B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), pp. 19-29: 29.

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

Its advantages are that parties can agree on an arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexibility; cost-effective; confidential; speedy and the result is binding. Proceedings in Court are open to the public, whereas proceedings in commercial arbitration are private, accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration. The other disadvantages of this mechanism is that similar cases cannot be consolidated without the consent of the parties and it may not be appropriate where parties need urgent protection, for example, an injunction. Arbitration was available to the parties in the above case study but was not the appropriate dispute resolution mechanism. For it to be applicable parties must sign an agreement to submit all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.[12] In their relationship the parties and stakeholders did not contemplate referring their disputes to an arbitrator and therefore it was not the appropriate recourse mechanism.

iii. Negotiation

Negotiation is by far the most efficient conflict management mechanism in terms of management of time, costs and preservation of relationships and has been seen as the preferred route in most disputes.[13] In negotiation the parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation.[14] According to Mwagiru, 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. It has been said that negotiation leads to mediation because the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.[15] This was clearly evident in the above case study where after months of negotiations, the Board of Directors and the entire management team and other stakeholders were unable to agree on a plan to re-structure the company and the other environmental issues, and the Company had to close permanently. They had reached a deadlock and the need of a mediator had thus arisen.

Its advantages, *inter alia,* are that it is fast; informal, cost saving; flexible; confidential; preserves relationships; provides a range of possible solutions and there is autonomy over the process and the outcome. Negotiation is also a non-coercive process in that the parties have autonomy about the forum, the process, and the outcome ***[See Fig. 1.3]***. Its

[12] Section 3 of The Arbitration Act, 1995, Government Printer, Nairobi.
[13] See Dispute Resolution Guidance op. cit.
[14] Peter Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, (CIArb, London, 2002), at p. 12.
[15] Makumi Mwagiru, Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), p. 115.

disadvantages are inter alia that, it requires the goodwill of the parties; may lead to endless proceedings; can create power imbalances; it is non-binding unless parties reduce the agreement into writing; creates no precedents and it is not suitable when one party needs urgent protection like an injunction. If the parties do not reach an agreement through negotiation, they will need to consider what other method or methods of dispute resolution would be suitable. However, it will still be possible or may be necessary to continue with negotiations as part of or alongside other forms of dispute resolution.[16]

iv. Mediation

Mediation is a voluntary, informal, consensual, strictly confidential and non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated solution.[17] As noted elsewhere mediation is a continuation of the negotiations with the assistance of a third party so as to come to a mutually acceptable outcome that is durable and that addresses the root causes of the conflict. The involvement of the neutral third party makes the negotiations more effective. It should be seen as the preferred dispute resolution route in most disputes when conventional negotiation has failed or is making slow progress.[18]

There are certain elements that must be present in a mediation situation: the parties in conflict, a mediator, process of mediation and the context of mediation. These elements are important in understanding mediation and its outcomes.[19] In discussing the mediation paradigm Wall states that the mediation system consists of the mediator, the two negotiators, and the relationships among them. In this paradigm Wall says that the mediation environment is wider and includes other actors such as the negotiator's constituents, the mediator's constituents and the third parties who affect or are affected by the process and outcome of the mediation. He further argues that this environment also includes other factors such as societal norms, economic pressures and institutional constraints which affect the mediation process and the outcome either directly or indirectly. The mediation environment is thus one of exchange where parties have expectations, receive rewards and incur costs as they deal with each of the other parties.[20] The case study, as illustrated, has clearly shown that the mediation environment is much wider including not only the mediator, the two negotiators, and the relationships among them but also the negotiator's constituents, the mediator's constituents and the third parties who affect or are affected by the process and outcome of the mediation. In the case

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[16] Ibid

[17] Peter Fenn, "Introduction to Civil and Commercial Mediation", op. cit, p.10

[18] See Dispute Resolution Guidance op. cit.

[19] J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", Cardozo Journal of Conflict Resolution, op.cit,pp.290-291

[20] James A. Wall, Jr, "An Analysis, Review, and Proposed Research", The Journal of Conflict Resolution, Vol. 25, No.25 [March.,1981], pp.157-160

study NEMA, effects of the company's activities on the environment and the local residents and economic hardships can be said to be the other forces or parties who formed part of the mediation environment as they would be directly or indirectly affected by the outcome of the mediation.

In the above case study the mediators brought additional resources which enabled them to bring the warring factions to the negotiating table, calmed down tension and gave them an opportunity to communicate their grievances freely. This allowed the parties to accommodate one another and continue with the stalled process of negotiation. Through mediation ZZ corporation agreed to fund a number of projects that were beneficial to the community and the matter amicably resolved to the benefit of all involved including, ZZ corporation, XX company, NEMA the residents and the surrounding community. Through mediation the parties were able to achieve a durable, mutually satisfying outcome through a process that was flexible, expeditious, cost-effective and one that fostered the broken relationships. The mediation in the above case study addressed all the underlying issues such that the conflict could not later flare up again as all the parties were satisfied with the outcome. The case study has also shown that mediation is a cost effective, flexible, informal, speedy, confidential process that allows for creative solutions, fosters relationships, enhances party control ***[see Fig. 1.3]*** and allows for personal empowerment and hence suitable in settling disputes. These are the main reasons why mediation was the most appropriate recourse mechanism in the above case study as opposed to the other conflict management mechanisms.

Sometimes, parties in litigation can engage in mediation outside the court process and then move the court to record a consent judgment.[21] This procedure exists as a remote form of court-annexed mediation. On the other hand, parties in a conflict that is not before a court may undergo a mediation process and conclude the mediation agreement as a contract *inter partes* enforceable and binding as between them, so long as it abides by the provisions of the Law of Contract Act.[22]

Critics of mediation have argued that it is indefinite, time consuming and does not encourage expediency.[23] This is may be a challenge in disputes that are time bound such as projects where a speedy, efficient and cost effective dispute resolution mechanism would be more admirable. The other risks related to mediation is that it requires the goodwill of the parties; may lead to endless proceedings; can create power imbalances; it

[21] Civil Procedure Rules, former Order XXIV Rule 6 (now order 25 rule 5(1) and section 3A of the Act; See also "The Rules Committee, The Proposed Amendments to Civil Procedure and Court of Appeal Rules", Secretariat of the Rules Committee, (Nairobi, 2008), p. 6.
[22] Cap 14, Laws of Kenya (Revised Edition, 2007), Government Printer, Nairobi.
[23] Tim Murithi & Paula Murphy Ives, Under the Acacia: Mediation and the dilemma of inclusion, Centre for Humanitarian Dialogue, April 2007, pg. 77.

is non-binding unless parties reduce the agreement into writing; creates no precedents and it is not suitable when one party needs urgent protection like an injunction.

v. Conciliation[24]

This process is similar to mediation save that the third party neutral can propose a solution. Its advantages are similar to those of negotiation. It has all the advantages and disadvantages of negotiation save that the conciliator can propose solutions making parties lose some control over the process. As such it could not have been the best method to resolve a complex dispute as the one presented in this case study.

vi. Med-Arb[25]

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

vii. Arb-Med[26]

This is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. It is best to have different persons mediate and arbitrate. This is because a person arbitrating may have made up his mind who is the successful party and thus be biased during the mediation process if he transforms himself into a mediator.

viii. Dispute Review Boards

Dispute Boards are normally set up at the outset of a contract and remain in place throughout its duration to assist the parties, if they so desire, in resolving disagreements arising in the course of the contract and make recommendations or decisions regarding disputes referred to it by any of the parties.[27]

ix. Early Neutral Evaluation[28]

A private and non-binding technique where a third party neutral (often legally qualified) gives an opinion on the likely outcome at trial as a basis for settlement discussions.[29] Although settlement is not the primary objective, the purpose of early neutral evaluation is to promote settlement discussions at an early stage in the litigation process, or at the very least to assist parties avoid the significant time and expense associated with further

[24] Peter Fenn, "Introduction to Civil and Commercial Mediation", op. cit, p.14
[25] Ibid, p. 15
[26] See Dispute Resolution Guidance op. cit.
[27] Sourced from http://www.buildingdisputestribunal.co.nz/DRBS.html, accessed on 05/01/2011
[28] Peter Fenn, "Introduction to Civil and Commercial Mediation", op. cit, p. 15
[29] Ibid

steps in litigation of the dispute[30]. The opinion can then be used as a basis for settlement or for further negotiation. The aim of a neutral evaluation is to test the strength of the legal points in the case. It can be particularly useful where the dispute turns on a point of law. It is therefore not useful where on the facts of a case the dispute does not turn to a technical point of law.

x. Expert Determination[31]

This is where the parties submit their dispute to an expert in the field of dispute for determination. The expert determinant gives his decision based on his expertise e.g., accountants valuing shares in a company, a jeweler assessing the carat content of a gold bracelet etc[32] It is a fast, informal and cost efficient technique which is applicable where there are disputes of a technical nature for example between the contractor and the architect or employer. It has become a popular method of resolving disputes in the building and construction industry involving qualitative or quantitative issues, or issues that are of a specific technical nature or specialized kind, because it is generally quick, inexpensive, informal and confidential. Expert determination is an attractive method of resolving disputes in building and construction contracts as it offers a binding determination without involving the formalities and technicalities associated with litigation and arbitration; and at the same time it assists in preserving relationships where litigation would not. Expert determination was thus available to the parties in the above case study but was not the most appropriate mechanism considering the nature of the conflict.

xi. Mini Trial (Executive Tribunal)

This is a voluntary non-binding process where the parties involved present their respective cases to a panel comprised of senior members of their organisation assisted by a neutral third party and has decision making powers.[33] After hearing presentations from both sides, the panel asks clarifying questions and then the facilitator assists the senior party representatives in their attempt to negotiate a settlement.

xii. Adjudication

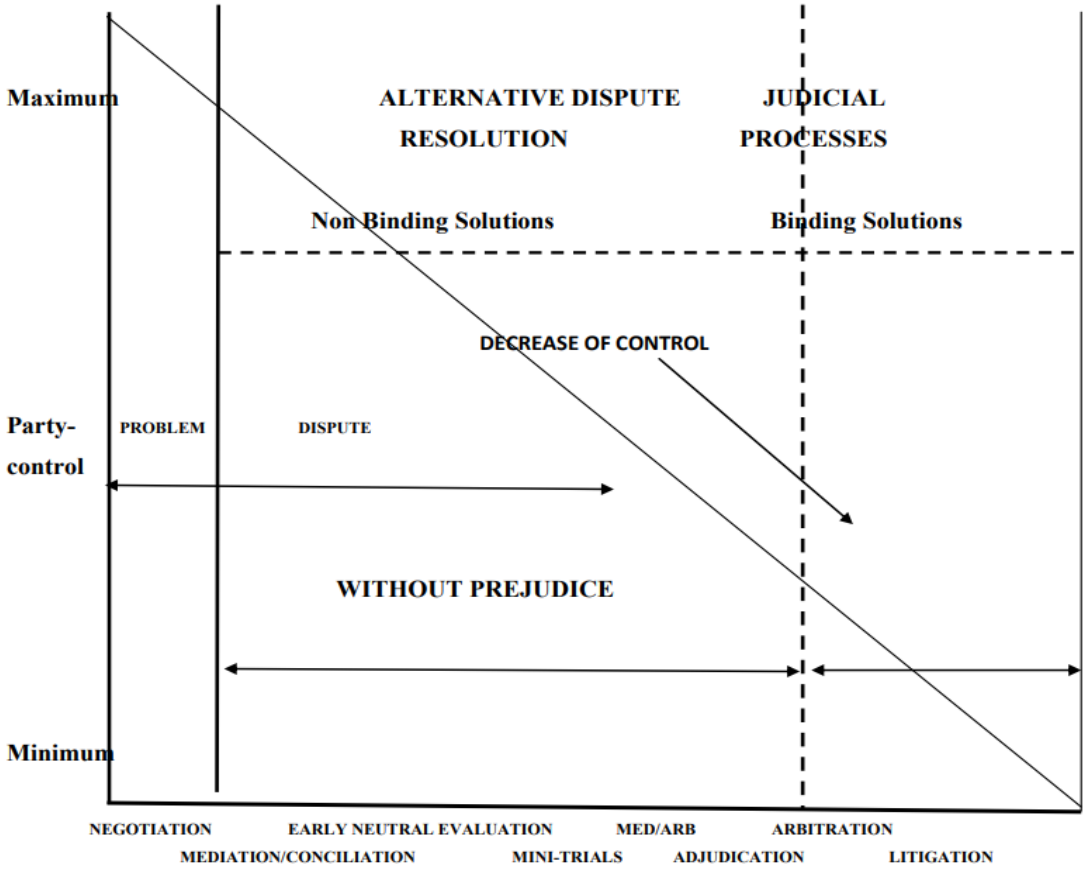
Adjudication is defined under the CIArb (K) Adjudication Rules as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract.[34]Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision within 28 days or the period stated in the

[30] Building Disputes Tribunal, New *Zealand<http://www.buildingdisputestribunal.co.nz/.html>accessed on 24/08/2011.*
[31] Ibid, p. 16
[32] Ibid
[33] Ibid, p.16.
[34] The CIArb (K) Adjudication Rules, Rule 2.1

contract)[35], flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation.[36]Adjudication is thus effective in simple construction dispute that need to be settled within some very strict time schedules.

The demerits of adjudication are that it is not suitable to non-construction disputes; the choice of the arbitrator is also crucial as his decision is binding and that it does not enhance relationships between the parties. These are the main reasons it could not have been fruitful in the above-stated case study.

Fig. 1.3 Degree of Party Control



*Source: Chartered Institute of Arbitrators (K) Branch.

Fig. 1.3 illustrates the degree of party control or autonomy over the dispute resolution process under the various ADR mechanisms. From the figure it is manifest that it is in a

[35] Ibid, Rule 23.1.
[36] Ibid., Rule 29

negotiation that the parties enjoy maximum party control. There is minimum or no control as one moves from negotiation to litigation.

3. Conclusion

The paper has addressed the issue of avoiding litigation through the employment of ADR mechanisms. In the case study illustrated above, the parties decided to negotiate. When negotiations hit a deadlock they got a third party to help them continue with the negotiations. Thereafter, they opted to continue negotiating with the assistance of the mediators. The mediators' role in this process was to assist the parties in the negotiations. They did not dictate the outcomes of the negotiations since the parties had autonomy of the process and of the outcome. The mediators successfully brought the warring factions in the management team to the negotiating table once again, calmed down tension and gave the parties an opportunity to communicate their grievances freely. This allowed the parties to accommodate one another and continue with the stalled process of negotiation. Through mediation the parties were able to achieve a durable, mutually satisfying outcome through a process that was flexible, cost-effective and one that fostered the broken relationships.

As the above discussion has shown ADR avails to a legal counsel in the corporate sector an array of mechanisms that can be used successfully in resolving disputes and hence avoid the numerous hurdles associated with the court process. There is a need to put in place mechanisms for effective management of conflicts out of the courts. The time to search for and adopt an effective conflict resolution mechanism if litigation and its attendant hitches are to be avoided is now. This is because ADR mechanisms such as mediation and negotiation offer the disputants autonomy over the forum, process, the outcome, they are flexible, cost-effective, fosters relationships and result to mutually satisfying outcomes. These are good opportunities that ADR mechanisms offer parties to a dispute. Such opportunities cannot be realized through litigation. Avoiding litigation through the employment of ADR mechanisms as has been demonstrated in this paper is possible. It is indeed an imperative and the way of the future.

Dealing with Conflicts in Project Management

Abstract

This paper addresses the issue of dealing with conflicts in project management. It looks at the range of conflict management mechanisms available to parties in the course of project management in Kenya. Their various merits and demerits are examined. The challenges facing the legal and institutional infrastructure for management of conflicts in Kenya are discussed. These challenges are likely to impact on project implementation and delivery. The paper examines the opportunities afforded by various mechanisms in dealing with conflicts expeditiously and hence ensuring smooth and timely implementation and delivery of projects.

1. Introduction

1.1 Definition and Nature of Project Management

Project management is a methodological approach to achieving agreed upon results within a specified time frame with defined resources and involves the application of knowledge, skills, tools, and techniques to a wide range of activities in order to meet the requirements of a project.[1] Scholars have argued that project management is premised on performance, cost and time as its main goals wherein the focus is to meet customer expectations, deliver projects within budget, and complete projects on time.[2] Notably, recent literature on the subject takes the view that while earlier debates on definitions of project management focused on the variables of time, cost, and scope—otherwise known as the "iron triangle", recent definitions of project management are more inclusive and emphasize the importance of working with stakeholders to define needs, expectations, and project tasks.[3] Thus, these definitions describe project management as involving

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[1] Amy Ohlendorf, Conflict Resolution in Project Management, Information Systems Analysis MSIS 488, Fall 2001, available at <http://www.umsl.edu/~sauterv/analysis/488_f01_papers/Ohlendorf.htm> accessed on 24/08/2011; See also Atkinson, R., "Project Management: Cost, Time And Quality, Two Best Guesses And A Phenomenon, It's Time To Accept Other Success Criteria," International Journal of Project Management, Vol.17, no. 6 (1999), pp. 337-342 at p.337:

1. …. Project Management is the application of a collection of tools and techniques (such as the CPM and matrix organisation) to direct the use of diverse resources toward the accomplishment of a unique, complex, one-time task within time, cost and quality constraints. Each task requires a particular mix of theses tools and techniques structured to ®t the task environment and life cycle (from conception to completion) of the task (p.337).

2. …...The planning, organisation, monitoring and control of all aspects of a project and the motivation of all involved to achieve the project objectives safely and within agreed time, cost and performance criteria. The project manager is the single point of responsibility for achieving this (p.338).

[2] Atkinson, R., "Project Management: Cost, Time and Quality, Two Best Guesses and A Phenomenon, It's Time to Accept Other Success Criteria," op cit., p. 338.

[3] Jugdev, Kam, and Müller, R., "A retrospective look at our evolving understanding of project success," Project management journal, Vol.36, no. 4 (2005), pp.19-31 at p.20.

cultural, structural, practical, and interpersonal aspects, making "project management about managing people to deliver results, not managing work".[4]

Based on the broadened scopes in definition, it follows that the success of a project will rely on a number of factors, including managing conflicts and problems in projects as an important determinant of project success.[5] This, according to scholars, involves people skills which focus on fostering a climate of active participation and minimal dysfunctional conflict and implies an environment of trust, consistent processes without ambiguity, communicating expectations, and clarity in communications.[6] It also considered as involving defining roles and responsibilities of project team members without ambiguity to avoid conflict and encourage teamwork.[7] Empirical studies on the criteria for effective project team management have shown these as including understanding the tasks and roles of the project team members; defining each team member's individual responsibilities, role and level of accountability; creating an environment of trust and support in problem solving; motivating team members; encouraging open, effective communication; and providing appropriate communication tools, techniques, and systems.[8] The studies also supported the hypothesis that satisfying personal and professional needs of team members will have the strongest effect on team performance, and identified some other factors, which include ability to resolve conflict, mutual trust and respect, and communications across organizational lines.[9] It therefore follows that conflict management is an important aspect of project management, and while it may not always be possible to avoid conflicts, the arising conflicts can be managed effectively in an atmosphere of mutual respect, trust, understanding and open communication for the success of the project.

It is on the basis of the above findings on what drives success in project management that this paper explores some of the most viable mechanisms, based on their characteristics, that project managers can use to deal with potential conflicts and enhance the chances of the project success.

1.2 Need for Conflict Management in Project Management

A conflict is a situation that exists when persons pursue goals that are incompatible and end up compromising or contradicting the interests of another.[10] In a conflict situation,

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[4] Ibid, at p.20.

[5] Anantatmula, V.S, "Project Manager Leadership Role in Improving Project Performance," Engineering Management Journal, Vol.22, No. 1 (2010), pp.13-22 at p.15.

[6] Ibid, at p.15.

[7] Ibid, at p.15.

[8] Ibid, at p.15.

[9] Ibid, at p.15.

[10] Odhiambo, M.O., The Karamoja Conflict: Origins, impacts and solutions, (Oxfam GB, 2003), p.15. Available at *https://oxfamilibrary.openrepository.com/oxfam/handle/10546/121081* [Accessed on 7/06/2018].

each party wants to pursue its own interests to the full, and in so doing ends up contradicting, compromising, or even defeating the interests of the other.[11] Conflict is also viewed as a process of adjustment, which itself can be subject to procedures to contain and regularize conflict behaviour and assure a fair outcome.[12]

Conflicts are inevitable in project management and can be time consuming, expensive and unpleasant in that they can destroy the relationship between the contractual parties and also add to the cost of the contract.[13] They can bog down and impede the smooth implementation of projects. Some scholars have argued that disputes and conflicts in projects divert valuable resources from the overall aim, which is completion of the project on time, on budget and to the quality specified.[14] Furthermore, they generally cost money, take time and destroy relationships, which may have taken years to develop.[15]

Protracted disputes that remain unsettled can negatively impact on the progress of a project and ultimately delay its delivery. They have attendant negative impact on projects. A delayed project continues to attract costs, fees, penalties and numerous other charges that would otherwise be avoided. For instance a project that is finalized through a loan needs to be implemented and delivered expeditiously so as to minimize financial losses occurring due to interest and other charges.

Disputes and conflicts impact negatively on relationships. Projects need teamwork in order to be implemented and delivered as planned. They occur in any social setting and when they do the need of a speedy, efficient and cost effective dispute resolution mechanism cannot be gainsaid. Even in project management, disputes do occur, and indeed, they are envisaged in contracts hence the Dispute Resolution Clause found in various standard form contracts[16]. For example, in construction disputes, the most common disagreement will be between the contractor and employer or sub-contractor and the main contractor. It is important for the parties to choose a dispute settlement mechanism that is practicable and effective. It is therefore crucial to work towards avoiding disputes at the first instance.

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[11] Ibid., p.15.

[12] Rummel, R.J., 'Principles of Conflict Resolution,' Chapter 10, Understanding Conflict and war: Vol. 5: The Just Peace. Available at http://www.mega.nu/ampp/rummel/tjp.chap10.htm [Accessed on 7/06/2018].

3. [13] Amy Ohlendorf, Conflict Resolution in Project Management, Information Systems Analysis, op. cit.

[14] Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, (CIArb, London, 2002), at p. 12.

[15] Ibid., at p. 12.

[16] See, Clause 20 of the FIDIC Conditions of Contract for Construction, First Edition 1999; Clause 45.0 of The Joint Building Council, Agreement and Conditions of Contract for Building Works, 1999 Edition and Clause 31.0 of The Kenya Association of Building and Civil Engineering Contractors, Agreement and Conditions of Sub- Contract for Building Works, 2002 Edition.

Consequently, it is to be noted that the contract negotiation stage is of the greatest importance since it is during this stage that parties agree on the dispute settlement method to be applied in the event of a dispute. If the parties agree in the contract to adopt certain procedures in the event of a dispute arising, one party cannot insist on the use of other procedures, or even any other methods of implementing agreed procedures, without the consent of the second party.[17]

2. Overview of the Conflict Management Mechanisms

Conflict management has been defined as the practice of identifying and handling conflicts in a sensible, fair and efficient manner that prevents them from escalating out of control and becoming violent.[18] It is considered as a multidisciplinary field of research and action that addresses how people can make better decisions collaboratively, through ensuring that the roots of conflict are addressed by building upon shared interests and finding points of agreement.[19]

In the widest sense conflict management mechanisms include any process which can bring about the conclusion of a dispute ranging from the most informal negotiations between the parties themselves, through increasing formality and more directive intervention from external sources, to a full court hearing with strict rules of procedure.[20] It has rightly been pointed out that there are many factors that determine the emergence, persistence, and even management of conflicts, and, the understanding of these factors which range from internal to relational and contextual ones, is thus important in developing policies that effectively limit and manage conflict.[21] It is arguable that the unique circumstances and needs of a conflict dictate the mechanism to be employed it its management. The discourse in this paper contemplates the following conflict management mechanisms in the context of project management;

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[17]See generally, Dispute Resolution Guidance *at http://www.ogc.gov.uk/documents/dispute resolution.pdf*, accessed on 19/08/2011.

[18] Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' Prepared in the framework of the Livelihood Support Programme (LSP), An interdepartmental programme for improving support for enhancing livelihoods of the rural poor, (Food and Agriculture Organization of The United Nations, Rome, 2005), available at *http://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement_FAO2005.pdf* [Accessed on 7/06/2018].

[19] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' available at http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage [Accessed on 7/06/2018].

[20] Sourced from, <*http://www.buildingdisputestribunal.co.nz/.html*> accessed on 24/08/2011.

[21] Louis, K., "Factors Shaping the Course of Intractable Conflict." Beyond Intractability. Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: October 2003. <*http://www.beyondintractability.org/essay/factors_shaping_intractable_conflict/*>.

2.1 Negotiation

Negotiation is defined as a process that involves parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It is also described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.[22] Negotiation is also defined as a process by which involved actors communicate and exchange proposals in an attempt to agree about the dimensions of conflict termination and their future relationship.[23]

Negotiation is considered by far the most efficient conflict management mechanism in terms of management of time, costs and preservation of relationships and has been seen as the preferred route in most disputes.[24] In negotiation the parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation.[25] Its advantages include, *inter alia,* that it is fast; cost saving; confidential; preserves relationships; provides a range of possible solutions and there is autonomy over the process and the outcome. The outcome of a collaborative approach to negotiations is considered to be: improved relationships; a better chance of building trust and respect; self-confidence; more enjoyment; less stress; and more satisfactory results.[26] Its disadvantages are, *inter alia*, it requires the goodwill of the parties; endless proceedings; can create power imbalances; it is non-binding unless parties reduce the agreement into writing; creates no precedents and it is not suitable when one party needs urgent protection like an injunction.

If the parties do not reach an agreement through negotiation, they will need to consider what other method or methods of dispute resolution would be suitable. However, it will still be possible or may be necessary to continue with negotiations as part of or alongside other forms of dispute resolution.[27] Negotiation with the help of a third party is called mediation, where negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.[28]

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[22] Negotiations in Debt and Financial Management 'Theoretical Introduction to Negotiation: What Is Negotiation?', Document No.4, December 1994,
Available *athttp://www2.unitar.org/dfm/Resource_Center/Document_Series/Document4/3Theoretical.htm* [Accessed on 7/06/2018].

[23] Bercovitch, J. & Jackson, R., 'Negotiation or Mediation?: An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict,' Negotiation Journal, January 2001, Vol. 17, Issue 1, pp 59-77, p. 60.

[24] See Dispute Resolution Guidance op. cit.

[25] Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p. 14.

[26] French, A., Negotiating Skills, (Alchemy, 2003), p. viii.

[27] Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p. 14.

[28] Mwagiru, M., Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

2.2 Mediation

Mediation is a voluntary, non-binding dispute resolution process in which a third party helps the parties to reach a negotiated solution.[29] Mediation is also defined as the intervention (often at different levels of development or intensity) in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.[30]

It has all the advantages of conventional negotiation as set out above but the involvement of the third party can make the negotiation more effective. It is also seen as the preferred dispute resolution route in most disputes when conventional negotiation has failed or is making slow progress.[31]

2.3 Conciliation

Conciliation[32] is a process in which a third party, called a conciliator, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions.[33] The difference between mediation and conciliation is that the conciliator, unlike the mediator who may or may not be totally neutral to the interests of the parties. Successful conciliation reduces tension, opens channels of communication and facilitates continued negotiations.[34] Frequently, conciliation is used to restore the parties to a pre-dispute *status quo*, after which other ADR techniques may be applied. Conciliation is also used when parties are unwilling, unable, or unprepared to come to the bargaining table.[35]

This process is similar to mediation save that the third party can propose a solution. Its advantages are similar to those of negotiation. It has all the advantages and disadvantages of negotiation save that the conciliator can propose solutions making parties lose some control over the process.

2.4 Med-Arb

Med-Arb is a combination of mediation and arbitration, where the parties agree to mediate, and if that fails to achieve a settlement, the dispute is referred to arbitration.[36]Med-Arb process is intended to allow the parties to profit from the

[29] Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.10.
[30] Moore, C., The Mediation Process: Practical Strategies for Resolving Conflict, 3rd, (San Francisco: Jossey-Bass Publishers, 2004).
[31] See Dispute Resolution Guidance op. cit.
[32] Peter Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.14.
[33] Hajdú, J., The methods of alternative dispute resolution (ADR) in the sphere of labour law. na, 1998.
[34] Oluwabiyi, A.A., "A Comparative Legal Analysis of the Application of Alternative Dispute Resolution (ADR) to Banking Disputes." JL Pol'y & Globalization, Vol.38 (2015): 1, at p.2.
[35] Ibid., p.2.
[36] Osborne, C., Civil Litigation 2007-2008: Legal practice course guides; 2007-2008, (Oxford

advantages of both procedures of dispute settlement.[37] It has been asserted that through incorporating mediation and arbitration, Med-Arb, therefore, strikes a balance between party autonomy and finality in dispute settlement.[38]

It is considered best to have different persons mediate and arbitrate. This is because the person mediating becomes privy to confidential information during the mediation process and may be biased if he or she transforms himself or herself into an arbitrator. The other risks have been identified as obtaining less-than-optimal assistance from the third party due to different competencies' requirement for mediation and arbitration.[39] This is because the arbitrator's strength is believed to be in intellectual analysis and evaluation, while the mediator's strength is in balancing the legal evaluation with the creative work necessary to meet the parties' underlying business, personal and emotional interests.[40] There is also the risk of delay should the mediation fail; it will take some time to get the arbitration back on track, especially if a party decides a different third party is needed to serve as the arbitrator.[41]

However, at times the same person acting as mediator "switches hat" to act as the arbitrator.[42] The disputing parties however agree in advance whether the same or a different third party conducts both the mediation and arbitration processes. It is argued that it is also important to let the parties know at the outset that particularly sensitive information, which they might identify in their deliberations with the Med-Arbiter as to matters not to be shared with the opposition, would be used only in mediation and would

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University Press, 2007), p. 461; Lowe, D., & Leiringer, R., (eds), Commercial Management of Projects: Defining the Discipline, (John Wiley & Sons, 2008), p. 238; Chartered Institute of Arbitrator, ADR, Arbitration, and Mediation, (Author House, 2014), p. 247.

[37] De Vera C,'Arbitrating Harmony: Of Culture and Rule of Law in the Resolution of International Commercial Disputes in China' Columbia Journal of Asian Law, Vol. 18, No.1, 2004, 149, p. 156.

[38] Bridge, C., 'Mediation and Arbitration - Are They Friends or Foes?' Paper Prepared For Bani / Rodyk & Davidson Conference Shangri-La Hotel Jakarta, 1 November 2012, p. 13. Available at *http://campbellbridge.com/wp-content/uploads/2012/12/MEDIATION-AND-ARBITRATION.pdf* [Accessed on 3/12/2015]; Chornenki BGA & Linton, H, 'Should Lawyers Be Recommending More Mediation-Arbitration ? Is It Really Mandatory Mediation ?' The Lawyer's Weekly, December, 2005.

[39] Bridge, C., 'Mediation and Arbitration - Are They Friends or Foes?' Paper Prepared For Bani / Rodyk & Davidson Conference Shangri-La Hotel Jakarta, 1 November 2012, p. 13. Available at *http://campbellbridge.com/wp-content/uploads/2012/12/MEDIATION-AND-ARBITRATION.pdf* [Accessed on 3/12/2015]; Chornenki BGA & Linton, H, 'Should Lawyers Be Recommending More Mediation-Arbitration ? Is It Really Mandatory Mediation?' The Lawyer's Weekly, December, 2005.

[40] Ibid.

[41] Ibid.

[42] Lieberman, A., 'MED-ARB: Is There Such a Thing?' Attorney At Law Magazine, (Greater Phoenix Edition), available at *http://www.attorneyatlawmagazine.com/phoenix/med-arb-is-there-such-a-thing/* [Accessed on 7/06/2018].

be ignored in arbitration.[43] That way, parties may gain confidence in the process and chances of the parties readily accepting the outcome are enhanced.

There are those who still hold that the Mediation/Arbitration process can be an effective alternative dispute resolution method if parties, counsel, and neutrals alike understand the pros and cons of merging the two processes and the nuances inherently involved in the resultant combination.[44]

Parties should appreciate the challenges that are likely to arise in Med-Arb before settling for it. To facilitate this, the proposed Mediator-Arbitrator should be well trained in both mediation and arbitration. They should also be able to advise the parties accordingly on the consequences of taking up Med-Arb as the conflict management mechanism of choice.

2.5 Arb-Med

Arb-Med[45] is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. Arb-Med begins with the parties presenting their case to the neutral third-party arbitrator who renders a decision, which is not revealed, and then the parties commence a standard mediation facilitated by the same person.[46] If they are able to resolve their issues, the arbitration award is discarded. If the parties are unable to resolve the issue in mediation, the arbitration award is revealed and generally becomes binding.[47]

The same ethical issues of caucus communications and confidentiality, the parties' perception of impartiality of both the mediator and the arbitrator, and the tendency to have a more restrained mediation process because of inhibitions of the parties to be openly candid are also likely to arise in this process.[48] The arbitrator-mediator should, thus, be knowledgeable in both processes so as to effectively handle all arising ethical issues as well as delivering satisfactory outcomes.

2.6 Dispute Review Boards

In other jurisdictions, and indeed across the world, scholars argue that the ubiquity of disputes on construction projects and the accompanying expense and disruption of litigation, led to the development of dispute review boards (DRBs) specifically for the

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[43] Ibid.

[44] Flake, RP, 'The Med / Arb Process : A View from the Neutral's Perspective,' ADR Currents: The Newsletter of Dispute Resolution Law and Practice, June, 1998, p. 1; See also Weisman, MC, 'Med/Arb-A Time And Cost Effective Hybrid For Dispute Resolution,' Michigan Lawyer's Weekly, October 10, 2011. Available at *http://www.wysr-law.com/files/med-arb_-_a_cost_effective_hybrid_for_dispute_resolution.pdf* [Accessed on 1/12/2015].

[45] See Dispute Resolution Guidance op. cit.

[46] Weisman, MC, 'Med/Arb-A Time and Cost-Effective Hybrid for Dispute Resolution,' Michigan Lawyer's Weekly, October 10, 2011, op cit, p. 2.

[47] Ibid.

[48] Ibid.

challenges of large construction projects and have become the ADR of choice on substantial, high-profile work in the construction industry.[49] However, it must be pointed out that although the origins of DRB's are found in the construction industry, their ambit is far wider than construction and DRB's are now found in financial services industry, long-term concession projects, operational and maintenance contracts.[50] Dispute Boards are normally set up at the outset of a contract and remain in place throughout its duration to assist the parties, if they so desire, in resolving disagreements arising in the course of the contract and make recommendations or decisions regarding disputes referred to it by any of the parties.[51]

The key features of a Dispute Review Board (DRB) have been identified as follows:[52] the three members of the DRB are appointed for their extensive expertise in the type of project on which the DRB is established; the DRB members must not have conflicts of interest and must act as objective, neutral third parties under a Three Party Agreement with the Employer and Contractor; the DRB is appointed at the beginning of the project, visits the project on a periodic basis depending on the pace of construction, and is kept appraised of the project's progress between site visits; at the periodic site visits the DRB explores with the parties all open issues and urges the parties to resolve disputes that may otherwise eventually become formal claims. The DRB can also be asked to give non-binding, very informal "advisory opinions" on issues that have not become formal claims under the contract; the DRB hears claims as part of an informal hearing process where the parties themselves (as opposed to legal representatives) present their positions. The informal hearing process has none of the trappings of a legal process, such as a formal record, swearing of witnesses, or cross-examination; the DRB issues detailed non-binding findings and recommendations that analyze the parties' arguments, the contract documents, the project records, and the supporting information presented at the hearing.[53]

In addition to the foregoing, since the DRB's findings and recommendations are non-binding, the parties are free to accept them, reject them, or keep negotiating based on the parties' respective risk exposure, taking into account the DRB's analysis.[54] The DRB's

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[49] McMillan, D.D., and Rubin, R.A., "Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements," Construction Lawyer, Vol.25, no. 2 (2005), p.1.
[50] Chapman, P.H.J, "Dispute Boards," p.2, available at *http://fidic.org/sites/default/files/25%20Dispute%20Boards.pdf [Accessed on 11/06/2018].*
[51] *Sourced from http://www.buildingdisputestribunal.co.nz/DRBS.html,* accessed on 24/08/2011
[52] Dettman, K. and Christopher Miers, C., "Dispute Review Boards and Dispute Adjudication Boards: Comparison and Commentary," Forum, February 2012 (Special Edition Reprint), p. 1. Available at *https://www.scmediation.org/wp-content/uploads/2013/09/DRBF-Forum-Kings-College-02-12-DRB-DAB-Reprint.pdf.*
[53] Ibid, p.1.
[54] Ibid, p.1.

findings and recommendations (but not other records) usually are also admissible in subsequent proceedings.[55] The technical competence of DRB members is considered as the one that enhances the credibility of their recommendations.[56]

The DRB is considered a hybrid form of ADR, which shares some attributes of adjudication as well as some traits of mediation.[57] Some authors have however opined that the significant difference between DRB's and most other ADR techniques (and possibly the reason why DRB's have had such success) is that the DRB is appointed at the commencement of a project and, by undertaking regular visits to site, is actively involved throughout construction. It becomes part of the project and thereby can influence, during the contract period, the performance of the contracting parties. It has `real-time' value.[58]
It has been suggested that the expanding use of DRBs on major construction projects requires that construction lawyers become more familiar with the DRB process, standard DRB agreements, and the varied roles lawyers may play in the DRB process.[59]

2.7 Early Neutral Evaluation

Early Neutral Evaluation[60] is a private and non-binding technique where a third party neutral (often legally qualified) gives an opinion on the likely outcome at trial as a basis for settlement discussions.[61] The aim of a neutral evaluation is to test the strength of the legal points in the case. It can be particularly useful where the dispute turns on a point of law.

2.8 Expert Determination

Expert Determination[62] is where the parties submit their dispute to an expert in the field of dispute for determination. The expert determinant gives his decision based on his expertise e.g., accountants valuing shares in a company, a jeweler assessing the carat content of a gold bracelet, etc.[63]
Expert Determination is defined as a process for settling disputes about facts (value of works done - satisfactory works and issue of certificates - including extensions of time – variations, amongst other technical issues.[64] Furthermore, Expert Determination may be

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[55] Ibid, p.1.
[56] McMillan, D.D., and Rubin, R.A., "Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements," op cit,, p.1.
[57] McMillan, D.D., and Rubin, R.A., "Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements," op cit,, p.1.
[58] Chapman, P.H.J, "Dispute Boards," p.1, available at *http://fidic.org/sites/default/files/25%20Dispute%20Boards.pdf* [Accessed on 11/06/2018].
[59] Ibid, p.1.
[60] Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p. 15.
[61] Ibid.
[62] Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p. 16.
[63] Ibid.
[64] CHSpurin, "Expert Determination Q&A," ADR News: The NADR Quarterly News Letter, Vol. 5 Issue No2, July 2005, p.1. Available at

contracted into before the event by the parties as a contractual mechanism for settling disputes about facts between the parties to a contract. Alternatively, the parties to a dispute about facts may refer that dispute to an expert for determination.[65] The crucial distinction between expert and judicial / quasi-judicial determination is believed to lie in the fact that the scope of the dispute is limited to questions of fact and does not extend to questions of law or involve mixed questions of law and fact.[66] Notably, after an expert has made a determination, the next step depends upon the procedure set out in the contract.[67] It has been suggested that Expert Determination is potentially the cheapest and quickest form of Dispute Resolution particularly in technically complex areas. Consequently, there is increasing interest in this Dispute Resolution method in high-tech areas or industries such as IT, pharmaceuticals, chemicals etc.[68] The coffee and tea industries also often rely on Expert Determination to address some disputes.

2.9 Mini Trial (Executive Tribunal)

This is a voluntary non-binding process where the parties involved present their respective cases to a panel comprised of senior members of their organisation assisted by a neutral third party and has decision making powers.[69] After hearing presentations from both sides, the panel asks clarifying questions and then the facilitator assists the senior party representatives in their attempt to negotiate a settlement.[70]

2.10 Adjudication

Adjudication is defined under the *CIArb (K) Adjudication Rules* as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract.[71] Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision usually within 28 days or the period stated in the contract)[72], flexible and inexpensive process; which allows the power imbalance in

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http://www.nadr.co.uk/articles/published/construction/Expert%20determination%20CHS%202005.pdf [Accssed on 11/06/2018].

[65] Ibid. p1.

[66] Ibid, p.1.

[67] Ibid, p.1.

[68] Engineers Ireland, "Expert Determination," available at *https://www.engineersireland.ie/EngineersIreland/media/SiteMedia/services/employment-services/Expert-Determination-Explained.pdf* [Accessed on 11/06/2018].

[69] Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit,p.16.

[70] Lowe, D., & Leiringer, R., (eds), Commercial Management of Projects: Defining the Discipline, (John Wiley & Sons, 2008), p. 239.

[71] The CIArb (K) Adjudication Rules, Rule 2.1

[72] Ibid, Rule 23.1. Notably, FIDIC Rules provide for up to 84 working days within which the decision can be rendered. (See the International Federation of Consulting Engineers (FIDIC), Conditions of Contract for Construction: for Building and Engineering Works Designed by the Employer 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, Appendices).

relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation.[73]

It has been argued that adjudication must be distinguished from litigation, arbitration and mediation in that, unlike litigation, adjudication is not generally controlled by legislation or a common law regime, nor is it administered by the state. Decisions are not immediately binding.[74] Furthermore, unlike arbitration, adjudication is not generally undertaken under the protection and within the confines of an Arbitration Act or subject to international conventions. Also, unlike mediation, adjudicators are required to decide matters in accordance with contractual and legal frameworks.[75]

Adjudication is thus effective in construction disputes that need to be settled within some very strict time schedules. However, it may not suitable to non-construction disputes; the choice of the adjudicator is also crucial as his decision is binding and it does not enhance relationships between the parties.

Notably, the International Federation of Consulting Engineers (FIDIC), *Conditions of Contract for Construction*: *for Building and Engineering Works Designed by the Employer* 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*, also contemplate the use of adjudication in construction disputes and the procedure therein is widely used internationally, where parties incorporate a dispute adjudication agreement into their contract. Adjudication usually leads to arbitration, if parties are not satisfied with the decision.

2.11 Arbitration

Arbitration in Kenya is governed by the Arbitration Act, 1995, the Arbitration Rules 1997, the Civil Procedure Act[76] and the Civil Procedure Rules 2010. It is also one of the ADR mechanisms contemplated under the Constitution of Kenya 2010[77], which provides that in exercising judicial authority, the courts and tribunals should be guided by certain principles. One of these principles is that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional conflict resolution mechanisms should be promoted, provided that they do not contravene the Bill of Rights, they are not

[73] CIArb (K) Adjudication Rules, Rule 29.
[74] Chapman, P.H.J, "Dispute Boards," op cit. p.1.
[75] Chapman, P.H.J, "Dispute Boards," op cit., p.1.
[76] Cap 21, Laws of Kenya; Section 59 of the Civil Procedure Act provides that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules.
[77] Order 46 of the Civil Procedure Rules, inter alia, provides that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court for an order of reference wherever there is a difference.

repugnant to justice and morality or results to outcomes that are repugnant to justice or morality and if they are not inconsistent with the constitution or any written law.[78] Arbitration arises where a third party neutral is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award. The Arbitration Act, 1995 defines arbitration to mean "any arbitration whether or not administered by a permanent arbitral institution." This is not very elaborate and regard has to be had to other sources. According to Khan[79], arbitration is a private consensual process where parties in dispute agree to present their grievances to a third party for resolution. It is an adversarial process and in many ways resembles litigation.

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

2.12 Litigation

This is an adversarial process where parties take their claims to a court of law adjudicated upon by a judge or a magistrate. The judge/ magistrate gives a judgment which is binding on the parties subject to rights of appeal. The judicial authority in Kenya is exercised by the courts and tribunals.[80]

In litigation, the parties to the dispute have minimum or no control at all over the forum, the process and outcome of the process and as such the outcome may not satisfy both parties. Litigation has its advantages in that precedent is created and issues of law are interpreted.[81] It is also useful where the contract between the parties does not stipulate a consensual process and the parties cannot agree on one, the only alternative is litigation. Through litigation, it is possible to bring an unwilling party into the process and the result of the process be enforceable without further agreement.[82]

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[78] Article 159 (2) (c) of the Constitution of Kenya, (Government Printer, Nairobi, 2010).

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

[80] See Article 159 of the Constitution of Kenya, Government Printer, Nairobi.

[81] See the argument by Calkins, R.M., 'Mediation: A Revolutionary Process That is Replacing the American Judicial System,' Cardoza Journal of Conflict Resolution, Vol. 13, No. 1, 2011; cf. Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases,' Utah Law Review, No. 3, 2009, pp. 797-843, p. 799.

[82] See generally, Dispute Resolution Guidance, available at http://www.ogc.gov.uk/documents/dispute resolution.pdf, [Accessed on 05/01/2012].

2.13 Ombudsman (Ombudsperson)

An Ombudsman (Ombudsperson) is an organizationally designated person who confidentially receives, investigates, and facilitates resolution of complaints.[83] The ombudsman may interview parties, review files, and make recommendations to the disputants, but normally is not empowered to impose solutions. Ombudsmen often work as management advisors to identify and recommend solutions for systemic problems in addition to their focus on disputes from individual complainants.

2.14 Conflict Avoidance

It has been suggested[84] that due to the expense and disruption caused to any contract when a dispute arises and the damage to the relationship of the parties the importance of dispute avoidance techniques cannot be over-emphasized. Conflict avoidance in the construction industry can take various dimensions:

1. Firstly, the contractual parties must ensure a clear wording in the contract that reflects the intention of the parties. The wording of the contract should include provision for the appropriate dispute resolution techniques to be applied in the event of a dispute arising, with suitable arrangements for escalation.[85]
2. Secondly, once the contract is in place good contract management is essential. Contract management techniques should include monitoring for the early detection of any problems where parties should give at the earliest possible warnings of any potential dispute and regular discussions between parties including reviews of possible areas of conflict.[86] This may include meetings to resolve issues such as change orders, extension of time to contractors and assessment of liquidated damages payable.
3. Thirdly, when a contract is initially established the parties should bear in mind how the expiry of the contract is to be managed (especially if there is a need for ongoing service delivery, not necessarily by the contractor) should be borne in mind and reflected in the contract.[87]

[83] For instance, see Commission on Administrative Justice (CAJ) also known as the Office of the Ombudsman is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, No. 23 of 2011, Laws of Kenya. The Commission has a mandate, inter-alia, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. (Website: http://www.ombudsman.go.ke/ombudsman/about-us-page/).

[84] See Dispute Resolution Guidance op. cit.

[85] Ibid.

[86] Ibid.

[87] Ibid.

Whenever a dispute arises it is important to manage it actively and positively and at the right level in order to encourage early and effective settlement. There are various techniques that can be used either consciously or end product to avoid disputes. According to Fenn[88] these techniques include: risk management to ensure that risks are identified, analyzed and managed; procurement strategies to ensure that risks are appropriately allocated and contractual arrangements to allow sensible administration.

3. Dispute Settlement Clauses in Standard Form Contracts

Clause 20.4 of the FIDIC Conditions of Contract for Construction[89] 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. This clause envisages a dispute of any kind whatsoever arising in connection with or arising out of the contract or the execution of the works, any dispute as to any certificate, determination, instruction, opinion or valuation of the engineer. Notably, the DAB is required to render its decision within 84 days of receiving such a reference.[90]

A party dissatisfied by the decision of the Dispute Adjudication Board should first resort to amicable settlement before the commencement of arbitration.[91] In other jurisdictions, courts have supported Board decisions through upholding the outcomes when challenged in court. For instance, in PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30, the Singapore Court of Appeal held that parties under a contract containing the Red Book's dispute resolution provision (clause 20.4) must comply with any decision by a dispute adjudication board in a prompt manner, even if the merits of the dispute have not been determined.[92]

The Agreement and Conditions of Contract for Building Works[93] provides that in the event of a dispute between the Employer or the Architect on his behalf and the contractor,

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[88] Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.14.

[89] 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).

[90] The International Federation of Consulting Engineers (FIDIC), Conditions of Contract for Construction: for Building and Engineering Works Designed by the Employer, Clause 20.4; See also 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), Clause 20.4.

[91] The International Federation of Consulting Engineers (FIDIC) Conditions of Contract for Construction, Clause 20.5.

[92] Cia Ai Eng, Henry Winter and Stephanie Khan, "Singapore Court of Appeal upholds obligation to promptly comply with dispute adjudication board decisions," June 10, 2015. Available at *https://www.hlarbitrationlaw.com/2015/06/singapore-court-of-appeal-upholds-obligation-to-promptly-comply-with-dispute-adjudication-board-decisions/* [Accessed on 8/6/2018].

[93] The Joint Building Council, Agreement and Conditions of Contract for Building Works, 1999 Edition.

either during the progress or after the completion or abandonment of the Works, the dispute shall be referred to an arbitrator agreed upon by the parties. Where the parties fail to concur on the appointment of the Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of The Architectural Association of Kenya or by the Chairman or Vice Chairman of The Chartered Institute of Arbitrators, Kenya Branch, on the request of the applying party. The clause further provides that the arbitral proceedings shall not commence unless an attempt has been made to settle the dispute amicably. Moreover, the award of the arbitrator is final and binding upon the parties[94] and thus an aggrieved party has no further recourse.

The dispute settlement clause under the Kenya Association of Building and Civil Engineering Contractors, Agreement and Conditions of Sub-Contract for Building Works, 2002 provides for similar avenues in the event of a dispute between the contractor and the sub-contractor. A model dispute resolution clause should include all avenues i.e. negotiations in good faith, mediation, adjudication, arbitration and litigation, within time frames on when each mechanism is to be tried to facilitate timely project implementation and delivery.

Notably, the main difference between a DRB and DAB is that if the decisions are non-binding and merely advisory, this is generally referred to as a dispute review board (DRB). In contrast, if the decisions are agreed to have binding effect between the parties, this is known as a dispute adjudication board or DAB. In the 1999 "rainbow suite" of FIDIC contracts, FIDIC opted to use the DAB form—accordingly, due to the widespread use of FIDIC forms internationally, this has become the dominant form.[95]

4. Challenges Facing the Conflict Management Framework in Kenya

There are various challenges facing the conflict management framework in Kenya. The mediation process has been criticised as being indefinite, time consuming and does not encourage expediency.[96] This is a big challenge in project implementation and delivery owing to the fact that projects are time bound and thus require a speedy, efficient and cost effective dispute resolution mechanism. Kenya does not as yet have a comprehensive and integrated policy framework to govern the application of ADR mechanisms in the resolution of disputes.

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[94] Ibid, Clause 45.10.

[95] Goodrich, M., "Dispute Adjudication Boards: Are they the future of dispute resolution?" 2 September 2016, available at https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution [Accessed on 11/06/2018].

[96] Murithi, T. & Ives, P.M., Under the Acacia: Mediation and the dilemma of inclusion, Centre for Humanitarian Dialogue, April 2007, p. 77.

Kenya does not also have an Act dealing with Construction Adjudication and parties rely on the Construction Adjudication Rules framed by the Chartered Institute of Arbitrators and other professional bodies. There is need to expand the scope of the Civil Procedure Act and entrench adjudication as a means of dispute resolution. There is also need for a constitutional provision on court ordered adjudication to avoid a situation where attempts to order adjudication by court are thwarted by constitutional references. These Adjudication Rules provide for the basic procedure for adjudication and for adjudication to be applicable, the subject construction contract must have an adjudication clause.[97] This is because at present, adjudication cannot be imposed by the law even where the contract in question is ideal for it. In any case, given that adjudication is not legislated for in Kenya, there is no provision for stay of proceedings for parties to undertake adjudication as provided for in the case of arbitration under the Arbitration Act 1995. Rule 29 of the CIArb Adjudication Rules makes it feasible to refer the matter to arbitration or litigation. The effect is that whether or not a dispute will be referred to adjudication in Kenya presently depends on the parties' willingness to participate in the process. This reality has hindered the application and attainment of full potential of adjudication as a mechanism for dispute resolution in Kenya.[98]

Arbitration, as practiced in Kenya, is increasingly becoming more formal and cumbersome as lawyers enter the practice of arbitration applying delay tactics and importation of complex legal arguments and procedures into the arbitral process.[99] The Civil Procedure Act does not help matters as it leaves much leeway for parties bent on frustrating the arbitral process to make numerous applications in court. It is hardly feasible to describe arbitration in Kenya as an expeditious and cost effective process which can be used in settling disputes arising out of the construction contracts where project implementation and delivery is at the heart of the contract. In essence arbitration is really a court process since once it is over an award has to be filed in court and thus the shortcomings of the court system apply to the arbitration process.

Litigation in Kenya is characterized with many problems related to access to justice for instance high court fees, geographical location, complexity of rules and procedure and the use of legalese. The court's role is also 'dependent on the limitations of civil procedure,

[97] See generally, Muigua, K., Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of the U.K: It's Development and Lessons for Kenya, A Paper presented at Nairobi Club on 23rd September, 2008.
[98] Ibid.
[99] See Muigua, K., "Overview of Arbitration and Mediation in Kenya"; A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations In Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6th May, 2011.

and on the litigious courses taken by the parties themselves.'[100] As a result litigation may take several years before settlement of disputes hence hampering the effective implementation and delivery of projects which are justice in environmental issues to be inaccessible to many people. This is due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice, litigation is so slow and too expensive and it has largely lost commercial and practical credibility necessary in project implementation.

5. Opportunities Offered by Various Dispute Settlement Mechanisms in Project Management

5.1 Negotiation

Negotiation can be, and usually is, the most efficient form of conflict resolution in terms of time management, costs and preservation of relationships. It should be seen as the preferred route in most disputes arising out of construction contracts owing to the fact projects are time bound and thus need timely implementation and delivery. It prides itself on speed, cost saving, confidentiality, preservation of relationships, range of possible solutions and control over the process and outcome which attributes are vital in ensuring the expeditious handling of disputes and the overall management and implementation of the project. Moreover, even if parties are unable to achieve a settlement through negotiation, it will still be possible or may be necessary to continue negotiating as part of or alongside other forms of dispute resolution.[101]

5.2 Mediation

Mediation should be seen as the preferred conflict resolution route when conventional negotiation has failed or is making slow progress.[102] It is a cost effective, flexible, speedy, confidential process that allows for creative solutions, fosters relationships, enhances party control and allows for personal empowerment and hence suitable in settling disputes to ensure effective project management and implementation. Mediation is particularly useful in projects because of the need to preserve the ongoing relationship between the parties and enhance communication.[103]

5.3 Adjudication

Adjudication is an informal process, operating under very tight time scales, flexible, fast and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The adjudicator is supposed to reach a decision within 28 days or the period

[100]Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), p. 29.

[101] See Dispute Resolution Guidance op. cit.

[102] Ibid.

[103] Sourced from< http://www.buildingdisputestribunal.co.nz/.html>accessed on 24/08/2011.

stated in the contract.[104] To guarantee impartiality and neutrality of the adjudicator, the Rules provide that s/he must not be involved in implementation or administration of the contract under which the dispute arises; be knowledgeable and experienced in the matter in dispute, preferably a construction expert and be well versed in dispute resolution procedures.[105] The CIArb Adjudication Rules provide for procedural fairness, natural justice, courts procedures, jurisdiction of the arbitrators, definition of construction adjudication, scope of the adjudicators powers, timeframe and extension of time, enforcement of adjudication awards, stay of court proceedings pending adjudication, appointment of adjudicators, misconduct of adjudicators and other ethical issues, adjudication fees per scale or as agreed by the parties, recognition of adjudication awards, correction of slips or errors, points of law, extent of court intervention, failure to adjudicate and adjudication agreement.[106] Since adjudication is flexible, fast, expeditious, cost effective and informal, it may be the way to go if effective project implementation and delivery is to be realized in the construction and building industry in Kenya.

5.4 Early Neutral Evaluation

Although settlement is not the primary objective, the purpose of early neutral evaluation is to promote settlement discussions at an early stage in the litigation process, or at the very least to assist parties avoid the significant time and expense associated with further steps in litigation of the dispute.[107] The opinion can then be used as a basis for settlement or for further negotiation. It would save time and costs that would be expended in dispute settlement and hence effective project implementation and delivery.

5.5 Expert determination

This is a fast, informal and cost efficient technique which is applicable where there are disputes of a technical nature for example between the contractor and the architect or employer. It has become a popular method of resolving disputes in the building and construction industry involving qualitative or quantitative issues, or issues that are of a specific technical nature or specialized kind, because it is generally quick, inexpensive, informal and confidential. Expert determination is an attractive method of resolving disputes in building and construction contracts as it offers a binding determination without involving the formalities and technicalities associated with litigation and arbitration; and at the same time it assists in preserving relationships where litigation would not[108]. Expert determination can be used in disputes related to; measure and value claims; variation claims; value of additional building and civil works; the standard of

[104] Adjudication Rules, Rule 23.1.
[105] See Muigua, K., "Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of the U.K: its Development and Lessons for Kenya," op. cit.
[106] Muigua, K., "Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of the U.K: Its Development and Lessons for Kenya," op. cit.
[107] Building Disputes Tribunal, New Zealand<*http://www.buildingdisputestribunal.co.nz/.html*>accessed on 24/08/2011.
[108] Ibid.

work completed i.e. concrete finishes, stopping, painting and specialist finishes, flooring, tiling, waterproofing; extension of time claims; delay and disruption claims, amongst others.

5.6 Arbitration

Even though closely related to litigation, there are certain salient features of arbitration which make it an important and attractive alternative to litigation. In arbitration the parties have autonomy over the choice of the arbitrator, place and time of hearing, and as far as they can agree, autonomy over the arbitration process which may be varied to suit the nature and complexity of the dispute.[109]

5.7 Litigation

Where the contract between the parties does not stipulate for a consensual process and the parties cannot agree on one, the only alternative is litigation. Through litigation it is possible to bring an unwilling party into the process and the result of the process is enforceable without further agreement.[110] The constitution postulates that the courts and tribunals should do justice to all irrespective of status; justice should not be delayed; alternative forms of dispute resolution should be promoted and justice should be administered without undue regard to procedural technicalities.[111] With a significantly reforming judiciary, litigation may become an efficacious process once again and parties to a contract may resort to it. Litigation should not be entirely condemned as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary.

6. Recommendations and Way Forward

Projects are time bound thus the conflict resolution procedure selected should be one that can manage conflicts in an expeditious, transparent, impartial, objective and constructive manner within the projected timelines. The mechanism should be easily accessible by the contractual parties from project planning, implementation and completion and where possible the mechanism should not interfere with the progress of the project. This is the need for early dispute settlement and application of dispute avoidance techniques in project implementation. It should be predictable allowing actions taken in response to complaints to be efficiently monitored and timely reported to the disputants. The following recommendations are essential in settling disputes in project management:

6.1 Constructing a Dispute Resolution Clause

It has been said that the inclusion of an alternative dispute resolution clauses in a contract allows the settlement process to begin at an early stage and obviates the frequent problem of persuading the other party to the dispute to engage in an ADR process thus saving on

[109] Ibid

[110] See Dispute Resolution Guidance op. cit.

[111] See Article 159 (2) of the Constitution of Kenya 2010, Government Printer, Nairobi.

time. A model dispute resolution clause should include all avenues i.e. negotiations in good faith, mediation, adjudication, arbitration and litigation. Such a dispute resolution clause should provide timelines within which each mechanism is to be tried so as to avoid a scenario whereby the projected timeframes for completion are jeopardized.

6.2 Improving the Policy, Legal and Institutional Framework for Managing Conflicts in Project Management

There is a need to restore speed, flexibility and public confidence in the existing policy, legal and institutional mechanisms. The legal system has been criticized for being too slow and expensive and has thus lost commercial and practical credibility necessary in project implementation. The flexibility, speed and cost effectiveness of ADR techniques such as negotiation, mediation and adjudication is what can lead to expeditious settlement of disputes in projects and thus these mechanisms need formal incorporation in the legal system. Kenya does not yet have an Act dealing with Construction Adjudication and parties rely on the Construction Adjudication Rules framed by the Chartered Institute of Arbitrators. An Adjudication Bill should be introduced in parliament to provide the legal framework for the application of adjudication in construction contracts in Kenya. There is a need to have a comprehensive and integrated framework providing for mediation in Kenya in the resolution of disputes as mediation has been linked to the court process and hence subject to the shortcomings of litigation.

6.3 Working as a Team to Achieve Project Goals

Need for transparency and open communication through continuous dialogue and focused site meetings between the contractors and the employers; sub-contractors and contractors, amongst others, to facilitate early dispute resolution and avoidance of disputes.

6.4 Need for Conflict Avoidance

It is important to manage disputes actively and positively and at the right level in order to encourage early and effective settlement. Good risk management techniques to ensure that risks are identified analyzed and managed; procurement strategies to ensure that risks are appropriately allocated and contractual arrangements to allow sensible administration should be in the party's contemplation while contracting. Such techniques may include Strategic Impact Assessments and Environmental and Social Impact Assessments before the projects are undertaken and regular audits in the course of the projects.

6.5 Use of Scientific Technology for Certainty

This may involve coming up with a critical path analysis of the project and represent this in gant charts. A critical path is a project-management technique that lays out all the activities needed to complete a task, the time it will take to complete each activity and the relationships between the activities. A critical path analysis can help predict whether a

project can be completed on time and can be used to reorganize the project both before starting it, and as it progresses, to keep the project's completion on track and ensure that deliverables are ready on time.[112] A critical path can thus be useful in handling disputes as it takes into the account the eventualities that may arise in the course of the contractual performance.

7. Conclusion

There is a need to have an efficacious conflict management mechanism in the course of projects in order to ensure effective project implementation and delivery. It is not possible to achieve efficient implementation in the face of unresolved disputes. There is a need to put in place mechanisms for effective management of conflicts. Kenya will benefit from a policy, legal and institutional framework that is flexible, speedy, cost effective, and efficacious to ensure that conflicts arising out of projects are disposed expeditiously. Since conflicts consume a lot of time, are expensive and may destroy the relationship of parties, the need of an effective mechanism is crucial.

Dealing with conflicts in project management cannot be wished away. It is an exercise that should be conceptualised and actuated throughout a project and even afterwards.

[112] Definition of Critical Path Analysis. (2011). Retrieved from Investopedia, *http://www.investopedia.com/terms/c/critical-path-analysis.asp#axzz1iz4S84vW*

Overview of Arbitration and Mediation in Kenya

Abstract

In this short paper, the writer critically examines arbitration, mediation and conciliation in the Kenyan context. These are dispute resolution methods that form part of what is known as Alternative Dispute Resolution (ADR) mechanisms. Dispute resolution mechanisms range from Negotiation, Alternative Dispute Resolution (Assisted Negotiation) beginning with Conciliation, Facilitation, Mediation, Early Neutral Evaluation, Mini-trial, Fact-Finding, Arbitration and Litigation (in Courts and Administrative Tribunals) The legal and institutional frameworks governing the three ADR Mechanisms are discussed. The advantaged of Arbitration and mediation are highlighted.

The writer also discusses the challenges facing arbitration, mediation and conciliation and the opportunities these dispute resolution mechanisms present. While appreciating that Alternative Dispute Resolution, of which the three are a part of, is gaining popularity owing to its many advantages, the paper also discusses the arguments that have been raised against ADR. Finally, the writer looks at the place of these Alternative Dispute Resolution Mechanisms within the various Labour laws.[1]

1. Conceptual Clarifications

1.1.1 Mediation

Mediation is a voluntary, non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated settlement which, when reduced into writing and signed by all the parties, becomes binding.[2] It is one of the dispute resolution mechanisms known as alternative dispute resolution (ADR), as opposed to the legal mechanisms, such as litigation and arbitration.[3]

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[1] The Kenyan labour laws are; The Employment Act No. 11 of 07 (which repealed the old Employment Act), Work Injury Benefits Act No. 13 of 07 (Repealed the Workmens Compensation Act, Cap 236), Labour Relations Act No. 14 of 07, (Repealed the Trade Union Act and Trade Disputes Act), Labour Institutions Act No 12 of 07 (Repealed the Regulation of Wages and Conditions of Employment Act Cap 229) and the Occupational Health and Safety Act, No. 15 of 2007 (Repealed the Factories and Other Places of Work Act).

[2] P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, (CIArb, London, 2002), p.10.

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

1.1.2 Advantages of mediation

Mediation is voluntary and seeks to encourage parties to find solutions that are agreeable to all of them and, as such, yields a win for all parties and preserves the relationship between parties.[4] The salient features of mediation are that it emphasises interests rather than (legal) rights and it is cost - effective, informal, private, flexible and easily accessible to parties to conflicts.

1.2 Arbitration

The Arbitration Act, 1995 defines arbitration to mean "any arbitration whether or not administered by a permanent arbitral institution." This is not very elaborate and regard has to be had on other sources. According to Khan[5], arbitration is a private consensual process where parties in dispute agree to present their grievances to a third party for resolution.

1.3 Who is an arbitrator?

Lord Justice Raymond provided a definition some 250 years ago which is still considered valid today:

> "An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them, and arbitrators are so called because they have arbitrary power; for if they observe the submission and keep within their due bonds, their sentences are definite from which there lies no appeal."[6]

An arbitrator is also defined as a legal arbitrator; a person appointed by two parties to settle a conflict, arbitrate, and decide by arbitration, judge between two parties to a conflict (usually at the request of the two parties).[7]

1.3.1 Advantages of Arbitration

Being a practical mechanism of conflict resolution that has been tested over the years, arbitration has a number of advantages. It is confidential; Parties select an arbitrator privately and proceedings are held privately. The process also has flexibility of time, procedure, venue and is not expensive compared to litigation. Further, there is minimum emphasis on formality, which fact encourages expeditious disposal of matters. Arbitration

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[4] J.G. Merrills, International Dispute Settlement, 4th edition. (Cambridge University Press, Cambridge, 2005), pg. 28.
[5] Supra, note 2.
[6] B. Totterdill, An Introduction to Construction Adjudication: Comparison of Dispute Resolution Techniques. (Sweet & Maxwell, London, 2003), p. 21.
[7] Oxford Advanced Learners Dictionary, 5th ed. (Oxford University Press, London, 1995), p. 51

also limits appeals against awards, a fact which impacts policy on expediency of the arbitral process.

1.4 Conciliation

The Commission for Conciliation, Mediation and Arbitration (CCMA) defines a conciliation hearing as a process where a commissioner (or a panellist, in the case of a bargaining council or agency) meets with the parties in a dispute explores ways to settle the dispute by agreement.[8]

The advantage of conciliation is that it extends the negotiation process and allows for settlement between the parties: for example, where a procedure requires that conciliation be attempted before industrial action can be undertaken, time is allowed for both parties to "cool off", for approach each other in a friendlier manner whilst seriously attempting to settle before engaging in industrial action which might eventually destroy the relationship.[9]

If the dispute is settled, the commissioner will draw-up a settlement agreement which both signed by both parties sign and issue a certificate recording that the dispute is settled. A conciliation agreement is final and binding on both parties. If either party fails to uphold the agreement, it can be made an award and thereafter certified as an order of court.[10]

If the disputed is not settled, there are two options available: Firstly, if the matter remains unresolved and relates to probation, the matter must continue as on Conciliation – Arbitration (CON-ARB) basis. If the matter relates to dismissal (conduct/incapacity) or unfair labour practice and the parties don't object to the process, the matter will continue on CON-ARB basis.[11] Secondly, the commissioner might issue a certificate of non-resolution and the applicant can then apply for arbitration.

2. Arguments against ADR mechanisms

Whereas the ADR mechanisms are lauded as having all the above advantages, there is still a school of thought that is completely against it. **Owen Fiss** in forefront of criticising ADR mechanisms and the whole notion of it on the premises that;

[8] The CCMA is a dispute resolution body established in terms of the Labour Relations Act, 66 of 1995 (LRA) of the Republic of South Africa.
[9] Ibid.
[10] Ibid.
[11] Ibid.

a) There is imbalance of power between the parties

b) There is absence of authority to consent (especially when dealing with aggrieved groups of people)

c) ADR presupposes the lack of a foundation for continuing judicial involvement.

d) Adjudication promotes justice rather than peace, which is a key goal in ADR.

He thus argues that a settlement will thereby deprive a court of the occasion and, perhaps, even the ability to render an interpretation. Thus, when parties settle, society gets less than what appears and for a price it does not know; parties might settle while leaving justice undone.

3. Legal And Institutional Framework Governing Mediation In Kenya.

Kenya does not as yet have a comprehensive and integrated legal framework to govern the application of mediation in the resolution of disputes. The mediation framework in existence has largely been derived from international law and practice and reduced into guidelines by institutions undertaking mediation in Kenya.[12]

The Rules Committee, which is a creature of Section 81 of the Civil Procedure Act,[13] conducted a national exercise aimed at soliciting views from the members of the public on the steps required to bring about changes to the Civil Procedure Act and Rules incorporating mediation among other modes of ADR.[14] With collaboration of other stakeholders in various professional organisations a draft of Court Mandated Mediation Rules was formulated.[15] These rules were to be contained in a proposed Order 45A of the Civil Procedure Rules. There were also proposal to amend section 2 and 59 of the Civil Procedure Act to provide for conduct of mediation and other related issues. However, all those proposals never materialized and the only section that was amended was section 81 (2) of the Act. A new subsection[16] was introduced and it provides that the Rules

[12] See Dispute Resolution Centre, "A lawyer's role in Alternative Dispute Resolution", a one-day workshop, held on 16th September 2004, at Nairobi, Kenya. These include the Dispute Resolution Centre-Nairobi, the Chartered Institute of Arbitrators and Compliance Advisor/Ombudsman (CAO), which is the independent recourse mechanism for IFC and Multilateral Investment Guarantee Agency (MIGA), the private sector lending arms of the World Bank Group. The CAO however only deals with disputes arising out of World Bank funded projects.

[13] Chapter 21 of the Laws of Kenya (Revised edition, 2010).

[14] A.V. Gichuhi, "Court Mandated Mediation: The final solution to expeditious disposal of cases" 1(2) The Law Society of Kenya Journal 106 (2005).

[15] The ADR Taskforce included membership from the Law Society of Kenya, The International Commission of Jurists, The Dispute Resolution Centre, The University of Nairobi School of Law, Parklands, The International Federation of Women Lawyers (FIDA), and the Family Mediation Centre (FAMEC)

[16] Subsection (ff).

Committee shall have power to make rules relating to, inter alia, the selection of mediators and the hearing of matters referred to mediation under the Act.

Further, Order 45 was renamed Order 46 and a new rule, Rule 20, introduced. The rule provides that;

> "(1) Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.
>
> (2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution.
>
> (3) Where a court mandated mediation adopted pursuant to this rule fails, the court shall forthwith set the matter down for hearing and determination in accordance with the Rules.

Apart from the above provisions and the few institutions mentioned under note 11, there is no structure for carrying out mediation within the Kenyan legal and institutional framework. Institutes such as the Chartered Institute of Arbitrators (CIArb (K)), Dispute Resolution Centre (DRC) and Mediation Training Institute (MTI) offer training for mediators. Of the 3 institutions, MTI and DRC are listed as offering mediation services. The CIArb (K) does not offer these services directly as it refers such matters to its trained members.

4. Legal And Institutional Framework Governing Arbitration In Kenya.

Arbitration in Kenya is recognized under and governed by the **Arbitration Act, 1995**, the **Civil Procedure Act (Cap. 21)** and the rules thereto. The Arbitration Act, 1995 was assented on 10th August, 1995 Act and came to force in on 2nd January, 1996. It repealed and replaced Chapter 49 Laws of Kenya, which had governed arbitration matters since 1968. The Act is based on the Model Arbitration Act of the United Nations Commission on Trade Law. Subsequently, the 1995 has been amended vide the Arbitration (Amendment) Act 2009 which was assented to on 1st January 2010.

An arbitration agreement or arbitration clause must be concluded in writing. An arbitration agreement is in writing if signed by parties or involves an exchange of letters, telex, telegram, facsimile, electronic mail or other telecommunication means providing a

record of the agreement.[17] An arbitration agreement by reference is also possible provided the contract making the reference is in writing and the reference makes the clause referred to part of that contract.[18] Where there is no binding agreement to arbitrate, parties to dispute willing to arbitrate usually enter into an "ad hoc" agreement to arbitrate the same. The Act contains provisions relating to arbitral proceedings, recognition and enforcement of arbitral awards, irrespective of the state in which it was made subject to certain limitations.[19]

Section 3 (1) of the Arbitration Act defines "arbitration" to mean any arbitration whether or not administered by a permanent arbitral institution. Further, the section defines an "arbitral tribunal" as a sole arbitrator or a panel of arbitrators.

Section 59 of the **Civil Procedure Act** provides that;

> "All references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules."

Order 46 of the **Civil Procedure Rules** provides, inter alia, that;

> "1. Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference."

The Order goes further to provide for all matters pertaining to conducting an arbitral hearing up until the time the award is honoured. The Order is very comprehensive and complements the provisions in the Arbitration Act.

Arbitration in Kenya is also governed by the Arbitration rules. In exercise of the powers under section 40 of the Arbitration Act, the arbitration rules 1997 were made on 6th May 1997. Further, there are arbitration rules formulated under the auspices of the Chartered Institute of Arbitrators to govern arbitral proceedings.[20]

Generally as the Arbitration Act recognizes, arbitration can be conducted by institutions or individual arbitrators. **The Chartered Institute of Arbitrators** (**Kenya Branch**),

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[17] Section 4 of the Act. See also Kariuki Muigua, The Arbitration Acts: A Review Of Arbitration Act, 1995 Of Kenya Vis-A-Viz Arbitration Act 1996 Of United Kingdom, Rev. March 2010, available at www.kmco.co.ke/articles.html

[18] Ibid.

[19] Sections 36 and 37.

[20] The Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules, 1998.

established in 1984, is the umbrella body that oversees, promotes and facilitates determination of disputes by Arbitration and other forms of Alternative Dispute Resolution (ADR). The Kenya Branch has about 300 registered members and maintains a register of knowledgeable and experienced Arbitrators and facilitates their appointment.[21] The institute relies on its membership to conduct the arbitrations whenever parties opt to source for an arbitrator through the institution.

Another institute that provides ADR services in the **Dispute Resolution Center**, a non profit organization founded in 1997. Through its founders and a selected Panel of Neutrals, DRC offers a wide range of *ADR* **services** appropriate to many different kinds of disputes. The institute also offers training for mediators.

5. Alternative Dispute Resolution and the Labour Laws

Section 47 of the Employment Act[22] provides for complaints of summary dismissal or unfair termination. It is provided under subsection 2 that;

> "A labour officer who is presented with a claim under this section shall, after affording every opportunity to the employee and the employer to state their case, recommend to the parties what in his opinion would be the best means of settling the dispute in accordance with the provisions of section 49."

Though not expressly stated, the practice alluded to therein is conciliation.

Section 12 (9) of the **Labour Institutions Act**[23] provides that;

> "The Industrial Court may refuse to determine any dispute before it, other than an appeal or review, if the Industrial Court is not satisfied that an attempt has been made to resolve the dispute through **conciliation**."

It can be seen that this Act encourages parties to conciliate their differences.

Section 58 of the Labour Relations Act[24] provides that;

"(1) An employer, group of employers or employers' organisation and a trade union may conclude a collective agreement providing for-

> (a) the conciliation of any category of trade disputes identified in the collective

[21] Sourced from the institute's website; www.ciarbkenya.org
[22] Act No. 11 of 2007.
[23] Act No. 12 of 2007.
[24] ACT No. 14 of 2007.

agreement by an independent and impartial conciliator appointed by agreement between the parties; and

(b) the arbitration of any category of trade disputes identified in the collective agreement by an independent and impartial arbitrator appointed by the agreement between the parties.

(2)....

(3)An award in an arbitration in terms of a collective agreement contemplated in subsection (1) is final and binding and -

(a) is subject to appeal on points of law to any court;
(b) may be set aside by the Industrial Court on any ground recognised in law; or

(c) may be enforced by the Industrial Court.

(4) An application to review an arbitration award shall be made to the Industrial Court within thirty days of the award.

Further the Act[25] provides that; "Within twenty-one days of a trade dispute being reported to the Minister as specified under section 62, the Minister shall appoint a conciliator to attempt to resolve the trade dispute…" Persons who may be appointed as conciliators include a public officer, any other person drawn from a panel of conciliators or a conciliator from the conciliation and mediation commission.[26]

Section 67 of the Act provides for the conciliator's powers to resolve a dispute. It provides in **subsection 2** that for the purposes of resolving any trade dispute, the conciliator or conciliation committee may –

a) Mediate between the parties
b) Conduct a fact finding exercise; and
c) Make recommendations or proposals to the parties for settling the dispute.

The conciliator or conciliation committee shall have power to summon and question any person to attend a conciliation.[27]

Section 68 of the Act provides that;

[25] Under section 65 (1)
[26] See section 66 (1) of the Act.
[27] See section 67(3) of the Act.

"**(1) If a trade dispute is settled in conciliation the terms of the agreement shall be -**

(a) recorded in writing; and
(b) signed by the parties and the conciliator.

(2) A signed copy of the agreement shall be lodged with the Minister as soon as it is practicable.

Section 69 provides that a trade dispute is deemed to be unresolved after conciliation if the-

(a) conciliator issues a certificate that the dispute has not been resolved by conciliation; or

(b) thirty day period from the appointment of the conciliator, or any longer period agreed to by the parties, expires.

Section 70 of the Act provides that the minister may appoint a conciliator or conciliation committee in public interest to prevent the dispute from arising or to resolve a dispute. The minister may also appoint a committee of inquiry to investigate any trade dispute and report to the minister.[28]

6. Challenges and Opportunities For ADR Mechanisms in Labour Issues

The adoption of ADR mechanisms in labour issues is faced with some practical challenges. The following are a few of those concerns and the writer opines that if ADR is to be useful in labour matters, those concerns ought to be addressed. These include;

a) Mediator, Conciliator and Arbitrator training – with a population of over 30 million and a labour force of about 17.94 million people[29], our alternative dispute resolvers are overwhelmed and cannot possibly deal with all the matters suggested by the labour laws to be handled using ADR mechanisms.

Further to the above, there are only 3 institutions mentioned earlier that train ADR practitioners in the entire country. These institutions cannot possibly meet the needs for training and therefore, more institutions ought to take up the training of ADR practitioner, more so the several middle level university colleges spread all over the country.

[28] Under section 71 of the Labour Relations Act.
[29] According to estimates by United States of America's Central Intelligence Agency (CIA) in 2010.

b)Ethics – there is going to be a flood of mediators, arbitrators and conciliators if training efforts are revamped. This is against a backdrop of the fact that there is no code of ethics in place for any of these practitioners, apart from the provisions in the Arbitration Act providing for removal or disqualification of an arbitrator.

c) Acceptance by the society – our community is still a believer in getting their day in court. Many people would rather have an order of the court or a decision of an administrative tribunal to enforce, rather than a negotiated agreement that is wholly dependent of parties' goodwill. Even where the law has put in place enforcement mechanisms for negotiated settlements, people still desire the coercive nature of courts and other tribunals, as opposed to all the cordial talks that are ADR.

d) Institutional capacity- there is a need to enhance the capacity of various labour institutions to meet the demands for ADR mechanisms introduced by the various labour laws. There is mention of a mediation and conciliation commission in the Labour Relations Act.[30] The capacity of such a commission should be enhanced.

e) The changing face of arbitration – the major selling point of the ADR approaches of dispute resolution is their attributes of flexibility, low cost and lack of complex procedures. These attributes are no longer tenable in arbitration as it is gradually becoming as expensive as litigation, especially when the arbitral process is challenged in court. When the matter goes to court, it is back to the same old technicalities that are present in civil proceedings.

This challenge also brings in the other factor that is changing the face of arbitration; interference by courts. Ordinarily, courts are not supposed to delve into the arena of the arbitral proceedings, even where the same are court mandated. Courts are entertaining all manner of applications by parties' intent on derailing the arbitral proceedings and thus delaying justice for all concerned.

This means then that parties are slowly losing confidence in the arbitral process at it makes no sense to engage in arbitration for years only for the dispute to end up in courts of law for determination**.**

[30] Section 66 (1) (c).

7. Conclusion

Structured mediation is a fairly new phenomenon in Kenya but Arbitration has been widely practised for years. This has mostly been in arrears of commercial contracting and these ADR methods are just being introduced into the various laws that govern labour matters. They have worked fairly well in commercial matters and it is hoped that they shall equally be useful in the labour sector. Their positive attributes outweigh the negative ones and it is possible that labour disputes and matters incidental thereto can be resolved more expeditiously if the above discussed ADR mechanisms are fully exploited.

It is noteworthy that matters labour have a Constitutional backing as far as the legal and institutional arrangements are concerned. **Article 162** of the Constitution provides that;

> (2) "Parliament shall establish courts with the status of the high court to hear and determine disputes relating to –
>
> **(a) employment and labour relations; and...**
>
> (4) **Parliament shall determine the jurisdiction and functions of the courts contemplated in clause** (2).

Parliament had already enacted the compendium of labour laws and these laws are saved by **Clause 7 (1) of the Sixth Schedule** of the Constitution which states that;

> "All law in force immediately before the effective date continues in force and shall be construed with all the necessary alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."

The direct inclusion, as opposed to inference, of ADR mechanisms as part of the means of dispute resolution in an Act of Parliament is a bold ground breaking move. However, there is need for caution so that this effort is not defeated by capacity challenges, some of which are discussed above.

Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya

Abstract

This paper examines critically the role of the court in arbitration in Kenya as stipulated by Arbitration Act, Act No. 4 of 1995 of laws of Kenya. The court intervention before, pending and after arbitration (in interlocutory and other matters) in arbitral proceedings in Kenya is analyzed in detail. In addition, necessary reforms as far as court intervention is concerned are proposed.

The legal provisions in the Arbitration Act 1995, as amended by the Amending Act of 2009, giving the court power to intervene are highlighted and reviewed in the context of the Kenyan case law and legal practice. The paper aims at establishing whether court intervention is a facilitator of expeditious arbitration or a hindrance.

No doubt parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending. In addition, recognition and enforcement of arbitral awards in court has often been unduly reduced to a sure wait-and-see game to the detriment of parties in whose favour the awards are made. Can something be done to reverse this trend? What reform measures can be undertaken to ensure that arbitration is the expeditious process it is supposed to be?

Underlying the discussion is the hypothesis that court intervention in interlocutory and other matters leads to delay and can be used by parties to frustrate the arbitral process. The extent to which this is true or otherwise of the role of the courts is what the paper grapples with.

The discourse takes us through the legal provisions that entitle parties to seek court intervention and the actual instances of court intervention in arbitration. The paper also attempts a critical examination of the role of the court in arbitration with a view to establishing whether court intervention is a friend or a foe to the expeditious and fair determination of arbitral matters.

1. Introduction

As the title hints, this paper is a critical examination of role of courts in arbitration in Kenya as stipulated by the Arbitration Act, Act No. 4 of 1995 Laws of Kenya. The court intervention before, pending and after arbitration (in interlocutory and other matters) in arbitral proceedings in Kenya is analyzed in detail. In addition, necessary reforms as far as court intervention is concerned are proposed.

The legal provisions in the Arbitration Act, 1995 (hereinafter the Act) giving the court power to intervene are highlighted and reviewed in the context of the Kenyan case law and legal practice. The paper aims at establishing whether court intervention is a facilitator of expeditious arbitration or a hindrance.

No doubt parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending. In addition, recognition and enforcement of arbitral awards in court has often been unduly reduced to a sure wait-and-see game to the detriment of parties in whose favour the awards are made. Can something be done to reverse this trend? What reform measures can be undertaken to ensure that arbitration is the expeditious process it is supposed to be?

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1.1 General Principle on Role of the Court in Arbitration

The general key principles of arbitration have received a restatement in section 1 of Arbitration Act, 1996 of United Kingdom as follows:

> *"1. …*
> *the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;*
> *the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. …"*

If one affords the above principles a literal interpretation, then, it becomes apparent that court's intervention is to be restricted as far as it may result in unnecessary delay and expense in the arbitration. Further, that the object of intervention of the court should be to guarantee fair and impartial resolution of disputes. Even more importantly, it is inferable that parties' autonomy is not to be restricted unnecessarily by courts except in public interest.

In Kenya, the general approach on the role and intervention of the court in arbitration in Kenya is provided in section 10 of the Arbitration Act 1995. The section provides:

> *"10. Except as provided in this Act, no court shall intervene in matters governed by this Act."*[1]

The section, clearly in mandatory terms, restricts the jurisdiction of the court to only such matters as are provided for by the Act. This section epitomizes the recognition of the policy of parties' autonomy which underlie the arbitration generally and in particular the Arbitration Act, 1995. The section articulates the need to restrict the court's role in arbitration so as to give effect to that policy.[2]The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense.

On the face of it, section 10 of the Act permit two possibilities where the court can intervene in arbitration. First is where the Act expressly provides for or permits the intervention of the court. Then, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. It is trite that the Act cannot reasonably be construed as ousting the inherent power of the court to do justice especially through judicial review and constitutional remedies. This latter instance can only be countenanced in exceptional instances.

In the case of ***Epco Builders Limited-v-Adam S. Marjan-Arbitrator & Another***[3], the appellant had taken out an originating Summons before the High Court (Constitutional Court) under, *inter alia*, sections 70 and 77 of the constitution of Kenya; section 3 of the Judicature Act and section 3A of the Civil Procedure Act. The appellant's contention in the constitutional application was that its constitutional right to a fair arbitration had been violated by a preliminary ruling of the arbitrator.

In essence, the applicant's main complaint was that it likely would not obtain fair adjudication and resolution of the dispute before the arbitral tribunal. That was, it argued, in view of the arbitrator's "unjustified refusal to issue summons to the Project Architect and Quantity Surveyor" who are crucial witnesses for a fair and complete resolution of the matters before the tribunal. Consequently, the applicant argued that such refusal was a violation of its rights under sections 70 and 77 of the Constitution of Kenya.

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[1] This section was not affected by the 2009 Amendments.
[2] Sutton D.J et al (2003), Russell on Arbitration (Sweet & Maxwell, London, 23rd Ed.) p. 293
[3] Civil Appeal No. 248 of 2005

The application was opposed and urged to be stuck out on the basis that it "disclose[d] no reasonable cause of action", was incompetent and did not lie in law, and that the court lacked jurisdiction to entertain the questions raised by it. The counsel for the Chartered Institute of Arbitrators-Kenya Branch, an interested party, submitted during trial that arbitration must have an end. In counsel's view, while she did not refute the application under section 77 (9) of the constitution, she was of the considered view that the procedure laid down under the Arbitration Act should be exhausted first before such application. The majority of the court, while avoiding making a conclusion as to whether the application disclosed a cause of action were of the view that the same was not frivolous. It was thus ordered that the application of the appellant be heard by the High Court on merits.

On his part, Justice Deverell contributing to the majority decision impressed the importance of encouraging alternative dispute resolution to reduce the pressure on the court from the ever increasing number of litigants seeking redress in court. He was of the view that every civil dispute dealt with by arbitration should result in a corresponding reduction in the pressure on the courts. Thus, articulating the precarious balance and interest at stake in the application he added:

> *"If it were allowed to become common practice for parties dissatisfied with the procedure adopted by the arbitrator(s) to make constitutional applications during the currency of the arbitration hearing, resulting in lengthy delays in the arbitration process, the use of alternative dispute resolution, whether arbitration or mediation would dwindle with adverse effects on the pressure on the courts. This does not mean that recourse to a constitutional court during an arbitration will never be appropriate. Equally it does not mean that a party wishing to delay an arbitration (and there is usually one side that is not in a hurry) should be able to achieve this too easily by raising a constitutional issue as to fairness of the "trial" when the Arbitration Act 1995 itself has a specific provision in section 19 stipulating that "the parties shall be treated with equality and each party shall be given full opportunity of presenting his case," in order to secure substantial delay. If it were to become common, commercial parties would be discouraged from using ADR."*

The dissenting judge in the ***EPCO Case*** (supra), Githinji, JA who considered the merits of the application was of the view that arbitration disputes are governed by private law and not public law and by invoking section 84(1) of the constitution, the appellant was seeking a public remedy for a dispute in private law. The judge also impressed that the subject matter of the constitutional application was a matter of discretion of the arbitral tribunal and where the same was exercised erroneously, the error could be corrected within the parameters of the Arbitration Act which provides effective remedies for such errors as deny the arbitral parties fair hearing and/or yield breach of nature justice. Thirdly, the learned judge of appeal emphasized the fact that just because the law is contained in the

constitution does not *ipso facto* mean that the breach of that law has to be redressed through a constitutional application under section 88(1) of the Constitution.

The learned judge reasoned that the right to fair hearing under section 77(9) of the constitution is applied by the courts in ordinary civil proceedings even without constitutional application and is one of the cardinal rules of natural justice. In his learned view, fair hearing is also incorporated by section 19 of the Act which provision the appellant could have invoked in a normal application to get redress for breach of principle of fair hearing, if any. In conclusion, the learned judge found that there is clear law and procedure (under Arbitration Act and the rules there under) for redress of the grievances of the appellant raised under the constitutional application and the law should be strictly followed. He thus held that the application to be not disclosing *ex facie* a constitutional issue and further that it was frivolous and gross abuse of the constitution and the process of the court. He was for the dismissing of the appeal but for the fact that the majority of court was of a different view ruling against considering the merits of the application.

In the England case of ***Coppee-Lavalin SA/NV-v-Ken-Ren Chemicals and Fertilizers Ltd [1994] 2 All ER 465*** the House of Lords drew a distinction, which is relevant for our purpose, between three groups of measures that involve courts in arbitration. First are such measures as involve purely procedural steps and which the arbitral tribunal cannot order and/or cannot enforce. For instance, issuing witness summons to a third party or stay of legal proceedings commenced in breach of the arbitration agreement. Second are measures meant to maintain the status quo like granting of interim injunction or orders for preservation of the subject matter of the arbitration. Lastly are such measures as give the award the intended effect by providing means for enforcement of the award or challenging the same.

There is no doubt that the three measures engender differing degrees of encroachment on the arbitral proceedings and by extension party autonomy. Indeed, sometimes the measures result in court's direct or indirect interference in the arbitral tribunal's task of deciding on merits of the dispute. Hence the need to ensure that such intrusion is kept to the bare minimum and only be exercised when the occasion merit it.[4]

The role of the courts at various stages of arbitral proceedings is discussed below together with the procedure for applying to the court to intervene. In particular, the following section considers court's intervention in arbitral proceedings before reference to arbitration, during course of arbitral proceedings and after arbitral award.

[4] See Lord Mustill's dicta in Coppee-Lavalin SA/NV case (supra) page 469-470 on the ideal court's approach in such intrusion.

2. Role of the Court Before Reference to Arbitration

There are at least two instances where the court intervenes in a matter subject of arbitration agreement strictly before commencement of any efforts to refer the dispute to arbitration. These are:

2.1 Stay of Legal Proceedings

Generally, the courts have no direct power, and of their own motion, to compel arbitration. However, courts can do so indirectly, and upon application of a party to an arbitration agreement. This is possible where the court, after an application for stay of proceedings for reference to arbitration, refuses the claimant audience and/or remedy through the court process. An order for stay of proceedings has the effect that if aggrieved party wants to pursue his claims, he can only do so by arbitration.[5]

The necessity of stay of proceedings arises where the parties have a valid arbitration agreement and upon a dispute arising on a matter covered by the same, one party goes to the court in breach of the Arbitration agreement.[6] An application for stay of the legal proceedings is what Section 6 of the Arbitration Act avails the other party if it is to give effect to the arbitration agreement. This section in the principle Act has now been amended[7] as hereunder;

(a) in subsection (1), by deleting the words "files any pleadings or takes any other step in the proceedings" and substituting therefor the words "takes the appropriate procedural step to acknowledge the legal proceedings against that party".

(b) by deleting subsection (2) and substituting therefor the following new subsections -

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of

[5]The justification is that agreements to refer disputes to arbitration are mainly contractual undertaking by parties to settle disputes out of the court and with the help of an arbitrator. The courts exist to enforce and give force of law what parties, exercising their freedom to contract, choose to agree to be bound by.

[6] Parties commence court action despite arbitration agreement for a number of reasons. The action may be inadvertent, because s/he challenges the existence or validity of the arbitration agreement or merely to breach the arbitration agreement.

[7] Vide section 5 of the Amending Act.

> legal proceedings in respect of any matter is of no effect in relation to those proceedings.

An arbitration clause or arbitration agreement in a contract is not an impediment to resolving disputes in court until a party objects. In ***Rawal-v-The Mombassa Hardware Ltd***[8] it was held that an arbitration agreement does not limit or oust the jurisdiction of the court to grant reliefs sought by way of a Plaint In the recent case of ***Peter Muema Kahoro & Another-v-Benson Maina Githethuki***[9] a Plaintiff had filed a suit seeking to enforce an agreement for sale of land by way of permanent injunction and in addition applied and was granted ex-parte temporary injunction pending a inter-partes hearing of the application. The said agreement contained an arbitration clause under which parties had undertaken to refer any dispute arising to a single arbitrator appointed by the Law Society of Kenya. The Defendant entered appearance and in addition filed grounds of opposition against the application for injunction.

The Defendant then brought an application seeking to strike out the plaintiff's suit and the application thereof on the ground that the court was not seized of jurisdiction to try the matter. The learned counsel for the Defendant argued in support of that ground that the Plaintiff having failed to invoke fully the arbitration agreement clause, the court has no jurisdiction to entertain the suit and/or the application as the relief's sought by the Plaintiff were best sought under inter section 7 of the Arbitration Act. The Plaintiff in response cited the above ***Rawal case*** arguing that an arbitration clause does not limit or oust the jurisdiction of the court and that the Defendant had taken steps in the suit.

The court found for the Plaintiff holding that striking out the suit was beyond the ambit of section 6 of the Arbitration Act. The court further held that the Defendant having failed to move the court in appropriate time under section 6 to refer the matter to arbitration and instead taking steps in the proceedings, he waived his right to rely on and invoke the arbitration agreement. Thus the Defendant's application to strike out the suit and/or stay the proceedings was thus dismissed with costs.

In other words, the parties can choose to ignore the arbitration agreement and file the proceedings in a court. However, if one of the parties is desirous of effectuating the arbitration agreement when the other has gone to court, then the former party may seek an order of the court under section 6 of the Arbitration Act staying the court proceedings. The grant of the order of stay of legal proceedings under section 6 leaves the initiator of the court proceedings with no option but to follow the provisions of the arbitration agreement if he wishes the dispute to be resolved.

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[8] [1968] E.A. 398

[9] [2006] HCCC (Nairobi) No. 1295 of 2005

In granting stay of proceedings, the courts generally have regard to the following conditions:

(i) The applicant must prove the existence of an arbitration agreement which is valid and enforceable.[10] The rationale here is that to stay proceeding where there is no valid Arbitration Agreement would otherwise amount to driving the claimant to the seat of justice as s/he cannot get redress by enforcing the arbitration agreement.

The doctrine of separability is important here in the sense that it enables the arbitration clause to survive the termination by breach of any contract of which it is part.[11] Even if the underlying contract is void, the parties are presumed to have intended their disputes to be resolved by arbitration. If the arbitration agreement's validity is questioned the court should endeavour to ascertain the same before staying the proceedings. At least, it should stay the proceedings pending the determination of the issue of validity.

Section 6 of the Act is to the effect that the court shall grant stay unless, *inter alia*, it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. For instance, if the arbitration agreement is inconsistent with a law or is incapable of being performed. The court will also not stay proceedings if it finds that there no dispute between the parties on matters agreed to be arbitrated.

The ideal policy for the court under this condition is anything but unequivocal. For instance it is not clear whether the court should lean towards giving effect to the Arbitration Agreement as far as possible or vice-versa.

(ii)The applicant for stay must be a party to the arbitration agreement or at least a person claiming through a party e.g. a personal representative or trustee in bankruptcy. This requirement is in view of the doctrine of privity of a contract, which is to the effect that only parties to a contract can enforce it and a party not party to a contract cannot enforce it.

In ***Chevron Kenya Limited-v-Tamoil Kenya Limited***[12], the Learned Azangalala found that the Defendant was not a party to the agreement enshrining the arbitration agreement on basis the matter was sought to be stayed and referred to arbitration. He therefore refused to stay the proceedings, *inter alia*, on that ground stating in the ruling:

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[10] In fact, section 6(1) (a) of the Act stipulates that court refuse to grant stay of proceedings where 'the arbitration agreement is null and void, inoperative or incapable of being performed'.
[11] Section 17(1) (a) of the Arbitration Act, 1995
[12] HCCC (Milimani) No. 155 of 2007

> *"To my understanding of [section 6(1)] of the Act, only a party to the arbitration agreement has the right to apply for stay of proceedings. As demonstrated above, the defendant is not a party and was [therefore] not entitled to lodge this application."*

Indeed, it seems that only the Defendant is permitted to apply for stay of proceedings under section 6 of the Act. In ***Pamela Akora Imenje-v-Akora ITC Intenational Ltd & Another*** [13]section 6 the court ruled to the effect. The learned Waweru, J held that the provisions of section 6(1) of the Act are available only to the Defendants. Therefore the judge ruled that the application to stay the suit by the Plaintiff was misconceived as the Plaintiff having chosen to file the suit, she could not purport to later have recourse to section 6(1) of the Act. The judge's conclusion was based on what he considered to be the plain and obvious impression of the wording of subsection 6(1) of the Act. Therefore, the Plaintiff having made her bed, as it were, she was bound to lie on it. She chose to file a suit; she had to stand or fall by it.

(iii)The dispute, which has arisen, must fall within the scope of the Arbitration Clause. The draftsmanship in vogue in Kenya today is to have the arbitration clause as wide and comprehensive as possible. However, there arise instances where the parties intended only some limited disputes to be referred to arbitration. In such an instance, the party opposing the arbitration may argue that the dispute is not covered by the arbitration agreement and therefore the court action is not in breach of the same. The court is bound to stay the proceedings unless, *inter alia*, it finds:

> *"that there is not in fact any dispute between the parties with regard to the matters referred to arbitration."*[14]

In ***TM AM Construction Group (Africa) v. Attorney General***[15] the plaintiff opposed the application for stay, *inter alia*, on basis that the AG was in fact making an application under section 6 of the Arbitration Act as a delaying tactic as there was not in fact a dispute about the claim. It was submitted that the AG took long and did not do anything and thus was precluded under section 6 (1) (b) of the Arbitration Act.

The AG claimed that there was a dispute between it and the respondent that deserved to be referred to arbitration. The respondent retorted that there was not in fact any dispute between the parties with regard to matters agreed to be referred to arbitration. The court found that there was failure by AG to tender any evidence showing that there was in fact any dispute between the parties and that this meant that no basis had been established to

[13] HCCC (Milimani) No. 368 of 2005
[14] Section 6(1) (b) of the Arbitration Act 1995
[15] HCCC (Milimani) No. 236 of 2001

show that a dispute in fact existed to justify staying the proceedings and referring the proceedings to arbitration.

The provisions of the Act are not clear on whether an applicant stay part of the proceedings where the other parts are not subject of the agreement. For example, in a suit involving both tort and contract claims and the scope of arbitration is confined to contractual agreement, it is not clear whether one can be granted a stay for the contractual claim only. Similarly, there is uncertainty as to what the courts are to do in case of an Alternative Dispute Resolution clause as opposed to an arbitration one. With such a clause, usually the dispute cannot be referred to arbitration immediately without first exhausting the other agreed methods. It is proposed that the position of the House of Lords in ***Channel Tunnel Corporation Ltd and others-v-Balfour Beatty Construction Ltd***[16] that should not prevent the court from staying the proceedings, a position adopted in UK Arbitration Act of 1996[17], should be the norm.

(iv) The party making the application for stay must not have taken steps in the proceedings to answer the substantive claim. For instance, the party must not have served defence or taken another step in the proceedings to answer the substantive claim. The rationale of this requirement is to ensure that stay of proceedings for reference to arbitration is not used as a delay tactic by the defence. The reasoning is that by taking steps to answer the substantive claim, the party submits or is at least taken to be submitting to the jurisdiction of the court and electing to have court deal with the matter rather than insisting on the right to arbitration.[18]

Under section 6 of the Arbitration Act, a party wishing to enforce the arbitration agreement in a situation where the other party has initiated court proceedings must apply to the court not later than the time when that party enters appearance or **takes the appropriate procedural step to acknowledge the legal proceedings against that party**.[19]

In ***Eagle Star Insurance Company Limited-v-Yuval Insurance Company Limited***[20], Lord Denning MR was of the view that to merit refusal of stay, the step in the proceedings must be one which "**impliedly affirms the correctness of the [Court's] proceedings and the willingness of the defendant to go along with the determination by the courts instead of arbitration**". In other words, the conduct of the applicant must be such as demonstrates election to abandon the right to stay in favour of the court action proceeding. However,

[16] [1993] 1 Lloyd's Rep. 291, HL
[17] Section 9(2) Arbitration Act 1996
[18] Russell on Arbitration (supra) p. 301.
[19] The 1995 Act made reference to when that party enters appearance or "files any pleadings or takes any other step in the proceedings".
[20] [1978] Llods Rep. 357

the courts in Kenya have opted to interpret the proviso to section 6 of the Act strictly and will not stay proceedings unless the application was filed at the time of filling the memorandum of appearance.

In the recent case, ***Chevron Kenya Ltd-v-Tamoil Kenya Limited (supra)***, the learned judge relied and upheld Lord Denning's dictum above. In the case, an application for stay was opposed, *inter alia*, on the ground that the Defendant took steps in the proceedings contrary to section 6(1) of the Arbitration Act. According to the counsel for the Plaintiff, the Defendant was not entitled to apply for stay of the proceedings having filed a notice of appointment unaccompanied by the application. According to the Plaintiff's counsel, the application for stay should have been lodged not later than when the notice of appointment of the advocates was filed. The application had been filed two days after the Notice of Appointment and the Plaintiff's counsel was of the view that as a result, it was barred by section 6(1) of Arbitration Act, 1995.

The Counsel for the Defendant on his part contented that the filing of a Notice of Appointment of Advocates did not constitute taking a step in the proceedings as disentitles the defendant from applying for stay of proceedings under section 6 of the Arbitration Act, 1995. The learned counsel proffered in support of the contention that a Notice of Appointment could not be construed as a step taken in the proceedings. At least, the counsel's view, not the kind of "steps taken in the proceedings" envisaged under section 6(1) of the Arbitration Act. The counsel further argued that for an act to amount to a 'step taken in the proceedings' it must be one that acknowledges the jurisdiction of the court to entertain the dispute.

The learned judge agreed with the Defendant's counsel on the point holding that a notice of appointment of advocates cannot be described as a step taken in the proceedings so as to deprive a Defendant of recourse under section 6(1) of the Arbitration Act for stay of proceedings. In the judge's view, a notice of appointment of advocates does exactly that: inform the court and the other side that the Defendant will from the date of the notice be acting through the named counsel. As such, a notice of appointment of advocates does not, in itself, acknowledge the jurisdiction of the court to determine the dispute. The court applying the standard set by Lord Denning in the dictum above found that a notice of appointment is not a step in the proceedings that impliedly affirms the correctness of the proceedings and the willingness of the Defendant to go along with the determination of the court instead of arbitration.

In the leading case of ***TM AM Construction Group (Africa) v. Attorney General***[21], an application for stay of proceedings under section 6 of the Act had also been opposed for

[21] supra

having been filed after defendant had entered appearance. The plaintiff in the case had instituted the suit against the Attorney General on 21st January 2001. The learned AG then entered appearance on the 15th March 2001. The application for stay of proceedings was then made on the 25th April 2001.

Mbaluto J (as he then was) held that an applicant was obliged to apply for a stay **'not later than the time when he entered appearance'**. The court thus found that the AG had lost the right to rely on the arbitration clause because if the AG was to rely on it he was obliged to make an application under section 6 not later than when he entered appearance.

The decision in foregoing ***TM AM case*** was followed in ***Victoria Furniture Limited-v-African Heritage Limited & Another***.[22] The case involved third-party proceedings where the third-party sought a stay of 'all the proceedings' and reference to arbitration under, *inter alia*, section 6 of the Arbitration Act. The applicant had been served with a Third Party Notice to which it had made an appearance on 10.8.2001. However, the applicant did not file the application for stay until 11.10.2001.

The Court in this latter case held that the clear position was that if a party wishes to take advantage of an arbitration agreement under section 6(1) of the Arbitration Act, he was obliged to apply for a stay '**not later than the time when he**

(a) enters appearance; or
(b) files any pleadings; or
(c) takes any other steps in the proceedings.'

In the court's view, the above means that if a party takes any of the steps above without at the same time applying for a stay of proceedings, then s/he losses the right to subsequently make the application. The court in so holding upheld the decision in ***TM AM Constuction Group Africa case*** **(supra)** on the same point.

The learned Mbaluto J in the latter case reasoned that if the section were to be interpreted to mean that a party could file an appearance or take the two other steps and then wait for some time before applying for stay of proceedings, the phrase 'not later than the time he entered appearance or etc,' would be not only superfluous but also meaningless. In any case, the court found that in the instant case there was delay of more than 31 days after appearance had been made which situation in the court's view was not what was contemplated under Section 6 (1) of the Arbitration Act.

[22] HCCC (Milimani) No. 904 of 2001

The matter of what time an application for stay must be lodged was settled in the recent case of ***Kenya Seed Co. Limited-v-Kenya Farmers Association Limited.***[23] Justice Visram upholding the TM AM Construction Case (supra) and finding that section 6 was not clear cut concluded that the correct position on the time to lodge an application was that:

> *"A party wishing for the proceedings to be stayed and the matter referred to arbitration under an arbitration agreement must apply not later than the time he enters appearance (if indeed he enters appearance) or not later than the time he files any pleadings (if he does not enter appearance) or not later than the time he takes any other steps in the proceedings (if he does not enter appearance or file any pleadings)."*

What if the party has indicated that it still intends to seek stay despite the act? For instance, if a party seeks leave to defend and stay of default judgement-is he to be taken as taking steps in the proceedings as preclude his/her entitlement to a stay? The Court of Appeal of England in ***Patel-v-Patel***[24] thinks not. What do you think?

It is to be noted that an action to resist interim injunction is not a step in proceedings. Applications for interim applications are interlocutory proceedings whereas the steps proscribed have to taken in substantive proceedings.

Even where the stay is sought against a counterclaim or set off, the rule on prohibition to taking steps in proceedings still apply with equal force. So that the party seeking stay of the counterclaim must not have filed a defence/reply to the counterclaim or at least any pleading after the counterclaim. The applicant must also not have filed an application to strike out the counter-claim or taken any other steps in the proceedings.[25]

The court in the **Victoria Furniture Case** (supra) also grappled with the issue of whether stay of proceedings will be granted where a third party, not party to the arbitration agreement, is involved. In the case, the arbitration agreement was only applicable as against the Defendant and the third party to the exclusion of the Plaintiff.

The application for stay was opposed on the ground that the suit would ultimately, and in any event, have to be determined by the Court. The court upheld the opposition on the point finding that apart from the Defendant and the applicant, there was another party involved, namely the Plaintiff. The court reasoned that as such, whether or not either of the Defendant or applicant was liable, the matter will still have to come back to court for final adjudication as between either of them and the Plaintiff. The court further reasoned that the process of arbitration could only decide the issue of who, between the Defendant

[23] HCCC (Nairobi) No. 1218 of 2006
[24] [1998] 3 WLR 322
[25] Chappel-v-North [1891] 2 Q.B 252

and the applicant was liable, but not the issue of liability to the defendant. The court also found that there were several questions of law to be resolved in the case.

The court then upheld as extant in matter the following grounds supplied in **Emden & Gills Building Contracts and Practice 7th Edition, at page 363** upon which a court may refuse to stay proceedings and refer a matter to arbitration:

1. where there are questions of law involved;
2. where there is multiplicity of proceedings and (it is necessary to avoid) inconsistent findings of facts;
3. where the arbitration is appropriate, (as was obviously the case in the matter) for only a part of the dispute.

The court concluded that it would be a miscarriage of justice to parties if the proceedings were stayed and the matter referred to arbitration. In a word, the court's ruled that a stay may be refused where there are questions of law involved; where there is multiplicity of proceedings and (it is necessary to avoid) inconsistent findings of facts; and where the arbitration is appropriate, for only a part of the dispute e.g. in third party proceedings as was the case in the matter.

The position seems to be that where a third party is involved, the court may refuse to stay the proceedings as the case will only be appropriate for only a part of the dispute. It is noteworthy that the position in UK has changed and involvement of third party is no longer a reason to refuse stay.

What if the suit is brought by a claimant who is a pauper and can show the court that he is not in position to afford arbitration? Generally, the position in UK is that the poverty of the Defendant is not a ground for staying arbitration unless the same has been brought about by the breach of contract on part of the Defendant.[26]The court has been enjoined to take into account whether or not the Plaintiff would be unable to receive legal aid for arbitration proceedings.[27] In addition, the court may also consider taking into account the ability of the Plaintiff to fund the take off of the arbitration process.

There is also the issue of the contractual limitation period which may arise as a ground for stay or preliminary point. In ***Barlany Car Hire Services Limited-v-corporate Insurance Limited***[28], an application for stay pending reference to arbitration was accompanied by a request that filing of the Defence be stayed pending the determination by the court on a

[26] At least this was the position taken by the court in Fakes-v-Taylor Woodrow Construction Limited [1973] Q.B. 436

[27] Edwin Journeys-v-Thyssen (GB) Ltd [1991] 57 Build. L.R 116

[28] HCCC (Milimani) No. 1249 of 2000

preliminary point of law whether the Plaintiff was disentitled to any claim having failed to refer its claim to arbitration within 12 months of the Defendant's disclaimer of liability.

The arbitration agreement provided that if the Defendant company disclaimed liability to the Insured for any claim such claim be referred to arbitration within 12 calendar months from the date of the disclaimer. The Plaintiff failed to properly institute the arbitration process and more than 12 months lapsed. The defendant therefore argued that the Plaintiff was now too late to arbitrate and indeed even too late to claim at all.

The court held that the Plaintiff was then too late to appoint an arbitrator or claim there having been no reference to arbitration within 12 months of the repudiation. The court agreed with the Defendant that the clause imposing the contractual deadline was a condition precedent to a valid claim as was held in the case of ***H.ford & Co. Limited-v-Compagnie Furness (France)***[29] where a clause to similar effect was upheld. The court quoted the following holding in that case with approval:

> *"Therefore as the jurisdiction of the arbitrator was only given to him by the consent of the parties and the parties agreed that the arbitrator if appointed at all should be appointed within a certain time, it seems to me to follow that as that time has elapsed, neither party had power to appoint an arbitrator unless the other party consented."*[30]

The court also therefore upheld the Defendant's argument that there was no longer any cause of action; the matter was time barred and noted that no application had been made to extend the limitation period if that were possible. The court upheld the comments in 4th Edition of Halsbury Vol. 2 Para. 515 holding those words answered the Plaintiff's suggestion that the matter was governed by section 4 of the Limitation of action Act. The court was of the view that the section of the Act merely gives a maximum time limit within which a suit may be brought. Halsbury Para. 515 provide:

> *"The parties to an arbitration agreement may, if they wish, contract that no arbitration proceedings shall be brought after the expiration of some shorter period than that applicable under the statute."*

2.2 Interim Measures of Protection

The courts have wide powers to make orders relating to interim orders for the purpose of preserving the status *quo* pending and during arbitration. Section 7 of the Act limits parties' freedom to contract any arbitration agreement that limits and/or bars seeking interim measures of protection in court. The jurisdiction to make such orders is the preserve of the High Court of Kenya. The courts have jurisdiction to make such orders as

[29] 1922 2 KB 797
[30] *Ibid*. page 810

preserve the status quo of the subject matter of the arbitration. The powers could include those of making orders for preservation like attachment before judgement; interim custody or sale of goods (e.g. perishables) the subject matter of the reference or for detention or preserving of any property or thing concerned in the reference, appointing a receiver and interim injunctions.

In *Forster-v-Hastings Corporation (1903) 87 LT 736* it was held that the court, in order to preserve the status *quo*, in a case where one of the parties to a contract had given a notice purporting to dismiss the contractors, it could restrain the other party from acting on the notice until judgement or further order, or until a reference to arbitration as provided for by the contract.

In *Don-wood Co. Ltd-v-Kenya Pipeline Ltd*[31]Ojwang J dealt with application for interim injunctive orders pending arbitration. The Defendant in the case had declined arbitration was doing everything to avoid the obligations under the contract. The judge granting the orders sought found that the jurisdiction to grant the injunctive relief under section 7 of the Arbitration Act was meant to preserve the subject matter of the suit pending determination of the issues between the parties.

However, it is important to note that the law discourages the parties from making parallel applications before the arbitral tribunal and/or the High Court. Section 7 (2) of the Act enjoins the court to adopt any ruling or finding on any relevant matter to the application as conclusive. There is no question that the section applies even where the ruling is on final matter so as to prevent appeals on arbitral rulings on applications. The rationale here is to prevent multiple applications, situations of delay occasioned by applications, or parties seeking to clog and/or stall arbitral proceedings by making frivolous applications under the section.

2.3 Procedure for Applications before Arbitration

The party seeking stay of legal proceedings and/or interim measures moves the court in the manner provided under rule 2 of the Arbitration Rules 1997. Rule 2 of the Arbitration Rules 1997 provides that an application under section 6 and 7 of the Act shall be made by summons in the suit. The chamber summons, as a matter of practice, is accompanied by a supporting affidavit usually annexing the arbitration agreement if the application is for a stay of the proceedings.[32]

[31] HCCC No. 104 of 2004

[32] Arbitration Rules, 1997 provide that the Civil Procedure Rules apply where appropriate. There being no provision on whether a supporting affidavit or not in the rules, recourse is had to the Civil Procedure Rules on chamber summons. Order 50 R. 3 therefore applies..

Some judges are of the view that if you move the court using a wrong procedure the error is fatal to the application. So that in a case like if instead of a chamber summons one prefers a notice of motion, the application may be struck-out though there are conflicting decisions on this. In James Muhando Mwangi-v-B.O.G Premier Academy & Another[33] an application for stay of proceedings under section 6 of the Arbitration Act was opposed on the ground that, *inter alia*, it did not comply with the requirements of Rule 2 of the Arbitration Rules.

The argument in the case was that Rule 2 requires that an application under Section 6 (and 7) of the Arbitration Act be made by summons in the suit while the application was headed "Chamber Summons" but took the form of a Notice of Motion. The Respondent's Counsel was of the view that, that was a defect, which could not be cured by amendment and urged for the dismissal of the application. However, the court held that the chamber summons, though wrongly taking the form of a Notice of Motion, did not invalidate the application which the rules require to be made. The court reasoned that the defects manifested were in form only and not substance and the respondent was not prejudiced thereby.[34]

In Nakumatt Holdings Limited-v-Kenya Wildlife Services[35] the plaintiff was seeking orders to refer a dispute between it and the Defendant to arbitration and appointment of an arbitrator from the list of three availed to the court. The application did not disclose which Arbitration Act was being invoked nor did the title of the summons indicate under which rule the matter had been brought. On that basis, the Originating Summons was preliminarily objected as patently incompetent and sought to be dismissed. The learned judge upheld the objection holding that the application was patently defective and could not succeed. As a result, the Originating Summons was dismissed with costs.

The moral? To be on the safe side do not overlook such minor issues as ensuring that the heading indicates that the Arbitration Act 1995 is the applicable Act and indicating the rules under which the application is brought in the application.

Generally, there is no requirement that reference to arbitration have started before application for stay of proceedings. However, the Act allows a party to commence arbitral proceedings despite pendancy of stay of proceedings application. The position is that while the application for stay is pending, arbitration may still be commenced and an

[33] HCCC (Milimani) No. 78 of 2001

[34] The High Court here was following the decision of the Court of Appeal in **Boyes-v-Gathure (1969) E.A. 385** where the court held that use of the wrong procedure does not invalidate the proceedings unless the same goes to jurisdiction and/or it caused prejudice to the other party.

[35] HCCC (Milimani) No. 1131 of 2001 (O.S.)

arbitral award made.[36] This provision appears justified given the not infrequent delay witnessed in our court system.

Can a party obtain interim anti-arbitration injunction to restrain the other party from commencing arbitration until the conclusion of the stay application?

3. The Role of the Court during Arbitration

The Arbitration Act makes provision for the following interventions by the High Court of Kenya during arbitral proceedings or at least after it becomes certain that the parties or one of them is decided on enforcing the arbitration agreement. There is a difference between the court's intervention measures that appear under this heading but strictly occur before commencement of arbitral proceedings and those classified under the previous heading as preceding arbitration. The pre-arbitration measures (those discussed in the previous section) are basically preliminary to the arbitration while those placed under the present heading are largely facilitative of arbitration and/or reference thereof.

4. Role of the Court in Appointment of Arbitrators

Generally, the arbitration agreement will specify the number of arbitrators and the mode of appointing the arbitral tribunal they would prefer to arbitrate their disputes.[37] There are several types of arbitral tribunals, the main ones being a sole arbitrator; a tribunal of two arbitrators, with an umpire in reserve; a tribunal of three arbitrators; a tribunal of more than three arbitrators; and an umpire.[38]

Subject to the arbitration agreement, the parties may agree on who is to arbitrate their dispute, even after dispute. In an arbitration with two arbitrators, each party shall appoint one arbitrator[39] and in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.[40] Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") –

(a) has indicated that he is unwilling to do so;

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[36] Section 6(2) of the Act

[37] Section 11(1) and 12(2) of the Act. The 2009 Amending Act has introduced a new Sec. 12 (3) which provides that Where an arbitration agreement provides that the reference shall be to two arbitrators, then, unless a contrary intention is expressed in the agreement, the agreement is deemed to include a provision that the two arbitrators shall appoint a third arbitrator immediately after they are themselves appointed."

[38] For an in-depth discussion of each of the tribunals see Sir Mustill M.J and Boyd S.C (1989) The Law and Practice of Commercial Arbitration in England (Butterworths, London and Edinburgh, 2nd Edition) p. 171-192

[39] Sec. 12 (2) (b) as amended by the 2009 Act.

[40] Sec. 12 (2) (c) *supra.*

(b) fails to do so within the time allowed under the arbitration agreement; or
(c) fails to do so within a reasonable time (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party),

the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.[41]

If the party in default does not, within fourteen days after notice under subsection (3) has been given –

(a) make the required appointment; and
(b) notify the other party that he has done so,
the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.[42]

Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.[43] The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.[44] The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator.[45] A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.[46]

As a matter of general rule, the courts assistance in appointment of arbitral tribunal is required in instances discussed above. Section 12 of the Arbitration Act 1995 stipulates the extent of the courts' power in making appointments of arbitral tribunals in Kenya. It is worth noting that the jurisdiction to make appointment to arbitral tribunal is vested exclusively in the High Court of Kenya. The Act premiers by acknowledging the parties autonomy to agree on who or how to appoint the arbitral tribunal to arbitrate between them. Thus the court appointment has provided for a default arrangement if efforts by the parties to appoint a tribunal encounter a stalemate. The High Court will be faced with diverse situations where it is required to make such appointments. These include where there is no agreement on appointment between the parties, where there is failure to appoint a sole arbitrator, where there is failure to appoint one of the two arbitrators, where

[41] Sec. 12(3) *supra.*
[42] Sec. 12(4) *supra.*
[43] Sec. 12 (5) *supra*
[44] Sec. 12 (6) *supra.*
[45] Sec. 12 (7) *supra.*
[46] Sec. 12 (8) *supra.*

there is failure by the two arbitrators to appoint the third arbitrator, where the parties had agreed that an appointing authority undertake appointment and the same is in default and finally to fill a vacancy. [47]

The High Court is enjoined in making such appointment to consider the qualifications required of the arbitrator by the agreement of the parties.[48] For instance, in a building arbitration, the court may consider appointing an architect as an arbitrator especially where the parties had agreed that an arbitrator be a distinguished person in the construction industry.

The court is also bound to make sure it secures appointment of independent and impartial tribunal.[49] Considerations of impartiality will depend on the circumstances of the dispute such that where the arbitral tribunal is proposed by one party and the other party has entered appearance in the appointment proceedings, the court may give audience to that other party either to raise objections against appointment of the proposed arbitrator(s) and/or to propose alternative ones.

The court is also to take into account the advisability of appointing an arbitrator of an arbitrator of a nationality other than those of the parties.[50] This is for instance requisite in international arbitration where if the arbitrator comes from one party's country, there is likelihood that his/her impartiality will not be guaranteed. The decision of the High Court shall not be subject to appeal.

5. Challenging Arbitrator(S) through Court

Parties are free to agree on how to challenge the arbitral tribunal. Where the parties fail so to agree, a party may within 15 days of becoming privy to the appointment of the tribunal or circumstances that merit its challenge write to it stipulating the reasons for the challenge. If the challenged tribunal does not withdraw from office or the other party agree to the challenge, the tribunal shall decide the matter. If the challenge whether in the manner agreed by the parties or after decision by the tribunal does not succeed, the challenging party may apply to the High Court, within 30 days of refusal of the challenge, to determine the matter.[51] The High court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.[52]

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[47] *Ibid*.
[48] Section 12(9) of the Act as amended by the 2009 amending Act.
[49] *Ibid*.
[50] Ibid.
[51] Section 14 (3) of the Amending Act. Under Sec. 14 (4) the arbitrator who has been challenged shall be entitled to appear and heard before the High Court determines the application.
[52] Sec. 14 (5) of the Amending Act.

The decision of the High Court on the challenge shall be final and is not subject to appeal.[53] Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.[54] While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.[55]

An arbitrator may be challenged on basis of various factors provided for under the Arbitration Act. First, an arbitrator may be challenged if there is reason to justifiably doubt his/her impartiality and independence. The fact that an arbitrator does not possess qualifications agreed to by the parties is also a potent reason for a challenge or "*if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so*".[56] However, a party who has appointed an arbitrator may only challenge him on basis of reasons that he becomes seized of after such appointment. The rationale here is to avoid a situation where a party appoints an arbitrator intending to challenge him/her later in the course of the arbitral proceedings as a delaying tactics. Hence the need to be cautious in making arbitrator appointments as the chance to challenge ones appointment is restricted.[57]

In the same vein, an arbitrator's office is to terminate in the event of his/her inability to perform the functions of the office of arbitrator or for any other reason fails to act without undue delay. In alternative, where an arbitrator resigns or parties agree to terminate his/her mandate, his office shall terminate. But in the instances where the above grounds are contested, recourse is to be heard at the High Court upon application of a party for a decision on the termination. Such decision shall be final and not appeal able. Where an arbitrator withdraws after challenge or parties agree to termination that shall not amount to acceptance of the ground cited for the challenge or removal. In the instance of termination of an arbitrator's mandate, another arbitrator shall be appointed as per the procedure applicable for appointment. The law stipulates instances where proceedings may be held afresh and when the proceedings may be upheld. Generally, orders and ruling of an arbitral tribunal are to be preserved despite change of composition of the tribunal except if successfully challenged by the parties. This is meant to ensure movement in arbitration.[58]

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[53] Sec. 14 (6) *supra*.
[54] Sec. 14 (7) *supra.*
[55] Sec. 14 (8) *supra.*
[56] See Sec. 9 of the Amending Act.
[57] Section 13 of the Act
[58] Section 15 of the Act

Thus as a general rule, an application challenging an arbitrator or for removal of the same, the court may grant the application or dismiss it. In the former instance, the court will remove the arbitrator against whom the application is made and leave the matter of replacement to be undertaken as per the agreed procedure of appointment. In addition, especially where the issue is raised in the application, the court may declare the arbitrator's entitlement to fees and expenses or otherwise. In the same breath, the High Court may direct repayment and/or restitution by the arbitrator of any fees and/or expenses already disbursed to him/her.

6. Determining The Arbitral Tribunal's Jurisdiction

As per the doctrine of "*kompetenz kompetenz* ", the arbitral tribunal may rule on its own jurisdiction. Such ruling may encompass matters including existence or validity of the arbitration agreement. [59] The fact that a party has appointed or participated in appointing an arbitrator is not a bar to challenging the jurisdiction of the arbitral tribunal.[60]

It is desirable that any challenge to the jurisdiction should be resolved as early as possible The Act requires that a plea of lack of jurisdiction be raised latest at submission of defence.[61] Where the plea is exceeding of jurisdiction, the same should be raised as soon as the matter alleged to be in excess of authority is raised in the proceedings.[62] However, the arbitral tribunal has the discretion to admit a later plea where it considers the delay justified.[63]

The arbitral tribunal has two options open to it when the question of jurisdiction is raised by a party. The arbitral tribunal may rule on the matter as a preliminary question or wait to address it in an arbitral award on the merits.[64] The ruling of the arbitral tribunal in the former instance may be challenged by the aggrieved party by way of an application to the High Court. Such application must be made within 30 days of notice of the award[65] and the decision of the High Court shall be final.[66] But while the application is pending before the superior court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such award shall be void if the application is successful.[67]

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[59] Section 17 (1) of the Act
[60] Section 17 (4) of the Act
[61] Section 17 (2) of the Act
[62] Section 17 (3) of the Act
[63] Section 17 (4) of the Act
[64] Section 17 (5) of the Act
[65] Section 17 (6) of the Act
[66] Section 17 (7) of the Act
[67] Section 17 (8) of the Act as amended by the Act of 2009.

The application challenging the jurisdiction of the arbitral tribunal to the High Court shall be made by originating summons. The summons should be returnable on a fixed date before a judge in chambers and must be served on all parties to the arbitration and the arbitral tribunal at least 14 days before the return date.[68] Any application resultant of the originating summons shall be made in summons in the same cause and served at least seven days before the fixed hearing date fixed for it.[69]

7. Interim Orders of Protection during Arbitration

Save where parties have otherwise agreed, the arbitral tribunal may at request of a party order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject of the dispute.[70] In that connection, the tribunal may require a party to provide security for the measure requested for [71]or order any party to provide security in respect of any claim or any amount in dispute[72] or order a claimant to provide security for costs.[73]

The Act gives the High Court power to enforce the peremptory orders of protection given by the arbitral tribunal. In order to enforce such protective measure or generally to exercise the power associated with the interim protective measures, the tribunal or a party with approval of the arbitral tribunal may apply for assistance of the High Court.[74] The High Court has equal powers as possessed by the arbitral tribunal with regard to interim measures of protection under the Act. In particular, the High Court's power shall be the equivalent the one it wields in civil proceedings before it. However, the arbitral proceedings shall continue regardless of the fact that such an application is pending in the High Court except where the parties agree otherwise.[75]

8. Assisting in Taking Evidence for use in Arbitration

The High court has power to take evidence for use at the arbitral hearing. This happens upon request of either a party or arbitral tribunal. The High Court has discretion to execute the request within its competence and its rules on taking evidence. The High Court's assistance in this instance includes issuing summons to the witness to secure attendance of the witness if the witness is within Kenya and refuses to attend and give evidence. If such a witness refuses to attend even after such summons, he will be liable to be punished for contempt of court. The High Court may also order examination of a witness on oath before an officer of the court or any other officer. Where the witness is outside the

[68] Rule 3(1) of the Arbitration Rules, 1997
[69] Rule 3(2) of the Arbitration Rules, 1997
[70] Section 18 (1) (a) of the Act as amended by the Act of 2009.
[71] *Ibid.*
[72] Sec. 18 (1) (b).
[73] Sec. 18 (1) (c).
[74] Section 18 (2) of the Act
[75] Section 18 (3) of the Act

jurisdiction, the court may order the issue of order for taking of evidence by commission or request for examination of a witness outside the jurisdiction.[76]

9. Determination of A Question of Law

The parties to a domestic arbitration may agree that application be made by a party to the High Court for determination of questions of law arising in arbitration.[77] The parties may also agree that appeal be available to aggrieved party on questions of law arising out of the award. Such appeal shall be to the High Court.[78]

On such application or appeal the High Court has two options available to it. It can either determine the question of law arising or confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration.[79] Where another tribunal has been appointed, remittance of the matter to this latter arbitral tribunal is permitted.[80]

The decision of the High Court is subject to appeal to the Court of Appeal if the following two conditions being met. The parties must have agreed to appeal and the High Court grants leave to appeal.[81] A party aggrieved by the High Court's refusal of leave to appeal may seek special leave to appeal from the Court of Appeal.[82] The court appeal has jurisdiction on such appeal to exercise any of the powers exercisable by the High Court on application for determination of questions of law in arbitration.[83]

The Court of Appeal in ***Kenya Shell Limited v Kobil Petroleum Limited***[84] held that public policy considerations may endure in favour of granting leave to appeal just as they would to discourage it. In the case, leave to appeal on a question of law was denied on ground of public policy. The court stated:

> *"We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings in this matter were conducted underscores that policy….We do not feel compelled Therefore to extend the agony of this litigation on account of the issues raised by the Applicant."*

[76] Section 28 of the Act
[77] Section 39 of the Act
[78] *Ibid.*
[79] *Ibid.*
[80] *Ibid.*
[81] Section 39(3) of the Act
[82] *Ibid.*
[83] Section 39 (3) of the Act
[84] Civil Appeal (Nairobi) No. 57 of 2006

10. Procedure For Court Application During Arbitration

The procedure for applications during arbitration is provided for under Rule 3 of the Arbitration Rules, 1997. The same are in Originating Summons supported by an affidavit. This is because originating summons is the method best suited as it initiates a suit as well as serve as an application. The summons must be served on all parties before the hearing date indicated on it.[85] Any other application subsequent to the originating summons and pursuant to the same is to be by way of chamber summons, which must be served seven days clear of the hearing date indicated on them.[86]

11. Role of the Court after Arbitration

This role involves mainly how the court may intervene after grant of award, the role of the court after arbitration involves essentially setting aside, recognition and/or enforcement of arbitral awards.

11.1 Setting Aside Arbitral Award

This is the only recourse in the High Court against an arbitral award permitted by the Arbitration Act, 1995.[87] The instances when the High court may set aside an arbitral award are specifically stipulated in the act.[88] First, the arbitral award may be set aside where it is proved that a party to the arbitration agreement was under incapacity.[89] When the presence of such incapacity is material is not stipulated. However, it seems that this ground applies where it is shown that the arbitration agreement is invalid as a party to it lacked capacity to enter it. The condition will be met where it can be shown that a party was a minor, or mentally incapacitated, insolvent or even in case of a company unincorporated at the time it purportedly entered the arbitration agreement.

The second ground under which an arbitral award may be set aside is invalidity of the arbitration agreement under the laws governing the dispute.[90] The parties are free to agree on the law that will govern the arbitration in default of which arbitration shall be governed by Kenyan laws. Thus upon proof that the arbitration agreement is invalid under the applicable law, the High Court may set aside the arbitral award made pursuant to a reference under the agreement. A further ground for setting aside arbitral award is if proper notice of appointment of an arbitrator or arbitral proceedings was not given.[91] The ground will have been met if the applicant can show that s/he was unable to present his case for any other reason.

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[85] Rule 3 (1) of the Arbitration Rules, 1997
[86] Rule 3 (2) of the Arbitration Rules, 1997
[87] Section 35(1) of the Act
[88] Section 35(2) of the Act
[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid.*

The High Court may also set aside the award if it deals with a dispute not contemplated by or falling within scope of the terms of reference to the arbitration. Similarly, an award may be set aside if it contains decision matters beyond the scope of the arbitration reference. But if the decision on the matters referred to arbitration can be separated from that on extraneous ones, on the latter part of the award may be set aside.[92]

In addition, the fact that the composition of the arbitral tribunal or the procedure during the proceedings was not as per the parties' agreement furnish a ground for setting aside arbitral awards. However, if the agreement was in conflict with a provision of the Act which the parties are not allowed to derogate from or there was no agreement on derogation, then the award shall not be set aside.[93]

An arbitral award may also be set aside where the High Court finds that the dispute is incapable of settlement by arbitration under the law of Kenya. The court will also set aside an award that is in conflict with public policy of Kenya.[94] These were the grounds relied upon in ***Macco Systems India PVT Limited-v-Kenya Finance Bank Limited***.[95]

Ringera J (as he then was), after examining several authorities, in **Christ For All Nationals vs. Apollo Insurance Co. Ltd**[96] and formed the view that: -

> "Although public policy is a most broad concept incapable of precise definition…. . an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:
>
> a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten or
> b) inimical to the national interest of Kenya or
> c) contrary to justice and morality."

An arbitral award can also be set aside where the making of the award was induced or affected by fraud, bribery, undue influence or corruption.[97]

The law requires that an application for setting aside an arbitral award be made within three months of receipt of the award by the applicant. If the application is made pursuant

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[92] *Ibid.*
[93] *Ibid.*
[94] Section 35 (2) (b) of the Act
[95] HCCC (Milimani) No. 173 of 1999
[96] [2002] 2 EA 366
[97] Sec 35 (2) (v).

to an application for recognition of award the same must be within 3 months of the award.[98]

A party to the arbitral proceedings whose award is sought to be set aside may apply suspension of the setting-aside proceedings. The High court may exercise the discretion to suspend such proceedings where it deems the same appropriate. A suspension shall be for such determined time and for the purpose of giving the arbitral tribunal an opportunity to resume the arbitral proceedings or take a remedial action for purging the grounds for setting aside the arbitral award.[99]

11.2 Recognition and Enforcement of Arbitral Awards

Generally, an arbitral award is recognised as binding regardless of the state in which it was made. Thus on application to High Court, a domestic arbitral award shall be enforced subject to relevant provisions of the Arbitration Act, 1995.[100] An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.[101] Any party may apply for enforcement of arbitral award.[102] But often application for enforcement is made by the party in whose favour the arbitral award was made and the other party will reply to the application.

The law requires that the High Court be furnished with a duly authenticated original arbitral award or duly certified copy thereof.[103] In addition, the parties should supply the original arbitration agreement or a certified copy of it to the superior court. However, the High Court may order otherwise where a party seek indulgency on compliance with these requirements to supply those documents. The arbitration award furnished must be in English and if the original was not English, the law requires a duly certified translation to be availed to the court.[104]

In ***Kundan Singh Construction Ltd-v-Kenya Ports Authority***[105]an application for recognition and enforcement of an arbitral award was struck out for failure to comply with section 36(2) of the Arbitration Act. The judge found that there was not a duly authenticated original arbitral award or a duly certified copy of it. Rather, he found that what was on court record were photocopies of the arbitral award and arbitration

[98] Section 35(3) of the Act
[99] Section 35 (4) of the Act
[100] Section 36 (1) of the Act
[101] Sec. 36 (2) of the Act as amended by the Act of 2009.
[102] *Ibid.*
[103] *Ibid.*
[104] *Ibid.*
[105] HCCC(Milimani) No. 794 of 2003

agreement contrary to the requirements of section 36(2) of the Act which could only be waived upon application which had not been made.

Section 37 provides the ground on which the High Court may refuse to recognise an arbitral award irrespective of the state of origin. At the request of the party against whom the award is sought to be invoked the court refuse to enforce award if the party proves any of the following: that the party to the agreement was under incapacity, that the arbitration agreement is not valid under the applicable law, that proper notice of appointment or arbitral award was not given the party or otherwise the party was unable to present his case, that the award does not fall within or is incurably beyond the scope of the reference to the arbitration, that the composition of the arbitral tribunal was not as per the parties agreement or was afoul the law applicable to the arbitration or the making of the award was induced or affected by fraud, bribery, undue influence or corruption. A proof that the arbitral award has not yet become binding on the parties or has been set aside or suspended is also a ground for refusal to enforce the award, at least temporarily.[106]

The High court may also, on its own motion or upon request by a party, refuse to enforce an arbitral award on the grounds provided for in section 37 (1) (b) of the Act. Here, the court has to find that subject matter of the dispute is not referable to arbitration under the laws of Kenya. Whether or not the matter was capable of settlement by arbitration in the country of origin of the award is not a valid consideration of the court. In alternative, the court will refuse to enforce an arbitral award where its recognition or enforcement would be contrary to the public policy in Kenya. These grounds are in recognition of the court's role as custodian of the laws and public interest in Kenya and the resultant duty on the courts to uphold the same.[107]

The law allows the High Court the discretion on proper occasions to adjourn its decision on refusal to recognise an arbitral award. The discretion is applicable where an application for setting aside or suspension has been made in a competent court in the state of origin of the arbitral award. The court may also on application of the party seeking recognition or enforcement order the other party to provide appropriate security before embarking on the application to consider grounds adduced for refusal to enforce an arbitration award.[108]

11.3 Procedure For Court Intervention After Award

Any application after the arbitral award is preceded by filling of the award. If an application had been made during arbitration, the award is to be filed under the same cause and is therefore not given a new number. In any other case, the award after filing is

[106] Section 37 (1) (a) of the Act
[107] Section 37 (1) (b) of the Act
[108] Section 37 (2) of the Act

given a serial number at the civil registry. The party filing the award must give notice to all concerned parties of the filing of the award indicating the date thereof, the cause number and the registry of filing. As proof of service of the notice, the party is required to file an affidavit of service.[109]

Generally, all applications subsequent to the filing of the award must be served seven days clear of the hearing date. If no application to set aside an arbitral award has been made according to section 35 of the Act i.e. within three months after receipt of the award by the parties, the party filing may apply *ex parte* by summons for leave to enforce the award as a decree.[110]

An application to set aside the arbitral award is by way of summons[111] supported by an affidavit specifying the grounds relied upon. The application and the affidavit must be served on the other party and the arbitrator.

An application for recognition and enforcement of the award is by summons in Chambers.[112] The Civil Procedure Rules apply in such application as far as appropriate. Generally, the Civil Procedure Rules apply to all proceedings under the Arbitration Act subject to the provisions of the Arbitration Rules, 1997 as to appropriateness of their application.[113]

12. Court Intervention in Arbitration: Friend or Foe?

In determining whether court intervention is friend or foe of arbitration, due appreciation must be had of the factors upon which the issue depends. In essence, the effect of court intervention on arbitral proceedings depends on three critical factors, namely the provisions of the law on court intervention, the general policy and attitude of the court towards its role in arbitration and arbitration generally and, finally the approach of lawyers and their clients on court intervention.

The legal provisions on court intervention are mainly to be found in the arbitration Act, 1995 and the rules there under (discussed extensively above) and the Civil Procedure Act (section 59) and the Civil Procedure Rules. There are chances of conflict of rules and uncertainty in the laws as to court intervention especially given the fact that there is not a one-stop source of law on the matter. However, all the instances of court intervention provided for in the legal framework as demonstrated above are justified and necessary.

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[109] Rule 5 of the Arbitration Rules, 1997.
[110] Rule 4 of the Arbitration Rules, 1997
[111] *Ibid*. Rule 4(2)
[112] *Ibid*. Rule 9
[113] *Ibid*. Rule 11

For instance, stay of proceedings application is meant to give effect to the arbitration agreement where one party has filed a suit in court in breach of the agreement. The interim measures of protection before arbitration offer an opportunity for a party to an arbitration agreement to take measures to secure the status *quo* of the subject matter of the intended arbitration. This is clearly an appreciation of the reality that reference to arbitration to arbitration does not happen overnight.

The court intervention measures during arbitration as provided for under the law are similarly based on demonstrable logic and rationalization. The provisions on court involvement in appointment of arbitral tribunal offers a default measure where parties' efforts to pursue the agreed modes of appointment have hit a dead end. On its part the opportunity to challenge arbitrators, just like the opportunity to challenge the bench in civil proceedings, is meant to ensure that justice is not only done but seen to be done. It also avoids the likelihood of the disgruntled party opting to later challenge the arbitral award on ground he could have raised as preliminary matters as that would imply extra expenses and delay in holding fresh arbitration proceedings if the challenge succeeds. It is universally accepted that jurisdiction is everything[114] and a party should thus not be compelled to put up with an award of a tribunal whose jurisdiction he would rather challenge whether on basis of substance or procedure. This is the basis for the provisions on challenging the jurisdiction of the arbitral tribunal.

The court is also permitted opportunity to facilitate and aid arbitration especially in matters that, as an emanation of a private arrangement, the arbitral tribunal cannot undertake and or purport to compel. The provisions for assisting in collecting evidence, assisting in enforcing interim measures of protection and interpreting questions of law fall under this category. In fact, even in normal civil proceedings, parties are entitled to appeal on questions of law and as such, except on express agreement, parties to an arbitration agreement cannot be said to waive that right merely by agreeing to arbitrate their disputes.

The opportunities for court intervention after the award are even more justified and necessary. The need to set aside arbitral awards that visit manifest injustices on a party cannot be admitted to debate. In the same breath, arbitral awards being a result of private contractual arrangements cannot attain immediate force of law until they are adopted by the court. The court, being the custodian of public policy in Kenya, cannot reasonably be expected to perform a mere rubber-stamping role. The High Court is thus afforded an opportunity to scrutinise the arbitral award. No doubt this also helps secure the party adversely affected by the arbitral award a right to be heard in the interest of natural justice.

[114] Nyarangi, JA in Owners' of the Motor Vessel "Lillian S"-v-Caltex Oil Kenya Ltd. [1989] KLR 1

But while the instances of court intervention are rationally justified, the provisions relating to them are far from being perfect and unambiguous. For instance, the provisions on stay of proceedings are beset with unnecessary conditions that even a well-meaning court is disadvantaged in expediting the application especially when the Plaintiff is not receptive. For instance, nothing a judge can do when an application for stay of proceedings is inadvertently lodged a day after entry of appearance except to dismiss it-there is no room for equity when the law is strict in its stipulations.

The point is that the law on court intervention is in dire need of reforms especially on matters to do with fine details. The procedure for applying for court interventions is very strict as to afford lawyers intending to delay arbitration proceedings room for manoeuvres. There is no reason why the procedure for such applications cannot be relaxed to ensure that it secures justice for the opposite party without being tyrannical and prone to abuse. For example, it could help providing that applications under the Arbitration Act be not dismissed for adopting wrong procedure and that the courts endeavour to uphold them with due regard to the justice and fairness to the parties need to avoid delays in arbitration.[115] The law may also be amended to provide that arbitration applications be heard on priority basis.

The uncertainty of the law has yielded emergency of constitutional applications in arbitration proceedings. The argument in support is largely that the legal framework on arbitration cannot reasonably be interpreted as ousting the inherent and constitutional rights of parties to fair hearing and natural justice. The counter argument is that arbitral proceedings are private and contractual arrangement where a party by choice opts to contract to sort out disputes outside the public domain. Thus, by extension, the parties are taken to have waived access to public remedies afforded under such vehicles as judicial review and constitutional applications. But this argument is clearly out of ignorance of the limitation of freedom to contract as one cannot contract away his/her basic rights.

The other argument offered in support by antagonists of constitutional and judicial review applications in arbitration is that there is an adequate mechanism offered under the law and one should exhaust that first. But rights are, by nature, matters urgent and emotional and remedies meant to enforce are permitted to be invoked despite other alternatives.

When a party feels his/her constitutional rights are being infringed, there is no denying that the first impulse is to doubt the arbitrator's jurisdiction. To make it compulsory that s/he first submits to the jurisdiction of the arbitral tribunal before he can be entertained in a constitutional court is unconscionable. If anything, no party would admit to arbitration

[115] This has been done for matters under the Children Act, if a demonstration that it is doable is needed!

knowing that the arbitral process will infringe his/her right to fair trial. If arbitration is to be made the choice mode of dispute resolution, the law must afford parties flexibility to make it fair and just process. In fact, the possibility of a constitutional application or judicial review, like the sword of Damocles, can help keep the arbitral tribunal guarded all for the best for the parties and arbitration in Kenya.

The best that can be done is to offer optional but efficient and appealing alternatives to constitutional application and judicial review and leave it to the choice of the aggrieved party. In addition, constitutional applications could be expedited make them more expedient and simple as possible. At least, there is no reason why this is not possible given that hardly is *viva voce* evidence adduced in such application. If that was done, the argument against constitutional and judicial review application in arbitration i.e. that they delay the process will be a thing of the past. The above measures are better than limiting the rights of parties in arbitral proceedings to recourse to the constitution court and judicial review applications. This latter measure is wont to set a bad precedent that might serve to affect the general attitude to arbitration and even serve as an impediment to parties genuinely out to secure their rights.

With regard to the court's approach to intervention in arbitration, the same has considerably changed from that of indifference to perception of the process as facilitative of arbitration. The sentiments of the court of appeal in the ***Epco case*** (supra) and Kenya Shell Case (also supra) are indicative of this change of heart. The courts now see arbitration as an opportunity to wrestle backlog of cases and yield justice on parties' terms. If only this positive attitude could be coupled with necessary reforms on the law proposed below much ground would be covered in making court intervention a friend, rather than foe, of arbitration.

There is also need to curb lawyers and arbitral parties bent on abusing court intervention to clog the arbitration process. The problem with the adversarial systems is that it often forces the court to stand aside and watch parties obviate each other's cause of action with all imaginable tricks like a lame duck. The few remedies fashioned to prevent abuse of court process do not offer much help especially when lawyers get into the fray with their bagful of tricks-and delay is the darling trick of most lawyers! Soon, what was a simple issue is reduced to complex lawyers' business. The court's interventions in arbitration are not immune to lawyers out to abuse the process of the court. It emerges that hoping to cure the abuse of arbitral process only by addressing the problem in arbitral proceedings is like proposing to cut a malignant finger when the whole blood system is poisoned.

Arbitration is part of the justice system of Kenya and the fates of each of the two are inseparably tied together and interdependent. The general duty of advocates as officers of the court needs to be addressed. So is counsel's allegiance and compliance to clients'

whims. The two are matters belonging to the realm of professional ethics. Undoubtedly, they go to the training and orientation of the lawyers. Local law schools will do better to impress upon their students the role of ADR and arbitration in general and the fact that two are not 'mechanisms designed by non-legal professionals to drive legal practitioners out of business.' Also, legal professional organizations like Law Society of Kenya and affiliate bodies like Chartered Institute of Arbitrators-Kenya branch need to adequately orient their members on ADR and adopt specific policies for the members to follow when involved in litigation affecting arbitration.

The foregoing discussion renders it clear that court intervention in Kenya cannot be dismissed as detrimental to the ideals of arbitration. No doubt, the role of the court so far exonerates it from being a foe of the arbitral process in Kenya. But it also leaves a lot to be desired especially due to the constrictions that are imposed by the provisions of the Arbitration Act that the courts are called to apply in their intervention in arbitration. Thus, many reforms are needed if role of the court is to become facilitative of arbitration and to shake off such qualities as we have seen above which unnecessarily render arbitration inexpedient and cumbersome.

13. Reforming The Role of the Court in Arbitration in Kenya

The reforms herein are based on the discussion above. On its part, the Arbitration (Amendment) Act, 2009[116] (hereinafter 'the Amendment Act') introduces a number of reforms on the Arbitration Act, 1995 that go to the core of the role of the Court in Arbitration Proceedings. The objectives of the amendments are clearly noble and far reaching.

The Amendment Act, *inter alia*, aims to make further provision as to the time within which an application to stay legal proceedings, provide for the appointment of a chairman in relation to an arbitration conducted by two or more arbitrators, provide for a right to challenge an arbitrator on the ground of physical or mental unfitness, permit an arbitrator to resign his appointment as arbitrator and permit the High Court to exculpate such an arbitrator from liability.[117] In addition, the amendments are aimed at limiting the right of appeal from the High Court on a point of law, make further provision for the expedition of arbitration proceedings and the obligations of parties and the powers of arbitrators, allow an arbitrator to request evidence to be given on oath and make other amendments of a minor character for the better operation of the law.[118]

[116] The Amendment Act is a result of joint efforts by the Law Reform Commission, the Chartered Institute of Arbitrators-Kenya Branch and other stakeholders

[117] Wako, S.A, Memorandum of objects and Reasons of Arbitration Bill, 2007

[118] *Ibid.*

Firstly, the provisions on the time for applying for stay of proceedings have been amended in a bid to render them more certain. The Amendment Act provides that the application for stay be made when a party enters appearance or takes the appropriate procedural step to acknowledge the legal proceedings against that party. The effect of this amendment is that it makes it compulsory for a party to enter appearance to be entitled to application for stay. However, it fails to the change the *status quo* obtaining as an application will still have to be made 'when a party enters appearance'.

The clause on the other alternative i.e. 'takes the appropriate procedural step to acknowledge the legal proceedings against that party' will likely be interpreted by courts to apply only where entry of appearance does not apply. The best provision would be that contained in the Repealed Arbitration Act, Cap. 49 i.e. 'any time after appearance or when the party otherwise acknowledges the claim against him."[119] A proviso that, on application, the court may extend the time for making application despite delay upon citing the reasons and finding that it will not unduly prejudice the plaintiff should also be added.

The strict condition for grant of stay that there should be a dispute between the parties with regard to matters agreed to be referred to arbitration makes proceedings unduly cumbersome as it shifts the burden of proof to the applicant for stay.[120] That the applicant can prove that the matter is the subject of an arbitration agreement should be enough to shift the burden to the party opposing the application to show that either there is no dispute or the instant dispute is not one of those contemplated by the arbitration agreement for reference to arbitration.

The Amendment Act provides that upon application for stay, the proceedings sought to be stayed be put on hold until the ruling on the application.[121] The strict implication of ***Scott & Avery*** clauses is exempted where the court refuses stay or proceedings as is the case in United Kingdom.[122] This is meant to ensure that a party can launch a suit despite the fact that arbitration is not possible. There is need to also make provisions for instances where the clause in question provides for reference to arbitration only after exhaustion of other dispute resolution measures e.g. as is the case with Alternative Dispute Resolution clause.[123]

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[119] Section 6 of the Repealed Arbitration Act, Cap. 49 of the Laws of Kenya
[120] The Arbitration (Amendment Act) 2009 does not amend section 6(1) (b) which engenders this requirement.
[121] Sec. 6 (2) of the Amendment Act.
[122] Section 9(5) of the Arbitration Act 1996 of UK
[123] See Ibid. Section 9 of the UK Act

The amendments on appointment in the Amendment Act make provisions for appointment of chairman (chairperson) and a tribunal of two arbitrators. In addition, major amendments have been introduced with regard to the grounds of challenge of arbitrators. The physical and mental incapacity of an arbitrator or justifiable doubt of the same is made a ground for challenge. The High Court is restricted in the instance of challenge of an arbitrator to either uphold or reject such a challenge. The High Court is also to rule on entitlement to fees and expenses of the arbitrator upon removal following a challenge.[124]

The amendments also seek to bland the effect of continuation of arbitration during a challenge as currently provided in the arbitration Act, 1995 and provide that an arbitration award shall be void if the application is successful.[125]

The Amending Act also makes provisions for what happens when an arbitrator withdraws. S/he is to apply to High Court for decision on relief for liability incurred by him/her and fees and expenses or repayment of the same. The court is bound to satisfy itself on the reasonableness or otherwise of the withdrawal before granting relief to the arbitrator.[126]

The Amending Act also introduces immunity of an arbitrator and his/her employees from liability for anything done or omitted during the arbitration.[127] But the same has to have been done in good faith in discharge or purported discharge of the arbitrator's office. The difference between the immunity proposed under the Amending Act and that existing in the UK is on whom the burden of proof is placed. In the Amending Act, it is not clear who is to show that the acts sought to be immunised from liability were done in good or bad faith. In the UK however, the party seeking to prove that the arbitrator is liable bears the responsibility of proving that the acts complained of were done in bad faith. In any case, the amendments do not cover any liability that may be incurred by reason of the arbitrator's withdrawal from office and a suit may be launched in that regard.

The interim powers of the arbitrators and, by extension, the High Court, during arbitration have been expanded in the Amending Act to include orders for party to provide security in respect of claim or amount in dispute or to provide security for costs.[128] This is in recognition of the fact that arbitration tribunals have to meet commercial requirements of expediency of decisions and to avoid frivolous claims and defence. But interim orders have been relegated in that they are not to be construed as awards and therefore the

[124] Sec. 16A of the Amending Act.
[125] Sec. 14(8) *supra.*
[126] *Supra,* note 125.
[127] Sec. 16B of the Amending Act.
[128] Sec. 18 (1) (a), (b) and (c).

principles of recognition and enforcement of awards are not to apply to them. This helps save time as the parties will be limited in their ability to clog arbitration with unnecessary and indirect challenges to interim orders through the channels provided for challenging arbitral awards.

The amendments seek to enjoin parties to arbitration to do all things necessary for proper and expeditious conduct of the arbitral proceedings.[129] But what is proper is not necessarily in the interest of expediency nor does it necessarily yield just results. The word 'proper' is clearly amenable to many meanings and could easily become a versatile ground for extraneous applications.

Beyond the amendments contained in Amending Act, there are more reforms that are needed to our legal framework to streamline the role of the court in arbitration in Kenya. There is, for instance, need to incorporate the law regulating arbitration into an omnibus Act. There is also need to revaluate the provisions concurrent arbitral and court proceedings and cater for consolidation of proceedings where necessary. The powers of the court in facilitating and aiding arbitration proceedings need to be clearly stipulated. The effect of a court order admitting challenges to enforcement of arbitral award is also not very clear.

There is undue constriction on the power to appeal from interlocutory orders and even arbitral awards. This unnecessarily limits growth in arbitration jurisprudence in Kenya and makes arbitration less appealing choices for contracting parties. There is, therefore, need for amendment to permit appeal on agreement between parties and with leave of the court. There is also no reason why the bulk of jurisdiction on arbitration matters should be limited only to the High Court. Presently, the parties are constrained to the extent that where the value of some of the dispute does not merit a suit in the High Court they opt not to seek court intervention. It would be better if a graduated system just like in civil litigation was worked out for determining jurisdiction depending on the value of the subject-matter. If anything, the costs of litigation in High Court are higher compared to those of litigation in the lower courts and the High Court is not always in the vicinity of the parties except for those in the urban areas.

14. Conclusion

As a conclusion, it suffices to quote fragments of the joint judgement of their Lordships the Judges of the Court of Appeal (Omolo, JA, Waki, JA and Onyango-Otieno, JA) in ***Kenya Shell Limited v Kobil Petroleum Limited*** (supra) which sums the ideal policy for courts in intervening in Arbitration in Kenya:

[129] Sec. 19A of the Amending Act.

"Arbitration is one of several dispute resolution methods that parties may choose to adopt outside the courts in this country. The parties may either opt for it in the course of litigation under Order XLV of the Civil Procedure Rules or provide for it in contractual obligations in which event the Arbitration Act, Act no. 4 of 1995 (the "Act") would apply and the courts take a back seat. …The [Arbitration] Act, which came into operation on 2nd January, 1996, and the rules thereunder, repealed and replaced Chapter 49 Laws of Kenya, and the rules thereunder, which had governed arbitration matters since 1968. A comparison of the two pieces of legislation underscores an important message introduced by the latter Act: the finality of disputes and a severe limitation of access to the courts. Sections 6, 10, 12, 15, 17, 18, 28, 35 and 39 of the Act are particularly relevant in that regard. The message, we think, is a pointer to the public policy the country takes at this stage in its development. …We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings … underscores that policy.

The Arbitration Acts: A Review of Arbitration Act, 1995 of Kenya Vis-A-Viz Arbitration Act 1996 of United Kingdom

1. Introduction

This paper is essentially a review of the statutory arbitration law applicable in Kenya and United Kingdom. It embodies an extensive review of the Arbitration Act, Act No. 4 of 1995, Laws of Kenya (hereinafter the Act or 1995 Act) and a brief overview of the basic provisions of Arbitration Act 1996 of United Kingdom (1996 Act).

The main aim is to outline the statutory law on arbitration in Kenya. The overview of the Arbitration Act 1996 is meant as a case study for the reader to gauge the provisions of the Kenyan arbitration law. In addition, the overview of the UK law is justified by the increased popularity of the Arbitration Act 1996 as the preferred law in international arbitration. It is also expected that the review of the Kenyan arbitration law alongside the admitted progressive UK 1996 Act will provoke comparison between the two systems and the Kenyan system will be the ultimate beneficiary. Such comparison is wont to yield proposals for reforms that would otherwise have been hard to come by.

2. Arbitration Law in Kenya

2.1 A Brief History of Arbitration Law in Kenya

The first Arbitration Act in Kenya was enacted in 1968. This 1968 Act is the now repealed Arbitration Act (Cap. 49) Laws of Kenya, which was describable as a near exact replica of the Arbitration Act 1950 of United Kingdom. The 1968 Act, like the Arbitration Act 1950 of UK, generally laid the framework for court's intervention in arbitrations. Arbitration stakeholders sought repeal of the Act for allowing courts such excessive leeway to interfere in arbitration.[1] This, they argued, meant arbitration based on the Act did not enjoy the main advantages of arbitration of speed and cost effectiveness. It is that clamour, combined with the emergence of UNICITRAL MODEL ARBITRATION LAW- which provided parliaments an easy fix in enacting an arbitration Act, led to legal reforms repealing the 1968 Arbitration Act and replacing it with the Arbitration Act, 1995.

2.2 Arbitration Act, 1995

2.2.1 Preliminary

The Arbitration Act, 1995 was assented on 10th August, 1995 and came to force in on 2nd January, 1996. It repealed and replaced Chapter 49 Laws of Kenya, which had governed

[1] Farooq Khan (2002) "Introduction to Arbitration" A paper presented at Chartered Institute of Arbitrators-Kenya Branch entry course held at Nairobi on 11th and 12th of February, 2002

arbitration matters since 1968.[2] The 1995 Act is made of 42 sections and is divided into 8 parts. The Act is based on the Model Arbitration Act of the United Nations Commission on Trade Law.

Subsequently, the 1995 has been amended vide the Arbitration (Amendment) Act 2009 which was assented to on 1st January 2010 (hereinafter referred to as the Amending Act).

2.2.2 Domestic arbitration and international arbitration

The Arbitration Act 1995 is applicable to both domestic and international arbitration save as limited by its provisions.[3] Section 3(2)[4] of the Act defines what arbitration is domestic while section 3(3) stipulates the requisite conditions for an arbitration to qualify as an international one.[5]

Arbitration is domestic;[6]

a)where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya;

(b) where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya;

(c) where the arbitration is between an individual and a body corporate

i) the party who is an individual is a national of Kenya or is habitually resident in Kenya; and

(ii) the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or

(d) the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject-matter of the dispute is most closely connected, is Kenya.

[2] Section 42 of the 1995 Act
[3] Section 2 of the 1995 Act
[4] As amended by Section 2 of the Amending Act.
[5] Subparagraph (b) of the Act has been amended to read "the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; "
[6] Sec. 3 (2) of the 1995 Act as amended by the Amending Act.

2.2.3 Arbitration agreement

An arbitration agreement or arbitration clause must be concluded in writing. An arbitration agreement is in writing if signed by parties or involves an exchange of letters, telex, telegram, facsimile, electronic mail or other telecommunication means providing a record of the agreement. Even better, it is enough that an arbitration agreement is alleged in the statement of claim and not denied by the other party. An arbitration agreement by reference is also possible provided the contract making the reference is in writing and the reference makes the clause referred to part of that contract.[7] Where there is no binding agreement to arbitrate, parties to dispute willing to arbitrate usually enter into an "ad hoc" agreement to arbitrate the same. In essence, arbitration in Kenya is a matter of contractual arrangement between partiers breach of which entitles the aggrieved party file a stay of proceedings filed in breach thereof.

2.2.4 Stay of proceedings

Applications for stay of the legal proceedings are provided for under section 6 of the Arbitration Act. It avails an avenue to a party to an arbitration agreement to give it effect when the opposite party has preferred court process in breach. Essentially, an arbitration clause or arbitration agreement in a contract is not an impediment to resolving disputes in court until a party objects.[8] However, if one of the parties is desirous of effectuating the arbitration agreement when the other has gone to court, then the former party may seek an order of the court under section 6 of the Arbitration Act staying the court proceedings. The grant of the order of stay of legal proceedings under section 6 leaves the initiator of the court proceedings with no option but to follow the provisions of the arbitration agreement if he wishes the dispute to be resolved.

In granting stay of proceedings, the courts generally have regard to the following conditions. One, the applicant must prove the existence of an arbitration agreement which is valid and enforceable.[9] The applicant for stay must also be a party to the arbitration agreement or at least a person claiming through a party e.g. a personal representative or trustee in bankruptcy.[10] In addition, it is necessary that the dispute which has arisen fall within the scope of the Arbitration Clause. The court is bound to stay the proceedings

[7] Section 4 of the Act 1995

[8] See Peter Muema Kahoro & Another-v-Benson Maina Githethuki [2006] HCCC(Nairobi) No. 1295 of 2005 and Rawal-v-The Mombassa Hardware Ltd [1968] E.A. 398

[9] In fact, section 6(1) (a) of the Act stipulates that court refuse to grant stay of proceedings where 'the arbitration agreement is null and void, inoperative or incapable of being performed'.

[10]Chevron Kenya Limited-v-Tamoil Kenya Limited HCCC (Milimani) No. 155 of 2007. See also Pamela Akora Imenje-v-Akora ITC Intenational Ltd & Another HCCC (Milimani) No. 368 of 2005

unless, *inter alia*, it finds: "that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."[11]

The party making the application for stay must also not have taken steps in the proceedings to answer the substantive claim. For instance, the party must not have served defence or taken another step in the proceedings to answer the substantive claim.[12] Under section 6 of the Arbitration Act, a party wishing to enforce the arbitration agreement in a situation where the other party has initiated court proceedings must apply to the court not later than the time when that it enters appearance or "takes the appropriate procedural step to acknowledge the legal proceedings against that party".[13]

2.2.4 Interim measures by court

The courts have wide powers to make orders relating to interim orders for the purpose of preserving the status *quo* pending and during arbitration. The jurisdiction to make such orders is the preserve of the High Court of Kenya.[14]

The courts have jurisdiction to make orders to preserve the status quo of the subject-matter of the arbitration. The powers could include making orders for attachment before judgment; interim custody or sale of goods (e.g. perishables), appointing a receiver and interim injunctions. However, the law discourages the parties from making parallel applications before the arbitral tribunal and/or the High Court by having section 7 (2) enjoin the court to adopt any ruling or finding on any relevant matter to the application as conclusive.

In ***Don-wood Co. Ltd-v-Kenya Pipeline Ltd***[15] Ojwang J, granting the orders sought, held that the jurisdiction to grant the injunctive relief under section 7 of the Arbitration Act was meant to preserve the subject matter of the suit pending determination of the issues between the parties.

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[11] Section 6(1) (b) of the Arbitration Act 1995. The section received an interpretation in TM AM Construction Group (Africa) v. Attorney General HCCC (Milimani) No. 236 of 2001

[12] Russell on Arbitration (supra) p. 301

[13] In Eagle Star Insurance Company Limited-v-Yuval Insurance Company Limited [1978] Llods Rep. 357, Lord Denning MR was of the view that to merit refusal of stay, the step in the proceedings must be one which "impliedly affirms the correctness of the [Court's] proceedings and the willingness of the defendant to go along with the determination by the courts instead of arbitration". See Chevron Kenya Ltd-v-Tamoil Kenya Limited and Kenya Seed Co. Limited-v-Kenya Farmers Association Limited HCCC (Nairobi) No. 1218 of 2006.

[14] Sec. 7 of the Act.

[15] HCCC No. 104 of 2004**.** See also Forster-v-Hastings Corporation (1903) 87 LT 736

2.2.5 Court's limited role in arbitration[16]

In Kenya, the general approach on the role and intervention of the court in arbitration in Kenya is provided in section 10 of the Arbitration Act 1995. The section provides that **'Except as provided in this Act, no court shall intervene in matters governed by this Act."**

That section, in mandatory terms, restricts the jurisdiction of the court in intervening in arbitration to such matters as are provided for by the Act. The section is a codification of the principle of parties' autonomy which underlies the arbitration generally and in particular under the Arbitration Act, 1995.[17] Section 10 permits two possibilities where the court can intervene in arbitration. First is where the Act expressly provides for or allows the intervention of the court. Intervention may also be permissible in public.

2.2.6 Appointment of arbitrator[18]

Generally the arbitration agreement specifies the number of arbitrators and the mode of appointing the arbitral tribunal they would prefer to arbitrate their disputes.[19] The parties can agree on any of several types of arbitral tribunals including sole arbitrator; a tribunal of two arbitrators, with an umpire in reserve; a tribunal of three arbitrators; a tribunal of more than three arbitrators; and an umpire.[20]

Where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") has indicated that he is unwilling to do so;[21] fails to do so within the time allowed under the arbitration agreement;[22] or fails to do so within a reasonable time (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party),[23] the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

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[16] See Kariuki Muigua (2008) "Role of Courts in Arbitration in Kenya" An unpublished paper available at the CIArb-K Library.

[17] See Sutton D.J et al (2003), Russell on Arbitration (Sweet & Maxwell, London, 23rd Ed.) p. 293

[18] See generally Jackie Kamau J and Farouk Khan (2007) "Appointment of an Arbitrator" A paper presented at Chartered Institute of Arbitrators-Kenya Branch special member course Held at Nairobi on 8th and 9th of March, 2007

[19] Section 11(1) and 12(2) of the Act

[20] For an in-depth discussion of each of the tribunals see Sir Mustill M.J and Boyd S.C (1989) The Law and Practice of Commercial Arbitration in England (Butterworths, London and Edinburgh, 2nd Edition) p. 171-192

[21] Sec. 12(3) (a) as amended by the Amending Act

[22] Sec. 12(3) (b), supra.

[23] Sec. 12 (3) (c), supra.

If the party in default does not, within fourteen days after notice under subsection (3) has been given make the required appointment and notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.[24] Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.[25]

Section 12 of the Arbitration Act 1995 further stipulates the extent of the courts' power in making appointments of arbitral tribunals in Kenya. The jurisdiction to make appointment to arbitral tribunal is vested exclusively in the High Court of Kenya. The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time. The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator. A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.[26]

The High Court is enjoined in making such appointment to consider the qualifications required of the arbitrator by the agreement of the parties.[27] The court is also bound to make sure it secures appointment of independent and impartial tribunal. The court is also to take account the wisdom of appointing an arbitrator other than fellow national of the parties or one of the parties. The decision of the High Court shall not be subject to appeal.[28]

2.2.7 Challenging of arbitration tribunal[29]

Parties are free to agree on how to challenge the arbitral tribunal. Where the parties fail so to agree, a party may within 15 days of becoming privy to the appointment of the tribunal or circumstances that merit its challenge write to it stipulating the reasons for the challenge. If the challenged tribunal does not withdraw from office or the other party agree to the challenge, the tribunal shall decide the matter.[30] If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to

[24] Sec. 12(4) (a) and (b), supra.
[25] Sec. 12(5), supra.
[26] Sec. 12 (6), (7) and (8) respectively as amended by the Amending Act.
[27] Sec. 12 (9)
[28] Ibid. This is for instance requisite in international arbitration where if the arbitrator comes from one party's country, there is likelihood that his/her impartiality will not be guaranteed.
[29] See generally Njeri Kariuki (2007) "Jurisdiction of Arbitrator" An paper presented at Chartered Institute of Arbitrators-Kenya Branch special member course held at Nairobi on 8th and 9th of March, 2007
[30] Sec. 14 (1) and (2) of the Act.

determine the matter. On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application. The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.[31]

The decision of the High Court on such an application shall be final and shall not be subject to appeal. Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid. While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.[32]

An arbitrator may be challenged on basis of various factors provided for under the Arbitration Act. First, an arbitrator may be challenged if there is reason to justifiably doubt his/her impartiality and independence or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so. The fact that an arbitrator does not possess qualifications agreed to by the parties is also a potent reason for a challenge. However, a party who has appointed an arbitrator may only challenge him on basis of reasons that he becomes seized of after such appointment. The rationale here is to avoid a situation where a party appoints an arbitrator intending to challenge him/her later in the course of the arbitral proceedings as a delaying tactics. Hence the need to be cautious in making arbitrator appointments as the chance to challenge ones appointment is restricted.[33]

In the same vein, an arbitrator's office is to terminate in the event of his/her inability to perform the functions of the office of arbitrator or for any other reason fails to conduct the proceedings properly and with reasonable dispatch. In alternative, where an arbitrator resigns or parties agree to terminate his/her mandate, his office shall terminate. But in the instances where the above grounds are contested, recourse is to be had to the High Court upon application of a party for a decision on the termination. Such decision shall be final and not subject to appeal.[34]

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[31] Sec. 14 (3), (4) and (5) as amended by the Amending Act.
[32] Section 14 (6), (7) and (8) of the Act as amended by the Amending Act.
[33] Section 13 of the Act as amended.
[34] Section 15 of the Act as amended.

2.2.8 Special powers and duties of an arbitrator[35]

The arbitration Act, 1995 makes a number of provisions touching on the powers of the arbitrator. The most important ones are the following:

i. Kompetenz kompetenz[36]

Most importantly, the arbitral tribunal may rule on its own jurisdiction. Such ruling may encompass matters including existence or validity of the arbitration agreement. The fact that a party has appointed or participated in appointing an arbitrator is not a bar to challenging the jurisdiction of the arbitral tribunal. The Act requires that a plea of lack of jurisdiction be raised latest at submission of defence. Where the plea is exceeding of jurisdiction, the same should be raised as soon as the matter alleged to be in excess of authority is raised in the proceedings. However, the arbitral tribunal has the discretion to admit a later plea where it considers the delay justified.[37]

The arbitral tribunal has two options open to it when the question of jurisdiction is raised by a party. The arbitral tribunal may rule on the matter as a preliminary question or wait to address it in an arbitral award on the merits. The ruling of the arbitral tribunal in the former instance may be challenged by the aggrieved party by way of an application to the High Court. Such application must be made within 30 days of notice of the award and the decision of the High Court shall be final. But while the application is pending before the superior court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such award shall be void if the application is successful.[38]

ii. Order interim measures

Unless the parties otherwise agree, an arbitral tribunal may, on the application of a party order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject- matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure; or order any party to provide security in respect of any claim or any amount in dispute; or order a claimant to provide security for costs.[39]

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[35] See generally Richard Mwongo, "The jurisdiction and powers of an Arbitrator" A paper presented at Chartered Institute of Arbitrators-Kenya Branch entry course held at Nairobi on 11th and 12th of February, 2002

[36] This is the German expression of the doctrine of Competence/Competence i.e. short for an arbitrator has competence to rule on its own competence.

[37] Section 17 of the Act as amended.

[38] Ibid.

[39] Sec. 18 (1) (a) (b) and (c) of the Act.

The Act gives the High Court power to enforce the peremptory orders of protection given by the arbitral tribunal. In order to enforce such protective measure or generally to exercise the power associated with the interim protective measures, the tribunal or a party with approval of the arbitral tribunal may apply for assistance of the High Court.[40] The High Court has equal powers as possessed by the arbitral tribunal with regard to interim measures of protection under the Act. In particular, the High Court's power shall be the equivalent the one it wields in civil proceedings before it. However, the arbitral proceedings shall continue regardless of the fact that such an application is pending in the High Court except where the parties agree otherwise.[41]

iii. Arbitrator 'master of procedure'

The arbitrator is given latitude to conduct the arbitration proceedings as s/he deems fit, having regard to the desirability of avoiding unnecessary delay or expense, in event of default by parties to agree on arbitral procedure.[42] The only condition guarding this freedom of the tribunal is the requirement of equal treatment of all parties and the need to give parties a fair and reasonable opportunity to present their case. The implication is that arbitrators are not bound procedural laws same way as they are by substantive laws. But even with the provision, most arbitration proceedings still ape the court procedures. There is need to change this state of affairs if arbitrations are to guarantee parties expeditious arbitral process.

The arbitrator is also given powers to deal with issue of amendment of pleadings unless parties have otherwise agreed. Section 24(3) of the Act gives the arbitrator power to decline or allow amendments or supplements to pleadings. The arbitral tribunal is further given discretion to decline amendments where they are likely to result in delay in the arbitral proceedings.

iv. Admissibility of evidence

The power to determine procedure is crowned with the discretion given the arbitrator in determining matters of admissibility, relevance, materiality and weight of evidence. In essence, the arbitrator has the power to determine the applicable rules of evidence.[43] In exercising this evidentiary discretion, the arbitral tribunal enjoys freedom from the reins of the provisions of the Evidence Act[44] which ordinarily regulate matters of procedure in judicial proceedings. Application of the Evidence Act is excluded as regards proceedings before an arbitrator by section 2(1) of the Act.

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[40] Section 18 (2) of the Act
[41] Section 18 (3) of the Act
[42] Section 20, as amended.
[43] Section 20(3) of the Act
[44] Cap. 80, Laws of Kenya

v. Ex-parte arbitration proceedings

Arbitration may proceed ex-parte where a party fails to appear despite grant of adjournments by the arbitrator and notices of hearings being served.[45] This power aims to ensure a party who senses defeat does not frustrate the arbitration. As such, the arbitrator must exercise due caution and ensure all reasonable effort is expended to give the absconding party an opportunity to attend. Where even after such reasonable efforts the party persists in absence or failure to produce, the arbitrator may make an award based on evidence available notwithstanding the absence or the failure by such party.

vi. Power to request assistance in taking evidence

The power of the arbitrator is limited in that s/he cannot compel a witness to give evidence. However, the arbitrator or a party can seek assistance of the High court in taking evidence for use at the arbitral hearing. In such circumstances, the High Court has discretion to execute the request within its competence and its rules on taking evidence.[46] The High Court's assistance in this instance includes issuing summons to the witness to secure attendance of the witness if the witness is within Kenya and refuses to attend and give evidence. If such a witness refuses to attend even after such summons, he will be liable to be punished for contempt of court. The High Court may also order examination of a witness on oath before an officer of the court or any other officer. Where the witness is outside the jurisdiction, the court may order the issue of order for taking of evidence by commission or request for examination of a witness outside the jurisdiction.[47]

vii. Powers to act on the arbitral award

The arbitrator may correct an error in an award on his/her own motion or upon request by any party.[48] The aim of this power is to eliminate the necessity to constitute a new tribunal just to tackle an error that does not go to the substance of the award.[49] This power is reserved for accidental additions or omissions and clerical errors. In the same vein, and based on agreement of the parties, an arbitrator may be called by either party to give an interpretation to a specific part of award. The arbitral tribunal also has power upon request by a party to make an additional award as to the claims presented but omitted from the main award within 60 days of the request. In addition, arbitral tribunal is given power under section 34(6) of the Act to extend time limits provided under the Act for correction, interpretation and additional awards.

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[45] Section 26(c) of the Act.
[46] Order XVII of the Civil procedure Rules
[47] Section 28 of the Act
[48] Section 34(3) of the Act
[49] The civil procedure equivalent is the power given to courts to correct minimal errors in judgements after issue

2.2.9 Termination of arbitration proceedings

The arbitral tribunal is enjoined under section 26 of the 1995 Act to terminate arbitration proceedings where the claimant defaults in communicating his/her claim. If the respondent is the party in default, the tribunal is to continue the proceedings without taking the default as admission. Thus the tribunal will require the claimant to prove its case as against the respondent and forbids summary awards.

If during proceedings the parties reach a settlement, the arbitral tribunal is under a duty to terminate the proceedings without more. Upon unopposed request by either party, the tribunal shall record the settlement in the form of an arbitral award on agreed terms. Such award is to state that it is an arbitral award and shall be in accordance with rules of formality under the Act.[50]

2.2.10 Costs and interest[51]

The arbitration process invariably involves costs and expenses and the questions of who bears the costs, how much is payable and at when costs are to be awarded are very delicate questions. The power of the arbitrator to award costs is provided for under section 32 B of the Act, as amended by the amending Act. The arbitrator must satisfy himself that the arbitration agreement is silent on costs and the legal provision on award of costs is subject to party autonomy to stipulate otherwise. Thus barring agreement as between parties, cost and expenses of arbitration are to be determined and apportioned by the arbitral tribunal. The section defines costs as legal and other expenses of the parties, fees and expenses of the arbitration and legal and other expenses of the arbitral tribunal. The arbitral tribunal may also exercise discretion to determine and award other expenses related to the arbitration.

The law provides for award of costs at award stage or after the award but not before. The arbitral tribunal may also be award costs by way of supplementary award where omitted in the main award. In default of award of costs and expenses, each party is responsible for the costs and expenses of the arbitration.

Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award.[52]

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[50] Section 31 of the Act

[51] F.Khan (2007) 'Costs and Interest" An paper presented at Chartered Institute of Arbitrators-Kenya Branch special member course held at Nairobi on 8th and 9th of March, 2007

[52] Sec. 32C of the Act.

2.2.11 Security for costs

Given that costs are awardable in arbitration and the costs that attend arbitration, the law allows the arbitrator, in limited instances, to require security for costs from a party on application by the opposite party. The security could take the form of cash or bond or a guarantee and like in court proceedings serves to ensure award of costs are not turn out to be unenforceable.

The Arbitration Act 1995 did not have an express provision for security for costs until the amendment of S. 18 of the Act in 2009. The new S.18 (1) provides that unless the parties otherwise agree, an arbitral tribunal may, on the application of a party –

(a) order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject- matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure; or

(b) order any party to provide security in respect of any claim or any amount in dispute; or

(c) order a claimant to provide security for costs.
In addition to section 18, the Arbitration Rules 16(C) 9 gives the tribunal jurisdiction to make orders for security of a party's costs. There is nothing that forbids parties from agreeing on the matter of orders for security for costs or even consent to allow the arbitrator to make the orders.

2.2.12 The arbitral award[53]

Essentially, the arbitrator's bears the primary duty under section 29 of the Act to decide the dispute under reference in accordance with the rules of law chosen by the parties and in default the laws of Kenya. Deciding the dispute inevitably boils down to making an award on addressing all issues raised in reference. An award not addressing all issues may be challenged either through a request for an additional award addressing issues not already addressed or by mounting a challenge against the award in court based on the ground of serious irregularity.[54] Generally, an award can be challenged in court under section 13, 14 and 35 of the Act.

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[53] K.I. Laibuta "Arbitration Awards" An paper presented at Chartered Institute of Arbitrators-Kenya Branch special member course held at Nairobi on 8th and 9th of March, 2007

[54] Serious irregularity is defined as 'an irregularity which the court considers has caused or will cause substantial injustice'.

There is no provision in Arbitration Act 1995 specifying which remedies an arbitrator may award except on interim applications where section 18 sets out orders which the an arbitrator may make for protection of the subject matter of arbitration. As for formality required of awards, section 32(1) set out the formal requirements of an award which apply where parties have not agreed otherwise. The award has to be in writing, signed, state the juridical seat of arbitration and the date when it was made and where it is a partial award specify the issues addressed in it. Section 32 (3) requires that an award contain reasons unless it is a consent award or the parties have agreed to disperse with the requirement. The Act does not stipulate the fate of an award not containing the foregoing formal ingredients. But section 34(4) allowing correction of minor slips and clerical error is anything to go by, minor error of formality will not invalidate an award especially where its import is clear.

2.2.13 Setting aside of an award[55]

Setting aside of an award is the only recourse in the High Court against an arbitral award permitted by the Arbitration Act, 1995.[56] The instances when the High court may set aside an arbitral award are specifically stipulated in the Act.[57] First, the arbitral award may be set aside where it is proved that a party to the arbitration agreement was under incapacity.[58] The second ground under which an arbitral award may be set aside is invalidity of the arbitration agreement under the laws governing the dispute.[59] A further ground for setting aside arbitral award is if proper notice of appointment of an arbitrator or arbitral proceedings was not given or the making of the award was induced or affected by fraud, bribery, undue influence or corruption;[60] The ground will have met if the applicant can show that s/he was unable to present his case for any other reason. The High Court may also set aside the award if it deals with a dispute not contemplated by or falling within scope of the terms of reference to the arbitration. Similarly, an award may be set aside if it contains decisions on matters beyond the scope of the arbitration reference.[61]

In addition, the fact that the composition of the arbitral tribunal or the procedure during the proceedings was not as per the parties' agreement furnishes a ground for setting aside arbitral awards. However, if the agreement was in conflict with a provision of the Act

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[55] K.I. Laibutta, supra_note 45
[56] Section 35(1) of the Act
[57] Section 35(2) of the Act, as amended by the amending Act.
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid.

which the parties are not allowed to derogate from or there was no agreement on derogation, then the award shall not be set aside.[62]

An arbitral award may also be set aside where the High Court finds that the dispute is incapable of settlement by arbitration under the law of Kenya. The court will also set aside an award that is in conflict with public policy of Kenya.[63] These were the grounds relied upon in ***Macco Systems India PVT Limited-v-Kenya Finance Bank Limited***.[64] Ringera J (as he then was), after examining several authorities, in **Christ For All Nationals vs. Apollo Insurance Co. Ltd**[65] and formed the view that: -

> "Although public policy is a most broad concept incapable of precise definition…an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:
>
> a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten or
>
> b) inimical to the national interest of Kenya or
>
> c) contrary to justice and morality."

The law requires that an application for setting aside an arbitral award be made within three months of receipt of the award by the applicant. If the application is made pursuant to an application for recognition of award the same must be within 3 months of the award.[66]

A party to the arbitral proceedings whose award is sought to be set aside may apply suspension of the setting-aside proceedings. The High court may exercise the discretion to suspend such proceedings where it deems the same appropriate and if so requested by a party. A suspension shall be for such determined time and for the purpose of giving the arbitral tribunal an opportunity to resume the arbitral proceedings or take a remedial action for purging the grounds for setting aside the arbitral award.[67]

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[62] Ibid.
[63] Section 35 (2) (b) of the Act
[64] HCCC (Milimani) No. 173 of 1999
[65] [2002] 2 EA 366
[66] Section 35(3) of the Act
[67] Section 35 (4) of the Act

2.2.14 Recognition and enforcement of awards

A domestic arbitral award shall be recognised as binding and on application in writing to the High Court, it shall be enforced subject to S. 36 and 37 of the Arbitration Act, 1995.[68] Any party may apply for enforcement of arbitral award.[69] The law requires that the High Court be furnished with a duly authenticated original arbitral award or duly certified copy thereof, by the party applying for its enforcement thereof.[70] In addition, the party should supply the original arbitration agreement or a certified copy of it to the superior court. However, the High Court may order otherwise where a party seek indulgency on compliance with these requirements to supply those documents. The arbitration award furnished must be in English and if the original was not English, the law requires a duly certified translation to be availed to the court.[71]

Section 37 provides the ground on which the High Court may refuse to recognise an arbitral award irrespective of the state of origin. At the request of the party against whom the award is sought to be invoked the court refuse to enforce award if the party proves any of the following: that the party to the agreement was under incapacity, that the arbitration agreement is not valid under the applicable law, that proper notice of appointment or arbitral award was not given the party or otherwise the party was unable to present his case, that the award does not fall within or is incurably beyond the scope of the reference to the arbitration or that the composition of the arbitral tribunal was not as per the parties agreement or was afoul the law applicable to the arbitration.

A proof that the arbitral award has not yet become binding on the parties or has been set aside or suspended is also a ground for refusal to enforce the award, at least temporarily. [72] Recognition or enforcement may also be refused where the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.[73]

The High court may also, on its own motion or upon request by a party, refuse to enforce an arbitral award on the grounds provided for in section 37 (1) (b) of the Act. Here, the court has to find that subject matter of the dispute is not referable to arbitration under the laws of Kenya. Whether or not the matter was capable of settlement by arbitration in the country of origin of the award is not a valid consideration of the court. In alternative, the court will refuse to enforce an arbitral award where its recognition or enforcement would be contrary to the public policy in Kenya. These grounds are in recognition of the court's

[68] Section 36 (1) of the Act, as amended.
[69] Ibid.
[70] Ibid.
[71] Ibid.See Kundan Singh Construction Ltd-v-Kenya Ports Authority HCCC(Milimani) No. 794 of 2003
[72] Section 37 (1) (a) of the Act
[73] Ibid; as amended by the amending Act.

role as custodian of the laws and public interest in Kenya and the resultant duty on the courts to uphold the same.[74]

2.2.15 Recognition of foreign awards

Previously, the Arbitration Act did not make a distinction between domestic and foreign awards. However, a repeal of Section 36 and replacement of the same introduced a new S. 36 (2) which provides that;

> *"An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is a signatory and relating to arbitral awards."*

However, a foreign award will not be taken as final if proceedings contesting its validity are pending in the country of its making.

2.2.16 Appeals/determination of questions of law

The parties to a domestic arbitration may agree that application be made by a party to the High Court for determination of questions of law arising in arbitration.[75] The parties may also agree that appeal be available to aggrieved party on questions of law arising out of the award. Such appeal shall be to the High Court.[76]

On such application or appeal the High Court has two options available to it. It can either determine the question of law arising or confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration.[77] Where another tribunal has been appointed, remittance of the matter to this latter arbitral tribunal is permitted.[78]

The decision of the High Court is subject to appeal to the Court of Appeal if the following two conditions being met. The parties must have agreed to appeal and the High Court grants leave to appeal.[79] A party aggrieved by the High Court's refusal of leave to appeal may seek special leave to appeal from the Court of Appeal.[80] The Court of Appeal has jurisdiction on such appeal to exercise any of the powers exercisable by the High Court on application for determination of questions of law in arbitration.[81]

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[74] Section 37 (1) (b) of the Act
[75] Section 39 of the Act
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Section 39(3) of the Act, as amended by the amending Act.
[80] Ibid.
[81] Ibid.

2.2.17 Provisions for incidental matters

Firstly, section 8 of the Act perpetrates the authority of the arbitral tribunal despite death of a party. In other words, the authority of the arbitrator is not revoked by death of any party to the arbitration or party who appointed the arbitrator. Under section 15, however, the authority of the arbitrator will cease if he fails to act or proceed.

The arbitrator is enjoined under section 19 of the Act to treat the parties with equality. This section in conjunction with sections 12 and 13 requiring an arbitrator to maintain independence and impartiality have been interpreted as aimed to guarantee fair hearing in arbitration proceedings.[82]

Previously, there were no provisions in the 1995 Act for the immunity of the arbitrator and his/her associates. However, the insertion of a new S. 16B vide the amending Act ensures that an arbitrator shall is not held liable for anything done or omitted to be done in good faith in the discharge or purported discharge of his functions as an arbitrator. This immunity shall extend to apply to a servant or agent of an arbitrator in respect of the discharge or purported discharge by such a servant or agent, with due authority and in good faith, of the functions of the arbitrator.[83] However, nothing in this section affects any liability incurred by an arbitrator by reason of his resignation.[84] Section 20(4) of the Act secures the privileges and immunities of persons appearing before an arbitrator in a fashion similar to those appearing in court proceedings.

The arbitrator is enjoined, in default of parties' agreement, to give directions on certain administrative matters of the arbitration preferably at the preliminary stages of the arbitration. As per section 21, the arbitrator is given the wherewithal to decide the juridical seat of arbitration and the location of any hearing or meeting. The arbitrator also decides the language of the arbitration if the parties fail to agree and may order translations where necessary.[85]

The arbitrator also sets time limits for submission of claims and defences if parties default in agreeing on the matter.[86] On its part, section 25 (1) and (2) of the Act bind the arbitrator to determine what type of submissions, oral or written, the arbitration shall take. The arbitrator is required to give sufficient notices of any hearing, meeting or inspection. Nevertheless, a party may require holding of oral proceedings at any time unless parties have agreed to hold no hearings. A party to arbitral proceedings may appear in person or

[82] See Githinji JA's dissenting judgment in Epco Builders Limited-v-Adam S. Marjan-Arbitrator & Another Civil Appeal No. 248 of 2005
[83] Sec. 16B (2)
[84] Sec. 16B (3)
[85] Section 23 of the 1995 Act
[86] Section 24(1) of the 1995 Act

be represented by any other person of his or her choice.[87] This is unlike in court proceedings where a party can only be represented by an advocate having a valid practicing certificate.[88] It is also within an arbitrator's discretion to mandate an expert to report on specific issues in the dispute and to require either party to permit such expert access to relevant records or property. However, this discretion is limited be limited and/or may be overtaken by parties' agreement on involvement of experts in the dispute.

2.2.18 Arbitration rules

The Arbitration Act, 1995 does not pretend to be exhaustive on matters of procedure for invoking court intervention in arbitration matters. Thus section 40 empowers the Chief justice of Kenya to make court procedure rules for matters not prescribed in the rules including recognition and enforcement of arbitral awards, setting aside of, stay of proceedings and generally any proceedings in court under the arbitration Act.[89] In exercise of the powers under section 40, the arbitration rules 1997 were made on 6th May 1997.

3. Arbitration Law in United Kingdom

3.1 History of Arbitration Law of UK

Arbitration statutory law is a recent development in United Kingdom. In Saxon times, arbitration was largely informal as courts were loath to enforce arbitration awards. Parties intending to arbitrate took to launching a suit in court and then requesting reference to arbitration. That way, arbitration was seen, at least by the judicial officers of the time, as a step in the action in court. The court used the leverage to exert control over arbitration. Then, arbitration was essentially viewed as an optional part of the court process and the award a sub-judgment given by an arbitrator acting on behalf of a judge.

This insistence by parties, especially disputants in commercial dispute, on arbitration besides indifference by the court against it led to passage of the Arbitration Act 1698. The Act objective was 'rendering award of arbitrator more effectual …for determination of controversies referred to them …" The courts responded to the Act by allowing arbitration agreements to be turned into 'a rule of the court' with the effect that a reference to arbitration pursuant to an arbitration agreement between the parties had the same effect as if the reference was achieved by a court order. The effect was that arbitrations subsequent to arbitration agreement had the same status as before the Act. The courts enforced arbitral awards save where 'procured by corruption or other unique means.'[90]

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[87] Section 25 (5) of the 1995 Act

[88] Section 13 of the Advocates Act, Cap. 16, Laws of Kenya

[89] Laibutta Supra_note 45

[90] This phraseology crated difficulties of interpretation as it admitted a wide definition as to ground for court to withhold enforcement.

The emergent problem in the post 1698 Act was that after conclusion of arbitration, arbitrators became *functus officio* (that is, discharged of his/her office). Incase of need for revision of awards, the parties had to start all over again. This situation was remedied in 1850's with court's holding that the arbitrators' duty was to issue a valid award and until then he could not be discharged. The Common Law Procedure of 1854 gave courts power to stay proceedings pending reference to arbitration and power of remission of awards to arbitrator(s) for reconsideration.

The Arbitration Act 1989 repealed the Act of 1698 and for the first time made provisions for appointment of arbitrators by court and set out terms to be universally implied into every arbitration agreement. It is worthy of note that courts were also assisting development of the law on arbitration through case law. The Arbitration Act 1934 also went a long way in filing gaps in the arbitration law in an attempt to make it more efficient and comprehensive.

On its part, the Arbitration Act 1950 was a consolidation of the gains of the Arbitration Acts of 1889 and 1934. This Act set out in much simple language than its predecessors, powers of an arbitral tribunal and granted the court power to appoint one in default and whenever desirable. The Act also made provisions for making and enforcing awards. The powers of the court to remove arbitrators upon challenge were also consolidated. The Arbitration Act 1975 sought to give effect to the New York Convention. Finally, at least until enactment of Arbitration Act 1996, the Arbitration Act 1979 regulated the powers of the court to review arbitral awards and determine questions of law arising in the course of arbitrations.

3.2 Background to the Arbitration Act 1996

The Arbitration Act 1996 came to force in January 31, 1997 and applies to all arbitration after that date even though it can be applied to those commenced before by agreement. The Act is a follow-up to the Departmental Advisory Committee (DAC) published in June 1989. The Report is commonly known as Mustill Report after Lord Mustill who was the Chairman of the DAC which had been appointed in 1984 to advice on whether the UNICITRAL Model Law should be enacted.[91]

The Mustill Report recommended against England adopting the Model Law as to do so would lead to loss of arbitration practice heritage which was England's common law. The report also highlighted the uncertainty attending English arbitration at the time pointing that remedying that would render London the heart of international commercial arbitration.[92] The report pointed that there was needed 'a rational, logical, comprehensive

[91] The Model Law has been enacted in a number of jurisdictions especially in developing world and influenced the content and structure of many legislations including Arbitration Act 1995.
[92] Paragraph 109 of the DAC Committee Report

exposition of the more important contents of the existing statute law [in England at the time]'. Thus the committee recommended:

> *"In the circumstances we recommend an intermediate solution, in the shape of a new Act with a subject-matter so selected as to make the essentials of at least the existing statutory arbitration law tolerably accessible, without calling for a lengthy period of planning and drafting, or prolonged parliamentary debate. It should in particular have the following features: (a) … comprise a statement in statutory form of the more important principles of the English law of arbitration, …(c) …set out in a logical order, and expressed in language which is sufficiently clear and free from technicalities to be readily comprehensible to the layman (d)…in general apply to domestic and international arbitration alike, …(e) …not be limited to the subject matter of the Model Law …(g) …so far as possible, have the same structure and language as the Model Law, so as to enhance its accessibility to those who are familiar with the Model Law."*

3.3 The Arbitration Act 1996: An Overview

3.3.1 Preliminary

The Act was passed on 17th June 1996 and came to force in January 31, 1997. The initial intention of the efforts that led to enactment of the 1996 Act had been merely to have a consolidating Act incorporating Arbitration Act of 1950, 1975 and 1979 with amendments. This was altered before July 1995 Report so that the new Act was, in addition, 'to restate and improve the law relating to arbitration'.

The 1996 Act has been hailed as an Act which 'provides the most exciting of challenges to arbitrators and those practicing around them'[93] and as 'a statute without precedent in English arbitration law'… [which] by standards of traditional English parliamentary drafting…[is] radically and unconventional …'[94] The 1996 Act extends only to England and Wales and North England and thus does not apply to Scotland.[95]

3.3.2 General principles of the Arbitral Process

This is the most profound aspect of this Arbitration Act in that at the very first section the Act it states the principles which are to apply to every facet of arbitration. The general key principles of arbitration as stated in section 1 of Arbitration Act, 1996 of United Kingdom are as follows:

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[93] Gato DM, Arbitration Practice and Procedure (Vol. II): Interlocutory and Hearing (London: LLP Limited, 2nd ed., 1997) p. IX

[94] Bernstein R, The Handbook on Arbitration Practice (London: Sweet & Maxwell, 1998) p. 21

[95] Section 108(4) of the 1996 Act

"1. …

(a)the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b)the parties [shall] be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.

(c)…the Court [shall] not intervene except as provided in this part. …"

The most important of these principles is that party autonomy is not to be restricted unnecessarily by courts except in public interest. In essence, it is left to the parties to agree on the extent of involvement of the court in their arbitration. However, the parties and the arbitral tribunal are bound to ensure that the arbitration process results in fair resolution of the instant disputes without

3.3.2 The arbitration agreement

Arbitration agreement is defined in section 6 of the 1996 Act to mean agreement to submit to arbitration present or future disputes whether contractual or otherwise. The definition is substantiated especially by provisions of section 5 and 6 of the Act. It suffices to say that any recording including a verbal recording constitutes writing which is one of requirements for a valid arbitration agreement under the Act.[96] An oral agreement to arbitrate is also enforceable under the common.

3.3.3 Stay of proceedings

Stay of proceedings under the 1996 Act is dealt with under section 9, 10 and 11. These sections apply regardless of the applicable substantive law or underlying agreement. The effect is that the English courts are given extraterritorial jurisdiction to award stay even where the arbitral proceedings are not to be held under the English law and even in United Kingdom. The conditions for stay of proceedings are essentially similar to the Kenya's with minor variation and especially the provisions on when the court must stay proceedings.[97]

3.3.4 Appointment and removal of arbitrators

The provisions of the 1996 Act on appointment of arbitrators stipulated in section 15-22 thereof are similar to those in the Kenyan arbitration Act. However, unlike in 1995 Act, in a tribunal of three arbitrators one will be chairperson.[98] The arbitration Act also specifies the power the court has upon application for appointment of arbitral tribunal.[99]With

[96] Section 6(2) of the 1996 Act
[97] Section 9(4) of the 1996 Act
[98] Section 20 of the 1996 Act
[99] Section 18(3) of the 1996 Act

regard to removal of arbitrators, section 24 provides for the specific grounds to justify application of the power.[100]

3.3.5 Challenge of Jurisdiction

In an effort to remedy the abuse of the avenue to challenge jurisdiction, the doctrines of separability and *kompetenz kompetenz* are secured and established in the 1996 Act. The provisions of section 7 give survival to arbitration clauses where parent agreement is found invalid, non-existent or ineffective. In the same vein, arbitral tribunals are given jurisdiction to rule on their jurisdiction in section 30 of the 1996 Act. In addition, section 31 of the 1996 Act provides the applicable procedure for challenge of jurisdiction. Lastly, section 67 provides as a ground to challenge award made by a tribunal lacking substantive jurisdiction.

3.3.6 Procedural freedom

The 1996 Act does not prescribe the applicable procedure in arbitral proceedings.[101] The Act direct arbitrators and parties alike to adopt "procedures suitable to the circumstances of the case avoiding unnecessary delay or expense."[102] Thus, arbitrators and parties are not bound to pursue the adversarial route or to apply any rules strictly but only to avoid such procedure as occasion unnecessary delay or undue expense.

3.3.7 Evidence

Section 43(2) (f0 of the Arbitration Act 1996 gives the arbitral tribunal jurisdiction on whether or not to apply strict evidentiary rules. This is, of course, subject to the right of parties to agree on rules of evidence. Additionally, a tribunal may latitude to decide whether the evidence is to be oral or written and the nature of submissions.

3.3.8 Costs and interest

Generally, costs of arbitration are dealt with in sections 59-65 of the 1996 Act. What is meant by costs is detailed in section 59 of the 1996 Act. Section 61(2) of the UK Act provides 'the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is inappropriate ….' The arbitrator also has discretion to leave determination of costs payable to the court but the popular practice is the arbitrator to determine costs in the award

The 1996 Act deals with award of interest in section 49 thereof. In absence of agreement of the parties as to interest payable and/or rate payable, section 49 gives the tribunal wide discretion to award interest even on compound basis.

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[100] Section 24 (1) of the 1996 Act

[101] Bernstein 27

[102] Section 33 (b) of the 1996 Act.

3.3.9 Arbitral awards

The 1996 Act deals with awards in sections 46-58 of the Act. The award must be according to the substantive law chosen by the parties. The tribunal has equivalent powers under the 1996 Act as those under the Kenyan Act as to formality[103] and power to effect corrections[104] except that the UK provisions are comprehensive and logically well arranged and articulated. In addition, the tribunal under section 56 of the UK Act is given power to withhold award in case of non-payment. The effect of an award is, subject to contrary agreement, final and binding on parties and persons claiming through or under them. This does not however affect the power to challenge such award as provided in the Act.

Section 48 of the UK Act provides for the remedies which a tribunal may award. Thus an arbitrator may, unless the parties otherwise agree, award any or a combination of any of the following remedies: order for payment of money, specific performance, a declaration, order rectification of instruments and where appropriate issue any type of injunction.[105]

3.3.10 Recognition and enforcement of awards

An arbitral award upon leave of the court is enforceable as if it were a judgment of the court. The court giving leave has discretion to enter judgment in terms of the award. The leave shall be denied where it is shown by the party opposing enforcement that the award was given by a tribunal lacking substantive jurisdiction. But even then, the party must not have lost the right to object on the ground as provided in section 73 of the Act.

3.3.11 Setting aside awards and appeals

The Act provides for challenging award claiming lack on the part of the arbitral tribunal of 'substantive jurisdiction' or in specifying circumstances that involve 'serious irregularity'. This latter basis of challenge is provided for in section 68 of the Act while the former is catered for in section 67. An appeal on a point of law is also permissible within section 69 of the Act. The right of appeal and is only available where court's jurisdiction to hear the appeal has not been excluded by the parties. In any case where there is no exclusion, appeal is available with leave of the court unless parties agree to it.

3.3.12 Court Procedure under 1996 Act

With the 1996 Act came into force the new Order 73 of the revised Rules of the Supreme Court. This Order 73 which provides the applicable procedure in court application under the Act. The procedure applies to proceedings in both the High Court of England and

[103] Section 52, 53, and 55 of the 1996 Act

[104] Section 57 of the Act

[105] Injunctions are orders requiring a party to or refrain from doing a specified activity for the benefit of the other party.

Central London Court Business List. Order 73 aims to streamline procedure for court applications under the 1996 Act.

4.0 Conclusion

If anything, the foregoing review has shown the difference between the two Acts which were both in response to legal reform efforts aims at achieving a universal goal: to reduce court interference in arbitration and expand party autonomy while rendering arbitration more expeditious and, as such, more just. The English Act succeeded where the Kenyan Act failed. However, several amendments to the 1995 act vide the amendment Act of 2009 have attempted to bring it to par with the UK Act of 1996.

The 1996 Act rendered the law of arbitration in U.K clear and unambiguous and therefore easy to apply and less prone to challenge in court. In its turn, the 1995 Act domesticated the UNICITRAL Model law but allowed ambiguity to sneak in providing ready fodder for parties' intent on delaying the arbitral process.

The effect is that the 1996 Act has managed to expand party autonomy in arbitration while checking to ensure that it does not fall prey to abuse by limiting instances of court intervention to a basic minimum. On its part, the 1995 Act has given autonomy to parties to arbitration together with unlimited opportunities for court involvement in arbitration. The result now is that parties abuse their autonomy by resorting to court process to delay and complicate the arbitral process. The 1996 Act is evidence what wide consultation of stakeholders affected by a given a proposed statute can yield. Its progressive provisions adequately meet the needs of the stakeholders in the Arbitration industry both in United Kingdom and in other jurisdiction considering London as the seat of arbitration. Until the 2009 amendments, the 1995 Act could hardly be said to have been progressive or catering to the changing trends in the arbitration industry. The efforts to repeal the Arbitration Act, 1995 culminating in the Arbitration Bill 2007 were thus timely and welcome.[106] The outcome however was that several sections were amended by repeal or insertion of new sections but a total overhaul was never undertaken as envisaged by the draft formulated by the stakeholders.

[106] The Arbitration Bill 2007, which proposed to repeal and replace the Arbitration Act, 1995, was a result of the joint efforts of the Law Reform Commission, Chartered Institute of Arbitrators-Kenya Branch and other arbitration and legal reform stakeholders. It has since been given presidential assent (on 1st January 2010) but some proposals were omitted.

Preliminary Proceedings and Interlocutories: The Birth, Teething, Immunization and Weaning of Arbitration Proceedings

1. Introduction

This paper aims to introduce matters relating to commencement of arbitration, interlocutory applications in arbitration and preliminary meeting and pleadings. Analogically, and as the title suggests, commencement of arbitration is what gives birth to the arbitration proceedings. Preliminary objections are the teething problems that beset the life of arbitration. Interlocutory applications, and the interim reliefs they yield, are what 'immunize' the arbitration process from succumbing to pre-mature fatalities as a result of dissipation of the subject matter of the arbitration. On their part, preliminary meeting, pleadings and pre-hearing procedures 'wean' the arbitral process for the impeding reality of the arbitration hearing.

The paper shall thus, first, address matters that touch on commencement of an arbitration including reference to arbitration, appointment of arbitrator, challenging the arbitrator. Other matters facilitating the birth of the arbitration such as stay of proceedings and court applications for interim reliefs will, at least in passing, be given due mention. Then, the possible interlocutories available during arbitration where conservatory and protective orders applicable to arbitration will be reviewed. Lastly, the paper will address the agenda of the first meeting and pleading in arbitration proceedings.

It is expected that the paper will exhaust the issues that need attention up till the point where all that is pending is an arbitration hearing. The paper refers to the arbitration Act, 1995 (hereinafter the Act) as amended by the Arbitration (Amendment) Act 2009 (hereinafter the Amendment Act), Chartered Institute of Arbitrator-Kenya Branch Arbitration Rules (hereinafter the Arbitration Rules) and, to a limited extent, the Arbitration Act 1996 of the United Kingdom.

2. What are Interlocutory matters?

The Osborn's Concise Law Dictionary defines interlocutory (and by extension preliminary proceedings) as … "one taken during the course of action and incidental to the principal object, namely, the judgment …" In arbitral proceedings, this is the stage from appointment of the arbitral tribunal to the commencement of the arbitration hearing.[1]

[1] A. Ali "Interlocutory (Intermediate) Matters" an unpublished paper presented at Chartered Institute of Arbitrators-Kenya Branch entry course held at Nairobi on 20th and 21st August, 2007

3. Appointment of Arbitral Tribunal[2]

Arbitration proceedings are commenced by appointment of the arbitral tribunal.[3] The arbitration agreement will likely provide for the mode of appointment and the preferred number of arbitrators.[4] The default number as provided under the Act is a single arbitrator.[5] The parties can agree to appoint either a sole arbitrator; a tribunal of two arbitrators who then appoint a third arbitrator; a tribunal of three arbitrators; or even a tribunal of more than three arbitrators with or without an umpire.[6] The odd number ensures that majority decisions are achievable.[7]

Where the parties have not agreed on appointment modality or there is a breach of the agreement in respect of appointments, one of the parties may request appointment of the arbitral tribunal by an institution, if any, is designated in the arbitration agreement to undertake the appointment or agreed upon after the dispute. Where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") has indicated that he is unwilling to do so;[8] fails to do so within the time allowed under the arbitration agreement;[9] or fails to do so within a reasonable time (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party),[10] the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

If the party in default does not, within fourteen days after notice under subsection (3) has been given make the required appointment and notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.[11] Where a sole arbitrator has been appointed under subsection (4), the party in default may,

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[2] See generally Jackie Kamau & Farooq Khan, "Appointment of an Arbitrator" an unpublished paper presented at Chartered Institute of Arbitrators-Kenya Branch entry course held at Nairobi on 11th and 12th of February, 2002

[3] That is, barring pre-arbitration steps such as stay of proceedings which are outside the scope of this paper.

[4] Section 11(1) and 12 (2) of the Act

[5] Section 11 of the Act

[6] For an in-depth discussion of each of the tribunals see Sir Mustill M.J and Boyd S.C (1989) The Law and Practice of Commercial Arbitration in England (Butterworths, London and Edinburgh, 2nd Edition) p. 171-192

[7] On appointment of arbitrators see section see section 12 of the Arbitration Act, 1995 (Kenya) and sections 15-27 of the Arbitration Act, 1996 (UK)

[8] Sec. 12(3) (a) as amended by the Amending Act

[9] Sec. 12(3) (b), supra.

[10] Sec. 12 (3) (c), supra.

[11] Sec. 12(4) (a) and (b), supra.

upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.[12]

Section 12 of the Arbitration Act 1995 further stipulates the extent of the courts' power in making appointments of arbitral tribunals in Kenya. The jurisdiction to make appointment to arbitral tribunal is vested exclusively in the High Court of Kenya. The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time. The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator. A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.[13]

The High Court is required to consider the qualifications, independence and impartiality of the tribunal. The court is also to take into account the wisdom of appointing an arbitrator other than fellow national of the parties or one of the parties.[14]

3.1 Objections Against/In Arbitration

In arbitration proceedings, parties are likely to raise a number of objections: objection alleging no binding arbitration agreement between parties, objection on whether the dispute is within the scope of arbitration agreement, objection that reference is time-barred, challenging arbitrators, and challenges to the jurisdiction of the arbitral tribunal.[15] These objections and/or matters are not necessarily preliminary *per se* but the law encourages their disposal as soon as possible.[16] Each of these pertinent issues is addressed here below in turn.

3.2 There is no valid arbitration agreement

The Arbitration Act 1995 requires an arbitration agreement as a condition precedent for commencement of arbitration under it. The rationale is that arbitration is mainly a private and contractual arrangement between the parties for resolution of a given dispute or potential dispute(s). The only exceptions where an agreement between the parties is not insisted upon are the limited to arbitration on motion of the court, for example in case stated instances, or when arbitration is a result of a statutory fiat as is the case in statutory

[12] Sec. 12(5), supra.
[13] Sec. 12 (6), (7) and (8) respectively as amended by the Amending Act.
[14] Section 12(9) of the Act. This is for instance requisite in international arbitration where if the arbitrator comes from one party's country, there is likelihood that his/her impartiality will not be guaranteed.
[15] This list is not necessarily exhaustive as parties can, theoretically, raise objection on anything in the arbitration proceedings they find objectionable.
[16] Section 5 of the Act

arbitration.[17] But even in these instances, parties' agreement is esteemed to the extent that parties are called upon to agree on details of the arbitral process such as venue, procedure, and evidence to be called among others matters.[18] In **Heyman& Another-v-Darwins Ltd**[19] at p. 373 Lord MacMillan stated as follows on arbitration agreement:

> *"… an arbitration clause in a contract … is quite distinct from other clauses. The other clauses set out the obligations which the parties undertake towards each other, but the arbitration clause does not impose on one of the parties an obligation in favour of another. It embodies the agreement of both parties that if any dispute arises with regard to the obligations which either party has undertaken to the other, such disputes shall be settled by a tribunal of their own constitution."*

The law requires an arbitration agreement, for validity, to be in writing.[20] An arbitration agreement may take the form of an independent contract or an arbitration clause[21] or even an Alternative Dispute Resolution (ADR) clause.[22] An arbitration agreement will be in writing for purposes of this requirement if signed by parties or involves an exchange of letters, telex, telegram, facsimile, electronic mail or other telecommunication means providing record of the agreement.[23] It seems a party can take a chance with the arbitration process where s/he is not sure of the validity of the arbitration agreement. The Act provides for presumption of arbitration agreement where the same is alleged in the statement of claim and not denied by the other party.[24] But a problem may arise where the other party opts to challenge the jurisdiction or at the point of filling the award as the same ought to be accompanied by the original arbitration agreement or a certified copy.[25] The law also sets out as a ground for application for setting aside the arbitral award if the arbitration agreement was not valid, that is, not in writing.[26]

An arbitration agreement by reference will be sufficient as a basis for reference to arbitration. However, the law requires that the contract making the reference be in writing and the reference is such as to make the clause referred to part of that contract.[27] Even

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[17] The New Labour Laws make ADR a condition precedent to accessing the industrial courts and undertaking industrial action.
[18] Ibid.
[19] (1942) AC 356
[20] Section 4(2) of the Act
[21] Section 4(1) of the Act
[22] However, such clause must provide arbitration as one of the proposed methods, whether in alternative or succession, for resolution of the dispute.
[23] Section 4(3) of the Act
[24] Ibid.
[25] Section 36(2) of the Act. But it seems from the wording of the requirement for filling the original arbitration agreement in the latter instance above may be waived on application to the High Court.
[26] Section 35(2) (a) (ii) of the Act
[27] Section 4(4) of the Act 1995

where there is no binding agreement to base an arbitration process on, a party may cajole the other to enter into an "ad hoc" agreement to arbitrate the dispute at hand.[28] It is also not a problem that the arbitration agreement or clause was part of an agreement that has been found null and void. The doctrine of separability guarantees an arbitration clause/agreement life and enforceability after the parent agreement has ceased enjoying validity. The doctrine is important here in the sense that it enables the arbitration clause to survive the termination by breach of any contract of which it is part.[29] Even if the underlying contract is void, the parties are presumed to have intended their disputes to be resolved by arbitration.

It is in the arbitration agreement that each party agrees to reference of disputes to arbitration.[30] There is no arbitration unless both parties to a dispute have agreed to arbitration or in other words unless there are 'bilateral rights of reference.' If the arbitration agreement's validity is questioned the arbitral tribunal should endeavour to ascertain the same before proceeding. The logic of this proposal is that even if the arbitration progresses to an award, the same may still be set aside for the invalidity. For instance, if the arbitration agreement may be inconsistent with a law or is incapable of being performed. It may also be invalid for missing the elements outlined above and which are compulsorily required to embody every arbitration agreement for the same to be valid

3.3 The dispute is not contemplated under the Arbitration Agreement

The matter of whether or not the instant dispute is contemplated for arbitration under the relevant arbitration agreement may appear rather academic[31] but it usually arises especially where parties had restricted the scope of reference to arbitration to only particular species on their disputes. It is also the case that arbitration does not resolve all disputes under the sun! The broad and practical question that arises when such objection is raised for resolution by the tribunal is whether the anticipated arbitration given the dispute to be arbitrated can be challenged as not being contemplated by the parties for reference to arbitration.

Arbitration, being a private process, only deals with civil disputes and does not venture into matters of public law.[32] Arbitration is, actually, dedicated to commercial disputes

[28] See also section 5 of the Arbitration Act, 1996
[29] Section 17(1) (a) of the Arbitration Act, 1995
[30] Davies LJ in Baron-v-Sunderland Corp [1966] 1 All ER 349 at 351
[31] The philosophical question of what is 'dispute for purposes of arbitration is a vexing one. But that is a discussion for another day!
[32] See Githinji JA's dissenting judgement in Epco Builders Limited-v-Adam S. Marjan-Arbitrator & Another Civil Appeal No. 248 of 2005

although even political agreement may provide for arbitration.[33] Essentially, the orders made under arbitration and arbitral award are personal and do not seek to bind the whole world, at least until filed, recognized and enforced by the High Court of Kenya.[34] As arbitration is based on agreement by parties, the matters referred to arbitration must pass muster as falling in the class of disputes the parties had agreed or can contract to refer to arbitration. There are matters that *cannot* be arbitrated. These are such as are not civil or at least have a public interest dimension and include divorce,[35] criminal matters,[36] issues of status (e.g. determining a person's sanity) or the liquidation of a company.[37] Thus arbitration of the foregoing matters will be objectionable on the basis that these are matters that cannot be arbitrated.

In addition, the dispute which has arisen must fall within the scope of the Arbitration clause. The draftsmanship in vogue in Kenya today is to have the arbitration clause as wide and comprehensive as possible. However, there are instances where the parties intend that only a limited scope of disputes to be reserved for reference to arbitration. In such an instance, the party opposing the arbitration may argue that the dispute is not covered by the arbitration agreement and therefore the arbitration is baseless.

In ***TM AM Construction Group (Africa) v. Attorney General***[38] one of the issues that arose for determination was whether there was not in fact a dispute in the claim. The defendant claimed that there was a dispute between parties which deserved to be referred to arbitration. The court found that there was failure by the defendant to tender any evidence showing that there was in fact any dispute between the parties. The court was of the view that that meant no basis had been established to show that a dispute in fact existed to justify staying the proceedings and referring the proceedings to arbitration.

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[33] Ford-Kenya dispute was taken to arbitration. The Kenya Football Federation also referred a dispute between its leaders to arbitration

[34] Judicial orders are either in personam (applying as between parties e.g. in contracts) or in rem, binding and enforceable as against the whole world.

[35] Marriage is an important unit of the society and the state, as well as the society, have an interest in its termination process. As such, the spouses cannot be allowed to private it and deny the public a say.

[36] The state, and not the complainant, is usually the party against the suspect. The prosecution of crimes is done for the benefit of and protection of the public. So that privatization of the process through arbitration may fail to reassure the public whether the state is acting on crime. And the orders given in criminal matters cannot be enforced in private setting!

[37] Company matters the bear public interest aspect where the state seeks to protect creditors from unscrupulous companies and their officers in promotion of commerce and investment. If parties were permitted to arbitrate in liquidation, the resultant award would hardly apply in rem as it would only be enforceable against parties to arbitration only.

[38] HCCC (Milimani) No. 236 of 2001

3.4 When the arbitration reference is time-barred

Parties often place limits in the arbitration agreement on when a party may refer a dispute arising to arbitration. In any event, the Limitation of Action Act applies to arbitrations with the same force it applies to litigation.[39] The issue of limitation of action of the arbitration and the contractual limitation period usually arise as a preliminary point. In ***Barlany Car Hire Services Limited-v-Corporate Insurance Limited***[40], a preliminary point of law was whether the Plaintiff was disentitled to any claim having failed to refer its claim to arbitration within 12 months of the Defendant's disclaimer of liability.

The arbitration agreement provided that if the Defendant company disclaimed liability to the insured for any claim, such claim be referred to arbitration within 12 calendar months from the date of the disclaimer. The Plaintiff had failed to properly institute the arbitration process and more than 12 months lapsed. The defendant therefore argued that the Plaintiff was now too late to arbitrate and indeed even too late to claim at all.

The court held that the Plaintiff was indeed too late to appoint an arbitrator or claim there having been no reference to arbitration within 12 months of the repudiation. The court agreed with the Defendant that the clause imposing the contractual deadline was a condition precedent to a valid claim as was held in the case of ***H. Ford & Co. Limited-v-Compagnie Furness (France)***[41] where a clause to similar effect was upheld. The court quoted the following holding in that case with approval:

> *"Therefore as the jurisdiction of the arbitrator was only given to him by the consent of the parties and the parties agreed that the arbitrator if appointed at all should be appointed within a certain time, it seems to me to follow that as that time has elapsed, neither party had power to appoint an arbitrator unless the other party consented."*[42]

The court therefore upheld the Defendant's argument that there was no longer any cause of action; the matter was time barred and noted that no application had been made to extend the limitation period if that were possible. The court in response to the Plaintiff's suggestion that the matter was governed by section 4 of the Limitation of action Act held that the law of Limitation of Action Act merely gives a maximum time limit within which a suit may be brought. The court quoted the following passage from the Halsbury Laws in support:[43]

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[39] Cap. 22 of Laws of Kenya. It is the case that the arbitral tribunal must uphold the law.
[40] HCCC (Milimani) No. 1249 of 2000
[41] [1922] 2 KB 797
[42] Ibid. page 810
[43] Halsbury Laws of England, 4th Edition Vol. 2 Para. 515

> *"The parties to an arbitration agreement may, if they wish, contract that no arbitration proceedings shall be brought after the expiration of some shorter period than that applicable under the statute."*

3.5 Challenge of the arbitration tribunal

Parties are free to agree on how to challenge the arbitral tribunal. Where the parties fail so to agree, a party may within 15 days of becoming privy to the appointment of the tribunal or circumstances that merit its challenge write to it stipulating the reasons for the challenge. If the challenged tribunal does not withdraw from office or the other party agrees to the challenge, the tribunal shall decide the matter. If the challenge whether in the manner agreed by the parties or after decision by the tribunal does not succeed, the challenging party may apply to the High Court within 30 days of refusal of the challenge. The decision of the High Court on the challenge shall be final and is not subject to appeal. While such an application is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.[44] But nevertheless, a stay of the proceedings may be granted by the tribunal.[45]

An arbitrator may be challenged on basis of various factors provided for under the Arbitration Act. First, an arbitrator may be challenged if there is reason to justifiably doubt his/her impartiality and independence. The fact that an arbitrator does not possess qualifications agreed to by the parties is also a potent reason for a challenge. However, a party who has appointed an arbitrator may only challenge him on basis of reasons that he becomes seized of after such appointment. The rationale here is to avoid a situation where a party appoints an arbitrator intending to challenge him/her later in the course of the arbitral proceedings as a delaying tactics. Hence the need to be cautious in making arbitrator appointments as the chance to challenge ones appointment is restricted.[46]

In the same vein, an arbitrator's office is to terminate in the event of his/her inability to perform the functions of the office of arbitrator or for any other reason fails to conduct the proceedings properly and with reasonable dispatch. In alternative, where an arbitrator resigns or parties agree to terminate his/her mandate, his office shall terminate.[47] But in the instances where the above grounds are contested, recourse is to be had to the High Court upon application of a party for a decision on the termination. Such decision shall be final and not subject to appeal. Where an arbitrator withdraws after challenge or parties

[44] Section 14 (6), (7) and (8) of the Act as amended by the Amending Act.
[45] Section 14 of the Act
[46] Section 13 of the Act
[47] Section 15 of the Act

agree to termination that shall not amount to acceptance of the ground cited for the challenge or removal.[48]

In the instance of termination of an arbitrator's mandate, another arbitrator shall be appointed as per the procedure applicable for appointment. The law stipulates instances where proceedings may be held afresh and when the proceedings may be upheld. Generally, orders and ruling of an arbitral tribunal are to be preserved despite change of composition of the tribunal except if successfully challenged by the parties. This is meant to ensure movement in arbitration.[49]

Thus as a general rule, on application challenging an arbitrator or for removal of the same, the court may grant the application or dismiss it. In the former instance, the court will remove the arbitrator against whom the application is made and leave the matter of replacement to be undertaken as per the agreed procedure of appointment. In addition, especially where the issue is raised in the application, the court may declare the arbitrator's entitlement to fees and expenses or otherwise. In the same breath, the High Court may direct repayment and/or restitution by the arbitrator of any fees and/or expenses already disbursed to him/her.[50]

3.6 Challenging the jurisdiction of the arbitrator(s)

Generally, the doctrine of "*kompetenz kompetenz*" gives the arbitral tribunal the wherewithal to rule on its own jurisdiction. Such ruling may encompass matters including existence or validity of the arbitration agreement.[51] The fact that a party has appointed or participated in appointing an arbitrator is not a bar to challenging the jurisdiction of the arbitral tribunal.[52]

It is desirable that any challenge to the jurisdiction should be resolved as early as possible The Act requires that a plea of lack of jurisdiction be raised latest at submission of defence.[53] Where the plea is exceeding of jurisdiction, the same should be raised as soon as the matter alleged to be in excess of authority is raised in the proceedings.[54] However, the arbitral tribunal has the discretion to admit a later plea where it considers the delay justified.[55]

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[48] Ibid.
[49] Section 16 of the Act
[50] Section 16A of the Act as amended by the amendment Act.
[51] Section 17 (1) of the Act as amended.
[52] Section 17 (4) of the Act
[53] Section 17 (2) of the Act
[54] Section 17 (3) of the Act
[55] Section 17 (4) of the Act

The arbitral tribunal has two options open to it when the question of jurisdiction is raised by a party. The arbitral tribunal may rule on the matter as a preliminary question or wait to address it in an arbitral award on the merits.[56] The ruling of the arbitral tribunal in the former instance may be challenged by the aggrieved party by way of an application to the High Court. Such application must be made within 30 days of notice of the award[57] and the decision of the High Court shall be final.[58] But while the application is pending before the superior court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such award shall be void if the application is successful.[59]

The application challenging the jurisdiction of the arbitral tribunal to the High Court shall be made by Originating Summons. The summons should be returnable on a fixed date before a judge in chambers and must be served on all parties to the arbitration and the arbitral tribunal at least 14 days before the return date.[60] Any application resultant of the Originating Summons shall be made in summons in the same cause and served at least seven days before the fixed hearing date fixed for it.[61]

4. Interlocutory Applications in Arbitration

As a matter of fact, arbitration proceedings witness diverse applications that mainly seek conservatory and protective orders in respect of the subject matter of arbitration. Essentially, these applications address the needs of the parties for immediate and temporary protection of rights and property pending discussion on the merits by the arbitration tribunal.[62] Invariably, the orders seek to protect and/or conserve the subject matter of the arbitration from dissipation. In other instances, for instance in an application for orders of security of costs, the aim is ensure the rights granted at conclusion of the arbitration via arbitral award are not in vain, that is, unenforceable. Basically, the Arbitration Act provides for interlocutory applications, whether before and during arbitration, in section 7 and 18 of the Act. The application for such interim reliefs may be before the arbitral tribunal or the court where the tribunal is yet to convene or be constituted.

4.1 Interim applications under section 7 of the Act

The courts have wide powers to make orders relating to interim orders for the purpose of preserving the status *quo* pending and during arbitration. Section 7 of the Act limits parties' freedom to contract any arbitration agreement that limits and/or bars seeking

[56] Section 17 (5) of the Act
[57] Section 17 (6) of the Act
[58] Section 17 (7) of the Act
[59] Ibid.
[60] Rule 3(1) of the Arbitration Rules, 1997
[61] Rule 3(2) of the Arbitration Rules, 1997
[62] David E. Wagoner, "Interim relief in International Arbitration" (1996) 62 (2) Arbitration 131

interim measures of protection in court. The jurisdiction to make such orders is the preserve of the High Court of Kenya. The courts have jurisdiction to make such orders as preserve the status quo of the subject-matter of the arbitration. The powers could include those of making orders for preservation like attachment before judgment; interim custody or sale of goods (e.g. perishables) the subject matter of the reference or for detention or preserving of any property or thing concerned in the reference, appointing a receiver and interim injunctions.

In ***Forster-v-Hastings Corporation (1903) 87 LT 736*** it was held that the court, in order to preserve the status *quo*, in a case where one of the parties to a contract had given a notice purporting to dismiss the contractors, could restrain the other party from acting on the notice until judgement or further order, or until a reference to arbitration as provided for by the contract.

In ***Don-wood Co. Ltd-v-Kenya Pipeline Ltd***[63] Ojwang J dealt with application for interim injunctive orders pending arbitration. The Defendant in the case had declined arbitration and was doing everything to avoid the obligations under the contract. The judge granting the orders sought found that the jurisdiction to grant the injunctive relief under section 7 of the Arbitration Act was meant to preserve the subject matter of the suit pending determination of the issues between the parties.

However, it is important to note that the law discourages the parties from making parallel applications before the arbitral tribunal and/or the High Court. Section 7 (2) of the Act enjoins the court to adopt any ruling or finding on any relevant matter to the application as conclusive. There is no question that the section applies even where the ruling is final on a matter so as to prevent appeals on arbitral rulings on applications. The rationale here is to prevent multiple applications, situations of delay occasioned by applications, or parties seeking to clog and/or stall arbitral proceedings by making frivolous applications under the section.

4.2 Interim applications under section 18 of the Act

Save where the parties otherwise agree, an arbitral tribunal may, on the application of a party order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject- matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure; or order any party to provide security in respect of any claim or any amount in dispute; or order a claimant to provide security for costs.[64]

[63] HCCC No. 104 of 2004

[64] Sec. 18 (1) (a) (b) and (c) of the Act.

The Act gives the High Court power to enforce the peremptory orders of protection given by the arbitral tribunal. In order to enforce such protective measure or generally to exercise the power associated with the interim protective measures, the tribunal or a party with approval of the arbitral tribunal may apply for assistance of the High Court.[65] The High Court has equal powers as possessed by the arbitral tribunal with regard to interim measures of protection under the Act. In particular, the High Court's power shall be equivalent to that which it wields in civil proceedings before it. However, the arbitral proceedings shall continue regardless of the fact that such an application is pending in the High Court except where the parties agree otherwise.[66]

4.3 Application for security for costs

Although application for orders for security for costs is provided for under section 18 of the Act (as amended), it is so special an order to merit consideration if only to emphasise its utility and versatility. Given the enormity of costs that, at times, attend arbitration, the law allows the arbitrator on application and, in limited instances, to require security for costs from a party on application by the opposite party. The party applying may specify the preferred form of security whether cash or bond or a guarantee. As in court proceedings, security for costs ensure that enforceability of award of costs in favour of one party is not frustrated by inability to pay on the part of the party against whom they are made.

In addition to section 18, the Chartered Institute of Arbitrators-Kenya Branch Arbitration Rules 16(C) 9 gives the tribunal jurisdiction to make orders for security of a party's costs. There is nothing that forbids parties from agreeing on the matter of orders for security for costs or even consent to allow the arbitrator to make the orders.

5. Preliminary Meeting[67]

The arbitral tribunal is appointed to take such procedural power either as parties have agreed upon[68] and failing an agreement under subsection 1, in the manner it considers appropriate, having regard to the desirability of avoiding unnecessary delay or expense while at the same time affording the parties a fair and reasonable opportunity to present their cases.[69]

The aim is to enable it determine the substantive dispute between the parties and make an arbitral award binding and final as against the parties. The arbitration laws require the arbitrator to act fairly. Basically, this implies securing each party's right to fair hearing. In

[65] Section 18 (2) of the Act
[66] Section 18 (3) of the Act
[67] See Bernstein Supra on "The Preliminary Dialogue" p. 126-130
[68] Section 20(1) of the Act
[69] Section 20(2) of the Act as amended

essence, the arbitrator is under an obligation to given all the parties equal and reasonable opportunity to present and ventilate their case.[70] However, even then, the arbitrator is in-charge of the arbitration proceedings and must utilise his discretionary powers to ensure that parties to not abuse the arbitral process or unnecessarily occasion delays. The arbitrator should thus adopt such procedures as limit delays, and by extension, resultant costs of arbitration.[71] Equally, the parties to arbitration shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.[72]

The arbitrator usually calls for a preliminary meeting with the parties and sends the meeting's agenda to accompany the notice for the meeting. The utility of preliminary meeting is mainly to help clarify and make certain matters arising under the arbitration so as to avoid misunderstandings and delays in future. The preliminary meeting provides a setting for each party to assess each other's case and an opportunity for them to narrow the dispute to specific issues amenable to a decision by the arbitrator. This meeting gives each party a chance to hear the other's side of the story and, therefore, be able to appraise the strength's and weaknesses of its case in comparison with that of the opposing party. The Arbitrator keeps the minutes of the preliminary meeting. As a matter of procedure, a signed copy of the minutes should be sent to each party for record purposes.[73]

6. Arbitrator's Directions

The arbitrator(s) normally issue directions after preliminary meeting addressing issues of administrative interest that are not addressed fully or at all in the party's agreement. Firstly, directions indicate the time table for the first stage of the arbitration e.g. filing of pleadings, applications, discovery and inspection and seeking further and better particulars. It is also the purpose of directions to set-out matters relating to general conduct of the arbitration. Here, the directions address matters to do with addresses and mode of delivery of notices.

The directions also stipulate the procedures of party communications to the arbitrator. For example, such communications should be copied to the other party and that inter-party correspondences should not be sent to the arbitrator as to avoid entangling the arbitrator in the dispute and cause him/her to lose objectivity. Directions also set-out the form the arbitration will take e.g. oral, documents only or by inspection and the applicable rules of procedure and evidence. The arbitrators also outline limits of recoverable costs of arbitration through directions. A party is at liberty to apply challenging any matter contained in the directions if s/he has a valid point in his/her favour.

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[70] Section 19 of the Act

[71] A. Ali "Interlocutory (Intermediate) Matters" an unpublished paper presented at Chartered Institute of Arbitrators-Kenya Branch entry course held at Nairobi on 20th and 21st August, 2007

[72] Section 19A of the Act.

[73] See the Appendix for a complete list of the agenda for the preliminary meeting.

Parties are bound to comply with the arbitrators directions failing which the arbitrator must give a notice outlining the default and calling upon the party to remedy the same. In event of failure by the defaulting party to remedy or continuation of default the law gives the arbitrator a number of options. However, the arbitrator must exercise due caution and ensure all reasonable effort is expended to give the defaulting party an opportunity to remedy the state of affairs.[74]

For instance, the law allows an arbitrator proceed *ex-parte* where a party fails to appear despite grant of adjournments by the arbitrator and notices of hearings being served.[75] Thus where even after such reasonable efforts the party persists in absence or failure to produce, the arbitrator may make an award based on evidence available notwithstanding the absence or the failure by such party.[76] Unless otherwise agreed by the parties, if, without sufficient cause;

- a party fails to comply with any order or direction of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing a time for compliance with the order;[77]

- a party fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim;[78]

- a party fails to comply with any other peremptory order, the tribunal may;[79]

  (i) direct that the party in default shall not be entitled to rely on any allegation or material that was the subject matter of the order;

  (ii) draw such adverse inferences from the non-compliance as the circumstances justify;

  (iii) proceed to an award on the basis of such materials as have been properly provided to it;

  (iv) make such order as it thinks fit as to the payment of costs of the arbitration incurred as a result of the non- compliance.

[74] Section 26 of the Act
[75] Section 26(c) of the Act.
[76] Section 26(b) of the Act
[77] Section 26 (e)
[78] Section 26 (f)
[79] Section 26 (g)

Thus the tribunal will require the claimant to prove its case as against the respondent and forbids summary awards.

Importantly, 'party's autonomy' permits parties to agree on any matter. Where parties have agreed on a given matter, the arbitrator should not give directions or deviate from the same. By way of exclusion agreement, for instance, parties can agree to exclude or regulate certain rights left to their discretion under the Act e.g. right to appeal or apply to court for determination of questions of law. In event of such exclusion agreement, then the parties or their legal representatives draft an exclusion agreement to the effect which the joint sign and serve to the notice of the arbitrator.[80]

7. Pleadings in Arbitration

The term "pleadings" above is used loosely to imply all documents that serve to identify issues in the party's dispute to the arbitrators. The parties, having appointed the arbitrator and agreed on procedure and other matters, need to identify the issues in dispute between them as that is the only way the arbitral tribunal can set out to arbitrate the matter and make a decision. The parties identify issues between them by utilising methods that have been adapted for raising claims and lodging defence against a claim raised.

It is through those methods that parties identify issues between them and articulate their case and the remedies sought against the other party in the arbitration. That way, each party becomes certain of his or her case and that of the other party. Consequently, certainty and finality are injected to the arbitration process as the parties are bound by the issues they raise and cannot deviate from them or amend the case without following due procedure.[81] It would border on chaos if parties were to have had no written statement of their claim and defence as on every turn of evidence likely injurious on ones case, a shift would be expected on his previous claim or defence.

Parties are afforded diverse devices for identifying issues in dispute between them in arbitration. The most popular are pleadings and statement of case. However, parties may also opt to define issues arising for arbitration in a schedule or even have correspondence stand in the place of statement of case.

7.1 Pleadings

Pleadings are an inheritance from litigation and court procedure. Generally, the rules of procedure define pleadings as a brief summary of the facts of the claim and defence against claim. Pleadings should not raise matters of evidence. Similarly, parties ought not to plead the law. The main pleadings are statement of claim, statement of defence and/or

[80] A.Ali Supra

[81] See below on amendment of pleadings

counterclaim, statement of reply and/or counterclaim.[82] As a rule of thumb, pleadings should as far as possible be rendered in clear, concise and in simple language. Otherwise one risks the opposite party and even the arbitral tribunal failing to grasp the gist of their case. However, pleadings as known to litigation are limited in that they are only amenable to instances where parties have a cause-of-action e.g. a claim for a piece of land or breach of contract.

Section 24(1) of the Act seems to endorse pleadings in that it requires the claimant to state the facts supporting his claim, the points at issue and the relief sought. Similarly, the respondent is directed to state his defence in respect of the particulars contained the statement of claim. However, the parties are free to agree on the contents of both statement of claim and defence.

7.2 Statement of case (Statement of Truth)

Pleadings have been criticised for their tendency, especially in the hands of crafty lawyers, to cloud rather than clarify issues. The use of statement of case can help cure this disadvantage. In this case, the claimant delivers to the arbitral tribunal a statement of his/her case setting out in prose and narrative form the material facts he relies on, any evidence he wishes to rely on and any arguments of law that he intends to urge in support of the claim. The statement is delivered within the period stipulated in the tribunal's directions. Then, within the period set out for reply, the respondent party delivers to the tribunal his/her statement of reply to the claimant's claim. The statement of reply/response invariably indicates which facts are accepted and/or disputed, which parts of the claim's legal argument are accepted and/or disputed. The statement of reply may also state the respondent's counterclaim as reply to the claimant's or even outline a right to a set-off.[83]

The main advantage of statement of case is that they encourage flow and are, therefore, easily understandable. By avoiding the format known to pleadings, which has perfected the art of concealing rather than revealing facts to the opponents, statements of case define issues before the tribunal and increase expediency of the process. The practice is to keep the statement of case short and to the point. In fact, the practice is that the tribunal gives directions if it prefers the statement of case to exhaust the issues in the matter or merely the summary and if the parties are required to append their documentary evidence to the statement of case.[84]

[82] For more details, see Order VII of the Civil Procedure Rules titled "Pleadings generally."
[83] See section 24 (1) and (2) of the Act
[84] See also section 34(2) (C) of the Arbitration Act, 1996 (UK)

7.3 Defining issues in a schedule

This method is used mainly in matters like building and construction arbitrations where there are many issues or potential issues for decision. It seems most suited as a supplement to the other methods rather than as a stand-alone method. The claim on each issue, the defence and reply are set out in schedule form for the arbitrator to see them all in one document and maybe one sheet of paper.[85]

7.4 Correspondence between parties as Statement of Case

Often, the parties to arbitration will have exchanged correspondence before and after reference to arbitration regarding the matter in dispute in the hope of reaching a settlement. Such correspondence from the claimant may become the statement of claim upon order of the arbitrator pursuant to an application by the claimant. But the letters must be few otherwise adopting them as statement of case may defeat the objective of expediting the arbitral process. If correspondence is adopted as the statement of case only, the defendant is directed to deliver statement of reply to the claim embodied in the correspondence. In other instances, both claim and defence are set-out in the correspondence and all an arbitrator needs to do is to give directions identifying those that outline the claim on the one hand and those that outline defence on the other.[86]

8. Pre-Hearing Steps in Arbitration

There are a number of pre-hearing procedures but the most outstanding are seeking further (and better) particulars, discovery (disclosure and inspection) and amendment of pleadings.

8.1 Further and better particulars

Further and better particulars are mainly a delicacy for lawyers. They owe their origin to adoption of litigation practices into arbitration as they are regular in the court process. Each party is entitled to request for particulars to elaborate on matters raised in the pleadings. So a party may seek particulars in an instance where the other states that "it was settled between the parties" without indicating the where, when and what of the settlement.

Even where a party responds to the first request for particulars, the other may press for further and better particulars. For instance in the instant case, where the reply is that the settlement was for set-off of the dispute, a request for further and better particulars may be sought on what was the basis of the set-off and what that other party's claim as against the other was so that they could end-up reaching a settlement for set-off. It falls on the arbitrator to give directions on necessity of the particulars after hearing the parties and to keep each from going beyond the original scope of the pleadings or argument on record.

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[85] Bernstein R, The Handbook on Arbitration Practice (London: Sweet & Maxwell, 1998) p.132

[86] Bernstein supra

8.2 Discovery (disclosure and inspection)

Each party is entitled to know the existence of all documents relevant, whether privileged or not, in possession, custody or power of the other party. This helps limit instances of trial by ambush, one of the draw-backs of the adversarial system. However, a party may only insist on and be allowed to inspect those that are not privileged. The arbitrator is to give directions on discovery and should restrict disclosure to only the relevant documents.[87]

8.3 Amendment of pleadings

A party may need to amend pleadings on record. For instance, the need could occur after response to request for particulars to disclose an issue not addressed in the present pleadings. The arbitrator may give leave for amendment of pleadings unless parties have otherwise agreed. Section 24(3) of the Act allows the arbitrator discretion to decline or allow amendments or supplements to pleadings where they are likely to result in delay of the arbitral proceedings.

9. Conclusion

The paper has grappled with an exposition of preliminary proceedings and interlocutories. Preliminary proceedings and interlocutories are indispensable as they lay the foundation upon which the arbitration proper proceeds. To advance the analogy of the birth, immunization and weaning of a child adopted at introduction, preliminary proceedings are the childhood of arbitration. If arbitration proceedings were human, preliminary proceedings would embody the childhood, the arbitration hearing the teenage and youth-as this is where growth and much ground is covered and, lastly arbitral award is the adulthood. Thus, if the arbitration proceedings survive the rigours and vagaries of preliminary proceedings, they mature to arbitration hearing and then progress to adulthood-a final and an enforceable award. The parties are, as pointed out, at liberty to make applications to the arbitrator until the termination of the latter's mandate just like a grown up never outgrows childhood. Indeed, the arbitrator allows the parties "the liberty to apply." (These words appear at the end of every order for directions).

[87] A. Ali Supra

Agenda For Preliminary Meeting

DATED: TIME: PLACE: Represented by: Also present:			
1	To see the original agreement		
2	To identify the issues in dispute		
3	Arbitrators schedule of charges	Accepted	
		Security	
		Interim payments	
4	To find out if the parties are briefing counsel	**Claimant**	
		Respondent	
5	Programme for pleadings	Points of claim…….. Points of defence & counter-claim. Points of reply to defence and defence to counter-claim……. Points of reply to defence to counterclaim….	
6	F & BP Further & better particulars		

7	Discovery	Procedure After close of pleadings, exchange of lists within ….days	
		Inspection	
		Bundle to be limited	
		To be provided to arbitrator ….days before the hearing.	
		Written representation	
8	Conduct of the reference	Hearing	
9	Hearing	venue	
		Estimated duration	
		Procedure	
10	Expert witness	Number on each side	
		Meeting of experts of the same discipline on a without prejudice basis	
		Exchange of reports simultaneously	
		Date for exchange	
		Sanction for failure to exchange reports	
		Access for expert	

11	Witness of fact Proofs of evidence	Exchange Date of exchange	
12	Communications with Arbitrator	Copies to be sent to other party	
13	Figures, plans, photographs and correspondence	To be agreed where possible	
14	Transcript of hearing		
15	Oath		
16	Pre-hearing review		
17	Opening addresses reduced to writing		
		Date of service	
18	Final speeches reduced to writing		
		Programme	
19	Taxation of costs	By taxing master	
		By arbitrator	
20	Any other business	Claimant	
		Respondent	

Towards Effective Peacebuilding and Conflict Management in Kenya

Abstract

Sustainable peace is considered to be an important ingredient of sustainable development and this is also acknowledged under Sustainable Development Goal (SDGs) 16 which calls for promotion of peaceful and inclusive societies. While Kenya has been making some notable steps towards peacebuilding and effective conflict management, the country is still awash with reports of both violent and non-violent conflicts, a hindrance to achievement of sustainable development. This paper critically discusses peacebuilding and conflict management in Kenya. It offers some recommendations on how the country can move closer to achieving sustainable peace for all citizens through effective peacebuilding and conflict management.

1. Introduction

Kenya's Vision 2030[1] is grounded on three development pillars namely: economic, social and political pillars.[2] The Social Pillar of the Vision 2030 seeks to invest in the people where it has been pointed out that 'Kenya's journey towards widespread prosperity also involves the building of a just and cohesive society that enjoys equitable social development in a clean and secure environment'.[3] Notably, the Political pillar of Vision 2030 also envisions "a democratic political system that is issue based , people-centred, result-oriented and accountable to the public" and 'a country with a democratic system reflecting the aspirations and expectations of its people, in which equality is entrenched, irrespective of one's race, ethnicity, religion, gender or socio-economic status; a nation that not only respects but also harnesses the diversity of its people's values, traditions and aspirations for the benefit of all'.[4]

It is worth pointing out the above inspirations are greatly linked to peacebuilding efforts, as also envisaged under United Nations 2030 Agenda for Sustainable Development (SDGs)[5] which provides in its Preamble that 'the State Parties were "determined to foster peaceful, just and inclusive societies which are free from fear and violence" as "there can be no sustainable development without peace and no peace without sustainable development".[6] In addition, SDGs provide that "the new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are

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[1] Republic of Kenya, Vision 2030 (Government Printer, Nairobi, 2007) < http://vision2030.go.ke/> accessed 1 May 2021.

[2] 'About Vision 2030 | Kenya Vision 2030' <http://vision2030.go.ke/about-vision-2030/> accessed 1 May 2021.

[3] 'Social Pillar | Kenya Vision 2030' <http://vision2030.go.ke/social-pillar/> accessed 1 May 2021.

[4] 'Foundation for The Pillars | Kenya Vision 2030' <https://vision2030.go.ke/enablers-and-macros/> accessed 1 May 2021.

[5] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

[6] Ibid, Preamble.

based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions".[7] In line with the foregoing, SDG 16 is the substantive goal dedicated to peace and it provides that States should 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.[8]

While Kenya's efforts towards realization of sustainable development Agenda as far as economic development and even some of the social aspirations are concerned are quite commendable,[9] the same cannot be said about the social pillar, and particularly, peacebuilding efforts. For instance, it has been observed that 'Kenya is a large multi-ethnic country, with over 40 different ethnic groups and many overlapping conflicts which range from high levels of sexual and gender-based violence and of intercommunal violence; low levels of persistent violence; cycles of election-related violence; and increasing numbers of terrorist attacks'.[10] The high levels of violence in Kenya have been attributed to a range of factors including: ethnic intolerance; border conflicts; political party zoning; competition over land and other resources; proliferation of small arms; weak security; and poverty, underdevelopment, and marginalisation.[11]

Existing literature on causes of conflict has highlighted the fact that there is not a single developmental variable that causes conflict, but many variables that foster violence when combined in specific contexts and this may be in relation to issues such as:

> *Globalisation and the transformation of societies: The first stage of democratization, when pressure is exerted on authoritarian governments, is often accompanied by violence; Economic growth and income: Economic growth may increase the risk of armed conflict in very poor economies, but decrease this risk in richer economies; Poverty and inequality: A simple link between each of these factors and conflict has been questioned as each context involves specific, complex variables; Resources: Whether environmental conflict becomes violent depends largely on the government's environmental policy. The 'war economy' debate*

[7] Ibid, para. 35.
[8] Ibid, SDG 16.
[9] 'Kenya Making Steady Progress towards Attainment of SDGs, President Kenyatta Says | The Presidency' <*https://www.president.go.ke/2019/09/25/kenya-making-steady-progress-towards-attainment-of-sdgs-president-kenyatta-says/*> accessed 1 May 2021; 'Lessons From the South: Towards Sustainable Development a Green Economy in Kenya | Youthpolicy.Org' <*https://www.youthpolicy.org/blog/sustainability/kenya-green-economy-transition/*> accessed 1 May 2021; James Macharia, 'Sustainable Development in Kenya' [2019] Horizons: Journal of International Relations and Sustainable Development 172; 'Sustainable Development in Kenya' (CIRSD) <*http://www.cirsd.org/en/horizons/horizons-winter-2019-issue-no-13/sustainable-development-in-kenya*> accessed 1 May 2021.
[10] 'Conflict Analysis of Kenya' (GSDRC) <https://gsdrc.org/publications/conflict-analysis-of-kenya/> accessed 1 May 2021.
[11] Ibid.

> *suggests that war may be seen as an alternative way of generating profit, power and protection; and aid: The aid system can inadvertently exacerbate conflict, as it did in Rwanda, where some have gone further to suggest that donors may use aid allocation as a political instrument.*[12]

While conflict has been defined variously by different scholars, some of the most comprehensive definitions include: conflict is a struggle over values and claims to scarce status, power and resources in which the aims of the conflicting parties are to injure or eliminate their rivals; conflict is a particular relationship between states or rival factions within a state which implies subjective hostilities or tension manifested in subjective economic or military hostilities.[13] While there are two broad categories of conflicts, that is, on the one hand, internal conflicts (or intra- states conflict) as one in which the governmental authorities of a state are opposed by groups within that state seeking to overthrow those authorities with force of arms or one in which armed violence occurs primarily within the borders of a single states, and on the other hand, international conflicts or interstate conflicts which is between two or more nations involving forces of more than one state[14], Kenya has often struggled with internal conflicts mainly relating to ethnic clashes influenced by ethnic diversity and the provision of public goods, natural resources scarcity or abundance as well as political influence,[15] with a few international ones.[16] The conflicts exacerbating situation has also been attributed to 'weak or non-existent structures and institutions for conflict prevention and response'.[17] This has

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[12] Thania Paffenholz, '19 Understanding the Conflict–Development Nexus and the Contribution of Development Cooperation to Peacebuilding1' [2008] Handbook of conflict analysis and resolution 272<*https://gsdrc.org/document-library/understanding-the-conflict-development-nexus-and-the-contribution-of-development-cooperation-to-peacebuilding/*> accessed 3 May 2021.

[13] AJ Olaosebikan, 'Conflicts in Africa: Meaning, Causes, Impact and Solution' (2010) 4 African Research Review 549, 550-551.

[14] Ibid, 551.

[15] Kenya Human Rights Commission, Maasive Internal Displacements in Kenya Due to Politically Instigated Ethnic Clashes (Kenya Human Rights Commission 2007); see also Eric Thomas Ogwora, 'Electoral Bribery and Corruption: A Deterrent and a Game Changer towards Democratic Process and Fair Election in Kenya' (2017) 1 Journal of Popular Education in Africa; Caroline Elkins, 'What's Tearing Kenya Apart? History, for One Thing' [2008] Washington Post; Beneah M Mutsotso, 'The Boundary Shifters of North Western Kenya'; Dominic Burbidge and Nic Cheeseman, 'Trust, Ethnicity and Integrity in East Africa: Experimental Evidence from Kenya and Tanzania' (2017) 2 Journal of Race, Ethnicity and Politics 88.

[16] 'Kenya Denies Role in Somalia's Internal Conflict | Voice of America - English' <*https://www.voanews.com/africa/kenya-denies-role-somalias-internal-conflict*> accessed 8 May 2021; Deutsche Welle (www.dw.com), 'Stability at Risk as Somalia and Kenya Spat over Sea Border | DW | 15.03.2021' (DW.COM) <*https://www.dw.com/en/kenya-somalia-border-dispute-threatens-stability/a-56879109*> accessed 8 May 2021; 'Summaries | Maritime Delimitation in the Indian Ocean (Somalia v. Kenya) | International Court of Justice' <*https://www.icj-cij.org/en/case/161/summaries*> accessed 8 May 2021;

[17] Lillian Mworia and J Ndiku, 'Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies', 163.

often dragged the country in achieving its development goals and sustainability in all spheres of life.

It is against this background that this paper critically evaluates the peacebuilding efforts and conflict management initiatives in Kenya and makes recommendations on how the country can achieve its sustainable peace goals of "building peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions".[18] The paper makes recommendations based on a conflict theory that advocates for non-violent and creative conflict resolution mechanisms.[19]

2. Peacebuilding, Conflict Management and Development

Arguably, 'development policies should be an integral part of the peacebuilding agenda'.[20] In relation to this, it has also been observed that 'development has multiple dimensions from human rights to environmental sustainability, from economic growth to governance'.[21] Also notable is the assertion that 'the concept of security has gradually expanded from state security to human security and now includes a range of military as well as non-military threats that recognize no borders'.[22]

As already pointed out, the United Nations 2030 Agenda for Sustainable Development (SDGs)[23] provides in its Preamble that 'the State Parties were "determined to foster peaceful, just and inclusive societies which are free from fear and violence" as "there can be no sustainable development without peace and no peace without sustainable development".[24]

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[18] see para. 35, UN 2030 Agenda for Sustainable Development Goals.

[19] Veronique Dudouet, 'Nonviolent Resistance and Conflict Transformation in Power Asymmetries' [2008] Berghof Center for Constructive Conflict Management; 'Principles Of Conflict Resolution' <https://www.hawaii.edu/powerkills/TJP.CHAP10.HTM> accessed 8 May 2021; 'Theories of Conflict Resolution and Their Applicability: To Protracted Ethnic Conflicts on JSTOR' <*https://www.jstor.org/stable/44481352?seq=1*> accessed 8 May 2021; Tukumbi Lumumba-Kasongo, 'Contemporary Theories of Conflict and Their Social and Political Implications' [2017] Peace, Security and Post-Conflict Reconstruction in the Great lakes Region of Africa. Oxford: African Book Collective 29.

[20] 'Understanding the Conflict-Development Nexus and the Contribution of Development Cooperation to Peacebuilding' (GSDRC) <*https://gsdrc.org/document-library/understanding-the-conflict-development-nexus-and-the-contribution-of-development-cooperation-to-peacebuilding/*> accessed 3 May 2021.

[21] International Peace Academy, 'The Security-Development Nexus: Research Findings and Policy Implications' (International Peace Institute 2006), 3 <*https://www.jstor.org/stable/resrep09516*> accessed 3 May 2021.

[22] Ibid, 3.

[23] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

[24] Ibid, Preamble.

Some scholars have argued that 'comparative studies show that development and peacebuilding must be integrated (not just linked) at an early stage – for example by including the political context in development policy and practice in conflict-affected fragile states and by addressing the structural causes of conflict'.[25]

Notably, development and more so, sustainable development, is a multifaceted concept that requires to achieve certain milestones in various sectors, such as social, political, environmental and economic spheres.[26] It is for this reason that 'the heads of state established five fields of critical importance, or the "five Ps" of the 2030 SDG Agenda, which are peopl*e*, planet, prosperity, *peace* and partnerships (Emphasis added).[27]

Reduction in poverty and concrete improvements in basic education, gender equality, and basic health, all underpinned by improved governance and environmental sustainability are seen as important in building sustainably peaceful and inclusive societies.[28] It has been argued that development and peacebuilding must be integrated (not just linked) at an early stage – for example by including the political context in development policy and practice in conflict-affected fragile states and by addressing the structural causes of conflict.[29] In addition, it has been acknowledged that strengthening state institutions and enhancing their capacity to provide security and development based on principles of good governance are essential for sound conflict management.[30] In the same way, an effective, credible, and accountable security sector can provide a safe and secure environment in which to entrench other programming initiatives, all embedded in a predictable legal environment supported by culturally appropriate rule of law programs..[31]

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[25] Thania Paffenholz, '19 Understanding the Conflict–Development Nexus and the Contribution of Development Cooperation to Peacebuilding1' [2008] Handbook of conflict analysis and resolution 272<*https://gsdrc.org/document-library/understanding-the-conflict-development-nexus-and-the-contribution-of-development-cooperation-to-peacebuilding/*> accessed 3 May 2021.

[26] 'Social Development for Sustainable Development | DISD' <*https://www.un.org/development/desa/dspd/2030agenda-sdgs.html/*> accessed 8 May 2021; Rodrigo Goyannes Gusmão Caiado and others, 'A Literature-Based Review on Potentials and Constraints in the Implementation of the Sustainable Development Goals' (2018) 198 Journal of cleaner production 1276.

[27] Rodrigo Goyannes Gusmão Caiado and others, 'A Literature-Based Review on Potentials and Constraints in the Implementation of the Sustainable Development Goals' (2018) 198 Journal of cleaner production 1276, 4.

[28] Bernard Wood, 'Development Dimensions of Conflict Prevention and Peace-Building' [2001] UNDP. (June).

[29] Thania Paffenholz, '19 Understanding the Conflict–Development Nexus and the Contribution of Development Cooperation to Peacebuilding1' [2008] Handbook of conflict analysis and resolution 272.

[30] Flavius Stan, 'The Security-Development Nexus: Conflict, Peace and Security in the 21st Century' (International Peace Institute, 14 October 2004) <https://www.ipinst.org/2004/10/the-security-development-nexus-conflict-peace-and-security-in-the-21st-century> accessed 8 May 2021.

[31] Ibid.

3. Peacebuilding and Conflict Management in Africa: Continental Status

There have been frequent conflicts across the African continent, which are fueled by various factors, including but not limited to natural resources, fight for political control, poverty, negative ethnicity, religion, environmental causes, and external influence, among others.[32] It is also worth noting that some of the frequent ethnic conflicts have been attributed to the former colonial masters where, colonial authorities drew up local and national territorial boundaries in Africa based on a rather simplistic understanding of the nature of ethnic communities, thus forcing into political entity people who lived apart, separating people who lived together undermining the natural process of state creation and nation building.[33] This has arguably been a major source of conflict among communities in some African countries, such as Nigeria.[34]

The African Union observes that 'in 2013, during the 50th Anniversary of the OAU/AU, African Heads of State and Government made a Solemn Declaration committing to tackle head-on the scourge of violent conflict in Africa and pronounced their firm determination to achieve the noble goal of a conflict-free Africa, thereby making peace a reality for African people, ridding the continent of wars, violent conflicts, human rights violations, humanitarian crises as well as preventing genocide'.[35]

African Union's *Agenda 2063*, Africa's blueprint and master plan for transforming Africa into the global powerhouse of the future[36], seeks to achieve a peaceful and secure Africa.[37] It is noteworthy that the continent will not make any tangible progress in peacebuilding unless individual states commit to work towards achieving sustainable peace in their territories.

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[32] 'The Environmental Challenges In Sub Saharan Africa' <*http://web.mit.edu/africantech/www/articles/EnvChall.htm*> accessed 8 May 2021; Macartan Humphreys, 'Natural Resources, Conflict, and Conflict Resolution: Uncovering the Mechanisms' (2005) 49 Journal of conflict resolution 508; AJ Olaosebikan, 'Conflicts in Africa: Meaning, Causes, Impact and Solution' (2010) 4 African Research Review 549; Huma Haider, Conflict analysis of North Eastern Kenya. K4D Emerging Issues Report36.Brighton, UK: Institute of Development Studies, 15 <*https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15570/EIR%2036_Conflict_analysis_of_Northern_Kenya.pdf?sequence=1&isAllowed=y* > accessed 8 May 2021.

[33] Lillian Mworia and J Ndiku, 'Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies', 162.

[34] Ibid, 162-163; see also Simone Datzberger, 'Civil Society as a Postcolonial Project: Challenging Normative Notions in Post-Conflict Sub-Saharan Africa', Negotiating Normativity (Springer 2016).

[35] African Union, 'Silencing The Guns: Creating Conducive Conditions for Africa's Development' (The East African) <*https://www.theeastafrican.co.ke/tea/sponsored/silencing-the-guns-creating-conducive-conditions-for-africa-s-development-1435754*> accessed 8 May 2021.

[36] 'Agenda 2063: The Africa We Want. | African Union' <*https://au.int/en/agenda2063/overview*> accessed 8 May 2021.

[37] African Union, Agenda 2063, 2 < *https://au.int/sites/default/files/documents/33126-doc-03_popular_version.pdf*> accessed 8 May 2021.

4. Peacebuilding and Conflict Management in Kenya: Towards Effective Peacebuilding and Conflict Management

4.1 Addressing Poverty, Ethnic and Social stratification

As already pointed, some of the conflicts in Kenya have been attributed to ethnic clashes as well as poverty and marginalisation of some parts of the country by successive governments.[38] It has been observed that 'the politicized nature of ethnicity in Kenya, and the fact that both elections and land tenure are closely associated with ethnic identity, are highlighted as key factors explaining the prevalence of violent communal conflict', with the four main drivers of conflict being: electoral politics, cattle raiding, local resources, and boundaries and local authority.[39] Some conflicts among neighbouring communities in Kenya such as the Turkana and Pokot who have had periodic conflicts have been attributed to scarcity and competition over pasture and water as well as border disputes, and often compounded by the minimum routine interaction and communication between the two communities.[40]

Poverty is a major contributing factor to insecurity and instability especially in the rural areas where communities mainly rely on scarce land based natural resources which are affected by climate change and population growth, among others. It has been observed that 'rural poverty can be caused by a combination of: living and farming in unfavourable conditions (climate, soils, access to markets, small land holdings); lack of resource access rights, legal protection or recognition; lack of ecosystem services (provisioning, regulating, cultural/spiritual, regenerative); lack of income opportunities (on- or off-farm) in local economies; and lack of investment in the (few) opportunities that exist for market-based ventures.[41]

Social stratification in any society may lead to bottled up anger and bitterness which is a recipe for violent and non-violent conflicts.[42] Despite the constitutional guarantee on

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[38] Friedrich Elbert Stiftung, 'Regional Disparities and Marginalisation in Kenya' [2012] Nairobi: Elite PrePress; Emma Elfversson, 'Patterns and Drivers of Communal Conflict in Kenya' in Steven Ratuva (ed), The Palgrave Handbook of Ethnicity (Springer 2019) <*https://doi.org/10.1007/978-981-13-2898-5_50*> accessed 8 May 2021.

[39] Emma Elfversson, 'Patterns and Drivers of Communal Conflict in Kenya' in Steven Ratuva (ed), The Palgrave Handbook of Ethnicity (Springer 2019) <*https://doi.org/10.1007/978-981-13-2898-5_50*> accessed 8 May 2021; Anne R Gakuria, 'Natural Resource Based Conflict among Pastoralist Communities in Kenya' (PhD Thesis, University of Nairobi 2013); Lillian Mworia and J Ndiku, 'Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies'.

[40] Lillian Mworia and J Ndiku, 'Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies', 163.

[41] Meine van Noordwijk, 'Integrated Natural Resource Management as Pathway to Poverty Reduction: Innovating Practices, Institutions and Policies' (2019) 172 Agricultural Systems 60, 61.

[42] Ben Fine, Theories of Social Capital: Researchers Behaving Badly (Pluto press 2010); Philip Arestis, Aurelie Charles and Giuseppe Fontana, 'Power, Intergroup Conflicts and Social

freedom from non-discrimination[43], protection of the minority and marginalised groups including women through affirmative action,[44] it is a documented fact that inequalities are manifest in Kenya's economic, social and political arenas.[45] It has rightly been observed that 'a degree of equality in social, political, economic and cultural rights is essential for rebuilding the trust between the state and society and among social groups.[46]

Stratification in the United States: What Has the Global Crisis Taught Us?' (2015) 73 Review of Social Economy 370.

[43] Article 27, Constitution of Kenya 2010.

[44] Article 11 recognizes culture as the foundation of the nation and obliges the state to promote all forms of cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage. The state is also obliged to recognize the role of indigenous technologies in the development of the nation.

Article 56. Minorities and marginalised groups
The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

(a) participate and are represented in governance and other spheres of life;
(b) are provided special opportunities in educational and economic fields;
(c) are provided special opportunities for access to employment;
(d) develop their cultural values, languages and practices; and
(e) have reasonable access to water, health services and infrastructure.

100. Promotion of representation of marginalised groups

Parliament shall enact legislation to promote the representation in Parliament of—
(a) women;
(b) persons with disabilities;
(c) youth;
(d) ethnic and other minorities; and
(e) marginalised communities.

177. Membership of county assembly
(1) A county assembly consists of—
(c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament;

Article 204. Equalisation Fund
(1) There is established an Equalisation Fund into which shall be paid one half per cent of all the revenue collected by the national government each year calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly.
(2) The national government shall use the Equalisation Fund only to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.

[45] Jeremiah Owiti, 'Political Drivers of Inequality in Kenya' (2014) 57 Development 547, 548.

[46] Hanny Cueva Beteta, Colleen Russo and Stephanie Ziebell, Women's Participation in Peace Negotiations: Connections between Presence and Influence (New York: UN Women 2010), 3.

It has also been suggested that there is a correlation between more inclusive and open models of negotiations and a higher likelihood that the outcome agreements will hold and prevent a relapse into conflict.[47]

Under the Constitution of Kenya 2010, the devolved system of governance was meant to, *inter alia*, promote democratic and accountable exercise of power, and foster national unity by recognising diversity; give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; recognise the right of communities to manage their own affairs and to further their development; facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya, Nairobi; and enhance checks and balances and the separation of powers.[48] While devolution has achieved commendable steps towards attaining equality and equity within the rural Kenya[49], the poverty levels and social, political and economic inequalities in the country are still high.[50] Rampant corruption and misallocation of political and economic resources in Kenya and especially at the county levels of governance may be some of the main factors that may be contributing to the slow pace of poverty alleviation despite the proximity of the rural areas to the devolved governance.[51]

There is need for stakeholders to go back to the drawing board on why devolution was introduced by the drafters of the Constitution while also ensuring that the national values and principles of governance are applied and upheld at both levels of governance, and these include: a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.[52] Chapter six of the Constitution on leadership and integrity, Chapter Twelve on Public Finance, Values and principles of public service under Chapter

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[47] Ibid, 3.

[48] George Nyabuga, 'Devolved Power: A Critical Interrogation of the Place, Roles and Obligations of the Media at the Grassroots in Kenya' (2017) 42 Africa Development / Afrique et Développement 105, 107.

[49] Michelle D'Arcy, 'Kenya Illustrates Both the Promise as Well as the Pitfalls of Devolution' (The Conversation) <*http://theconversation.com/kenya-illustrates-both-the-promise-as-well-as-the-pitfalls-of-devolution-96729*> accessed 8 May 2021.

[50] Brendon J Cannon and Jacob Haji Ali, 'Devolution in Kenya Four Years On: A Review of Implementation and Effects in Mandera County' (2018) 8 African Conflict and Peacebuilding Review 1.

[51] Brendon J Cannon and Jacob Haji Ali, 'Devolution in Kenya Four Years On: A Review of Implementation and Effects in Mandera County' (2018) 8 African Conflict and Peacebuilding Review 1; George Nyabuga, 'Devolved Power: A Critical Interrogation of the Place, Roles and Obligations of the Media at the Grassroots in Kenya' (2017) 42 Africa Development / Afrique et Développement 105.

[52] Article 10, Constitution of Kenya 2010.

Thirteen of the Constitution on Public service, *Leadership and Integrity Act*, 2012[53] should also be strictly enforced to ensure that there is real development at the grassroots in efforts to eradicate abject poverty. This will also potentially address the concerns on ethnic, nepotism and favouritism during employment of devolved governments' staff.[54]

Some commentators have also explored the role of culture in causing ethnic conflicts especially within the North-Western region of Kenya, where cattle rustling between the Nilotic communities is the main cause of conflicts.[55] For instance, it has been argued that 'cattle rustling is a cultural aspect of the Pokot founded on their myth of origin and a belief that all cattle belong to them'.[56] While Article 11 of the Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation, the practice of such cultural activities should not violate constitutional provisions especially on the Bill of Rights. Arguably, there is a need for the stakeholders in peacebuilding to address this notion through education as an empowerment tool for more people within the community (both formal and informal education) as well as creating opportunities for alternative sources of livelihoods for these communities to supplement their income and hence have a sense of security as far as their livelihoods are concerned.

Notably, Peace Education Programme at primary and secondary schools' levels of study was introduced in 2008 whose overall goal was to promote peaceful co-existence among members of the school community hence contributing to peace and national cohesion in the country; and enhance the capacity of the education sector to promote peaceful

[53] Leadership and Integrity Act, No 19 of 2012, Laws of Kenya.

[54] Paul Olendo Ombanda, 'Nepotism and Job Performance in the Private and Public Organizations in Kenya' (2018) 8 International Journal of Scientific and Research Publications 474; see also Kefa Ruto Plimo, 'Assessing Determinants of Effective Human Resource Functions Devolution in County Government of West Pokot, Kenya' (PhD Thesis, COHRED-JKUAT 2017); Buagu Musazi Says, 'Ethnic Favouritism in Kenya and Uganda's Public Sector' (Africa at LSE, 1 August 2019) <*https://blogs.lse.ac.uk/africaatlse/2019/08/01/has-ethnic-favouritism-in-public-sector-hiring-in-kenya-and-uganda-been-exaggerated/*> accessed 8 May 2021; Mr NjagiIreri and Wario Guyo, 'The Influence of the County Public Service Board (CPSB), on the Devolved Human Resources Governance in Kenya' (2018) 8 International Journal of Humanities and Social Science; Hamun A Jubase, 'Challenges of Human Resource Management in Wajir Public Service Board' (PhD Thesis, University of Nairobi 2018).

[55] David M Kimaiyo, 'Women Involvement in Cattle Rustling between the Marakwet and the Pokot Communities of North-Western Kenya' (Thesis, University of Nairobi 2016) <*http://erepository.uonbi.ac.ke/handle/11295/97405*> accessed 8 May 2021.

[56] Daniel Nganga, 'Culture as the Cause of Conflict: A Case Study in West Pokot District, Kenya' (2012) 6 Journal of Peace and Justice 51; see also Mutsotso, B. M., Kimaiyo, D., & Gaciuki, P., "The centrality of cattle in the social organization of the East Pokot pastoralists of North Western Kenya." European Scientific Journal 10, no. 8 (2014).

coexistence through conflict sensitive policies and programming.[57] The specific objectives of the programme include:

To promote conflict sensitive policies and programmes within the education sector; to create awareness among learners on the causes of conflict and how to constructively resolve them in their daily lives; to prepare learners to become good citizens in their communities, nation and the world and to equip them with skills that promote peace and human dignity at all levels of interaction; to use the classroom as a springboard through which global values of positive inter-dependence, social justice and participation in decision-making are learned and practiced; and to foster positive images that lead to respect for diversity to enable young people learn to live peacefully in diverse communities in the world.[58]

This may be a good step towards restoring and achieving lasting and sustainable peace and cohesion among the warring communities and the country in general.

4.2 Joint and Participatory Efforts in Peacebuilding and Conflict Management

Peacebuilding for achievement of sustainable peace as a prerequisite for realising the sustainable development is an imperative that requires the concerted efforts of all groups of people in society.[59] It is important for State organs to acknowledge that peacebuilding and conflict management is and should be a joint effort involving all stakeholders. As a such, their greatest efforts should be towards empowering the other relevant stakeholders to build capacity for sustainability. Within most indigenous communities, elders still play a vital role in conflict management and should thus be involved in peacebuilding efforts and conflict management. For instance, within Somali people of North Eastern Kenya, it has been observed that 'traditional elders' roles include negotiating application of customary law –an important source of conflict management, conflict resolution and enforcement of peace agreements'.[60] However, elders can and have indeed been used to mobilize communities along ethnic lines and this can be a threat to sustainable peace.[61] As such, it is suggested that the Government should work closely with the elected elders as well as religious leaders and positively empower them to ensure that they are only used as agents of peace and not divisive politics.

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[57] Kangethe, Mary Wanjiru. "The peace education programme in Kenya." The Global Campaign for Peace Education 121 (2015).

[58] Ibid.

[59] Office for ECOSOC Support and Coordination United Nations, Achieving Sustainable Development and Promoting Development Cooperation: Dialogues at the Economic and Social Council (UN 2008); '5 – Quest for Sustainable Peace and Development under Militarized Security Approaches' (2030 Spotlight) <*https://www.2030spotlight.org/en/book/1730/chapter/5-quest-sustainable-peace-and-development-under-militarized-security-approaches*> accessed 9 May 2021.

[60] Huma Haider, Conflict analysis of North Eastern Kenya. K4D Emerging Issues Report36.Brighton, UK: Institute of Development Studies, 16.

[61] Ibid, 16.

While it is widely acknowledged that violent conflict affects men and women in different ways, women and children are arguably the greatest victims in conflict situations.[62] The disproportional burden borne by women is often attributed to the inequalities that exist between men and women in social, economic and political spheres.[63] Notably, Kenya ranks 109 out of 153 countries in the Global Gender Gap Report 2020, with a score of with significant inequalities between males and females in education attainment, health outcomes, representation in parliament, and labour force participation.[64] Arguably, these factors predispose women to greater losses and suffering during conflicts. They also make them vulnerable to recruitment to armed gangs such as Al-Shabaab which has been attacking Kenya frequently in the last several years. For instance, it has been observed that Al-Shabaab has been actively (and forcibly) recruiting women in Kenya, including through social media, religious indoctrination in schools, marriage, employment incentives, and abduction.[65] Just like men, their support for the terrorist group is informed by: ideology, grievances over socio-political and economic circumstances, among others, with economic pressures being an especially strong motive for women.[66]

Considering that women have needs just like men which, if not met, may make women be used as tools off propagating violence and hatred, often to their detriment, women are regularly considered and should indeed be among the greatest stakeholders in peacebuilding and conflict management if sustainable peace is to be achieved.[67] Despite this, statistics from many countries around the globe show that the number of women in decision-making positions remains relatively small.[68] It has also been observed that the underrepresentation of women at the peace table is much more pronounced compared to other public decision-making roles, where though women are still underrepresented the gap has been steadily narrowing.[69] Ironically, this persists despite the fact that women

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[62] 'Gender in Fragile and Conflict-Affected Environments' (GSDRC) <*https://gsdrc.org/topic-guides/gender/gender-in-fragile-and-conflict-affected-environments/*> accessed 8 May 2021.

[63] Iffat Idris, Gender, countering violent extremism and women, peace and security in Kenya. K4D Factsheet. Brighton, UK: Institute of Development Studies < *https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15832/K4D_Factsheet_Kenya_2.4.pdf?sequence=1&isAllowed=y*> accessed 8 May 2021.

[64] Ibid.

[65] Ibid.

[66] Ibid.

[67] Clare Castillejo, 'Building a State That Works for Women: Integratin g Gender in to Post-Conflict State Buildin g' [2011] Documentos de Trabajo FRIDE 1; 'Why Women Should Have a Greater Role in Peacebuilding' (World Economic Forum) <*https://www.weforum.org/agenda/2015/05/why-women-should-have-a-greater-role-in-peacebuilding/*> accessed 8 May 2021.

[68] 'Why Women Should Have a Greater Role in Peacebuilding' (World Economic Forum) <*https://www.weforum.org/agenda/2015/05/why-women-should-have-a-greater-role-in-peacebuilding/*> accessed 8 May 2021; 'Facts and Figures: Women's Leadership and Political Participation | What We Do' (UN Women) <*https://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures*> accessed 8 May 2021.

[69] Hanny Cueva Beteta, Colleen Russo and Stephanie Ziebell, Women's Participation in Peace Negotiations: Connections between Presence and Influence (New York: UN Women 2010), 3.

have been closing the gap in professions and roles that typically dominate peace talks: politician, lawyer, diplomat and member of a party to armed conflict.[70]

The United Nations Security Council *Resolution 1325* (2000)[71] in its Preamble reaffirms the important role of women in the prevention and resolution of conflicts and in peace-building, and stresses the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution.[72] Kenya's *National Action Plan for the Implementation of United Nations Security Council Resolution 1325 and Related Resolutions*[73] (KNAP) was titled 'Kuhusisha Wanawake ni Kudumisha Amani' ('to involve women is to sustain peace') and acknowledges the changing nature of insecurity and incorporates a human security approach whose focus is on the protection of individual citizens. In addition, this broader paradigm of human security was meant to expand the meaning of security to include secure livelihoods, environmental protection, and access to resources.[74] The *Action Plan* also recognizes that security threats include social, economic, and environmental factors and women's vulnerability is exacerbated by unequal access to resources, services, and opportunities.[75] The Kenya National Action Plan was to be executed over a three-year period (2016–2018) and was meant to provide a comprehensive approach to the implementation of UNSCR 1325, and also enhance coordination among the relevant actors, raise awareness among stakeholders, and increase accountability among actors responsible for its implementation.[76]

The KNAP also aimed to mainstream UNSCR 1325 into national conflict resolution, conflict prevention, peace promotion, and peacebuilding strategies contained in prior agreements, including the 2008 National Accord and its implementing agreements, the National Peace Policy, and relevant gender policies, among others.[77] KNAP I mainly focused on equal protection of individual citizens and endeavoured to better understand and *address the root causes of socio-economic and political inequalities around peace and security issues*, designed around four pillars: Participation and Promotion, Prevention, Protection, and Relief and Recovery (Emphasis added).[78]

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[70] Ibid, 3.
[71] UN Security Council, Security Council resolution 1325 (2000) [on women and peace and security], 31 October 2000, S/RES/1325 (2000).
[72] Ibid, Preamble.
[73] Republic of Kenya, National Action Plan for the Implementation of United Nations Security Council Resolution 1325 and Related Resolutions, 2016–2018 < *http://peacewomen.org/sites/default/files/Kenya%20NAP-with-cover-final.pdf*> accessed 8 May 2021.
[74] Ibid, 11-12.
[75] Ibid, 12.
[76] Ibid, 13.
[77] Ibid, 14.
[78] Ibid.

The second *Kenya National Action Plan for the Advancement of United Nations Security Council Resolution 1325 on Women, Peace and Security 2020–2024*[79] which was launched in May 2020 focuses on key objectives, priority actions, expected outcomes, and interventions/responsibilities of relevant actors and stakeholders and also provides clear indicators, monitoring and evaluation benchmarks, and projected targets. It is also based on the above 4 pillars.[80] The KNAP II is a commendable step towards enhancing empowerment and greater participation of women in development and in peace, security, and disaster management.

Women can participate in peace processes as: mediators or as members of mediation teams; delegates of the negotiating parties; all-female negotiating parties representing a women's agenda; signatories; representatives of women's civil society with an observer role; witnesses; in a parallel forum or movement; gender advisers to mediators, facilitators or delegates; or as members of technical committees, or a separate table or working group devoted to gender issues.[81]

It has been argued that while the full impact of women's participation on peace and security outcomes remains poorly understood, existing data shows how women's inclusion helps prevent conflict, create peace, and sustain security after war ends.[82] Women's empowerment and gender equality are also associated with peace and stability in society.[83] Women's participation in peace talks is also associated with the following advantages: Women promote dialogue and build trust as conflict parties may see women as less threatening because they are typically acting outside of formal power structures and are not commonly assumed to be mobilizing fighting forces; Women bridge divides and mobilize coalitions; Women raise issues that are vital for peace; and women prioritize gender equality.[84]

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[79] Republic of Kenya, Kenya National Action Plan for the Advancement of United Nations Security Council Resolution 1325 on Women, Peace and Security 2020–2024 < *http://peacewomen.org/sites/default/files/KNAP-II-digital-30-Apr.pdf*> accessed 8 May 2021.

[80] Ibid, 14.

[81] Hanny Cueva Beteta, Colleen Russo and Stephanie Ziebell, Women's Participation in Peace Negotiations: Connections between Presence and Influence (New York: UN Women 2010), 5-10.

[82] Marie O'Reilly, 'Why Women?' [2015] Inclusive Security 1, 3 <*https://www.almendron.com/tribuna/wp-content/uploads/2019/02/why-women-report-2017.pdf*> accessed 8 May 2021.

[83] Ibid, 4.

[84] Ibid, 7-9.

It is, therefore, important to ensure that women are empowered and included in peacebuilding and conflict management in Kenya[85], as a step towards building peaceful, cohesive and inclusive societies as part of the bigger sustainable development agenda.[86]
The civil society as well as the private sector also have a role to play in peacebuilding and conflict management in Kenya. A past report focusing on the role of the private sector in peacebuilding within the context of Kenya's 2013 election cycle observed that 'the private sector undertook a sustained, systematic, and comprehensive peacebuilding campaign that almost certainly contributed to the peaceful nature of the electoral process', where the 'private-sector engagement influenced key political actors, spread messages of peace across the country, brought together disparate sectors of Kenyan society, prevented incitement, and ensured a return to normalcy as challenges to electoral results worked their way through the courts'.[87] The report also documented the fact that 'the motivations for business involvement included a desire to never go back to the dark days of 2007–08; a deep concern for the people with whom they did business; an acceptance of their mandate, especially in regard to providing uninterrupted service; the allure of, and pressure to exercise, the formidable power of a united business front; and, the fact that remaining aloof to developments that have an impact on their continued existence is bad for the sector'.[88]

4.3 Addressing the Weak or Non-Existent Structures and Institutions for Peacebuilding, Conflict Prevention and Response

SDG 16 calls on State Parties to promote just, peaceful and inclusive societies. The associated relevant Targets require States to, *inter alia*: promote the rule of law at the national and international levels and ensure equal access to justice for all; by 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime; develop effective, accountable and transparent institutions at all levels; ensure responsive, inclusive, participatory and representative decision-making at all levels; broaden and strengthen the participation of

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[85] 'How Women in Kenya Mobilised for Peace after Surviving Violence - Kenya' (ReliefWeb) <*https://reliefweb.int/report/kenya/how-women-kenya-mobilised-peace-after-surviving-violence*> accessed 8 May 2021.

[86] Kariuki Muigua, 'Mainstreaming the Role of Women in Peacemaking and Environmental Management in Kenya' (2020) Journal of cmsd Volume 4(5)< *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3834364*> accessed 8 May 2021; Katie Zanoni, 'Kenyan Girls as Agents of Peace: Enhancing the Capacity of Future Women Peacebuilders' (2017) 12 Research in Comparative and International Education 110; Irene Cherotich Loyatum, 'The Role of Women in Peace Building in Conflicting Society: The Case of West Pokot County, Kenya, 2000-2018' (PhD Thesis, United States International University-Africa 2019); Jeanne Izabiliza, 'The Role of Women in Reconstruction: Experience of Rwanda' [2003] Source unknown.

[87] Victor Owuor and Scott Wisor, 'The Role of Kenya's Private Sector in Peacebuilding: The Case of the 2013 Election Cycle' [2014] Broomfield, CO: One Earth Future Foundation'ii<*https://www.oefresearch.org/sites/default/files/documents/publications/kenyaprivatesectorreport-digital.pdf*> accessed 3 May 2021.

[88] Ibid, 26.

developing countries in the institutions of global governance; ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements; strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime; and promote and enforce non-discriminatory laws and policies for sustainable development.[89] SDG 16 is premised on the fact that 'sustainable development cannot be achieved without peace, stability, human rights and effective governance, based on the rule of law'.[90]

It is worth pointing out that while some conflicts call for use of formal systems such as national courts to deal with them, especially where criminal activities are concerned, there is a need to explore and exploit non-violent and/or non-confrontational approaches, in the spirit of the 2010 Constitution of Kenya which 'encourages of communities to settle land disputes through recognised local community initiatives consistent with this Constitution'[91], and requires that 'in exercising judicial authority, the courts and tribunals should be guided by, *inter alia*, the principles of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)'.[92]

The drafters of the *National Land Policy 2009*[93] as well as the 2010 Constitution of Kenya also acknowledged that to address some of the protracted conflicts that have afflicted some parts of Kenya, there was a need to address what is popularly referred to as present or historical land injustices. The National Land Commission[94] and the Environment and Land Court[95] are the two main institutions that are charged with addressing this problem.

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[89] Martin, 'Peace, Justice and Strong Institutions' (United Nations Sustainable Development) <*https://www.un.org/sustainabledevelopment/peace-justice/*> accessed 8 May 2021.

[90] 'Sustainable Development Goals | United Nations Development Programme' <*https://www.undp.org/sustainable-development-goals#peace-justice-and-strong-institutions*> accessed 8 May 2021.

[91] See Articles 60(1)(g) & 67(2)(f), Constitution of Kenya 2010.

[92] Article 159(2) (c) & (3), Constitution of Kenya 2010; 159 (3): Traditional dispute resolution mechanisms shall not be used in a way that—(a) contravenes the Bill of Rights;(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law; Nairobi Centre for International Arbitration, Alternative Dispute Resolution Policy, Draft October 2019< *https://www.ncia.or.ke/wp-content/uploads/2019/10/DRAFT-NATIONAL-ADR-POLICY.pdf*> accessed 8 May 2021; Mediation Bill, 2020, Kenya Gazette Supplement No. 92 (National Assembly Bills No. 17).

[93] Republic of Kenya, Sessional Paper No. 3 of 2009 on National Land Policy, August, 2009 (Government Printer, Nairobi, 2009), para. 3.6.2.

[94] Article 67 (2)(e), Constitution of Kenya 2010; see also National Land Commission Act, No. 5 of 2012, Laws of Kenya. Revised Edition 2016 [2015], sec. 15; see also National Land Commission Citation. (Investigation of Historical Land Injustices) Regulations, 2017, Legal Notice No. 258, Kenya Gazette Supplement No. 154, 6th October, 2017, Laws of Kenya.

[95] Environment and Land Court Act, No. 19 of 2011, Laws of Kenya. Notably, Regulation 29 of the NLC (Investigation of Historical Injustices) Regulations 2017 stipulates as follows:

It is important that land issues are addressed in ways that fully address the underlying issues that have often resulted in conflicts. This is because secure rights to land are important to the development of economic activities, capital accumulation, food security, and a wide variety of other socioeconomic benefits, all important for assurance of peace.[96] Indeed, in recognition of the important role that these Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution Mechanisms (TDRMs) can play in not only addressing internal conflicts but also doing so in ways that enhance sustainable peace rather than dividing people further as would be the case with adversarial court mechanisms[97], Kenya's Judiciary has been making strides towards promoting and encouraging their use in the country, while working closely with other stakeholders in the sector.[98] This is because, more often than not, the court process fails to address the underlying real issues that brought the conflict in the first place.[99] This has been attributed to the fact that since the official law is based on a different understanding of justice, it is rarely effective in creating stability and societies are, therefore, more interested in solving conflicts through informal means - although they may ask the police to trace their cattle and the local administration to help in negotiating peace.[100] Arguably, local

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"A person aggrieved by the decision of the Commission may, within twenty-eight days of the publication of the decisions, appeal to the Court."

Regulation 3 of the NLC (Investigation of Historical Injustices) Regulations 2017 defines "Court" to mean the Environment and Land Court established under the Environment and Land Court Act, 2011 and includes other courts having jurisdiction on matters relating to land.

[96] Unruh, Jon. "Land rights and peacebuilding: challenges and responses for the international community." International Journal of Peace Studies (2010): 89-125, 89.

[97] Tanja Chopra, 'Reconciling Society and the Judiciary in Northern Kenya' [2008] Justice for the Poor and Legal Resources Foundation Trust Research Report.

[98] 'List of MAC Accredited Mediators as at 1st January 2021 – The Judiciary of Kenya' <*https://www.judiciary.go.ke/download/list-of-mac-accredited-mediators-as-at-1st-january-2021/*> accessed 8 May 2021; see also 'State of the Judiciary and the Administration of Justice Annual Report 2019 – 2020 – The Judiciary of Kenya' <*https://www.judiciary.go.ke/download/state-of-the-judiciary-and-the-administration-of-justice-annual-report-2019-2020/*> accessed 8 May 2021; 'Inside the Judiciary Magazine, Edition No. 15 – The Judiciary of Kenya' <*https://www.judiciary.go.ke/download/inside-the-judiciary-magazine-edition-no-15/*> accessed 8 May 2021; 'Court Annexed Mediation Virtual Dispute Resolution – The Judiciary of Kenya' <*https://www.judiciary.go.ke/download/court-annexed-mediation-virtual-dispute-resolution/*> accessed 8 May 2021; 'Judiciary Strategic Plan 2019 -2023 – The Judiciary of Kenya' <https://www.judiciary.go.ke/download/judiciary-strategic-plan-2019-2023/> accessed 8 May 2021; Nairobi Centre for International Arbitration, Alternative Dispute Resolution Policy, Draft October 2019 < *https://www.ncia.or.ke/wp-content/uploads/2019/10/DRAFT-NATIONAL-ADR-POLICY.pdf*> accessed 8 May 2021; Mediation Bill, 2020, Kenya Gazette Supplement No. 92 (National Assembly Bills No. 17).

[99] Tanja Chopra, 'Reconciling Society and the Judiciary in Northern Kenya' [2008] Justice for the Poor and Legal Resources Foundation Trust Research Report, 21< *http://documents1.worldbank.org/curated/en/590971468272735172/pdf/716920ESW0P1110ry0in0Northern0Kenya.pdf*> accessed 8 May 2021.

[100] Ibid, 21.

leaders prefer to deal with the conflicts of their communities as they are convinced that they have better solutions than the state can provide.[101] In *Geoffrey Muthinja Kabiru & 2 Others -vs- Samuel Munga Henry & 1756 Others (2015) eKLR,* the Court of Appeal stated as follows regarding use of ADR and TDRMs:-

> *"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews… The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."…*

Use of ADR and TDRM mechanisms in addressing ethnic tensions and other intergroup conflicts in Kenya has a potential to bring the country closer to attaining sustainable peace as a step towards achieving SDG 16.[102] Indeed, the Draft *Alternative Dispute Resolution Policy*, 2019 has acknowledged that 'ADR, through its reconciliatory and non-adversarial nature is a major contributor to peace and cohesion in the country.[103] It also acknowledges that 'the rule of law is essential for democracy and economic growth and is the backbone of human rights, peace, security, and development'.[104]

The importance of these mechanisms is also acknowledged in Kenya's *National Policy on Peace-building and Conflict Management, 2011*[105] which calls for capacity building through, *inter alia*, training various stakeholders in relevant areas such as alternative conflict resolution mechanisms.[106]

It has been argued that where there have been harsh and violent conflicts, there is usually firstly the temporary management of the conflict; which typically involves negotiation, meditation and arbitration, and rests on leaders and elites, although it still requires support by the general population, while secondly, deeper, level involves reconciliation

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[101] Ibid, 21.
[102] K Muigua, 'Institutionalising Traditional Dispute Resolution Mechanisms and Other Community Justice Systems' [2017] Nairobi: Published online< *http://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf*> accessed 8 May 2021.
[103] Nairobi Centre for International Arbitration, Alternative Dispute Resolution Policy, Draft October 2019, 4.
[104] Ibid, 8.
[105] Republic of Kenya, Kenya: National Policy on Peace-building and Conflict Management, 2011, 11 December 2011< *https://www.refworld.org/pdfid/5a7ad25f4.pdf*> accessed 8 May 2021.
[106] Ibid, see Chapter Five.

which requires change in the societal repertoire shared by society members.[107] This is because reconciliation involves the formation or restoration of genuine peaceful relationships between societies and that this requires extensive changes in the socio-psychological repertoire of group members in both societies.[108] In addition, reconciliation is associated with socio-psychological processes consisting of changes of motivations, goals, beliefs, attitudes and emotions by the majority of society members.[109] This is the kind of approach that is recommended for such conflicts as the one involving Pokot and Turkana communities, among others. It is, however, acknowledged this should be accompanied with poverty eradication projects by the State since poverty and limited sources of livelihood can aggravate competition for scarce natural resources thereby contributing to instability.[110] The State's involvement in addressing natural resources scarcity through climate change mitigation measures as well as adopting a participatory approach to resource management can potentially help in alleviating poverty and consequently address the insecurities that these communities face as far as food security and access to resources are concerned.[111] County peace committees should be empowered through capacity building because, as some commentators have argued, County governments have better local knowledge and are likely to enjoy greater local legitimacy thus placing them at a better position to address conflicts and promote peace, in partnership with the National Government.[112]

Based on the foregoing, it is thus important for the State to continually promote and strengthen the use of local leadership and community peace groups in efforts to reach sustainable peace solutions in Kenya.[113]

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[107] Daniel Bar-Tal, 'Reconciliation as a Foundation of Culture of Peace', Handbook on building cultures of peace (Springer 2009), 363.

[108] Ibid, 365.

[109] Ibid, 365.

[110] Noro Aina Andrimihaja, Matthias Cinyabuguma and Shanta Devarajan, 'Stop Conflict, Reduce Fragility and End Poverty: Doing Things Differently in Fragile and Conflict-Affected Situations'; Olsson, Lennart, Maggie Opondo, Petra Tschakert, Arun Agrawal, and Siri EH Eriksen. "Livelihoods and poverty." (2014); 'Poverty and Conflict' (GSDRC) <*https://gsdrc.org/professional-dev/poverty-and-conflict/*> accessed 8 May 2021; Jonathan Goodhand, 'Violent Conflict, Poverty and Chronic Poverty' [2001] Chronic Poverty Research Centre Working Paper.

[111] Meine van Noordwijk, 'Integrated Natural Resource Management as Pathway to Poverty Reduction: Innovating Practices, Institutions and Policies' (2019) 172 Agricultural Systems 60.

[112] Huma Haider, Conflict analysis of North Eastern Kenya. K4D Emerging Issues Report36.Brighton, UK: Institute of Development Studies <*https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15570/EIR%2036_Conflict_analysis_of_Northern_Kenya.pdf?sequence=1&isAllowed=y* > accessed 8 May 2021.

[113] David Pottebaum and Christopher Lee, 'In Control of Their Future: Community-Led Reconciliation and Recovery', World Bank workshop" Moving out of Poverty in Conflict-Affected Areas", available at (2007); Ervin Staub, 'Reconciliation after Genocide, Mass Killing, or Intractable Conflict: Understanding the Roots of Violence, Psychological Recovery, and Steps toward a General Theory' (2006) 27 Political psychology 867; Michael Wessells, 'Community Reconciliation and Post-Conflict Reconstruction for Peace', Handbook on building cultures of peace (Springer 2009); Daniel Bar-Tal, 'Reconciliation as a Foundation of Culture of Peace', Handbook on building cultures of

5. Conclusion

As already acknowledged, peace and development are interlinked and one may not take place in the absence of the other. As Kenya strives towards achieving sustainable development agenda, this paper has argued that the stakeholders must first work towards building sustainable peace and enhancing conflict management capacity of the various relevant stakeholders in the peace sector. Unless the underlying factors that result in conflicts are fully addressed, the dream of sustainable peace will remain a mirage. Similarly, without peace, realisation of sustainable development goals in the country, alongside other development goals such as the Vision 2030 will arguably remain a pipe dream. Working Towards Effective Peacebuilding and Conflict Management in Kenya is a necessary step in the quest for Sustainable Development.

peace (Springer 2009); Nyambura Githaiga, 'When Institutionalisation Threatens Peacebuilding: The Case of Kenya's Infrastructure for Peace' (2020) 15 Journal of Peacebuilding & Development 316.

Conflict Management Mechanisms for Effective Environmental Governance in Kenya

Abstract

Conflict and conflict management are considered to be a critical part of any environmental governance framework. This is due to the fact that environmental resources come with conflict among user groups due to conflicting needs and abundance or scarcity. As such, any framework designed to achieve effective environmental governance must include conflict management framework. This paper discusses the nature of environmental and natural resource related conflicts and their applicability or suitability in the management of environmental conflicts. The author does this within the context of Kenya's framework on management of environmental and natural resource related conflict, offers suggestions and recommendations on how best to harness and utilise the available conflict management mechanisms for effective environmental governance and sustainable development in Kenya.

1. Introduction

This paper entails a critical examination and analysis of conflict management mechanisms in environmental matters for effective environmental governance. The paper has several parts that address the following: the first part defines and discusses the nature of environmental and natural resource related conflicts; the second part offers an overview of the various conflict management mechanisms and their applicability or suitability in the management of environmental conflicts; the third part offers a critique of Kenya's framework on management of environmental and natural resource related conflicts; and the last part discusses the way forward on environmental conflicts management for effective environmental governance and sustainable development in Kenya. The Sustainable Development Goals (SDGs) provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.[1]

2. Nature of Environmental and Natural Resource Related Conflicts

The role of natural resources in society has been discussed by various authors as including sources of income, industry, and identity, with developing countries being more dependent on natural resources as their primary source of income, as many individuals depend on these resources for their livelihoods, with agriculture, fisheries, minerals, and timber as their main sources of income.[2] In addition, natural resources also play a

[1] United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, para. 35.

[2] United States Institute of Peace, Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.6. Available at *www.usip.org/sites/default/files/file/08sg.pdf* [Accessed on 13/08/2018].

prominent cultural role for many local communities and may even be a point of pride for the nation as a whole, a part of the country's patrimony, where resources such as land, water, and timber (forests) usually have historical and cultural significance, serving as the home of ancient civilizations, historical artifacts, and cultural practices.[3] This is well reflected in the Constitution of Kenya which recognises the environment in its preamble as the heritage of people of Kenya worthy of respect and sustenance for the benefit of future generations.[4]

Away from the communities, natural resources, both renewable and nonrenewable, are mostly controlled by the state (which is considered to be the case in most developing countries) and are used as exports by the government to attain profit and power.[5] It has been observed that environmental scarcities have had great adverse effects on populations, including violent conflicts in many parts of the developing world.[6] These conflicts are especially expected to be more devastating in poor societies since they are less able to buffer themselves from environmental scarcities and the social crises they cause.[7]

The many groups whose interests in and actions concerning a region's natural resources can lead to or exacerbate conflict may include local communities, governments, rebel groups, and outside actors.[8] Natural resource conflicts are defined as social conflicts (violent or non-violent) that primarily revolve around how individuals, households, communities and states control or gain access to resources within specific economic and

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[3] United States Institute of Peace, Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.7.
[4] Preamble, Constitution of Kenya, 2010.
[5] United States Institute of Peace, Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, pp.6-7; See also Constitution of Kenya, 2010, Article 62 which places some resources under state control, as part of public land including, inter alia:
(f) all minerals and mineral oils as defined by law;(g) government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;(j) the territorial sea, the exclusive economic zone and the sea bed;(k) the continental shelf;(l) all land between the high and low water marks;(2) Public land shall vest in and be held by a county government in trust for the people resident in the county;(3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya;

[6] Homer-Dixon, T.F., "Environmental scarcities and violent conflict: evidence from cases," International security 19, No. 1 (1994): 5-40 at p. 6.
[7] Ibid, p. 6.
[8] United States Institute of Peace, Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.7.

political frameworks.[9] They are the contests that exist as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests. Natural resource conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development factors such as population growth and socio-economic advancement.[10] The role of natural resources in conflict has also been a focus of many authors. The two approaches that have been proposed to explain the role of natural resources in conflict include scarcity (sometimes called the neo-Malthusian view) and abundance.[11]

Under the scarcity theory, it is argued that rapid population growth, environmental degradation, resource depletion, and unequal resource access combine to exacerbate poverty and income inequality in many of the world's least developed countries, and such deprivations are easily translated into grievances, increasing the risks of rebellion and societal conflict."[12] An example of areas experiencing scarcity problems in Kenya is Turkana County which has been documented as one of the Counties with the highest level of poverty in Kenya[13], and with the distrust between local communities around the region against each other[14] leading to constant conflicts as well as cross border conflicts.[15] The conflict is largely attributed to livestock rustling, harsh climate and boundary dispute. A degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.[16]

Those who view abundance as a problem argue that it is resource abundance, rather than scarcity, that is the bigger threat to create conflict, often referred to as the "resource

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[9] Funder, M., et al, 'Addressing Climate Change and Conflict in Development Cooperation Experiences from Natural Resource Management,' p. 17, (Danish Institute for International Studies, DIIS, 2012), available at *https://www.ciaonet.org/attachments/20068/uploads [Accessed on 12/08/2018].*

[10] Toepfer, K., "Forward", in Schwartz, D. & Singh, A., Environmental conditions, resources and conflicts: An introductory overview and data collection (UNEP, New York, 1999). p.4

[11] United States Institute of Peace, Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.8.

[12] Ibid, p.8.

[13] Turkana County –United Nations Joint Programme 2015-2018, (Executive Office, Turkana County Government, Lodwar, Turkana UN Resident Coordinator Office, Nairobi, Kenya), p. 4. Available at *https://info.undp.org/docs/pdc/Documents/KEN/ProDoc%20Turkana-UN%20Joint%20Programme%20final%205th%20%20March%202015-binder%20%282%29.pdf* [Accessed on 12/08/2018].

[14] Bollig, M., "Ethnic Conflicts in North-West Kenya: Pokot-Turkana Raiding 1969—1984." Zeitschrift Für Ethnologie 115 (1990), pp. 73-90. http://www.jstor.org/stable/25842144. [Accessed on 12/08/2018].

[15] Johannes, E.M., et al, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?' African Geographical Review, Vol. 34, No.2, 2015, pp.142-164, p. 142.

[16] 'Wangari Maathai-an excerpt from the Nobel Peace Prize winner's Acceptance Speech,' Earth Island Journal. Available at *http://www.earthisland.org/journal/index.php/eij/article/wangari_maathai_an_excerpt_from_the_nobel_peace_prize_winners_acceptance_sp/* [Accessed on 12/08/2018].

curse"—corruption, economic stagnation, and violent conflict over access to revenues.[17] For instance, it has been pointed out that for many resource rich developing countries, there have been cases of low economic growth, environmental degradation, deepening poverty and, in some cases, violent conflict.[18] For instance, extractive industries, particularly in sub-Saharan Africa, have been marked with increasing levels of political, social, technical and environmental risk.[19] This has been the case in countries like Sudan, Democratic Republic of Congo[20] and Nigeria where there have been eruption of internal armed conflict as a result of their rich natural resources. Conflict also often produces significant environmental degradation.[21]

Apart from the adverse effect of the conflict on the environment, the illegal trade of minerals bars communities from benefiting from its resources.[22] Communities expect that availability of environmental goods and services in their region will improve their livelihoods by 'real' development, which may not always be the case.[23] Poor and low economic development[24] and consequently, failed economies result in conflicts,[25] as a result of environmental and natural resources' bad governance or mismanagement.[26]

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[17] United States Institute of Peace, Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.8.

[18] Alstine, J.V., et al, Resource Governance Dynamics: The Challenge Of 'New Oil' In Uganda, Resources Policy, Vol. 40, 2014, pp.48–58, p. 48.

[19] Ibid, p. 48; see also Lohde, L.A., The Art and Science of Benefit Sharing in the Natural Resource Sector, (International Finance Corporation, February 2015), p. 55. Available at *https://commdev.org/wp-content/uploads/2015/07/IFC-Art-and-Science-of-Benefits-Sharing-Final.pdf*

[20] Samndong, R.A. & Nhantumbo, I., Natural resources governance in the Democratic Republic of Congo:
Breaking sector walls for sustainable land use investments, (International Institute for Environment and Development Country Report, February 2015), p. 11. Available at *http://pubs.iied.org/pdfs/13578IIED.pdf* [Accessed on 12/08/2018].

[21] Ballet, J., et al, 'Social Capital and Natural Resource Management: A Critical Perspective,' The Journal of Environment & Development, Vol. 16, No. 4, December 2007, pp. 355-374, p. 367.

[22] See 'Diamonds in Sierra Leone, A Resource Curse?' available at http://erd.eui.eu/media/wilson.pdf [Accessed on 12/08/2018]; Kinniburgh, C., 'Beyond "Conflict Minerals": The Congo's Resource Curse Lives On,' Dissent Magazine, Spring 2014, available at https://www.dissentmagazine.org/article/beyond-conflict-minerals-the-congos-resource-curse-lives-on [Accessed on 12/08/2018]; Free the Slaves, 'Congo's Mining Slaves: Enslavement at South Kivu Mining Sites,' Investigative Field Report, June 2013. Available at *https://www.freetheslaves.net/wp-content/uploads/2015/03/Congos-Mining-Slaves-web-130622.pdf* [Accessed on 12/08/2018].

[23] Sigam, C. & Garcia, L., Extractive Industries: Optimizing Value Retention in Host Countries, *(UNCTAD, 2012). Available at http://unctadxiii.org/en/SessionDocument/suc2012d1_en.pdf* [Accessed on 12/08/2018].

[24] See Billion, P., Wars of Plunder: Conflicts, Profits and Politics, (New York: Columbia University Press, 2012).

[25] Maphosa, S.B., Natural Resources and Conflict: Unlocking the Economic dimension of peace-building in Africa. ASIA Policy brief Number 74, 2012.

[26] Billion, P., Wars of Plunder: Conflicts, Profits and Politics. (New York: Columbia University Press, 2012.); See also Wiebelt, M., et al, 'Managing Future Oil Revenues in Uganda for Agricultural Development and Poverty Reduction: A CGE Analysis of Challenges and Options,' (Kiel Working

Skewed distribution of benefits from natural resources and other environmental goods may fuel social exclusion and conflict, threatening sustainability.[27]

As far as the abundance theory is concerned, it has been argued that rent-seeking models assume that resource rents can be easily appropriated hence encouraging bribes, distorted public policies and diversion of public towards favour seeking and corruption,[28] which is a threat to protected human security.[29] Mismanagement of resources is thus associated with corruption, undermining inclusive economic growth, inciting armed conflict and damaging the environment.[30]

Public policy can also lead to natural resource conflicts. It is argued that specific policies, government programs, and their implementation have, in some areas, generated or aggravated conflicts, even when the intention was to reduce the conflict.[31] A good example of such policies would be those touching on property ownership, especially land, and where there is need to balance conservation and access to the resources by communities. A government policy to relocate people forcefully may degenerate into conflicts as witnessed in Mau forest eviction in Rift Valley Kenya.[32]

Based on the foregoing possibilities, some scholars have rightly maintained that regardless of which approach describes the bigger threat, both scarcity and abundance can create environments that are ripe for violent conflict.[33]

Paper No. 1696, May 2011). Available at *https://www.ifw-members.ifw-kiel.de/publications/managing-future-oil-revenues-in-uganda-for-agricultural-development-and-poverty-reduction-a-cge-analysis-of-challenges-and-options/kap-1696.pdf* [Accessed on 12/08/2018].

[27] Saboe, N.T., 'Benefit Sharing Among Local Resource Users: The Role of Property Rights,' World Development, Vol. 72, pp. 408–418, 2015, p. 408.

[28] Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,' Resources Policy, 38(2013), pp.181–195, p. 184.

[29] Alao, A., Natural Resource Management and Human Security in Africa, in Abass, A., Protecting Human Security in Africa (ISBN-13: 9780199578986, Oxford University Press, 2010); Lawson, T. R. & Greestein, J., 'Beating the resource Curse in Africa: A global Effort,' Africa in Fact, August 2012. Available at *http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780* [Accessed on 12/08/2018].

[30] Aled, W., et al, Corruption in Natural Resource Management: An introduction (Bergen: Michelsen Institute, 2008). Available at *http://www.cmi.no/publications/file/2936-corruption-in-natural-resource-management-an.pdf* [Accessed on 12/08/2018].

[31] Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' available at *http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan022237.pdf* [Accessed on 12/08/2018].

[32] Amnesty International, et al, 'Nowhere to go: Forced Evictions in Mau Forest, Kenya,' Briefing Paper, April 2007; Sang J.K., Case study 3-Kenya: The Ogiek in Mau Forest, April 2001.

[33] United States Institute of Peace, Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.8.

3. Overview of Conflict Management Mechanisms and their Applicability in the Management of Environmental Conflicts

Natural resource conflicts can, arguably, involve three broad themes: actors (or stakeholders, groups of people, government structures and private entities), resource (land, forests. rights, access, use and ownership) and stakes (economic, political. environmental and socio-cultural).[34] As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.[35] Despite this, there are key principles such as, inter alia, participatory approaches[36], equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.[37]

Conflict is a process of adjustment, which can be subject to procedures to contain and regularize conflict behaviour and assure a fair outcome[38], and the same can be managed, transformed, resolved or settled depending on the approach adopted. Conflict management has been defined as the practice of identifying and handling conflicts in a sensible, fair and efficient manner that prevents them from escalating out of control and becoming violent.[39] It involves action that addresses how people can make better decisions collaboratively, to address the roots of conflict by building upon shared interests and finding points of agreement.[40]

Conflict transformation, on the other hand, aims to overcome revealed forms of direct, cultural and structural violence by transforming unjust social relationships and

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[34] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' Annex C - Summary of Discussion Papers, (FAO), available at *http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage* [Accessed on 12/08/2018].

[35] Ibid.

[36] Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process. (Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' Land Use Policy, Vol. 23, Issue 1, January 2006, PP. 10–17.

[37] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

[38] Rummel, R.J., 'Principles of Conflict Resolution,' Chapter 10, Understanding Conflict and war: Vol. 5: The Just Peace.

[39] Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' Prepared in the framework of the Livelihood Support Programme (LSP), An interdepartmental programme for improving support for enhancing livelihoods of the rural poor, (Food And Agriculture Organization Of The United Nations, Rome, 2005), available at *http://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement_FAO2005.pdf* [Accessed on 12/08/2018].

[40] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' available at *http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage* [Accessed on 12/08/2018].

promoting conditions that can help to create cooperative relationships, by focusing on long-term efforts oriented towards producing outcomes, processes and structural changes.[41]

Conflict settlement deals with all the strategies that are oriented towards producing an outcome in the form of an agreement among the conflict parties that might enable them to end an armed conflict, without necessarily addressing the underlying conflict causes.[42] Settlement is an agreement over the issues(s) of the conflict which often involves a compromise.[43] Parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in the relationship. Basically, power is the defining factor for both the process and the outcome.[44]

Settlement may be an effective immediate solution to a violent situation but will not thereof address the factors that instigated the conflict. The unaddressed underlying issues can later flare up when new issues or renewed dissatisfaction over old issues or the third party's guarantee runs out.[45] Settlement mechanisms may not be very effective in facilitating satisfactory access to justice (which relies more on people's perceptions, personal satisfaction and emotions). Litigation and arbitration are coercive and thus lead to a settlement. They are formal and inflexible in nature and outcome.[46]

Conflict resolution deals with process-oriented activities that aim to address and resolve the deep-rooted and underlying causes of a conflict.[47] Conflict resolution mechanisms include negotiation, mediation and problem solving facilitation.[48] It has rightly been observed that whereas concerns for justice are universal, views of what is just and what is unjust are not universally shared, and as such, divergent views of justice often cause social conflicts.[49] This is attributed to the fact that frequently, the parties involved in

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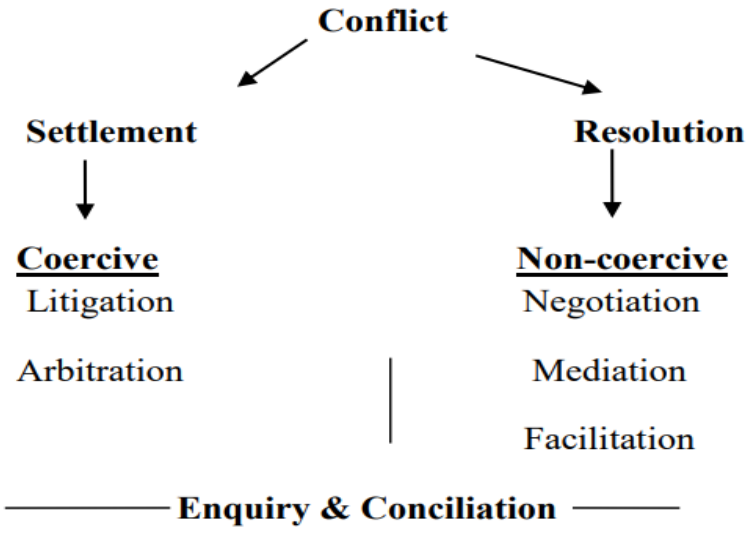
[41] Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' op cit.
[42] Ibid.
[43] Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", Journal of Peace Research, Vol. 32, No. 2(May, 1995), P.152.
[44] Baylis, C., and Carroll, R., "Power Issues in Mediation", ADR Bulletin, Vol. 1, No.8 [2005], Art.1, p.135.
[45] Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit. p. 153; See also Mwagiru, M., Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), p. 42.
[46] See generally Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management, op. cit.
[47] Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' op cit.
[48] Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", The Conflict Resolution Information Source, Version IV, December 2005.
[49] Montada, L., 'Justice, Conflicts, and the Justice of Conflict Resolution,' International Encyclopedia of the Social & Behavioral Sciences (Second Edition, 2015), pp. 937–942.

conflicts are convinced that their own view is the solely valid one.[50] It is, thus, suggested that since there is no access to an objective truth about justice, conflicts may be reconciled by the judgement of an authority accepted by all parties or by a negotiated agreement between the parties: agreements are just when the parties are equally free in their decision and equally informed about all relevant facts and possible outcomes.[51] Article 33 of the Charter of the United Nations outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to including, *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of parties' own choice* (Emphasis added).[52] These are captured in the fig. 1 below.

Fig. 1: Methods of Conflict Management



***Source: The author.**

From the foregoing figure, it is thus clear that there is a wide range of mechanisms for the avoidance of conflicts, resolution of conflicts, dispute settlement and conflict transformation. Conflict avoidance as a conflict management technique involves the application of a variety of techniques, some used consciously and some unconsciously, to avoid the escalation from normal conflict into a dispute.[53] Some require communication between the parties and others involve the intervention of third parties. The appropriate mechanisms depend on the particular stage of the conflict. For instance, where the conflict

[50] Ibid.
[51] Ibid.
[52] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[53] Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, op.cit.

involves complex underlying issues and relationships have been totally destroyed, dispute settlement processes may not be the appropriate mechanisms to resolve the conflict.[54]

Generally, interest-based or non-coercive processes are timely, cost efficient, provide more satisfaction to the disputing parties and are less destructive to the relationship of the parties than processes like litigation, and often result in more durable solutions to which disputants stay committed, therefore lessening the possibility of appeal, future conflict or dishonoring of the agreement.[55]

Both the power- and rights-based processes lead to results in which one side loses and the other side wins. These processes can lead to the issues in disagreement flaring up again. They can lead to resistance, violence and revolt as they are merely settlement mechanisms that do not address the underlying causes of the conflict. Although rights-based dispute resolution feels fairer and less arbitrary than power-based processes, the outcome is zero-sum since one side must win and the other loses. On the other hand, interest-based processes can lead to win-win outcomes, in that they explore the real interests, goals and motivations of disputants and aim to develop a solution which mutually satisfies those needs. Interest-based processes are also more efficient at bringing about participant satisfaction, process fairness, effectiveness, efficiency, fostering of relationships and addressing power-based issues, all of which are important considerations in the conflict resolution process. [56]

Environmental conflicts are perceived as a symptomatic manifestation of global model of economic development based on the exploitation of natural resources, disregard for people's rights and lack of social justice.[57] Furthermore, it is believed that there are about four key factors that contribute in the creation of environmental conflict: poverty, vulnerable livelihoods, migration and weak state institutions – all problems that are present at the local level.[58]

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[54] Muigua K. Resolving Conflicts through Mediation in Kenya, 2nd Ed., 2017, p. 55.
[55] Ury, B. & Goldberg, "Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict" Program on Negotiation at Havard Law School Cambridge, Massachusetts 1993, available at www.williamury.com, [Accessed on 16/08/2018].
[56] See Serge, L, et al, "Conflict Management Processes for Land-related conflict", A Consultancy Report by the Pacific Islands Forum Secretariat, op.cit; Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", The Conflict Resolution Information Source, op.cit.
[57] Ibid.
[58] Barnett, J., & Adger, W. N., 'Climate change, human security and violent conflict,' Political Geography, Vol.26, 2007, pp. 639-655, at p.643 (As quoted in Akins, E., "Environmental Conflict: A Misnomer?" Environment, Climate Change and International Relations: 99, available at *http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/* [Accessed on 20/08/2018]].

Some authors also argue that environmental factors often interact with the visible drivers of ethnic tensions, political marginalisation and poor governance to create a causal framework that allows degradation to affect livelihoods, interests and capital – which, in turn, lead to conflict.[59] For instance, conflicts have been associated with the changing norms, values, and world views about property rights within formerly subsistence-based (or pastoralist) communities.[60] There has been witnessed violence in areas around Kajiado town with Maasai community seeking to 'evict foreigners' in the area.[61] The alleged foreigners were people who have bought land for residential homes and commercial purposes, through real estate land developers. They felt that their land was being taken away. Such incidences require collaborative conflict management techniques considering that there are deep-rooted issues and harboured feelings of alienation and discrimination that need to be adequately addressed. There is need to strike a balance between community interests and national interests on development. Otherwise, without such a balance, erupting conflicts subsequently affect the course of development in the country. Environmental conflicts thus need to be managed through interactive, participatory and inclusive approaches for the sake of balancing interests, power and adjusting parties' expectations, in order to avoid the potentially negative effects of conflict in a society. There is a need to strike a balance among the three component parts of a conflict, namely, goal incompatibility, attitudes and behaviour, in order to ensure a peaceful society where groups do not unduly use their power to suppress the perceivably weak groups or individuals.[62]

Some of the current conflict management mechanisms in Kenya, while they may have helped in tackling some environmental conflicts, they have not done enough in ensuring amicable resolution of environmental conflicts, since some of them are not affordable, while others such as the court have too many and complex procedural requirement. The Kenyan framework on conflict management has for long time preferred litigation as a mechanism for conflict resolution yet courts of law are often inaccessible to the poor,

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[59] Akins, E., "Environmental Conflict: A Misnomer?" Environment, Climate Change and International Relations: 99, available at *http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/* [Accessed on 20/08/2018]; See also Sosa-Nunez, G. & Atkins, E., Environment, Climate Change and International Relations, (E-International Relations, 2016). Available at *http://www.e-ir.info/wp-content/uploads/2016/05/Environment-Climate-Change-and-International-Relations-E-IR.pdf* [Accessed on 20/08/2018].

[60] Armitage, D., 'Adaptive Capacity and Community-Based Natural Resource Management,' Environmental Management, Vol. 35, No. 6, pp. 703–715, p. 710.

[61] Sayagie, G., 'Tension as different clans from Narok, Kajiado both claim Nguruman,' Sunday Nation, November 9, 2014, (Nation media Group, Nairobi, 2014). Available at http://www.nation.co.ke/counties/Narok-Kajiado-clans-Nguruman/-/1107872/2516170/-/c6b4t5/-/index.html [Accessed on 12/08/2018]; Daily Nation, 'Clashes in Kitengela as traders fight over market,' (Nation media Group, Nairobi, September 8, 2015). Available at *http://www.nation.co.ke/photo/-/1951220/2865112/-/faabnp/-/index.html* [Accessed on 12/08/2018].

[62] See generally, Bercovitch, J., "Conflict and conflict management in organizations: A framework for analysis." Hong Kong Journal of Public Administration 5, no. 2 (1983): 104-123.

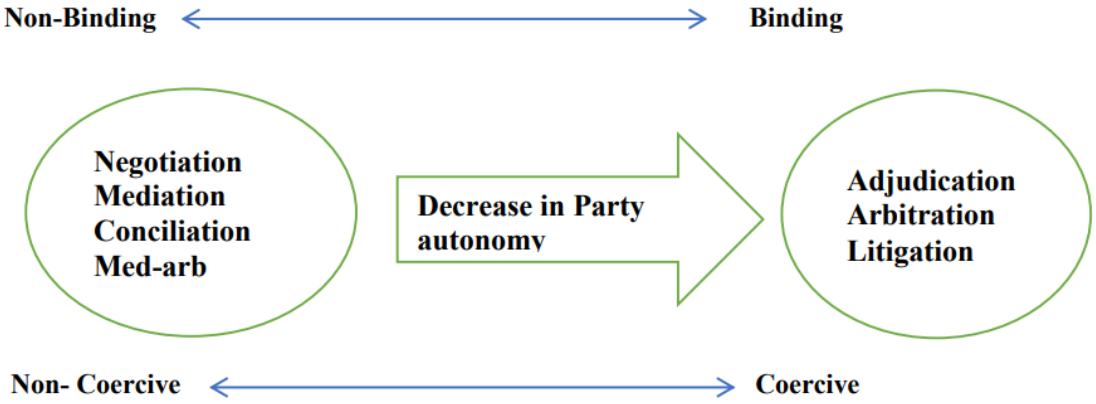
marginalized groups and communities living in remote areas. However, access to justice through litigation is, however, considered a potent remedy when access to environmental information or public participation has been wrongly denied or is incomplete. It guarantees citizens the right to seek judicial review to remedy such denial and/or depravation.[63] `

Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution Mechanisms (TDRMs), especially negotiation and mediation, have been effective in managing conflicts where they have been used. (ADR) mechanisms include mediation, conciliation, negotiation and traditional/community based dispute management mechanisms. ADR methods have the advantages of being cost effective, expeditious, informal and participatory. Parties retain a degree of control (as illustrated in fig. 2 below) and relationships can be preserved. Conflict management mechanisms such as mediation encourages "win-win" situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal, flexible and attempts to bring all parties on board.[64]

[63] See Akech, M., "Land, the environment and the courts in Kenya," A background paper for The Environment and Land Law Reports, February 2006, 1 KLR (E&L) xiv-xxxiv. Available at *http//:www.kenyalaw.og* [Accessed on 20/08/2018]; The Fair Administrative Action Act, 20l5 (No. 4 of 2015) which is an Act of Parliament to give effect to Article 47 of the Constitution provides under s. 6(1) that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with s. 5. S. 5(1) provides that in any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall- issue a public notice of the proposed administrative action inviting public views in that regard; consider all views submitted in relation to the matter before taking the administrative action; consider all relevant and materials facts; and (d) where the administrator proceeds to take the administrative action proposed in the notice- (i) give reasons for the decision of administrative action as taken; (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and (iii) specify the manner and period within the which such appeal shall be lodged. In relation to access to information, Art. 35(1) (b) of the Constitution guarantees every person's right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom. In addition to the foregoing, Access to Information Act, 2016, was enacted to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers. Notably, clause 2 defines "private body" to mean any private entity or non-state actor that, inter alia, is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.

[64] Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.10.

Fig. 1 Degree of Party Autonomy



***Source: Author.**

Arguably, negotiation and mediation have more value to the local communities than just being means of conflict management, as they present means of sharing information and participating in decision-making. They have the unique and positive attributes which include their participatory nature that can be used to manage environmental and natural resource conflicts for meaningful participation in the decision making process by enabling communities to present proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.[65]

Community-based approaches to conflict resolution are also deemed to be useful, particularly to promote locally based, indigenous management strategies.[66] Since indigenous mechanisms of conflict management are based on the very values and tenets of the people, they maintain and protect the customs and traditions of the society. Thus, they are able to solve long standing disputes and promote durable peace.[67]

4. Kenya's Framework on Management of Environmental and Natural Resource Related Conflicts: Prospects and Challenges

Most of the sectoral laws governing environmental matters in Kenya mainly provide for conflict management through the national court system based on legislation and policy

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[65] Ristanić, A., 'Alternative Dispute Resolution And Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,' (Lund University, April 2015), available at *https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf* [Accessed on 14/08/2018].

[66] Ibid.

[67] Azebre, A.I., et al, 'Indigenous Mechanisms of Dispute Resolution among the People of Adaboya Traditional Area,' July 2012, available at *https://www.modernghana.com/news/534448/1/indigenous-mechanisms-of-dispute-resolution-among-.html* [Accessed on 14/08/2018].

statements that are administered through regulatory and judicial institutions. Litigation, which is a state-sponsored approach to conflict management, does not afford the affected parties a reasonable and fair opportunity to participate in finding a lasting solution. This is because, apart from the coercive nature of the process, litigation is also subject to other procedural technicalities which may affect its effectiveness.[68] The Constitution provides for active involvement of communities in sustainable environmental and natural resources matters through seeking court's intervention. Citizenry have a role of ensuring that their rights in relation to the environment are not violated, by way of litigation.[69] This is also captured in various statutes such as the Forest Conservation and Management Act, 2016, which provides that persons can sue for enforcement of environmental rights,[70] and the Environmental Management and Coordination Act (EMCA), 1999[71], the framework law on environmental management and conservation which provides that a court of competent jurisdiction may, in proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment[72], amongst others.

The role of courts in environmental governance has also been reaffirmed by courts around the world, including the Kenyan courts in various cases. In the Kenyan case of *Peter K. Waweru v Republic,*[73] the High Court held that sustainable development has a cost element which must be met by the developers.[74] The Court went on to state as follows:

> *…As regards the township itself this court is concerned on whether or not in the circumstances described the development is ecologically sustainable…. We are also concerned that the situation described to us could be the position in many other towns in Kenya especially as*

[68] Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), pp. 19-29, p. 29.
[69] Art. 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened; Art. 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Furthermore, on application under clause (1), the court may make any order, or give any directions, it considers appropriate–– to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment (Art. 70(2). For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury (Art. 70(3). The right to seek legal redress is also guaranteed under s. 3(3) of the Environmental Management and Co-ordination Act, No. 8 of 1999.
[70] Sec. 70, Forest Conservation and Management Act, No. 34 of 2016, Laws of Kenya.
[71] No. 8 of 1999, Laws of Kenya.
[72] Sec. 111(1), Environmental Management and Coordination Act, 1999.
[73] Peter K. Waweru v Republic [2006] eKLR, Misc. Civil Application No. 118 of 2004.
[74] Ibid, para. 4.

regards uncoordinated approval of development and the absence of sewerage treatment works. As a Court we cannot therefore escape from touching on the law of sustainable development although counsel from both sides chose not to touch on it although it goes to the heart of the matter before us…. Section 3 of EMCA demands that courts take into account certain universal principles when determining environmental cases. Apart from the EMCA it is our view that the principles set out in s 3 do constitute part of international customary law and the courts ought to take cognizance of them in all the relevant situations.[75]

Thus, courts can step in and protect the environment without necessarily looking for immediate proof of likely violation of the environment. To facilitate the same, the Constitution gives courts the power to make any order, or give any directions, it considers appropriate – to prevent, stop or discontinue any act on omission that is harmful to the environment, or to any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or to provide compensation for any victim of a violation of the right to a clean and healthy environment.[76] An applicant seeking such orders from courts does not have to demonstrate that any person has incurred loss or suffered injury. The Constitution provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury.[77] However, to succeed in their plea one must demonstrate that their Right under Art. 42 has been or is likely to be denied, violated, infringed or threatened.[78]

The *suo moto powers* of the Court in environmental matters are also envisaged under provisions of the *Environment and Land Act.*[79] It is also important to point out that the Courts are under a constitutional obligation under Article 10 to uphold the principles of sustainable development. This includes protecting the environment for the sake of future generations. In addition to the foregoing provisions on the use of litigation, the promulgation of the 2010 Constitution of Kenya created an opportunity for exploring the use of ADR mechanisms and Traditional Dispute Resolution Mechanisms (TDRMs) in managing natural resource conflicts.[80] One of the principles of land policy as envisaged in the Constitution of Kenya is encouragement of communities to settle land disputes

[75] Ibid, p. 7.
[76] Constitution of Kenya, 2010, Art. 70(2).
[77] Constitution of Kenya, 2010, Art. 70(3); See also s. 3(1) of Environment (Management and Conservation) Act, 1999 (EMCA)
[78] Joseph Owino Muchesia & another v Joseph Owino Muchesia & another [2014] eKLR, para. 34.
[79] No 19 of 2011, Laws of Kenya. S. 20(1)-Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Art. 159(2) (c) of the Constitution.
(2) Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.
[80] Constitution of Kenya 2010, Art. 159(2) (c).

through recognised local community initiatives consistent with the Constitution.[81] In addition, one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.[82] TDRMs include informal mediation, negotiation, problem-solving workshop, council of elders, consensus approaches among others. It has been observed that where traditional community leadership was strong and legitimate it had positive impacts in promoting local people's priorities in natural resource management.[83]

In the case of *Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR*[84], the Court observed that: "*quite apart from the special consideration that needs to be given to the Ogiek community as a minority and indigenous group when allocating forest land that this court has enunciated on in the foregoing, this court also recognizes the unique and central role of indigenous forest dwellers in the management of forests. This role is recognized by various international and national laws. The Convention on Biological Diversity which Kenya has ratified and which is now part of Kenyan law by virtue of Art. 2(6) of the Constitution recognizes the importance of traditional knowledge, innovations and practices of indigenous and local communities for the conservation and sustainable use of biodiversity and that such traditional knowledge should be respected, preserved and promoted*."

The traditional and customary systems for managing conflict are associated with a number of strengths which include: they encourage participation by community members, and respect local values and customs; are more accessible because of their low cost, their flexibility in scheduling and procedures, and their use of the local language; they encourage decision-making based on collaboration, with consensus emerging from wide-ranging discussions, often fostering local reconciliation; they contribute to processes of community empowerment; informal and even formal leaders may serve as conciliators, mediators, negotiators or arbitrators; and finally, long-held public legitimacy provides a sense of local ownership of both the process and its outcomes.[85]

5. Way Forward

5.1 Public Participation and Community Empowerment

Article 69(2) of the Constitution of Kenya places a duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure

[81] Art. 60 (1) (g).
[82] Art. 67(2) (f).
[83] Shackleton, S., et al, 'Devolution And Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' Overseas Development Institute Natural Resource Perspectives, No. 76, March 2002, p.4.
[84] ELC Civil Suit No. 821 of 2012 (OS).
[85] FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

ecologically sustainable development and use of natural resources. The *Agenda 21*[86] under chapter 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making. Meaningful public participation can act to preempt conflicts in environmental matters since all the important stakeholders get to own up the decisions made. Various sectoral laws and policies should be designed in ways that protect the environment from degradation, and also ensures meaningful participation of communities in such measures, first through decision-making, and then encouraging active participation, whether through incentives or otherwise.

A bottom-top approach to natural resource management, including conflict management, creates an opportunity to involve the local people who may have insiders' grasp of the issues at hand and thus positively contribute to addressing them satisfactorily. There is need for empowerment of communities which helps people gain control over their own lives, through fostering power (that is, the capacity to implement) in people, for use in their own lives, their communities, and in their society, by acting on issues that they define as important.[87] Empowerment promotes participation of people, organizations, and communities towards the goals of increased individual and community control, political efficacy, improved quality of community life, and social justice.[88] Thus, through empowerment, poor people get the assets and capabilities to participate in, negotiate with, influence, control, and hold accountable institutions that affect their lives.[89]

The basic aspects of empowerment that are considered important especially in the context of this discussion include: *participation, control and critical awareness* (emphasis added) where participation is the individual's actions that contribute to community contexts and processes; control is the effective or the perception of ability to influence decisions; and critical awareness is the ability to analyze and understand the social and political environment.[90]

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[86] United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

[87]Page, N. and Czuba, C.E., "Empowerment: What Is It?" Journal of Extension, October 1999, Volume 37, Number 5, Commentary, 5COM1.

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

[89] World Bank, Chapter 2. What Is Empowerment? p.11. Available at *http://siteresources.worldbank.org/INTEMPOWERMENT/Resources/486312-1095094954594/draft2.pdf* [Accessed on 19/08/2018].

[90]Zimmerman, M.A., "Empowerment Theory: Psychological, Organizational and Community Levels of Analysis," in Rappaport, J. and Seidman, E. (Eds.), Handbook on Community Psychology, New York: Plenum Press, 2000. p.52.

Kenyan local communities should therefore be empowered to participate more productively in social, political and economic decision-making processes, especially in the areas of natural resources and environmental management, conflicts management and participation in general governance matters. These have a direct impact on the quality of the social, economic and cultural life of the local people and it is therefore important to involve them.

5.2 Concerted Peacebuilding Efforts

Promotion and implementation of peacebuilding efforts in environmental governance matters as an element of sustainable development cannot meaningfully be achieved without the concerted efforts from all stakeholders. The Sustainable Development Goals (SDGs) recognise this connection and provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.[91]

The non-Governmental organisations, academia, government institutions and community leaders directly concerned in peacebuilding efforts can collaborate in creating awareness and coming up with creative ways to manage environmental conflicts for peace and sustainable development. Religious organisations can also come in to facilitate the actual processes of conflict management and also foster awareness creation efforts. In Kenya, where these conflicts are clan-based or community based, courts offer little help in terms of achieving lasting peace due to the settlement nature of the outcome.[92] Courts are thus under an obligation to take lead role in promoting the use of traditional and community justice systems in environmental conflict management. They should offer support and uphold the relevant provisions where they are faced with such situations. Their split role in litigation as well as ADR and other alternative justice systems is recognised under the Environment and Land Court Act 2011[93].

The need to involve everyone is affirmed in the Constitution which provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[94]

[91] United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, para. 35.
[92] See generally Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management, op. cit.
[93] Sec. 20, Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.
[94] Constitution of Kenya 2010, Art. 69(2).

5.3 Enhanced Legal and Institutional Framework on Environmental Conflicts Management

Natural resources and environmental conflicts negatively affect Kenyans owing to the many weaknesses of the present legal and institutional framework. Despite the fact that the existing legal and institutional framework in the country is meant to deal with natural resource conflicts, it has not offered much in stemming the natural resource conflicts, due to inadequacies within the structure. It is clear that most of the sectoral laws mainly provide for conflict management through the national court system and specifically litigation. However, the recognition of ADR and TDR mechanisms in the Constitution heralds a new dawn on the use of these mechanisms and other alternative justice systems in managing environmental conflicts. ADR and TDR mechanisms allow public participation in enhancing access to justice as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and voluntariness in conflict management

6. Conclusion

The political and strategic impact of surging populations, spreading disease, deforestation and soil erosion, water depletion, air pollution, and possibly, rising sea levels - developments that will prompt mass migration and, in turn, incite group conflicts – are considered to be some of the most serious problems of the twenty-first century.[95] It is thus important to deal with environmental conflicts if peace and stability is to be maintained. Natural resource based conflicts are unique, and left to escalate, suffering and death may be the undesirable result. The ADR conflict management mechanisms are considered suitable for use in resolution of natural resource based conflicts. However, litigation also has its own advantages. As such, there is need for synergy in application of coercive and non-coercive mechanisms, deepening on the nature of dispute.

This paper has discussed the nature and methods of conflict management in environmental and natural resources governance and suggested some of the approaches that may be employed to enhance the same for sustainable development.

[95] Kaplan, R., "The Coming Anarchy," Atlantic Monthly, 1994.

Achieving expeditious Justice-Harnessing Technology for Cost Effective Arbitral Proceedings*

Abstract

Expeditious access to justice in commercial and business transactions is a fundamental human right whose inviolability cannot be compromised. Alternative Dispute Resolution (ADR) and especially arbitration, is considered as one of the most viable means of access to justice due to some intrinsic advantages over litigation. Notably, it bridges the gaps and challenges that arise from transacting across borders as well as managing the disputes that come with such transactions. The developments in technology have changed the way in which people communicate and interact with one another. This has inevitably impacted the ways in which disputes are also managed and resolved. Various technological platforms such as email, video/audio conferencing, online platforms, electronic signatures and e-filing have already manoeuvred their way into the realm of arbitration. Technology has both positive and negative consequences that have the potential to impact and disrupt arbitral proceedings in a myriad of ways. This necessitates a discussion on achieving expeditious justice through harnessing technology for cost effective arbitral proceedings.

1. Introduction

Globally, international commercial arbitration has been regarded as the legal bridge that transcends the differences in legal systems to enable the business and commercial people to manage their disputes without having to deal with the potential challenges faced by these legal systems.[1]

Scholars have observed that 'the high degree of uncertainty and risks associated with litigating international business disputes in national courts have been contributing factors in the prominence of arbitration as the preferred method of resolving international business and commercial disputes'.[2] The challenges necessitating the use of international commercial arbitration in international business and commercial transactions disputes are summarised as follows:

> *International business and commercial transactions are affected by significant levels of risk and uncertainty. The more complex and lengthy the contractual relationship, the higher*

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* ***This paper is co authored with Jeffah Ombati.***

[1] See McConnaughay, P.J., 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles' *PKU Transnational Law Review,* Volume 1, Issue 1, pp. 9-31,pp. 11-12; See also Muigua, K., 'Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 3, No 1, (2015), pp.45-87.

[2] Lynch, K. and Lynch, K.L., *The forces of economic globalization: Challenges to the regime of international commercial arbitration*. Kluwer Law International, 2003, p.7. Available at *https://books.google.co.ke/books?hl=en&lr=&id=PZKHwaTNz1oC&oi=fnd&pg=PA1&ots=zm686eQWLI&sig=Cb8bgLUuo_clkGZmo9F-34bUpX0&redir_esc=y#v=onepage&q&f=true [Accessed on 3/12/2018].*

> *the likelihood of disputes arising between contracting parties.*[3] *International business transactions also have increased uncertainty and risk due to financial and monetary factors (e.g. the cost and availability of capital and currency exchange fluctuations), political and legal factors (e.g. the possibility of war, revolution, violent civil unrest, nationalisation, inconvertibility of local currency and precipitous government acts or omissions), language differences (e.g. linguistic barriers created by parties having to communicate in a foreign language and use of interpreters), communication and logistical factors (e.g. difficulties created by geographical distances and limitations of technology), and cross-cultural barriers and difficulties posed by the interaction of parties with different cultural backgrounds. ……..litigating disputes arising in international business and commercial transactions in national courts pose various problems and creates legal complexities given the potential involvement of several different legal systems. It may be difficult for the parties to find the most appropriate forum to litigate the dispute.*[4]

International commercial arbitration is associated with a number of advantages and the same is also considered as an important method of dealing with disputes in private cross-border or transnational economic transactions.[5] These advantages can be summarised as follows:

> *The major advantages are a relatively well-defined legal structure for international enforcement of arbitration agreements and arbitral awards, considerable insulation from the application of national public policies extrinsic to the intentions of the parties, procedural flexibility, free choice of decision-makers, and confidentiality. Disadvantages include additional costs and less effective tools of discovery.*[6]

Generally, arbitration is considered potentially cost effective.[7] However, it must be clarified that this depends on a number of factors including the willingness of the parties involved to move the process forward. Even where parties are willing to save time and costs, some resultant costs may be inevitable. For instance, in most cases, especially those involving parties from different jurisdictions, the parties will have chosen a jurisdiction different from their own, that is the juridical seat and the venue, as a measure to avoid bias, and this usually means inflated costs. With time, commercial arbitration has also become very expensive in terms of filing fees and the legal fees. This usually results in very high final costs of the arbitral proceedings. It is therefore important that measures aimed at avoiding unnecessary costs and cutting down those that can, should be explored by the parties at every stage of the proceedings.

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[3] Ibid, p.4.
[4] Ibid, p.4.
[5] Ibid, p.1.
[6] Nelson, S.C., "Planning for Resolution of Disputes in International Technology Transactions," *Boston College International and Comparative Law Review* 7, no. 2 (1984): 269 at p.279.
[7] Shah, A., "Using ADR to Resolve Online Disputes." *Richmond Journal of Law & Technology* 10, no. 3 (2004): 25.

It is against this background that this paper seeks to explore the opportunities that information technology presents to parties in international commercial arbitration, as a means of keeping the costs of these processes at a minimum or eliminating them all together, where possible.

Arbitration is one of the ADR Mechanisms in common use in the modern world.[8] It has widely been used in settling disputes both at the international and the national levels.[9] For instance, arbitration has been applied in the settlement of several disputes in numerous areas of law including commercial, family and environmental.[10] Disputants often resort to settle their disputes through arbitration due to its several advantages which include: party autonomy to determine the law and seat of arbitration, flexibility; cost effectiveness and confidentiality.[11]

2. International Arbitration and Expeditious Access to Justice

The positive attributes of arbitration enable disputants to get expeditious settlement of disputes. The top benefits of arbitration are specialized expertise, time savings and privacy.[12] Arbitration of international disputes provides awards that are enforceable through worldwide treaty conventions.[13] Besides, arbitration offers a private decision-making process that is favoured particularly where confidential business information or trade secrets are at issue.[14] Although cost, time and expertise are concerns in both litigation and arbitration, the opportunity for decision-making by specialized practitioners and time savings are viewed as significant advantages of arbitration compared to litigation. Privacy, streamlined processes and flexibility are also ranked high as benefits provided by arbitration.[15] It is advisable that parties choose arbitrators with the right technology expertise to manage the arbitral proceedings to limit costs and take advantage of the

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[8] Muigua K., *Settling Disputes Through Arbitration in Kenya*, 3rd Edn, Glenwood Publishers Ltd, Feb., 2017, pp. 34.

[9] Ibid.

[10] Muigua K., *Settling Disputes Through Arbitration in Kenya*, op. cit.

[11] Muigua, K., *Resolving Conflicts Through Mediation in Kenya*, 2nd Edn Glenwood Publishing Nairobi, 2017, p. 12.

[12] Gary Benton, Chris Compton & Les Schiefelbein, "Cost is the Top Tech Litigation Problem, Survey Shows Arbitration Strongly Preferred for Specialized Expertise." Available at *https://svamc.org/wp-content/uploads/SVAMC-2017-Survey-Report.pdf* [Accessed November 28, 2018].

[13] Ibid; See also Martinez, R., "Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The" Refusal" Provisions," *The International Lawyer* (1990): 487-518.

[14] Ibid; Blackman, S.H. and McNeill, R.M., "Alternative Dispute Resolution in Commercial Intellectual Property Disputes," *American University Law Review* 47, no. 6 (1998): 5; Gu, W., "Confidentiality Revisited: Blessing Or Curse In International," *UCLAL REV* 949 (2000): 1085.

[15] Ibid, "Cost is the Top Tech Litigation Problem, Survey Shows Arbitration Strongly Preferred for Specialized Expertise," op cit; Gu, W., "Confidentiality Revisited: Blessing Or Curse In International," *UCLAL REV* 949 (2000): 1085.

benefits and flexibility offered by arbitration.[16] This in turn enhances provision of expeditious justice through efficient arbitral proceedings. The challenges facing litigation as a means of access to justice in international business and commercial transactions can be summarised as follows:

> *Two reasons traditionally given for the emergence of international commercial arbitration as a private dispute resolution system are: (a) the privacy of the arbitration process; and (b) that it allows each party to avoid being forced to submit to the foreign courts of the other. ..there is concern over potential disadvantage due to the perceived national bias by the courts and lawyers, lack of familiarity with the jurisdictions language and procedures, and layers of appellate review causing further delay and uncertainty in the ultimate resolution of the dispute….the perceived neutrality of the arbitration forum as distinct from the influences of a state's national courts is one of the primary motivations for recourse to arbitration.*[17]

Notably, one of the challenges associated with the use of litigation in both domestic and transnational disputes is the escalation of costs due to the long periods of time usually taken to deal with these disputes. Such costs range from court fees, legal fees and other miscellaneous costs that may ultimately hinder access to justice for the parties involved.[18] However, the issue of escalating costs may not be unique to litigation as the costs involved in international arbitration have also continually increased to sometimes prohibitive amounts.[19] This threatens one of the bestselling points of using international arbitration-cost effectiveness. This may be attributed to the different jurisdictional issues and the need for a neutral venue and juridical seat as well as the growing complexity of international arbitration proceedings. This is well captured by the International Chamber of Commerce (ICC) in the following words:

> …….if the overall cost of the arbitral proceedings is to be minimized, special emphasis needs to be placed on steps aimed at reducing the costs connected with the parties' presentation of their cases. Such costs are often caused by unnecessarily long and complicated proceedings with unfocused requests for disclosure of documents and unnecessary witness and expert evidence. Costs can also be unnecessarily increased when counsel from different legal backgrounds use procedures familiar to them in a manner that leads to needless duplication. The increasing and, on occasion, unnecessary complication of the proceedings seems

[16] Ibid; Sussman, E. and Wilkinson, J., "Benefits of arbitration for commercial disputes." *Retrieved June* 20 (2012): 2014.

[17] Lynch, K. and Lynch, K.L., *The forces of economic globalization: Challenges to the regime of international commercial arbitration*,op. cit., pp.11-12; See also Leahy, E.R. and Bianchi, C.J., "The Changing Face of International Arbitration," *Journal of International Arbitration*, vol.17, no. 4 (2000): 19-61.

[18] See generally, Gotanda, J.Y., "Awarding Costs and Attorneys' Fees in International Commercial Arbitrations," *Michigan Journal of International Law* 21, no. 1 (1999): 1-50.

[19] Halket, T.D., "The Use of Technology in Arbitration: Ensuring the Future Is Available to Both Parties," *John's L. Rev.* 81 (2007): 269, at p.269.

> to be the main explanation for the long duration and high cost of many international arbitrations. The longer the proceedings, the more expensive they will be.[20]

The next section explores the various ways in which information technology can be harnessed to enable the parties save on the total costs of the arbitral proceedings.

3. Harnessing Technology for Cost Effective Arbitral Proceedings

One of the factors that have contributed to an increasingly globalised economy has been the innovations in information technology and computer networks.[21] Closely associated with this is the realisation that, 'in the context of the Internet, where parties located in different corners of the world can contract with each other at the click of a mouse, litigation of online disputes is often inconvenient, impractical, time-consuming and prohibitive.[22]

The developments in technology have changed the way in which people communicate and interact with one another.[23] This has inevitably impacted the ways in which disputes are managed and resolved.[24] Various technological platforms such as email, video/audio conferencing, online platforms, electronic signatures and e-filing have already maneuvered their way into the realm of arbitration.[25] The greatest concern is whether these technological platforms have attained fully mainstream application in arbitration, and their impact in the conduct of arbitral proceedings.[26]

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[20] International Chamber of Commerce, *Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration*, ICC Publication 843, 2007, p.1. Available at http://gjpi.org/wp-content/uploads/icc-controlling-time-and-cost.pdf

[21] Lynch, K. and Lynch, K.L., *The forces of economic globalization: Challenges to the regime of international commercial arbitration*. Kluwer Law International, 2003, op. cit., p. 1.

[22] Shah, A., "Using ADR to Resolve Online Disputes," *Richmond Journal of Law & Technology* 10, no. 3 (2004): 25 at p.25.

[23] Blake S., Heather JB, & Stuart S., *A Practical Approach to Alternative Dispute Resolution*. 2nd Edn Oxford University Press, 2016, pp. 67.

[24] Ibid.

[25] Soares, Francisco Uribarri, "New Technologies and Arbitration," *Indian J. Arb. L.* 7 (2018): 102-103; See also International Chamber of Commerce, *Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration*, ICC Publication 843, 2007; Negi, C., "Concept of Video Conferencing in ADR: An Overview--Access to Justice." (2015). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662344 [Accessed on 10/12/2018]; Ekwenze, S.A., "Video Conferencing in Arbitration: An Overview." (2012). Available at https://coou.edu.ng/resources/video-conferencing-in-arbitration.pdf [Accessed on 10/12/2018]; "Use of Telephonic and Video Conferencing Technology in Remote Court Appearances," *A Supplemental Report to a State Justice Institute (SJI) Funded Project*, June 20, 2016. Available at *https://www.ncsc.org/~/media/Microsites/Files/Civil%20Justice/UseTelephonicVideoTechnology.ashx [Accessed on 10/12/2018].*

[26] Ibid.

Technology has both positive and negative consequences that have the potential to impact and disrupt arbitral proceedings in a myriad of ways.[27] This necessitates a discussion on the present technologies being used in arbitration and the potential future technologies whose usage may have an impact in arbitration.[28] Thus, this paper entails comprehensive discussion on achieving expeditious justice through harnessing technology for cost effective arbitral proceedings. It mainly ventures into the advantages and risks associated with the use of technology in arbitral proceedings. Consequently, it uses this analysis to make a case for the enhanced regulatory framework and information security for effective usage of technology in arbitral proceedings.

Digital technologies play a fundamental and an increasingly central role in arbitration.[29] Technology is particularly used in e-briefs to purposefully eliminate the need for hard-copy submissions, presentation technology and technology consultants for managing documents during the hearing, and in persuasive presentations.[30] The following are some examples of the usage of technology in arbitration:

3.1 E-briefs

An e-brief is an interactive version of the submissions.[31] A party or counsel in arbitration does not have to wait until the arbitral proceedings' hearing phase to persuasively apply technology.[32] A first step in conducting a paper-free hearing is to begin using available technology solutions from the initial pleading.[33] Rather than searching through hundreds of PDF files or boxes of paper, an e-brief enables the tribunal to click on hyperlinks from the cites in the brief to all the referenced exhibits, legal authorities, witness statements and expert reports in an easily accessible digital format.[34] The e-brief has become more popular especially with the following challenges affecting the paper based system (in courts): Paper files are cumbersome to organize, difficult to retrieve quickly, and are subject to the access limitations of normal business hours; Paper files are usually only available to one person at a time, limiting the ability of a panel of judges or their clerks to access or work

[27] Ibid; See also Kaufmann-Kohler, G. and Schultz, T., "The use of Information Technology in arbitration," *Jusletter* 5. Dezember (2005).

[28] Panjwani, P., The Present and Near Future of New Technologies in Arbitration: If not US, Who? If not Now, When? April 27, 2018, Available at *http://arbitrationblog.kluwerarbitration.com/2018/04/27/the-present-and-near-future-of-new-technologies-in-arbitration-if-not-us-who-if-not-now-when/* [Accessed November 28, 2018].

[29] International Chamber of Commerce, Three Takeaways on how Digital Technologies are Transforming Arbitration, (Paris August 30, 2017) Available at, https://iccwbo.org/media-wall/news-speeches/three-takeaways-digital-technologies-transforming-arbitration/

[30] Whitley Tiller et al, The Effective Use of Technology in the Arbitral Hearing Room, Available at *https://globalarbitrationreview.com/chapter/1147795/the-effective-use-of-technology-in-the-arbitral-hearing-room* [Accessed November 28, 2018].

[31] Whitley Tiller et al, The Effective Use of Technology in the Arbitral Hearing Room, op.cit.

[32] Ibid.

[33] Ibid.

[34] Ibid; See also Jagusch, S., *Guide to Advocacy*, (Law Business Research Ltd., Nov 3, 2017).

on files at home; and Paper files require multiple copies to file, distribute, maintain and store, all of which must be done manually with a risk that files will be lost or misfiled.[35]

E-briefs provide the perfect affordable solution for tribunal members to easily review all submissions from the statement of claim through post-hearing briefs in a joined-up manner.[36] In a nutshell, these submissions provide the arbitrator an opportunity to examine the submissions and evidence in a more holistic fashion thus enabling him to come up with a prudent award.[37]

3.2 Electronic Submissions

Notably, whether it is an electronic arbitration or not, it is possible for arbitrators to settle the dispute without any hearings unless the parties have decided otherwise. Once the parties have determined the seat of arbitration, all proceedings and hearings could be held electronically and the arbitrators need only state the seat of arbitration in the award itself, as the parties determined, and sign the award.[38]

Electronic submissions such as submissions via the email, yahoo and WhatsApp are cheaper and take a shorter time as compared to sending hard copies.[39] It facilitates delivery of documents to members at different jurisdictions within a shorter time, quickly and cheaply.[40] For instance, in arbitration cases with several exhibits and large bundles of briefs can be easily and quickly sent to the whole tribunal, whose members may be located indifferent jurisdictions, and also to the other counsel.[41] This saves time and the costs of printing. A good example of active use of electronic submissions is the WIPO Electronic Case Facility (ECAF), which enables parties, the arbitral tribunal and the Center to file, store, and retrieve case-related submissions electronically.[42] It is secure and allows for access from anywhere in the world using the Center´s website. It takes the form of a case management system, a central database accessible via the Internet that allows participants in a case to submit documents online and to access a case overview, contact information, time tracking, docket listing, a finance overview, and a message board.[43]

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[35] Crist, M.P., "The E-Brief: Legal Writing for an Online World," *New Mexico Law Review* 33, no. 1 (2003): 49, at p.52.
[36] Whitley Tiller et al, The Effective Use of Technology in the Arbitral Hearing Room, op. cit; See also Crist, M.P., "The E-Brief: Legal Writing for an Online World," op. cit.
[37] Ibid.
[38] YÜKSEL, A.E.B., "Online International Arbitration," *Ankara Law Review* 4, no. 1 (2007): 83-93, at p.89.
[39] Whitley Tiller et al, The Effective Use of Technology in the Arbitral Hearing Room, op. cit
[40] Ibid.
[41] Ibid.
[42] Kaufmann-Kohler, G. and Schultz, T., "The use of Information Technology in arbitration," *Jusletter* 5. Dezember (2005), p.53.
[43] Ibid, p.53.

3.3 Artificial Intelligence

Artificial intelligence (AI) is defined as a field of computer science that includes machine learning, natural language processing, speech processing, expert systems, robotics, and machine vision.[44] Notably, there exist a number of artificial intelligent models, a detailed discussion of which goes beyond the scope of this paper.[45] The paper however highlights some of the ways in which such models can be explored in achieving cost effective arbitration proceedings. Artificial Intelligence (AI) aids in the automation of institutional arbitrations and case management by software.[46] AI can also aid in the prediction of costs, duration, and, perhaps more ambitiously, the merits of an arbitration.[47] For instance, in an effort to enhance quick resolution of disputes, arbitral institutions could, at the request of the parties or their agents, propose settlement ranges based on arbitrations of similar size and complexity.[48] This could push the parties toward settlement.[49]

AI can also aid in the augment human cognitive abilities and automate time-consuming labour.[50] A number of AI-powered products and services already exist to help lawyers parse through submissions, identify better legal authorities, review documents and agreements (e.g. predictive coding), estimate costs, and predict outcomes.[51] A number of start-ups are focusing on disrupting the legal industry, with some already offering case management and forecasting services to the international arbitration community.[52]

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[44] Stothard, P., Plaistowe, M. and Dowling, C., "Jargon buster: legal technology" Navigating the hype, in *Norton Rose Fulbright Publication*, October 2017, p.27. Available at *http://www.nortonrosefulbright.com/files/20170925-international-arbitration-report-issue-9-157156.pdf* [Accessed on 13/12/2018].

[45] See Andrade, F., Novais, P., Carneiro, D. and Neves, J., "Conflict resolution in virtual locations," In *Information Communication Technology Law, Protection and Access Rights: Global Approaches and Issues*, pp. 33-50, IGI Global, 2010.

[46] Lucas Bento, *International Arbitration and Artificial Intelligence: Time to Tango?* KLUWER ARB. BLOG (February 23, 2018), Available at *http://arbitrationblog.kluwerarbitration.com/2018/02/23/international-arbitration-artificial-intelligencetime-tango/https://globalarbitrationreview.com/chapter/1147795/the-effective-use-of-technology-in-the-arbitral-hearing-room* [Accessed November 28, 2018].

[47] Ibid.

[48] Lucas Bento, *International Arbitration and Artificial Intelligence: Time to Tango? op. cit*; Bellucci, E., Lodder, A.R. and Zeleznikow, J., "Integrating artificial intelligence, argumentation and game theory to develop an online dispute resolution environment," In *null*, pp. 749-754. IEEE, 2004.

[49] Ibid; Lodder, A. and Thiessen, E., "The role of artificial intelligence in online dispute resolution," In *Workshop on Online Dispute Resolution at the International Conference on Artificial Intelligence and Law, Edinburgh, UK*. 2003.

[50] Ibid*; See also* Carneiro, D.R., Novais, P., Andrade, F.C.P. and Neves, J., "Retrieving Information in online dispute resolution platforms: a hybrid method," In *Proceedings of the Thirteenth International Conference on Artificial Intelligence and Law*, pp. 224-228, ACM, 2011.

[51] Ibid; Katz, D.M., "Quantitative Legal Prediction-or-How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry," *Emory Law Journal* 62, no. 4 (2013): 909.

[52] Ibid; International Bar Association, "Times are a-changing': disruptive innovation and the legal profession." (2016): 7-11.

AI could also help with the appointment of arbitrators, the preparation of the award, and the simulation of judicial review.[53] Case management could be automated, or significantly streamlined with the aid of software, giving arbitrators more time to arbitrate.[54] Some practitioners have advocated for the use of AI in arbitration to help in the management of massive amounts of documentation.[55] Besides, albeit with reservations, it can be used to analyse arbitration or court decisions in order to statistically derive probabilities about how your own case is going to be decided, in what has also been termed as 'predictive justice'.[56] Although there are various legal and ethical issues that may arise with the use of AI and technology in general[57], they are not within the scope of this paper.

3.4 Video Conferencing

Arbitral proceedings' hearings can also take place through a video platform.[58] For instance, instead of having a venue of arbitration located in Nairobi that forces the arbitrators to travel to Nairobi, everybody stays in his or her office and uses the online platform to conduct the hearing.[59] For example, in the case of an international arbitration, parties can strive to ensure that tele-conferencing is used in the case of witnesses of fact and expert witnesses from abroad. This will save the parties the costs as well as time.[60]

In summary, the use of videoconferencing in international commercial arbitration has been recommended because the use of the infrastructure will be:

> more cost effective; the inconveniences of travelling will be eliminated; effect of any political factor in any country will not interfere with arbitration process; restriction of entry of any of the parties, arbitrators and witnesses will be

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[53] Lucas Bento, *International Arbitration and Artificial Intelligence: Time to Tango? op. cit*; Nappert, S, "The Impact of Technology on Arbitral Decision Making - The Practitioner's Perspective," 2016. Available at *https://www.researchgate.net/publication/303749723_The_Impact_of_Technology_on_Arbitral_Decision_Making_-_The_Practitioner's_Perspective*

[54] Ibid; Chernick, R. and Neal, B.R., "Expediting Arbitration," available at *https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Chernick_Reeves_March_7.authcheckdam.pdf*

[55] Hogan Lovells, "The future of arbitration: New technologies are making a big impact — and AI robots may take on "human" roles," *Hogan Lovells Publications*, 21 February 2018. Available at *https://www.hoganlovells.com/en/publications/the-future-of-arbitration-ai-robots-may-take-on-human-roles* [Accessed on 13/12/2018].

[56] Ibid.

[57] See Kemp, R., "Legal Aspects of Artificial Intelligence (v2.0)," 26 September 2018, available at *http://www.kempitlaw.com/wp-content/uploads/2018/09/Legal-Aspects-of-AI-Kemp- IT-Law-v2.0-Sep-2018.pdf* [Accessed on 13/12/2018].

[58] Soares, Francisco Uribarri, "New Technologies and Arbitration," *Indian J. Arb. L.* 7 (2018): 97.

[59] Ibid.

[60] International Chamber of Commerce, "Benefits of IT in arbitration outweigh risks, says new ICC report," Paris, 12/04/2017. Available at *https://iccwbo.org/media-wall/news-speeches/benefits-arbitration-outweigh-risks-says-new-icc-report/*[Accessed on 13/12/2018].

eliminated; there will not be any diplomatic break – down or interference; there will not be need for transfer of funds to the venue of the arbitration proceeding for the administrative duties and convenience of arbitrators and witnesses; there will not be need for suitable rooms for hearing; shortage of hotel rooms for parties and arbitrators/witnesses will not arise; there will not be need for transportation facilities and hold – ups; need for support facilities, for instance shorthand writers and interpreters and so on, may not be there; the net cost will be very much less than the aggregate cost of rooms, air fare for all parties, arbitrators and witnesses; there will not be any need for justifiable, but paralyzing fear of flight due to terrorist attack and SARS; there may not be need for fear of natural disaster(s) where it normally occurs like earthquake, TSUNAMI, volcano etc.; phobia for unfamiliar forum will be eliminated; there will be effective use of time by every person involved as only negligible time of each person may be used for arbitration by video conferencing; the recording and storage of proceedings will be faster and easier; and dissemination of information will be faster.[61]

3.5 Presentation Technology and Technology Consultants

Technology consultants create an electronic bundle of all exhibits for use in real time on the screen in the hearing room using software such as TrialDirector or OnCue.[62] The application of these programs yields quick access to supporting information and allows for the repetition of key points, which increases retention.[63] Besides making the presentation interactive, it gives tremendous flexibility to the manner in which the case is presented.[64] This ensures that all involved are indeed following the same, relevant document.[65] This saves an incredible amount of time and maximises efficiency.[66]

A common misconception is that these types of services are too costly and reserved for use only in very large cases.[67] This argument is not true as the use of technology brings efficiency and cost reduction in the conduct of arbitral proceedings.[68]

[61] Ekwenze, S.A., "Video Conferencing in Arbitration: An Overview." (2012), p.6. Available at *https://coou.edu.ng/resources/video-conferencing-in-arbitration.pdf*

[62] Whitley Tiller et al, The Effective Use of Technology in the Arbitral Hearing Room, op. cit.

[63] Ibid.

[64] Whitley Tiller et al, The Effective Use of Technology in the Arbitral Hearing Room, op. cit.

[65] Ibid.

[66] Ibid.

[67] Ibid.

[68] Ibid; International Chamber of Commerce, *Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration*, ICC Publication 843, 2007.

3.6 Email Communication

The consent in arbitration can be given by and through the email correspondences.[69] Email communications are beneficial in several ways which includes delivery/service of documents is possible after offices close at 5.00 p.m., beating traffic jams, Email communication saves the cost of printing, copying, envelopes and postage/courier, one can send or receive emails from anywhere in the world, such that it does not matter when one travels; easy to forward communication to arbitrator, client, parties, etc. ; searchable database; ease of digital filing and retrieval and quoting documents verbatim is easy – just copy and paste![70]

3.7 Advantages of the use of Technology in International Commercial Arbitration

Use of technology in arbitration increases efficiency, reduce costs and permit the expansion of arbitration into new market segments.[71] Advances in communication technology enable arbitrators and parties to transmit all sorts of documents instantly, from simple letters to audio and visual files.[72] Digital technologies have as much potential to transform arbitration as they have transformed other areas of life.[73] It is now up to practitioners and other stakeholders to define best practices and create a workable environment that enables this potential to be fully leveraged for the benefit of all.[74] However, while all there are many benefits that can potentially accrue from the use of technology, the main focus of this paper as the end result is the cost and time saving ability of effective utilisation of technology in international commercial arbitration proceedings.

3.8 Risks Associated with the use of Technology in Arbitral Proceedings

The International Chamber of Commerce rightly cautions that practitioners should not always believe that any use of IT will always save time and costs or ensure the arbitration is conducted efficiently. If managed poorly, the use of IT can increase time and costs, or even result in the unfair treatment of a party.[75] Despite numerous advantages conferred

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[69] Panjwani, P., The Present and Near Future of New Technologies in Arbitration: If not US, Who? If not Now, When? April 27, 2018, Available at *http://arbitrationblog.kluwerarbitration.com/2018/04/27/the-present-and-near-future-of-new-technologies-in-arbitration-if-not-us-who-if-not-now-when/* [Accessed November 28, 2018].

[70]Ngotho, P., "Expediting Ad Hoc Arbitrations through Emails: the Experience of a Kenyan Arbitrator," (2015) 1 *Alternative Dispute Resolution*, pp 133-134.

[71]Ljiljana, B., "International commercial arbitration in cyberspace: recent developments," *Nw. J. Int'l L. & Bus.* 22 (2001): 319, P. 345.

[72]Ljiljana, B., "International commercial arbitration in cyberspace: recent developments," op. cit.

[73] Ljiljana, B., "International commercial arbitration in cyberspace: recent developments," op. cit.

[74] International Chamber of Commerce, Three Takeaways on how Digital Technologies are Transforming Arbitration, (Paris August 30, 2017) Available at, *https://iccwbo.org/media-wall/news-speeches/three-takeaways-digital-technologies-transforming-arbitration/*[Accessed November 28, 2018].

[75] International Chamber of Commerce, "Benefits of IT in arbitration outweigh risks, says new ICC report," Paris, 12/04/2017; See also the counter argument on the use of technology in international

by the use of technology in the arbitral proceedings, there are several drawbacks associated with it.[76] First, there is a concern that machines lack emotional sensitivity or perception which are considered to be a prerequisite for the efficient conduct of one's duties as an arbitrator, and are also inextricably linked to information, motivation, processing, memory and judgment.[77] Besides, some jurisdictions may not enforce codified decisions rendered by a machine arbitrator due to the lack of reasoning attached to such decisions.[78]

Second, the use of technology in arbitral proceedings has impacted greatly on the element of confidentiality. The confidential nature of arbitration is one of its major advantages.[79] The issue of confidentiality has evolved from interpersonal confidentiality to technological confidentiality.[80] For instance, enabling access to precedents and the external assistance required to operate technologies during the conduct of arbitration, including reporters and translators, create confidentiality concerns.[81] Since commercial arbitration awards and

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commercial arbitration in Serbest, F., "The Use of Information Technology in International Commercial Arbitration," June 2012. Available at *https://www.researchgate.net/publication/259823045_The_Use_of_Information_Technology_in_International_Commercial_Arbitration* [Accessed on 14/12/2018].

[76] Soares, Francisco Uribarri, "New Technologies and Arbitration," op cit.; See also Halket, T.D., "The Use of Technology in Arbitration: Ensuring the Future Is Available to Both Parties," *St. John's Law Review* 81, no. 1 (2012): 13.

[77] Ibid; Soares, Francisco Uribarri, "Machine arbitrators: science-fiction or imminent reality?" December 2018, Special Report: International Dispute Resolution, *Financier Worldwide Magazine*. Available at *https://www.financierworldwide.com/machine-arbitrators-science-fiction-or-imminent-reality/* [Accessed on 14/12/2018]; Ryan, E., "The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation," *10 Harvard Negotiation Law Review, 231-285 (2005)* (2005).

[78] Soares, Francisco Uribarri, "New Technologies and Arbitration," op cit.; International Centre for Settlement of International Disputes, *ICSID Convention, Regulations and Rules* (as Amended and Effective April 10, 2006), Article 48(3). Available at *http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/parta-chap04.htm*; Knull III, W.H. and Rubins, N.D., "Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?" *Am. Rev. Int'l Arb.* 11 (2000): 531; Carbonneau, T.E., "At the Crossroads of Legitimacy and Arbitral Autonomy," *bepress Legal Series* (2006): 1139; Gleason, E.E., "International Arbitral Appeals: What Are We So Afraid Of?" *Pepperdine Dispute Resolution Law Journal*, 7, no. 2 (2007): 5; Carbonneau, T.E., "Rendering Arbitral Awards with Reasons: The Elaboration of Common Law of International Transactions," *Columbia Journal of Transnational Law,* 23 (1985): 579; Lalive, P., "On the reasoning of international arbitral awards," *Journal of International Dispute Settlement*, 1, no. 1 (2010): 55-65.

[79] Noussia, K., *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law*, (Springer-Verlag Berlin Heidelberg 2010); Brown, A.C., "Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration," *American University International Law Review*, 16, no. 4 (2001): 969-1025.

[80] Britz, J. J., "Technology as a threat to privacy: ethical challenges to the information profession." (2010). Available at *http://web.simmons.edu/~chen/nit/NIT%2796/96-025-Britz.html [Accessed* on 14/12/2018]; Trakman, L.E., "Confidentiality in International Commercial Arbitration," *Arbitration International* 18, no. 1 (2002): 1-18.

[81] Norton Rose Fulbright, *International Arbitration Report*, Issue 9, October, 2017. Available at *http://www.nortonrosefulbright.com/files/20170925-international-arbitration-report-issue-9-157156.pdf* [Accessed on 14/12/2018].

procedural orders are generally private thus confidential the subjection of the issues of the dispute to the third parties threatens this principle even though these parties can be subjected to confidentiality agreements.[82]

Third, there are several issues surrounding email communication some which affect confidentiality of the arbitral proceedings, such as the potential risks of hacking.[83] Most email providers also have size limits for possible attachments, another hurdle to email communication in arbitration.[84] This particularly interferes with the proper communication among the members of the tribunal or from the tribunal to the parties and vice versa.

Fourth, despite the proliferation of technology in developing countries, a significant number of the smaller law firms in particular risk facing more costs, as they might lack the necessary financial and technical resources to utilize new technologies.[85] While this may greatly affect their ability to take up the challenge of using technology while participating in international commercial arbitration, either as a firm or as individual advocates, it has been suggested that they can overcome the challenge by coming up with alliances between smaller law firms and outsourcing to specialized companies.[86] This way, they may be the much needed option for their equally disadvantaged clients.

In addition, international commercial arbitration practitioners should be aware of potential security hacks, of which law firms are often targets.[87]

4. Legal Framework on Harnessing Technology for Cost Effective Arbitral Proceedings

The international commercial arbitration legal framework as it exists may not have been designed to expressly forbid nor allow the appointment of computers as arbitrators.[88] Although advancements in technology are occurring at an ever more rapid pace, the

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[82] Soares, Francisco Uribarri, "New Technologies and Arbitration," op cit.

[83] Ngotho, P., "Expediting Ad Hoc Arbitrations through Emails: the Experience of a Kenyan Arbitrator," op. cit.

[84] Ngotho, P., "Expediting Ad Hoc Arbitrations through Emails: the Experience of a Kenyan Arbitrator," op. cit.; See also Outlook, "Maximum email size limit for Gmail, Outlook.com, etc," July 19, 2013. Available at *https://www.outlook-apps.com/maximum-email-size/* [Accessed on 14/12/2018].

[85] Arbitration Institute of the Stockholm Chamber of Commerce, "Innovation in Arbitration, p.5. Available at *https://sccinstitute.com/media/37112/innovation-in-arbitration_the-report.pdf* [Accessed on 14/12/2018]

[86] Ibid, p.5.

[87] Panjwani, P., "The Present and Near Future of New Technologies in Arbitration: If not US, Who? If not Now, When?" April 27, 2018, Available at *http://arbitrationblog.kluwerarbitration.com/2018/04/27/the-present-and-near-future-of-new-technologies-in-arbitration-if-not-us-who-if-not-now-when/*

[88] José Maria de la Jara et al., *Machine Arbitrator: Are We Ready?*, KLUWER ARB. BLOG (May. 4, 2017), Available at *http://arbitrationblog.kluwerarbitration.com/2017/05/04/machine-arbitrator-are-we-ready/.*

incorporation of technology in international commercial arbitration proceedings remains extremely slow or even non-existent in most countries.[89] In order for information technology to be successfully integrated into the system of international commercial arbitration in the future, its parameters should be clearly defined and its use should be regulated. While there may be development of customised information technology legal framework for the use of the same in international commercial arbitration, amendment of the existing arbitration rules, domestic legislation, and international agreements may also be another route towards making this work. Such changes in domestic arbitration laws would be strongly recommended to provide certainty to the international arbitration community (arbitral institutions, counsel, and parties) that the use of such technology as AI and others, for settlement of disputes by arbitration is legal.[90] This therefore necessitates the examination of the legal framework on the use of technology in arbitration.

4.1 Current Legal Framework on Use of Technology in Arbitral Proceedings

In this advent of technology, the major concern is whether the underlying arbitral frameworks permit the use of technologies by all players and parties to arbitral proceedings.[91] The current legal and policy framework on arbitration does not categorically rule out the use of new technology in arbitral proceedings. This is because both the decision to arbitrate and the manner in which the arbitration is conducted are contractually based, which confers on the parties and the arbitrator significant operational freedom.[92] Indeed, some jurisdictions have embraced and encouraged the use of technology in arbitration proceedings to not only increase efficiency but also save on time and costs.[93]

Article 7 of the 1985 version of the *UNCITRAL Model Law on International Commercial Arbitration*[94] on the form of the arbitration agreement was modelled on the language used in article II (2) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.[95] This provision was amended in the 2006 Model and among the fundamental

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[89] International Chamber of Commerce, Three Takeaways on how Digital Technologies are Transforming Arbitration, (Paris August 30, 2017) Available at, *https://iccwbo.org/media-wall/news-speeches/three-takeaways-digital-technologies-transforming-arbitration/*

[90] *Snider, T., Dilevka, S. and Aknouche, C., "Artificial Intelligence and International*
Arbitration: Going Beyond E-mail," April 2018. Available *at https://www.tamimi.com/law-update-articles/artificial-intelligence-and-international-arbitration-going-beyond-e-mail/*

[91] Soares, Francisco Uribarri, "New Technologies and Arbitration," op cit.

[92] Ibid.

[93] Essam Al Tamimi and Sara Koleilat-Aranjo, "United Arab Emirates: Commentary on the UAE's New Arbitration Law," 8 August 2018. Available at
http://www.mondaq.com/x/726276/Arbitration+Dispute+Resolution/Commentary+On+The+UAEs+New+Arbitration+Law [Accessed on 14/12/2018]; See also International Chamber of Commerce, *Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration*, ICC Publication 843, 2007, op. cit.

[94] UNCITRAL Model Law on International Commercial Arbitration UN Doc A/RES/40/17 annex1 (As adopted by the United Nations Commission on International Trade Law on 21st June 1985).

[95] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York Convention, (Adopted 10th June 1958, came into force 7th June 1959) 330 UNTS 38.

amendment is the new article 7 (4) which provides that, "the requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy."[96] This revision was intended to address evolving practice in international trade and technological developments aspects such as the use of technology in arbitration.[97] Article 19(1) of the *UNCITRAL Model Law on International Commercial Arbitration* allows the parties, subject to the provisions of the Model Law, to agree on the procedure to be followed by the arbitral tribunal in conducting proceedings.[98]

Apart from the abovementioned Model Law, various institutional rules such as the *Singapore International Arbitration Centre Rules*[99], the *London Court of International Arbitration Rules*, the *Hong Kong International Arbitration Centre Rules* and the *International Chamber of Commerce Rules*, afford the parties and the tribunal the opportunity to determine different procedural aspects of the hearing in international commercial arbitration. Therefore, it can be gathered that there is a significant degree of freedom awarded to arbitrators in establishing the facts of the case – and there is no specific mention or restriction on the means by which they may do so.[100]

4.2 Need for Enhanced Regulatory Framework and Information Security

As technology evolves, the time to amend domestic laws might come sooner than expected.[101] It is obvious that early regulatory frameworks on arbitration such as the *New York Convention* did not foresee unprecedented development of high technology as a means of communication.[102] However, this position is changing and in some instances it has already changed, as evidenced by ICC's efforts to encourage the active uptake of technological advancements to help in saving time and costs.[103] It is also noteworthy that in line with the 2006 amendments on the UNCITRAL Model Law, countries have

[96] Art 7 (4), UNCITRAL Model Law on International Commercial Arbitration, op. cit.
[97] Soares, Francisco Uribarri, "New Technologies and Arbitration," op cit.
[98] UNCITRAL Model Law on International Commercial Arbitration, op. cit.
[99] SIAC Rules (6th Edition, 1 August 2016), available at http://www.siac.org.sg/index.php
[100] Soares, Francisco Uribarri, "New Technologies and Arbitration," op cit.
[101] José Maria de la Jara et al., *Machine Arbitrator: Are We Ready?*, KLUWER ARB. BLOG (May. 4, 2017), *Available at http://arbitrationblog.kluwerarbitration.com/2017/05/04/machinbrightnesse -arbitrator-are-we-ready/.*
[102] Ljiljana, B., "International commercial arbitration in cyberspace: recent developments," op. cit.
[103] International Chamber of Commerce, *Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration*, ICC Publication 843, 2007.

continually amended their domestic laws on arbitration to reflect these developments on the modern means of communication.

In addition to these developments, however, there is need to establish the regulatory framework on the information security in different countries around the world, including Kenya, considering that some of the procedural aspects of international commercial arbitration may be subjected to domestic laws especially during the recognition and enforcement stage of the resultant award.

5. Conclusion

Traditional arbitration is increasingly incorporating modern technology into its proceedings.[104] What cannot be denied is that with improved technology and automation, less complex disputes work will be claimed by online dispute resolution services.[105] It is therefore imperative that legal practitioners continue to improve themselves and keep abreast of the latest legal and technological developments to avoid falling by the way side in the wake of technology's relentless march.[106] There are several unprecedented opportunities associated with the use of technology such as use of email, video/audio conferencing, online platforms, electronic signatures and e-filing that helps to save time and costs in international commercial arbitration.

Achieving expeditious justice in arbitration is necessary. Harnessing technology for cost effective international commercial arbitration proceedings is a potent idea whose time has come.

[104] Derric Yeoh, *Is Online Dispute Resolution the Future of Alternative Dispute Resolution?,* KLUWER ARB. BLOG (Mar. 29, 2018), Available *at http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-futurealternative-dispute-resolution/* [Accessed November 28, 2018].

[105] Derric Yeoh, *Is Online Dispute Resolution the Future of Alternative Dispute Resolution?, op. cit.*

[106] Ibid.

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

1. Introduction

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

However, with the advent of the colonial masters, most of the ADR and traditional justice systems were relegated to an inferior position, with the main conflict management methods becoming the formal common law system, which went ahead to be established as a profession requiring specialised training and qualifications. A misconception of the African communal way of life, conflict resolution institutions and prejudice against their traditional way of life led to the introduction of the western ideals of justice which were not based on political negotiations and reconciliation.[2] Although certain minor disputes could be settled in the customary manner, the English Common Law was the ultimate source of authority.[3]

While there was no problem with some of these developments, the practitioners of the alternative and traditional justice systems were rarely recognized under the new system. Even where recognized, the system was to be used only for reference when dealing with a small section of disputes touching on a few issues such as community land, family law, amongst others. The political and legal systems of the colonial masters were superimposed upon the traditional and customary political and legal processes of African people, and

[1] See Muigua, K., *Resolving Conflicts through Mediation in Kenya.* (Glenwood Publishers Ltd, Nairobi, 2012), Chap.2, pp. 20-37.
[2] Muigua, K., *Resolving Conflicts through Mediation in Kenya.* (Glenwood Publishers Ltd, Nairobi, 2012), Chap.2, pp. 20-37, p.21.
[3]Cobbah, J.A.M., "African Values and the Human Rights Debate: An African Perspective", *Human Rights Quarterly*, Vol. 9, No. 3 (Aug., 1987), pp. 309-331 at p.315.

the African customs and practices were allowed to continue 'only if they were not repugnant to justice and morality'.[4]

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

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

ADR and TDR mechanisms are now formally recognized in the Constitution of Kenya and provided for under various statutes.[5] This has led to increased application of these mechanisms by courts and tribunals, amongst other informal forums. The Judiciary has also since launched and rolled out the Court Annexed Mediation Project to especially deal with commercial and family matters.[6] Therefore, it is expected that a good number of disputes that used to end up in court will be managed using these mechanisms.[7] Courts have a constitutional obligation to promote their utilisation whether within the formal framework, that is, court-annexed ADR, or as informal mechanisms as envisaged in the various constitutional provisions.[8]

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

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

[6] Cf. Muigua, K., Court Sanctioned Mediation in Kenya-An Appraisal, available at *http://www.kmco.co.ke/attachments/article/152/Court%20Sanctioned%20Mediation%20in%20Kenya-An%20Appraisal-By%20Kariuki%20Muigua.pdf* .

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

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

Alongside this is the fact that in the last few years, ADR practice has emerged as an area of specialisation with both lawyers and non-lawyers becoming ADR practitioners. Thus, seeking to cash in on the consequently increased demand for trained practitioners, ADR centres have been set up to offer training and continuing professional development courses for the trained.[9] This paper grapples with the question as to whether or not ADR and TDR practice should formally be regulated. It examines various arguments by writers and practitioners who believe that ADR, just like lawyers in the court process, should be regulated by an overall body or at least under a centralized policy framework. On the other hand, there are those who believe that ADR practice should be left within the ambit of private regulation by private bodies. This debate is far from being finalised and the discourse herein thus explores only a number of related issues.

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

3. To Regulate or Not to Regulate?

Regulation of ADR is a subject wrought with contentious discourse. There are those who strongly advocate for ADR to be deregulated, while others argue for strong state regulation. On one end, the legislation of ADR carries with it the advantages of encouraging its adoption nationally; establishing standards of ADR practitioner's competence; developing systems of compliance and complaints; [10] addressing weaknesses of ADR such as ensuring the fairness of the procedure and building capacity and coherence of the ADR field. Proponents of regulation have argued that regulation of ADR will increase the use and demand of services and create or enhance an ADR "market".[11]
There are those who believe that the regulation of ADR may have its value in assuring that the parties employ qualified, neutral and skilled mediators and arbitrators in resolving a wide variety of disputes.[12] However, this is countered by the argument that in mediation

[9] See generally, Muigua, K., "Heralding A New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya", Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 1, No 1, (2013), pp. 43-78.
[10]Syme, D. & Bryson, D., 'A Framework for ADR Standards: Questions and Answers on NADRAC's Report,' *The ADR Bulletin*, Vol. 4, No. 1.
[11]Robert, J.M., 'Florida's Experience with Dispute Resolution Regulation: Too much of a Good Thing?' *Florida Conflict Resolution Consortium,* available at
http://consensus.fsu.edu/ADR/PDFS/FloridaADR.pdf [Accessed on 10/21/2015].
[12] Zack AM, 'The Regulation of ADR : A Silent Presence at the Collective Bargaining Table,' p.4, *Seventh Annual Conference of the ABA Dispute Resolution Section Los Angeles*, California, April 15, 2005, available at

where the parties select private non-government mediators, monitoring is complimented by the fact that the parties share in the compensation of such neutrals, better assuring their freedom from bias.[13]

This assertion may be relevant to Kenya considering that private mediators are also appointed and compensated the same way. It is therefore possible to argue that the mediator may be compelled by this fact to act fairly. Contention would, however, arise where there are allegations of corruption. It is not clear, at least in Kenya, how the parties would deal with the same. This is because, unlike in arbitration where parties may seek court's intervention in setting aside the otherwise binding arbitral award, mediation award is non-binding and wholly relies on the goodwill of the parties to respect the same. Therefore, faced with the risk of corruption and the potential non-acceptance of the outcome by the parties, it is arguable that the foregoing argument of the compensation being a sufficient incentive may not be satisfactory.

This may, arguably, call for better mechanisms of safeguarding the parties' interests. In arbitration, the argument advanced is that whether of interests or rights disputes, the same process of joint selection and joint funding coupled with mutual selection of neutral from a tried and experienced cadre of professional arbitrators further assures their independence and neutrality, with protection of their integrity as their only ticket to future designations.[14] Again, the issue of independent practitioners would arise. For instance, in Kenya, there has been increased number of professionals taking up ADR. Professional bodies and higher institutions of learning have increased their rate of teaching ADR, as professional course and academic course respectively.

The net effect of this will be increased number of ADR practitioners in the country. As part of professional development, not all of those who get the academic qualifications may enroll with the local institutions for certification as practitioners. There are also those who may obtain foreign qualifications and later seek such certification. However, there are those who are not affiliated to any institution or body. In such instances, it would only be hoped that they would conduct themselves in a professional manner, bearing in mind that any misconduct or unfair conduct may lead to setting aside of the award or even removal as an arbitrator by the High Court. The court process obviously comes with extra costs and it would probably have been more effective to have a supervisory body or institution to report the unscrupulous practitioner for action, without necessarily involving the court. Such instances may thus justify the need for formal regulation, especially for the more formal mechanisms.

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http://www.law.harvard.edu/programs/lwp/people/staffPapers/zack/The%20Regulation%20of%20ADR-ABA%207th%20conference.pdf [Accessed on 1/12/2015].

[13] Ibid.

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

Currently, there are attempts to make referral to ADR mandatory in Kenya. This is especially evidenced by the gazetted *Mediation (Pilot Project) Rules, 2015,* which provide that every civil action instituted in court after commencement of these Rules, must be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable and may be referred to mediation.[15] Thus, there is no choice as to whether one may submit the matters voluntarily or otherwise. While this may promote the use of mediation where the parties are generally satisfied with the outcome, the opposite may also be true. Caution ought to be exercised in balancing the need for facilitating expeditious access to justice through ADR and retaining the positive aspects of the processes. For instance, in other jurisdictions where there is provision for mandatory promotion of ADR processes, the use of those processes has not necessarily become common.[16] Among the reasons given for this reluctance towards the adoption of ADR include lack of education and training in the field, lack of court-connected programs, whether voluntary or mandated and insufficient legislation.[17] The argument is thus made that when introducing ADR for the first time, there may be a need for some element of compulsion or legislative control, as this can support its growth.[18] This is the path that the Kenyan Judiciary has taken.

The Judiciary mediation programme is on a trial basis and the outcome will inform future framework or direction. The pilot program (having been rolled out to other stations outside Nairobi in May 2018) will define how the practitioners as well as the general public perceive court-annexed mediation and ADR in general. It is therefore important that the concerned drivers of this project use the opportunity to promote educational programming, with the efforts including workshops and seminars among the local practicing lawyers to enhance their understanding of ADR and the services provided by the pilot project.[19] This, it is argued, may enable them to assist their clients in making informed decisions about whether or not to use ADR.[20]

On the other end, it has been argued that legislative regulation, no matter how well meaning, inevitably limits and restrains.[21] The regulation of ADR is feared to hamper its

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[15] *Mediation (Pilot Project) Rules, 2015*, Rule 4(1).
[16] Leon, J.A.R, 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model', *Journal of Dispute Resolution*, Vol. 5, No. 2, (2005).
[17] Ibid.
[18] NADRAC, 'Legislating Alternative Dispute Resolution: A guide for government policy-makers and legal drafters,' (November, 2006), Commonwealth of Australia, p. 14.
[19] Leon, J.A.R, 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model', op cit, p. 414.
[20] Ibid, p. 414.
[21]Bryan, K. & Weinstein, M., 'The Case against Misdirected Regulation of ADR,' *Dispute Resolution Magazine*, (Spring, 2013).

advantages.[22] The developing country's experience with court-annexed ADR indicates that when a judge imposes a conciliator or mediator on the parties, it does not provide the proper incentive for the parties to be candid about the case.[23] ADR advantages such as low cost, procedural flexibility, enhanced access for marginalized groups and a predictable forum for conflict management tend to disappear when there is discretionary power with court personnel, procedural formalities within the ADR process or an artificial limit to competition within the ADR market.[24]

Court mandated mediation has been argued to negate the fundamental aspects of voluntariness and party control that distinguish it from litigation, the very aspects attributed to its success in a vast number of cases.[25] In addition, the "one size fits all" approach taken by legislation that encourages or requires all to use ADR, without regard to needs in various contexts and to the distinctions among the various processes, is another reason why ADR legislation should be undertaken with caution.[26] For instance, in the Kenyan situation, while the *Mediation (Pilot Project) Rules, 2015* require screening of civil matters for possible submission for mediation, it is possible for the Registrar to realise that some of the cases may be appropriate for arbitration instead of mediation. The programme only takes care of mediation process with no reference to arbitration or any other process, well, apart from litigation. The question that would, therefore, arise is whether the Registrar has powers to force parties into arbitration as well. Further, if they have such powers, the next question would be who would pay for the process, bearing in mind that it is potentially cost-effective but may be expensive as well. On the other hand, if the Registrar lacks such powers, it is also a question worth addressing what the Court would do if it ordered the parties to resort to arbitration but both parties fail to do so due to such factors as costs.

It is, therefore, worth considering whether the Mediation Accreditation Committee, established under the Civil Procedure Act[27], should have its mandate expanded to deal

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

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

[24] Ibid.

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

[26] See Syme, D. & Bryson, D., 'A Framework for ADR Standards: Questions and Answers on NADRAC's Report,' *op cit.*

[27] S. 59A, S.59B, Cap 21, Laws of Kenya.

with all processes, or whether there should be set up another body to deal with the other processes.

4. A Case for a Multi-Layered Approach

It has been argued that 'deregulation' does not in fact refer to the absolute lack of regulation, but rather the lack or removal of one particular type of regulation which is legislation. In real sense, deregulation or market regulation is regulated by market forces, in which competition results in private regulation or self-regulation.[28]

According to some proponents, the benefits of industry self-regulation are apparent: speed, flexibility, sensitivity to market circumstances and lower costs.[29] It is argued that because standard setting and identification of breaches are the responsibility of practitioners with detailed knowledge of the industry, this will arguably lead to more practicable standards, more effectively policed.[30] Yet, in practice, say critics, self-regulation often fails to fulfill its theoretical promise, more commonly serving the industry rather than the public interest.[31] Self-regulation refers to the mechanisms used by companies or organisations, both individually and in conjunction with others, to raise and maintain standards of corporate conduct.[32]

Contemporary best practice models recommend a combination of private and public mechanisms with a high level of responsiveness to needs, interests and change in regulated markets. Experts further suggest that reflexive and responsive processes –often associated with self-regulatory approaches and even formal framework approaches – encourage performance beyond compliance.[33] It has been argued that participation in ADR should be compulsory only where there is appropriate assessment of whether the dispute is suitable to be referred to ADR and where appropriate professional standards are maintained and enforced.[34] Currently, the main practice in Kenya is that majority of

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

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

[30] Ibid.

[31] Ibid.

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

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

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

ADR practitioners are regulated by their respective accrediting professional bodies. While there exists institutional rules for the various institutions in the country, statutory law, such as Arbitration Act, 1995, has provisions that are meant to regulate some of the critical issues such as confidentiality, ethics, enforceability of awards or outcomes of ADR mechanisms. It is, however, important to point out that while the court plays a significant role in upholding professional ethics of ADR practitioners, especially mediators and arbitrators, the same is limited in effectiveness. This is because the statutory provision on the court's power to remove an arbitrator on grounds of misconduct is vague on what exactly entails misconduct. This is where institutional rules or statutory regulations would come in handy to clearly spell out the code of ethics. For the practitioners that are affiliated to institutions, reference can be made to the institutional rules. A challenge arises when the ADR practitioners in questions are independent practitioners. This may therefore require a multi-layered approach to regulation, where we should have private regulation coupled with statutory regulation to ensure that there are gaps.

5. Processes or type of ADR

With regard to legislating the definition and scope of ADR processes[35], Kenyan lawmakers should take much caution. While legislating ADR terms would come with the advantage of clarity and consistency, it would also result in lack of flexibility in the ADR processes. It is, however, on the foundation of consistent terminology that obligations and protections can be mandated by law.

Article 159(2) (c) of the Constitution of Kenya makes mention of reconciliation, mediation, arbitration and traditional justice systems.[36] The Civil Procedure Act[37], which provides for court-mandated mediation, defines mediation as 'an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto.'[38] Notably, the Mediation (Pilot Project) Rules, 2015 also adopt this definition.[39]

The Act also provides for the referral of matters to other Alternative Dispute Resolution mechanisms where the parties decide or the court sees it suitable,[40] only making reference to arbitration in a separate section.[41] It conspicuously does not define ADR, nor does it give the list of mechanisms which would fall under its umbrella. Although, this broad

[35] See Muigua, K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 1, (2017), pp. 74-104.
[36]Constitution of Kenya, 2010, S. 159(2) (c).
[37] Cap 21, Laws of Kenya.
[38]Civil Procedure Act, Chapter 21, Section 59B &D & S. 2.
[39] Rule 3, Mediation (Pilot Project) Rules, 2015.
[40] Ibid, S. 59C.
[41] Ibid, S. 59.

provision covers under it a number of terms, policy makers would do well to specifically set out these mechanisms, as this is the foundation of the regulation of ADR such as setting standards for ADR practitioners.

Using consistent terms serves important functions.[42] First, it ensures those who use, or are referred to conflict management services receive consistent and accurate information and have realistic and accurate expectations about the processes they are undertaking. This will enhance their confidence in, and acceptance of, conflict management services. Secondly, it helps courts and other referrers to match processes to specific disputes and different parties. Better matching improves outcomes from these processes. Thirdly, it helps service providers and practitioners to develop consistent and comparable standards. Such understanding also underpins contractual obligations and the effective handling of complaints about conflict management services. Fourthly, it provides a basis for policy and program development, data collection and evaluation. The flipside to outlining an exhaustive list would however be that some of the TDR mechanisms, that the policy makers would be unaware of, risk being left out and consequently be undermined.

It is important to also be aware of the diverse contexts in which ADR is used. Thus, definition or outlining an exhaustive list may impede access to justice through locking out some useful yet unlisted mechanisms. National Alternative Dispute Resolution Advisory Council (NADRAC) in Australia, advocates for the 'description' of terms as opposed to their definition, as this sets out the contexts in which such terms are used as opposed to their essential features.[43] This may be useful in contemplating every possible ADR and TDR mechanism as recognised settings. It is imperative to point out that the Constitution of Kenya recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.[44] Further, it requires the State to, *inter alia*, promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage.[45]

In traditional settings, some of the conflict management mechanisms could be classified as forms of cultural expressions. For instance, the mechanisms they used include, kinship systems, joking relations, third party approach, consensus approach, *riika* (age-sets) social groups, women/men elders and blood brotherhood.[46] Caution should, therefore, be

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[42] See Leon, J.A.R, 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model,' *Journal of Dispute Resolution*, op cit.
[43] NADRAC, 'Legislating Alternative Dispute Resolution: A guide for government policy-makers and legal drafters,' (Commonwealth of Australia, November, 2006).
[44] Art. 11(1).
[45] Art. 11(2).
[46] See Muigua, K., *Resolving Conflicts through Mediation in Kenya*, (Glenwood Publishers, 2012), pp. 30-37.

exercised while approaching the issue of definition to ensure that such mechanisms are given a chance. Courts ought to appreciate the fact that culture has a role to play in conflict management. Indeed, the 2010 Constitution of Kenya recognises culture as the foundation of the nation and as cumulative civilisation of the Kenyan people and nation.[47] Further, one of the principles of land policy is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.[48] It is therefore imperative that in matters that affect a whole community or even individuals, but with a bearing on cultural factors, courts should take into consideration such factors.

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

6. Referral of disputes to ADR

Law makers need to decide which method of ADR referral should be employed. Referral may be compulsory by a court or voluntary, where parties are at will to decide whether to submit their dispute to an ADR forum. It may also be mandatory or at the discretion of the referrer, as contemplated in the Mediation (Pilot Project) Rules, 2015. The Civil Procedure Act provides for discretionary compulsory referral as well as voluntary referral.[49]

Where there is compulsory participation, it is important that there be established professional standards for the process as well as for the practitioners, to ensure a quality process and a quality outcome. These processes also need to be described so as effectively promote public confidence.

It is noteworthy that one of the main reasons why most of the ADR mechanisms are popular and preferred to litigation are their relative party autonomy which makes parties gain and retain control over the process and the outcome. It is therefore important for the court to ensure that there is no foreseeable factor that may interfere with this autonomy as it may defeat the main purpose of engaging in these processes.

One of the constitutional requirements with regard to access to justice in Kenya is that the State should ensure that cost should not impede access to justice and, if any fee is required, the same should be reasonable. It is, therefore, important that even where persons use private means of accessing justice, the cost should be reasonable. This is especially where there was no prior agreement to engage in ADR. One of the advantages of ADR mechanisms is that the outcome is flexible and parties can settle on outcomes that

[47] Art. 11.
[48] Art. 60 (1) (g).
[49] See Leon, J.A.R, 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model,' *Journal of Dispute Resolution*, op cit.

satisfactorily address their needs. This should not be lost as it would affect parties' ability and willingness to participate in such processes.

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

7. Obligations of parties to participate in ADR

Compulsory participation in ADR is highly opposed by those in favour of voluntary participation in ADR who argue that conciliation or mediation is essentially a consensual process that requires the co-operation and consent of the parties.[50] On the other hand, those who argue in favour of compulsory participation in ADR respond that if the dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, then even the most fundamental resistance to compromise can turn to co-operation and consent.[51]

The element of 'good faith' which is usually present in voluntary ADR is not assured in compulsory ADR, leading states and courts to give rules requiring parties to participate in ADR in good faith or 'in a meaningful manner.'[52] Courts also sanction parties for violations of a good-faith-participation requirement such as for failing to attend or participate in an ADR process or engaging in a pattern of obstructive, abusive, or dilatory tactics.[53] Sanctions include the shifting of costs and attorney's fees, contempt, denial of trial de novo, and even dismissal of the lawsuit.[54] Law makers should thus have regard to what conduct constitutes good conduct, a system of handling claims of bad faith, maintenance of the confidentiality of the process even as such case of bad faith is before the court and the effects of non-compliance with the good faith participation requirement.[55]

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

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

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

[53] English, R.P., 'Annotation, Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in Mediation' op cit.

[54] Ibid.

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

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

8. Standards and Accreditation of ADR practitioners

It has been argued that development of standards of practitioners will ensure much greater accountability of practitioners. Sociologists argue that professionals perform better "on stage" (in public) than they do "off stage" (in private) and this has consequences for issues of integrity in arbitration.[56] It is argued that documented standards would also provide a source of information to enable consumers to know what to expect of an ADR practitioner, a basis for choosing a particular type of ADR, and an 'industry norm' against which to measure the performance of the practitioner.[57] They would also improve the public awareness of ADR.

These standards may be provided by either professional groups or by the government. The standards of conduct of individual professional groups are still the primary source of regulation in most states. Codes of professional conduct tailored to mediation and ADR have been issued by various professional organizations.[58]

It is argued that as governments are increasingly legislating to require parties to attend ADR, such as in the litigation context, they need to be accountable for the competence of practitioners performing these services.[59] Legislative instruments that provide for compulsory submission of a dispute to ADR should thus also provide minimum standards of conduct for the practitioners. The provision of standards will also go towards boosting the public's confidence in ADR, as parties need to have confidence that the quality of the ADR service will meet the standards of professionalism. Knowledge of how the practitioner's standards are met through training and accreditation, as well as a complaints mechanism will also boost public awareness and public confidence.[60]

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

[57] National ADR Advisory Council (NADRAC), 'The Development of Standards for ADR: Discussion Paper' (March, 2000).

[58] Feerick, J., et al, 'Standards of Professional Conduct in Alternative Dispute Resolution,' *Journal of Dispute Resolution*, 1995.

[59] See English, R.P., 'Annotation, Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in Mediation' op cit.

[60] See Leon, J.A.R, 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model', Journal of Dispute Resolution, (2005), p. 50; see also Deane, P., et al, 'Making Mediation Mainstream: A User/Customer Perspective,' (International Mediation Institute, 2010). Available at *https://imimediation.org/private/downloads/A_W2d3vlh6edvLHjbTa0Kw/making-mediation-*

Standards may, however, in detailing the structure of ADR, restrain creative ways of solving disputes, and with ADR being applicable in a variety of contexts, standards may not be applicable in all the available contexts.[61] Standards should be formulated with the objective of ensuring a fair ADR process, protecting the consumer, establishing public confidence and building capacity in the field. Issues to consider when setting out the duties and standards of ADR practitioners include: how the practitioner is to be selected, the role of the practitioner, impartiality, conflicts of interest, competence, confidentiality, the quality of the process, the termination of the ADR process, recording settlement, publicity, advertising and fees.[62]

It has been suggested that rather than establishing a single body to accredit each mediator individually, a system is required to accredit organisations which in turn accredit mediators. In order for these organisations to be approved, they would need to develop common standards for initial assessment, as well as ongoing monitoring, review and disciplinary processes for mediator.[63]

The downside to this kind of approach would be the risk of locking out those who acquire their skills and expertise outside this jurisdiction as it would not be clear if they would need to compulsorily become members of local organisations for accreditation. For mediation, there is already in place Mediation Accreditation Committee but for the other mechanisms it is not clear how such an approach would be implemented as there exists no body at the moment. This also risks leaving out the informal experts who may be lacking in the required 'professional' qualifications to qualify to join such bodies. This requires careful consideration by the concerned stakeholders.

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

Confidentiality is central to ADR as it allow parties to freely engage in candid, informal discussions of their interests to reach the best possible settlement of their dispute.[64] The parties to the dispute and the neutral third party have a duty to maintain such confidentiality, with the neutral being held to a higher standard of non-disclosure. The neutral has a duty not to disclose to a third party, as well as not to disclose to the other

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mainstream-1-article.pdf [Accessed on 10/12/2015]; De Palo, G., et al, ''Rebooting' The Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU,' (European Union, 2014).

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

[62] Ibid, p. 19; See also National ADR Advisory Council (NADRAC), *A Framework for ADR Standards: Report t o t h e Commonwealth Attorney-General*, (Commonwealth of Australia, April, 2001)

[63] Ibid, p. 62.

[64] Interagency ADR Working Group Steering Committee, 'Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators' (April 2006).

party what has been told to him by a party in private. The question that law makers should consider is whether confidentiality should be mandated by statute, and what sanctions will be employed when breach occurs.[65] They should also consider the circumstances under which an exception to confidentiality lies.[66] Limitations of confidentiality arise in a variety of instances: by consent of the parties; where mandated by law; where a crime is committed or a threat is made to commit such crime.[67]

10. Confidentiality Issues

Inadmissibility is intertwined with the issue of confidentiality of communications during ADR. This is an approach taken to protect the confidentiality of the ADR process, by statutory provision that evidence of matters in an ADR proceeding is inadmissible in later court proceedings.[68] This issue also includes the compellability of ADR practitioners to give evidence before subsequent court proceedings.[69] The mediation (Pilot Project) Rules, 2015 also recognises the importance of this and provides that all communication during mediation including the mediator's notes are to be deemed to be confidential and shall not be admissible in evidence in any current or subsequent litigation or proceedings.[70]

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

11. Conclusion

The Government policy is to encourage ADR to foster a more conciliatory approach to conflict management. It can also be important that parties have a choice to use an effective

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[65]Leon, J.A.R, 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model', Journal of Dispute Resolution, (2005), p. 73.

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

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

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

[69] Ibid, p. 64.

[70] Rule 12(1).

ADR process.[71] This overcomes the risk that parties will fail to suggest ADR from fear they will appear weak to the other party.[72] However, there are limitations to the use of formal law in regulating ADR. ADR is practiced in diverse contexts and a single law is unlikely to be able to address all these areas. This explains the widespread use of sector-specific legislation in other jurisdictions, which have deliberately chosen not to enact comprehensive general national ADR legislation.[73]

The inadequacy of the common law to govern ADR in Kenya is plain. It has been rightly observed that the objective of dispute resolution in many non-Western traditions typically is not the ascertainment of legal rights and the allocation of blame and entitlement, as it is in the West; the objective is a resolution, and hopefully a reconciliation, whatever the result.[74] The western concept of contract implies rights and obligations, whereas ADR and TDR have the object of preserving the relationship of the parties, and are thus inconsistent. Furthermore, TDR is practiced in the context of society while contract law is based on an individualistic western culture, which does not uphold the same values. Parties engaging in TDR are unlikely to have fulfilled the elements compounding a contract, such as offer, acceptance, consideration etc. There is thus a need for legislative governance of these informal systems.

Policy-makers should recognise the desirability of enabling diversity, flexibility and dynamism in conflict management practices and processes. They should also have in mind that ADR processes cannot be viewed in isolation. Party autonomy allows the parties to craft a hybrid process, linking different techniques and processes to meet their contextual need. They thus need to be viewed in the larger ADR context.[75] In drafting legislation, provision should thus be made for parties to retain some autonomy.

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

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

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

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

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

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

Looking into the Future: Making Kenya a Preferred Seat for International Arbitration

Abstract

With the ever increasing globalisation and international trade and investments, territorial boundaries have increasingly become irrelevant as far as businesses are concerned. However, with the ever present commercial disputes, international arbitration has continued to play a critical role in their management. Developing countries have been working hard to position themselves to tap into the economic benefits that come with the practice of international arbitration. This paper offers an analysis of the prospects and challenges of international arbitration practice in Kenya and what the country can do to sell itself as the preferred seat and venue for international arbitration.

1. Introduction

Some authors have rightly argued that international arbitration has undergone a self-sustaining process of institutional evolution that has steadily enhanced arbitral authority.[1] It has undergone both judicialization and delocalization. Delocalization, that is, detachment from national procedural and substantive law of the place of arbitration, or any other national law, and underlines the principle of party autonomy as the guiding idea pertaining to the process of delocalization,[2] also recognises the choice of parties for the seat of arbitration, which defines the law that will govern the arbitration; it is about which courts have supervisory power over your arbitration and the scope of those powers.[3]

This judicialization process, it has been observed, was sustained by the explosion of trade and investment, which generated a steady stream of high stakes disputes, and the efforts of elite arbitrators and the major centres to construct arbitration as a viable substitute for litigation in domestic courts.[4] In addition, state officials (as legislators and treaty makers), and national judges (as enforcers of arbitral awards), have not just adapted to the expansion of arbitration; they have heavily invested in it, extending the arbitral order's

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[1] Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) <*https://hal-univ-paris10.archives-ouvertes.fr/hal-01647263*> accessed 1 August 2020.

[2] Dejan Janićijević, 'Delocalization in International Commercial Arbitration' (2005) 3 Facta Universitatis - Law and Politics 63.

[3] 'The Seat of Arbitration Is Important. It's That Simple.' (*Kluwer Arbitration Blog*, 10 June 2018) <*http://arbitrationblog.kluwerarbitration.com/2018/06/10/seat-arbitration-important-simple/*> accessed 1 August 2020.

[4] Ibid; See also Dimitropoulos, Georgios. "Constructing the independence of international investment arbitrators: past, present and future." *Nw. J. Int'l L. & Bus.* 36 (2016): 371; Sweet, Alec Stone, and Florian Grisel. "The Evolution of International Arbitration: Delegation, Judicialization, Governance." *Studies* 31 (1999): 147-184; Stromberg, Winston. "Avoiding the full court press: International commercial arbitration and other global alternative dispute resolution processes." *Loy. LAL Rev.* 40 (2006): 1337.

reach and effectiveness.[5] It is against this background that many states around the world have been working on the domestic legal and institutional frameworks geared towards enhancing the practice of international arbitration within their jurisdictions. This paper critically discusses Kenya's preparedness for the ever-growing field of international arbitration practice. The author discusses the existing challenges but also offers some recommendations on how the country can position itself to tap into this field of international dispute settlement.

2. The Place of International Arbitration in Global Economy: Prospects and Challenges

Over the past century, international arbitration has grown to become an autonomous legal order.[6] It has been growing in its importance especially in settling international disputes within the international commercial circles. Globalization has led to an influx of international contracts, and the resultant increased complex commercial disputes.[7] These have been instrumental in the development of international arbitration as the preferred choice of businessmen for the settlement of their disputes.[8] They have further led to a denationalization of arbitration, both procedurally and substantively, as well as to a convergence of national legislation and institutional rules, based on a consensus on a greater liberalization of the process.[9] It has also been documented that the forces of globalization have also opened the door to the application by arbitral tribunals of general principles of international commercial law, common to all nations, and have contributed to the development of an international arbitration culture.[10]

There is however a group that feels that international arbitration has also come with its fair share of challenges. There is an increased concern over its judicialization, its time and

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[5] Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) <https://hal-univ-paris10.archives-ouvertes.fr/hal-01647263> accessed 1 August 2020.

[6] Ibid; See also Gaillard, Emmanuel. "International Arbitration as a Transnational System of Justice." In *Arbitration – The Next Fifty Years (ICCA Congress Series 16). Kluwer Law International*, pp. 66-73. 2012.

[7] Bernard Hanotiau, 'International Arbitration in a Global Economy: The Challenges of the Future' [2010] 2010 Herbert Smith Freehills-SMU Arbitration Lecture Series <*https://ink.library.smu.edu.sg/hsmith_lect/2*> accessed 1 August 2020.

[8] Ibid; 'The Globalization of International Arbitration' (*Global Arbitration News*, 13 June 2017) <*https://globalarbitrationnews.com/the-globalization-of-international-arbitration/*> accessed 1 August 2020.

[9] Ibid; Katherine Lynch and Katherine L Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* (Kluwer Law International BV 2003).

[10] Bernard Hanotiau, 'International Arbitration in a Global Economy: The Challenges of the Future' [2010] 2010 Herbert Smith Freehills-SMU Arbitration Lecture Series <*https://ink.library.smu.edu.sg/hsmith_lect/2*> accessed 1 August 2020; 'The Globalization of International Arbitration' (*Global Arbitration News*, 13 June 2017) <*https://globalarbitrationnews.com/the-globalization-of-international-arbitration/*> accessed 1 August 2020.

cost efficiency and various ethical issues.[11] Some feel that the mechanism of international arbitration has lost a stronghold in the global justice arena despite its continuous growth, and a consensus among scholars, businesses, and parties across the world is also mounting that the mechanism has completely lost feasibility.[12] It has been argued that generally argued that international arbitration has lost its complete efficiency and seen to be equating with litigation-based mechanisms, where parties' ultimate goals are no longer realized and justified as the ends of international arbitration.[13]

It has been noted that even as the debate on the pros and cons of international arbitration ranges on, there are those who view it as a developed versus developing world issue. One author has rightly pointed out that the success story has been relatively regionally celebrated given that some regions like Africa, Latin America, as well as Asia, except the Asian Pacific, are still grappling with how to mainstream and take their share of global international arbitration growth.[14]

Despite these challenges, it is not in question that both developed and developing countries have actively promoted international arbitration practice as the best option for settling global disputes, and have manifestly substantiated their efforts by massively embracing pro-arbitration laws or statutes, as well as ratifying key international and regional arbitration legal instruments.[15] Most African countries, including Kenya, may be said to be at this stage where they are still trying to make their jurisdictions attractive to business community and international arbitration practitioners.

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[11] Ibid; See also Gu, Weixia. "Looking at Arbitration through a Comparative Lens: General Principles and Specific Issues." *The Journal of Comparative Law* 13, no. 2 (2018): 164-188.

[12] Nwedu, Cosmos Nike, 'Spotlight on International Arbitration: A Study of Emerging Trends and Challenges to Its Practice' *YB on Int'l Arb.* 6 (2019): 23 <*https://www.researchgate.net/publication/332104324_Spotlight_on_international_arbitration_A_study_of_emerging_trends_and_challenges_to_its_practice*> accessed 4 August 2020; Seen, Things Not. "Achieving Access to Justice through ADR: Fact or Fiction?." *https://www.fordham.edu/download/downloads/id/13894/law_review_colloquium_2019_cle_materials.pdf accessed 4 August 2020*.

[13] Ibid; ABA Journal, 'International Arbitration Loses Its Grip' (*ABA Journal*) <*https://www.abajournal.com/magazine/article/international_arbitration_loses_its_grip*> accessed 4 August 2020; Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3 Groningen Journal of International Law 110; William W Park, 'Arbitrators and Accuracy' (2010) 1 Journal of International Dispute Settlement 25.

[14] Ibid; International Bar Association, 'The Current State and Future of International Arbitration: Regional Perspectives,' IBA Arb 40 Subcommittee < www.ibanet.org › Document › Default> accessed 4 August 2020.

[15] Nwedu, Cosmos Nike, 'Spotlight on International Arbitration: A Study of Emerging Trends and Challenges to Its Practice' *YB on Int'l Arb.* 6 (2019): 26 <*https://www.researchgate.net/publication/332104324_Spotlight_on_international_arbitration_A_study_of_emerging_trends_and_challenges_to_its_practice*> accessed 4 August 2020; see also 'Commercial Arbitration in Africa: Present and Future | Herbert Smith Freehills | Global Law Firm' <*https://www.herbertsmithfreehills.com/latest-thinking/commercial-arbitration-in-africa-present-and-future*> accessed 4 August 2020.

3. Emerging Issues and Trends in International Arbitration

3.1 Costs and time efficiency

Some authors have argued that although individual parties and businesses traditionally believed that one of the advantages of international arbitration is costs and time efficiency, they have begun to realize clearly that this is not certainly true at all times.[16] It is well known within international arbitration practice that practitioners' hourly rates and venue charges are usually high especially for the well-established institutions.[17] Sometimes, parties spend hugely to have their disputes conducted, even paying higher than what they would have ordinarily spent in litigation, due to inordinate delays in the conduct of arbitral proceedings.[18] This has therefore raised doubt on the effectiveness of international arbitration as the preferred choice for management of commercial disputes.

3.2 Third party funding

In the last decade, the efficiency of arbitration has become a concern. Some of the arbitration advantages that have always been highlighted include the speed and the reduced costs of this alternative method of dispute resolution.[19] International arbitration, while potentially cost effective, can have its costs growing exponentially expensive. To arrest this situation, major players and practitioners have been coming up with creative means of financing the process. One such means is third party funding which is defined as an arrangement where someone who is not involved in arbitration provides funds to a party to that arbitration in exchange for an agreed return.[20] The third party funding or financing usually covers the funded party's legal fees and expenses incurred in the arbitration and the funder may also agree to pay the other side's costs and provide security for the opponent's costs if the funded party is so ordered.[21]

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[16] Nwedu, Cosmos Nike, 'Spotlight on International Arbitration: A Study of Emerging Trends and Challenges to Its Practice' *YB on Int'l Arb.* 6 (2019): 26 <*https://www.researchgate.net/publication/332104324_Spotlight_on_international_arbitration_A_study_of_emerging_trends_and_challenges_to_its_practice*> accessed 2 August 2020.

[17] Herbert Smith Freehills, 'Inside Arbitration Perspectives on Cross-Border Disputes,' Issue 3 February 2017; White &Case LLP, '2018 International Arbitration Survey: The Evolution of International Arbitration,' < *http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf* > accessed 2 August 2020.

[18] Nwedu, Cosmos Nike, 'Spotlight on International Arbitration: A Study of Emerging Trends and Challenges to Its Practice' *YB on Int'l Arb.* 6 (2019): 29 <*https://www.researchgate.net/publication/332104324_Spotlight_on_international_arbitration_A_study_of_emerging_trends_and_challenges_to_its_practice*> accessed 2 August 2020.

[19] Florescu, Cristina Ioana. "Emerging tools to attract and increase the use of international arbitration." *Juridical Tribune/Tribuna Juridica*, Jun2020, Vol. 10, Issue 2, p255-278.

[20] 'Third Party Funding in International Arbitration' <*https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/*> accessed 1 August 2020.

[21] Ibid.

While third party funding is not new, and was originally designed to support companies that did not have the means to pursue claims, its use has become a feature of the litigation landscape in several jurisdictions, including in international arbitration, where it has attracted the funders due to the high-value claims, perceived finality of awards, and the enforcement regime provided by the New York Convention.[22] Initially, the funding focused on investor-state arbitration, but now spreading to commercial international arbitration.[23]

While third party funding comes with some risks, it can also enhance access to justice for under-resourced parties (especially in investor–state disputes) enabling them to pursue proceedings which a lack of financing would otherwise have prevented.[24] On the other hand, for parties that are adequately resourced, funding can offer a more convenient financing structure, allowing capital which would otherwise be spent on legal fees to be allocated to other areas of their business during the proceedings.[25]

3.3 Changing Arbitration Rules

It has been reported that most of the major international arbitration institutions have been considering their arbitration rules as a way of embracing the emerging trends and practice in international arbitration. For instance, as at 2020, the rules of the London Court of International Arbitration (LCIA) were updated, with a particular focus on cybersecurity and data protection.[26] Also noteworthy is the fact that the International Centre for the Settlement of Investment Disputes (ICSID) has also refined its rules –a code of conduct for tribunal members, the need for transparency in third party funding, and a new advisory centre on investor-state dispute settlement, and addressing common criticisms of investor-state dispute settlement by addressing costs, the quality and consistency of decisions, and access to justice.[27]

4. The Practice of International Arbitration in Kenya: Prospects and Challenges

In the last few years, the setting up of legal and institutional frameworks specifically meant to promote the growth and practice of international arbitration in Kenya has picked up.

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[22] 'Third Party Funding in International Arbitration' <*https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/*> accessed 1 August 2020.

[23] Ibid.

[24] 'The Third-Party Funding Debate - We Look at the Risks | Global Law Firm | Norton Rose Fulbright' (*https://www.nortonrosefulbright.com/en/knowledge/publications/imported/2018/07/18/05*) <*https://www.nortonrosefulbright.com/en/knowledge/publications/6c843d32/the-third-party-funding-debate---we-look-at-the-risks*> accessed 1 August 2020.

[25] Ibid.

[26] 'International Arbitration: Current Trends and What to Expect In 2020 And the Years Ahead - Litigation, Mediation & Arbitration - Worldwide' <*https://www.mondaq.com/uk/arbitration-dispute-resolution/880988/international-arbitration-current-trends-and-what-to-expect-in-2020-and-the-years-ahead*> accessed 1 August 2020.

[27] Ibid.

The *Nairobi Centre for International Arbitration Act*[28] establishes the Nairobi Centre for International Arbitration (NCIA) whose functions include, inter alia, to promote, facilitate and encourage the conduct of international commercial arbitration in accordance with the Act; to administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; to ensure that arbitration is reserved as the dispute resolution process of choice; and, to develop rules encompassing conciliation and mediation processes.[29] NCIA is administered by a Board of Directors as provided for under the Act.[30] There is also an Arbitral Court established under the Act, which court has exclusive original and appellate jurisdiction to hear matters that are referred to it under the Act.[31]

Its capacity to handle domestic and international arbitration requires to be constantly improved, and it can only be hoped that this potential will be exploited to its maximum in the years to come so as to prominently place Kenya on the global map of international arbitration. Despite the efforts by stakeholders in Alternative Dispute Resolution (ADR) and especially arbitration to invest in making Kenya a more receptive destination for international arbitration, the country still faces a number of challenges that have slowed down the progress. These include: real or perceived national courts interference; perception of corruption/ government interference; inadequate marketing of the country; inadequate capacity of existing institutions; and endless court proceedings, among others.[32]

5. Making Kenya a Preferred Seat for International Arbitration

5.1 Enhanced Capacity

Kenya has qualified and experienced arbitrators who are arbitrating commercial disputes around Africa. Indeed, following the revival of the East African Community and the expansion of regional trade, the possibility of Nairobi becoming a regional centre for arbitration is very high. Therefore, the prospects of international commercial arbitration in Kenya are really promising. However, with the changing trends at the global scene, there is a need for the practitioners and the judges to stay abreast with what is happening. In addition, with the international commercial arbitration taking root in Kenya in recent

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[28] *Nairobi Centre for International Arbitration Act*, No. 26 of 2013, Laws of Kenya (Government Printer, Nairobi, 2013).

[29] Ibid, Sec. 5 (a)-(d).

[30] Ibid, Sec.6.

[31] Ibid, Sec.21.

[32] Muigua, K., *Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya,* Arbitration workshop for EAC region 24th-25th May 2013. Available at *http://www.kmco.co.ke/index.php/publications.*

years and the ever increasing institutional capacity, there is a need to equip students and practitioners with the basic knowledge in their quest for expertise in the area.[33]

5.2 Marketing and Arbi-Tourism

The stakeholders in arbitration sector in the country can utilise arbi-tourism to market Kenya as a preferred seat and venue for international arbitration. Arbi-tourism (arbitration tourism) may be defined as the promotion of arbitration alongside tourism.[34] Kenya is known globally for its tourism sector and thus, the stakeholders in the arbitration and dispute resolution sector should make use of this fame. While marketing Kenya as a tourist destination, there is a need for the ADR stakeholders to consider working with the ministry of tourism and all other relevant ministries to market Kenya as a friendly seat and venue for international arbitration. This could be done by providing incentives in terms of subsidized hotel and park rates for those who are in the country for international arbitration. The relevant government and private stakeholders should also take advantage of international conferences and seminar forums to market the country as a friendly and viable seat and venue for international arbitration.

5.3 Security

Over the last several years, Kenya has had an unprecedented level of insecurity from both internal and external forces such as the Somali Islamist group, al-Shabaab.[35] This has negatively affected the image of Kenya as a safe destination for tourism and business due to this increased insecurity.[36] While the government has done much in improving security over the years, the perception that the larger horn of Africa is insecure still affects Kenya's rating. If effort towards marketing Kenya as a preferred seat and venue for international arbitration are to bear fruits, then there is a need for the stakeholders in the security department to work closely with other regional leaders to eradicate the insecurity or the perception for the same since security is paramount for both local practitioners and the foreign ones, together with their clients.

5.4 Adherence to the Rule of law

The Constitution of Kenya, 2010 provides under Article 259(1) that the Constitution should be interpreted in a manner that: promotes its purposes, values and principles;

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[33] See Muigua, K., *Settling Disputes through Arbitration in Kenya,* 3rd Ed., Glenwood Publishers, Nairobi, 2017.

[34] See Muigua, K., 'Promoting International Commercial Arbitration in Africa,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 2, (2017), pp. 1-27, p. 13.

[35] Atta-Asamoah, A. "The nature and drivers of insecurity in Kenya." *East Africa Report* 2 (2015) < *https://www.files.ethz.ch/isn/190658/East-Africa-Report-2-Kenya.pdf* > accessed 1 August 2020.

[36] 'Tourism Activity, Terrorism and Political Instability within the Commonwealth: The Cases of Fiji and Kenya | Request PDF' <*https://www.researchgate.net/publication/227843064_Tourism_activity_terrorism_and_political_instability_within_the_Commonwealth_The_cases_of_Fiji_and_Kenya*> accessed 1 August 2020.

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.

While international arbitration has developed over the years to stand as a transnational legal order, its outcomes still heavily rely on national courts and laws in conservatory orders as well as recognition and enforcement of arbitral awards. There is thus a need for continued reforms and fidelity to the rule of law in the country so as to win the confidence of investors as well as practitioners who may wish to designate Kenya as their preferred seat and venue for arbitration but would otherwise be wary of the status of respect for rule of law in the country.

5.5 Supportive Institutional Framework and Informed Judges

International arbitration is an important component of the right of access to justice especially in commercial disputes. There have been efforts over the years to ensure that the legal and institutional framework on access to justice in Kenya achieves that: fulfilment of the right of access to justice. Notably, this right comes with several components as a means to an end.[37] In the case of *Dry Associates Limited v Capital Markets Authority & Another; Interested Party Crown Berger (K) Ltd*[38], the High Court outlined some of the components of access to justice as follows: *[110] "Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay."*

Further, in *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* [2012] eKLR, the Court affirmed that "*the right of access to justice protected by the Constitution involves the right of ordinary citizens being able to access remedies and relief from the Courts.* The Supreme Court also elaborated on the confines of access to justice in the case of *Francis Karioko Muruatetu & another v Republic*[39], in the following words: [57] *Thus, with regard to access to justice and fair hearing, the State through the courts, ensures that all persons are able to ventilate their disputes. Access to justice includes the right to a fair trial. If a trial is unfair, one cannot be said to have accessed justice. In this respect, when a murder convict's sentence cannot be reviewed by a higher court, he is denied access to justice which cannot be justified in light of Article 48 of the Constitution.*

[37] See generally, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya,* Glenwood Publishers, Nairobi, 2015.

[38] *Dry Associates Limited v Capital Markets Authority & Another; Interested Party Crown Berger (K) Ltd*, High Court Constitutional Petition No.328 of 2011 [2012] eKLR.

[39] *Francis Karioko Muruatetu & another v Republic*, SC Petition No. 15 of 2015; [2017] eKLR.

The effect of court intervention on arbitral proceedings depends on three critical factors, namely the provisions of the law on court intervention, the general policy and attitude of the court towards its role in arbitration and finally, the approach of lawyers and their clients on court intervention.[40]

The legal provisions on court intervention are mainly found in the Arbitration Act, 1995 and the Arbitration Rules thereunder, the Civil Procedure Act[41] and the Civil Procedure Rules 2010[42]. There are chances of conflict of rules and uncertainty in the laws on court intervention especially because of the fact that there is no one-stop source of law on the matter. However, all the instances of court intervention provided for in the legal framework as demonstrated above are justified and necessary. For instance, stay of proceedings applications are meant to give effect to the arbitration agreement where one party has filed a suit in court in breach of the agreement.

The interim measures of protection before arbitration, offer an opportunity for a party to an arbitration agreement to take measures to maintain the *status quo* of the subject matter of the intended arbitration. This is clearly an appreciation of the reality that reference to arbitration does not happen overnight.[43]

The court intervention measures during arbitration as provided for under the law are similarly based on demonstrable logic and rationalization. The provisions on court involvement in the appointment of the arbitral tribunal offer a default measure where the parties' efforts to pursue the agreed modes of appointment have hit a dead end. On its part, the opportunity to challenge arbitrators/the arbitral tribunal, just like the opportunity to challenge the bench in civil proceedings, is meant to ensure that justice is not only done but seen to be done.[44]

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[40] Muigua, K., *Settling Disputes through Arbitration in Kenya,* 3rd Ed., Glenwood Publishers, Nairobi, 2017, Chapter Ten; See also Lew, Julian DM. "Does national court involvement undermine the international arbitration process." *Am. U. Int'l L. Rev.* 24 (2008): 489; Allahhi, Nahal. "The Optimization of Court Involvement in International Commercial Arbitration." PhD diss., University of Manchester, 2016.

[41] See Sec. 59 of the Civil Procedure Act Chapter 21, which provides that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules.

[42] Ibid, see generally Order 46 of the Civil Procedure Rules 2010.

[43] Alison Jean Louis v Rama Homes Limited [2020] eKLR, Miscellaneous Application E235 of 2019; Coast Apparel Epz Limited v Mtwapa Epz Limited & another [2017] eKLR, Commercial Suit 12 of 2017; Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010; '10 – Provisional Measures In International Arbitration |' <*https://lawexplores.com/10-provisional-measures-in-international-arbitration/*> accessed 7 August 2020.

[44] Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010; Muigua, K., *Settling Disputes through Arbitration in Kenya,* 3rd Ed., Glenwood Publishers, Nairobi, 2017, Chapter Ten.

It also avoids the likelihood of the disgruntled party opting to later challenge the arbitral award on grounds he could have raised as preliminary matters as that would imply extra expenses and delay in holding fresh arbitration proceedings if the challenge succeeds.[45] It is universally accepted that jurisdiction is everything[46] and a party should thus not be compelled to put up with an award of a tribunal whose jurisdiction he would rather challenge, whether on the basis of substance or procedure. This is the basis for the provisions on challenging the jurisdiction of the arbitral tribunal.[47]

The court is also afforded an opportunity to facilitate and aid the arbitration especially in matters that, as an emanation of a private arrangement, the arbitral tribunal cannot undertake and or purport to compel. The opportunities for limited court intervention after the award are even more justified and necessary. The need to set aside arbitral awards that visit manifest injustices on a party cannot be admitted to debate.[48] In the same breath, arbitral awards, being a result of private contractual arrangements, cannot attain immediate force of law until they are adopted by the court. The court, being the custodian of public policy in Kenya, cannot reasonably be expected to perform a mere rubber-stamping role.[49] The High Court is thus afforded an opportunity to scrutinise the arbitral award. No doubt this also helps secure the party, adversely affected by the arbitral award, a right to be heard in the interest of natural justice.[50]

But while the instances of court intervention are rationally justified, the provisions relating to them are far from being perfect and unambiguous. For instance, the provisions on stay of proceedings are beset with unnecessary conditions that even a well-meaning court is

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[45]Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010.

[46] Nyarangi, JA in *Owners' of the Motor Vessel "Lillian S"-v-Caltex Oil Kenya Ltd*. [1989] KLR 1.

[47]Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010; Muigua, K., *Settling Disputes through Arbitration in Kenya,* 3rd Ed., Glenwood Publishers, Nairobi, 2017, Chapter Ten; Barraclough, Andrew, and Jeff Waincymer. "Mandatory rules of law in international commercial arbitration." *Melbourne Journal of International Law* 6, no. 2 (2005): 205-245.

[48] See the decisions of the Kenyan courts in Kenyatta International Convention Center v Congress Rental South Africa [2020] eKLR, Civil Application 231 of 2018; Manyota Limited v Muranga University College [2020] eKLR, Miscelaneous Application E132 of 2019; Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR, Petition No. 2 of 2017; Synergy Industrial Credit Limited v Cape Holdings Limited [2020] eKLR, Civil Appeal No. 81 Of 2016; Nyutu Agrovet Limited v Airtel Networks Kenya Limited;Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR, Petition No. 12 of 2016.

[49] Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010.

[50] Prakash Pillai and Umer Chaudhry, 'The Singapore Approach to Scrutiny of Arbitral Awards' (*Kluwer Arbitration Blog*, 24 December 2014) <*http://arbitrationblog.kluwerarbitration.com/2014/12/24/the-singapore-approach-to-scrutiny-of-arbitral-awards/*> accessed 7 August 2020; Brady, Daniel. "Review of arbitral awards for breach of natural justice: an internationalist approach." (2013) < *https://core.ac.uk/download/pdf/41338459.pdf*> accessed 7 August 2020.

disadvantaged in expediting the application especially when the Plaintiff is not receptive.[51] For instance, there is nothing that a judge can do when an application for stay of proceedings is inadvertently lodged a day after entry of appearance except to dismiss it.[52] In such an instance, there is no room for equity when the law is strict in its stipulations.[53] The uncertainty of the arbitration law on the issue of setting aside arbitral awards even within the allowed timelines has given rise to a myriad of constitutional applications in arbitration proceedings.[54]

With regard to the court's approach to intervention in arbitration, the same has considerably changed from indifference to a perception of the process as being facilitative of arbitration. The sentiments of the court of appeal in the *Epco Builders Limited-v-Adam S. Marjan-Arbitrator & Another,*[55] and *Kenya Shell Limited v Kobil Petroleum Limited*[56] are indicative of this change of heart. The courts now see arbitration as an opportunity to wrestle the backlog of cases and yield justice on the parties' terms. If such a positive attitude could be coupled with the necessary reforms as proposed herein, much ground would be covered in making court intervention a friend, rather than a foe, of arbitration.

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51 Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010; MITS Electrical Company Limited v Mitsubishi Electric Coporation [2018] eKLR, Civil Suit 132 of 2016; Darius Chan, 'Stay of Proceedings in Favour of Arbitration under the Court's Inherent Jurisdiction' (*Kluwer Arbitration Blog*, 15 August 2012) <*http://arbitrationblog.kluwerarbitration.com/2012/08/15/stay-of-proceedings-in-favour-of-arbitration-under-the-courts-inherent-jurisdiction/*> accessed 7 August 2020.

52 Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010; Eunice Soko Mlagui versus Suresh Parmar& 4 others [2017] eKLR; Adrec Limited versus Nation Media Group Limited [2017] eKLR; Mt. Kenya University v Step Up Holding (K) Ltd [2018] eKLR, Civil Appeal 186 of 2013.

53 See court's decision in *Manyota Limited v Muranga University College [2020] eKLR, Miscelaneous Application E132 of 2019*, where the High Court at Nairobi stated as follows:

> *From the authorities it is clear that the Court can only deal with Arbitration matters as encapsulated by the Arbitration Act. The Court's jurisdiction is limited by* ***Section 10 of Arbitration Act*** *that prescribes that the Court's intervention is/can only be to the extent provided by the Act.* ***Section 35(3) Arbitration Act*** *does not employ an opportunity for the Court to exercise discretion and extend the period to file an application to set aside the Arbitral award beyond the statutory 3 months from the date of receipt of the Award. The cited authority of* ***Anne Hinga case supra*** *ousts the application of* ***Civil Procedure Act & Rules 2010*** *as the* ***Arbitration Act*** *is a complete Code.*

54 See Alison Jean Louis v Rama Homes Limited [2020] eKLR, Miscellaneous Application E235 of 2019; See also Kenyatta International Convention Center v Congress Rental South Africa [2020] eKLR, Civil Application 231 of 2018; Manyota Limited v Muranga University College [2020] eKLR, Miscelaneous Application E132 of 2019; Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR, Petition No. 2 of 2017; Synergy Industrial Credit Limited v Cape Holdings Limited [2020] eKLR, Civil Appeal No. 81 Of 2016; Nyutu Agrovet Limited v Airtel Networks Kenya Limited;Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR, Petition No. 12 of 2016.

55 *Epco Builders Limited-v-Adam S. Marjan-Arbitrator & Another,* Civil Appeal No. 248 of 2005 (unreported).

56 *Kenya Shell Limited v Kobil Petroleum Limited*, Civil Appeal (Nairobi) No. 57 of 2006.

Courts have also continually demonstrated their commitment to upholding arbitration awards and making their recognition and enforcement in the country as easy as possible. This was recently affirmed in the case of *Kenya Bureau of Standards v Geo-Chem Middle East [2017] eKLR*[57] where Ochieng, J. stated as follows:

> *39. As regards the finding that the Kenya Bureau of Standards was liable for the payments to Geo-chem, that is a decision on the merits of the case. It is not the function nor the mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the court was called upon to determine whether or not to set aside an award.*
> *40. If the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue.*
> *41. In the light of the Public Policy in Kenya, which loudly pronounces the intention of giving finality to Arbitral Awards, it would actually be against the said public policy to have the court sit on an appeal over the decision of the arbitral tribunal.*
> *42. When the court is called upon to decide whether or not to set aside an arbitral award, issues such as the justice, morality and fairness do not come into play, unless they were so perceived within the confines of Section 35 of the Arbitration Act.*
> *43.The court cannot set aside an arbitral award on the grounds that it was unfair, unreasonable or non-feasible.*
> *…..*
> *54. Regrettably, this court does not have authority to make an assessment on the merits of the arbitral award. The jurisdiction of the High Court, when called upon to set aside an award, is limited to what is permissible pursuant to Section 35 of the Arbitration Act.*
> *55. Any other intervention by the Court is expressly prohibited by Section 10 of the Act; and I therefore decline the invitation to ascertain if there were any contradictions in the various aspects of the decision made by the arbitral tribunal.*

In the above matter, the Respondent filed an appeal to the Court of Appeal in *Civil Appeal No. 259 of 2018*. The Court of Appeal, in allowing the appeal and setting aside the ruling of the High Court held *inter alia*; that the reference and the subsequent constitution of the arbitral tribunal was done outside the time limits prescribed in the contract. The appellate Court further held that the issues determined by the arbitral tribunal fell outside its scope pursuant to Section 35(2)(iv) of the Arbitration Act and that the award which imposed a liability on the Respondent, a state corporation, to pay from public funds over Kshs.1Billion without proof of liability was against public policy. The decision was appealed to the Supreme Court which pronounced itself as follows:

> *[48] In the premises, we have no option but to hold that the Judgment of the Court of Appeal, to the extent to which it purported to interrogate the merits of an arbitral award, in the absence of the High Court's pronouncement on the same, was rendered in excess of*

[57] Kenya Bureau of Standards v Geo-Chem Middle East [2017] eKLR, Miscellaneous Cause 455 of 2016.

jurisdiction. This means that even if we had found that we had jurisdiction to decide the appeal on its merits, this jurisdictional conundrum would have stopped us in our tracks.

[49] In conclusion, having declined to delve into the merits of the Court of Appeal Judgment for the reasons stated, and having also found that the Appellate Court prematurely, and in excess of its jurisdiction, sat on an appeal that was not ripe, instead of remitting the same to the High Court for determination, what course of action is open to us? To answer this question, we must first address the issue as to whether the leave that triggered these proceedings in the first place, ought to have been granted. Or put another way, had the application for leave to appeal been made after the delivery of Nyutu and Synergy, would such leave have been likely granted by the Court of Appeal? It is to this question that we must now turn.

[50] Towards this end, we have already made two critical observations, firstly, that in granting leave on 31st May 2018, the Court of Appeal did not interrogate the substance of the intended appeal and whether it fell within the said Section (read, Section 35 of the Arbitration Act). Secondly, that in granting leave, the Court of Appeal appeared to suggest or must be taken to have been suggesting that such appeals were open-ended. At that time there were two divergent schools of thought at Court of Appeal; the one which argued that appeals lay to the Court from decisions of the High Court and the other which was categorical that no such appeals could lie to the Court. And then came our decisions in Nyutu and Synergy of which we shall say no more, save that the window to appeal is severely restricted.

[51] The applicable law is now settled regarding the vexed question as to whether an appeal lies or not, under Section 35 of the Arbitration Act and if so, under what circumstances. We appreciate the fact that at the time leave was granted, the Supreme Court was yet to pronounce itself on the issue. However, the law as enunciated must now henceforth be the yardstick for granting or refusing to grant leave to appeal in such matters. After our pronouncements in Nyutu and Synergy, it is not possible that the Court of Appeal can grant leave to appeal from a Section 35 Judgment of the High Court without interrogating the substance of the intended appeal, to determine whether, on the basis of our pronouncement, such an appeal lies. A general grant of leave to appeal would not suffice. Yet this is exactly what happened in the instant case before us.

[52] In conclusion, having declined to delve into the merits of the substantive Judgment of the Court of Appeal for the reasons stated, and having further determined that the said Judgment was nonetheless rendered in excess of jurisdiction, and finally having determined that the initial leave to appeal was granted without interrogating the substance of the intended appeal, the only course of action open to us is to maintain the Ruling of the High Court.

In the highlighted cases of Synergy[58] and Nyutu, the Supreme Court had been called upon to decide the fate of parties' right to appeal the decision of the High Court made under section 35 of the Arbitration Act, Kenya, on recognition and enforcement of arbitral

[58] Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR, Petition No. 2 of 2017.

awards. In Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR at the Supreme Court, the majority held as follows:

> *[90] In the circumstances, various questions would necessarily arise; would a Judgment that leaves a party in such a precarious position be said to create confidence in the administration of justice" Would the principle of minimal courts' intervention in arbitration matters supersede the need to correct an injustice" Our position is that where allegations of such manifest unfairness have been made, they should not be left incapable of a higher Court's review. And it is on that basis that, we hold that in this case, the Court of Appeal should have assumed jurisdiction to hear the Petitioner's appeal arising from the decision of the High Court under Section 35 of the Arbitration Act limited to the relevant consideration expressed above.*
>
> *[91] As we conclude on this issue, we affirm that arbitration should and ought to drastically reduce courts' intervention and in this regard, we find favour in the words of the Court of Appeal in CGU (supra) where it stated that: "the Courts will not permit the residual jurisdiction, which exists to ensure that injustice is avoided, to become itself an unfair instrument for subverting statute and undermining the process of arbitration." These words ring true if we are to protect the integrity of the arbitration process. But in this case, as we have shown, justice must be done and that necessitates that the Court of Appeal ought to relook at the decision of the High Court in the manner we have explained above.*

The dissenting opinion of Justice D.K. Maraga, CJ & P was as follows:

> [146] Taking all these factors into account and given its wording, *I find no warrant whatsoever to imply that the silence in Section 35 of the Kenyan Arbitration Act should be understood as a tacit right of appeal against a decision made thereunder*.
>
> [147] Following the shift it made with the repeal of Arbitration Act of 1968 and the enactment of the Arbitration Act of 1995, Kenya would backpedal if the appellant's argument that Article 164(3) ipso facto grants both the jurisdiction and right of appeal against all High Court decisions, including those made in arbitral proceedings, is accepted. That would also jettison out of the window the principle of finality in arbitral proceedings.
>
> [149] Because the Kenyan Arbitration Act of 1995 puts emphasis on the concept of finality in arbitration and the above stated public policy to promote arbitration as encapsulated in Article 159(2)(c), save as stated in the Arbitration Act, awards should be impervious to court intervention as a matter of public policy. Unwarranted judicial review of arbitral proceedings will simply defeat the object of the Arbitration Act. The role of courts should therefore be merely facilitative otherwise excessive judicial interference with awards will not only be a paralyzing

blow to the healthy functioning of arbitration in this country but will also be a clear negation of the legislative intent of the Arbitration Act.

[150] In commercial transactions, disputes are often about money, and more often than not, large sums of money. "[A]nd where money is concerned there are not many good losers…." In an adversarial system as ours, to open unwarranted doors to court intervention in arbitral proceedings, as the Singaporean Court of Appeal observed in the said case of *AKN & Another v. ALC and Others* and other appeals (supra) "*through the ingenuity of counsel," we shall have appeals on literally all issues "disguised and presented as … challenge[s] to process failures during the arbitration*." And we know what that means: arbitral awards or decisions on them shall be subject to court challenges on every issue. Arbitration will therefore be an extra cog in the gears of access to justice through litigation or "a precursor to litigation." By the time the court determines the issue, the matter will have dragged in court for years. Arbitrations will thus prolong dispute resolution and be self-defeating. In such a scenario, it would be more efficacious to abandon arbitration altogether and litigate all disputes in courts of law.

[151] As stated, timelines in the performance of contracts and speed in the disposal of disputes are the hallmarks of the current competitive commercial environment. The importance of arbitration as an ADR mechanism cannot be over-emphasized. "Parties enter into arbitration agreements for the very reason that they do not want their disputes to end up in court." The common thread that runs through most arbitration statutes based on the UNCITRAL Model Law is the restriction of court intervention except where necessary and in line with the provisions of the Acts of various jurisdictions.

[152] Kenya's boasting as the arbitration centre in the East African region cannot hold if Kenyan courts do not reflect on the effect of their decisions in arbitral proceedings. The words of Andrew P. Tuck, in his treatise, The Finality Question: Appellate Rights and Review of Arbitral Awards in the Americas are particularly apposite with regard to the appellate jurisdiction in arbitral proceedings. He observes that in the selection of the seat of arbitration, parties often pay regard to, inter alia, the right of appeal and judicial review in that jurisdiction; and also finality of an arbitral award and whether the jurisdiction is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This is because, in his view, which I share, the rights of appeal and review;
"*can seriously frustrate the advantages of international arbitration … over the vicissitudes and uncertainties of international business litigation*."

[153] And as Christa Roodt, in her article titled Reflections on finality in arbitration, warned, "If a state's judicial institutions fail to accord respect for rights established

> under international law, their judicial decisions cannot demand pluralist respect." In other words if decisions of Kenyan courts disregard established principles of international arbitration law, Kenya will be shunned as both an investment destination and a seat of arbitration. In the words of Nyamu J. (as he then was) in Prof. Lawrence Gumbe & Anor v. Hon. Mwai Kibaki & Others[37], that will reduce Kenya into "a pariah state" and cause it to "be isolated internationally".
>
> [154] In the circumstances, all0wing appeals where the Arbitration Act states otherwise would in my view, as stated, turn arbitration into "a precursor to litigation." The Kenyan courts must therefore, "as a matter of public interest"[39], interpret the provisions of the Arbitration Act in a manner that seeks to promote and embellish arbitration, rather than emasculate and thus render it redundant. As the United States' Second Circuit of the Court of Appeal stated in Parsons Whittemore Overseas Co Inc v. Société Générale de l'Industrie du Papier (RAKTA),
>
> "By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights … [including the appellate process] in favor of arbitration with all of its well-known advantages and drawbacks"
>
> [156] The dispute in this matter has been raging for over 10 years. That alone is clear testimony of the danger we will be exposing arbitration to in this country if we allow unwarranted court intervention. Failure to adhere to the prescriptions in the Arbitration Act will hinder investment, as foreign firms and their agents will not be assured of an expeditious clear-cut dispute resolution mechanism in line with international standards.
>
> [157] Given the history of the practice of arbitration in this country and the clear and unambiguous wording of Section 10 of the Kenyan arbitration Act, we would, in my humble view be amending the Arbitration Act if we allow appeals from High Court decisions on Section 35 which, as the explanatory notes by the UNCITRAL Secretariat state was intended to be final.

While the dissenting opinion holds valid points regarding the subject at hand, the Synergy matter had to be referred back to the Court of Appeal under *Synergy Industrial Credit Limited v Cape Holdings Limited [2020] eKLR*[59] where the Court of Appeal held as follows:

> *Where the terms of the arbitral agreement are clear and unrestricted, it is not open to the court to look for and impose its own strictures and restrictions on the arbitral agreement. If the parties wished to restrict the arbitration to only the written agreements, we would*

[59] Synergy Industrial Credit Limited v Cape Holdings Limited [2020] eKLR, Civil Appeal No. 81 of 2016.

> *have expected them to state so expressly in the arbitral agreement itself. Furthermore, a look at how the learned judge dealt with the question leaves no doubt in our minds that he did not confine himself to the real question, namely the terms of the arbitral agreement, but instead went into a determination that amounts to saying the arbitral award was erroneous under the law of contract.*
>
> *This was tantamount to undertaking a merit review of the arbitral award, based on consideration of provisions of the written agreements far removed from the arbitral agreement itself, so as to reach a different finding from the arbitral tribunal, which we think the learned judge was not entitled to do.*

As for the Nyutu case[60], the Supreme Court was called upon to address itself to a Ruling of the Court of Appeal which had dismissed an appeal against the decision of the High Court in Nyutu Agrovet Ltd v Airtel Network Kenya Ltd Nairobi H.C.C.C. No. 350 of 2009, where the Court of Appeal in its Ruling had found that there is no right of appeal to that Court following a decision made under Section 35 of the Arbitration Act 1995 (the Act), and so struck out the entire appeal to it.

At the High Court, Airtel had filed an application under Section 35 of the Act seeking to set aside the award in its entirety Kimondo J, in *Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd* (supra), had to decide inter alia whether the arbitral award had dealt with a dispute not contemplated by the parties; whether it had dealt with a dispute outside the terms of reference to arbitration and whether the said award was in conflict with public policy. The entire arbitral award was then set aside purely on the ground that the award contained decisions on matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties and for other reasons and deliberations contained in the learned Judge's Ruling.

The Supreme Court had to deal with, inter alia, the following issues for determination: Whether Sections 10 and 35 of the Act contravene a party's right to access justice under Articles 48, 50(1) and 164(3) of the Constitution and are therefore unconstitutional to that extent; and Whether there is a right of appeal to the Court of Appeal following a decision by the High Court under Section 35 of the Arbitration Act.

The Supreme Court pronounced itself as follows:

> *[69] The above comparative review thus shows circumstances where a decision challenging an award may be appealable. With regard to jurisdictions that grant leave to appeal, Courts have held that leave to appeal may be granted where there is unfairness or misconduct in the decision making process and in order to protect the integrity of the judicial process. In*

[60] Nyutu Agrovet Limited v Airtel Networks Kenya Limited;Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR, Petition No. 12 of 2016.

addition, leave would be granted in order to prevent an injustice from occurring and to restore confidence in the process of administration of justice. In other cases, where the subject matter is very important as a result of the ensuing economic value or the legal principle at issue. An appeal may also arise when there is need to bring clarity to the law by settling conflicting decisions. However as cautioned by the Singapore Courts, an intervention by the Courts should not be used as an opportunity to delve into the merits of the arbitral award but rather that the intervention should be limited to the narrowly circumscribed instances for reviewing or setting aside an award.

[71] We have in that context found that the Arbitration Act and the UNCITRAL Model Law do not expressly bar further appeals to the Court of Appeal. We take the further view that from our analysis of the law and, the dictates of the Constitution 2010, Section 35 should be interpreted in a way that promotes its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. Thus our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under Section 35 of the Act for Orders of setting aside of the award. And hence the purpose of Section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would taint the process of arbitration. Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice. Therefore, whereas we acknowledge the need to shield arbitral proceedings from unnecessary Court intervention, we also acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions.

[72] Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in AKN and another (supra) that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the 'no Court intervention' principle.

[74] Whereas the above proposals are clearly progressive and well thought out, if adopted as they are, they may considerably broaden the scope of the exercise of the limited jurisdiction under consideration. As we have stated above, there has to be exceptional reasons why an appeal should be necessary in a matter arising from arbitration proceedings which by its very nature discourages court intervention. Thus, we do not think as suggested by the Interested Party that an issue of general public importance should necessarily deserve an appeal. This is because such an issue cannot be identified with precision because of its many underling dynamics. To that extent we reject that proposal.

> *[77] In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.*
>
> *[81] We have answered the question whether there is a right of appeal from the High Court to the Court of Appeal under Section 35 of the Arbitration Act but have delimited the circumstances under which the right can be exercised….*

Thus, the Supreme Court's position in the above matters is that the window to appeal is severely restricted.

The above decisions by the Supreme Court on the implication of appeals under Article 35 had come against the background of conflicting decisions from the Court of Appeal such in *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited Civil Application No. Nai. 302 of 2015;*

[2017] eKLR, where the Court of Appeal had rendered itself as follows:

> *"In our view, the fact that Section 35 of the Act is silent on whether such a decision is appealable to this Court by itself does not bar the right of appeal. The Section grants the High Court jurisdiction to intervene in arbitral proceedings wherein it is invoked. It follows therefore that the decision thereunder is appealable to this Court by virtue of the Constitution."*

This confusion was aptly captured by the Supreme Court in Nyutu case as follows:

> *[51] Thus, it is evident that there is no consensus by the Court of Appeal both before and after 2010 on how Section 35 should be interpreted. There is need therefore to properly interrogate the matter and establish why, unlike other provisions in the Arbitration Act, Section 35 does not specifically state that decisions of the High Court are final, and unlike Section 39, it does not also state that an aggrieved litigant may appeal to the Court of Appeal. We shall also need to understand the import of Section 10 of the Act and its relevance, if at all to the interpretation before us. A proper interpretation would also require a broader understanding of the principles of arbitration vis-a-vis the lingering powers of the Courts to intervene in arbitral proceedings. And finally, any interpretation adopted should not negate the fundamental purpose for which the Arbitration Act was enacted.*

There is also a need to curb lawyers and parties bent on abusing court intervention to clog the arbitration process. The problem with the adversarial system is that it often forces the court to stand aside and watch parties obviate each other's cause of action with all imaginable tricks like a lame duck. The few remedies fashioned to prevent abuse of court process do not offer much help, especially when lawyers get into the fray with their bagful of tricks. Soon, what was a simple issue is reduced into complex legal affair.[61] This was aptly captured in *Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR* at the Supreme Court, in the dissenting opinion of Justice D.K. Maraga, CJ & P as follows:

> [*150] In commercial transactions, disputes are often about money, and more often than not, large sums of money. "[A]nd where money is concerned there are not many good losers…." ***In an adversarial system as ours, to open unwarranted doors to court intervention in arbitral proceedings, as the Singaporean Court of Appeal observed in the said case of AKN & Another v. ALC and Others and other appeals (supra) "through the ingenuity of counsel," we shall have appeals on literally all issues "disguised and presented as … challenge[s] to process failures during the arbitration." And we know what that means: arbitral awards or decisions on them shall be subject to court challenges on every issue. Arbitration will therefore be an extra cog in the gears of access to justice through litigation or "a precursor to litigation."*** *By the time the court determines the issue, the matter will have dragged in court for years. Arbitrations will thus prolong dispute resolution and be self-defeating. In such a scenario, it would be more efficacious to abandon arbitration altogether and litigate all disputes in courts of law.*

Arbitration is part of the justice system in Kenya and the fates of each of the two are inseparably tied together and interdependent. The general duty of advocates as officers of the court needs to be addressed. So is counsel's allegiance and compliance to clients' whims. The two are matters belonging to the realm of professional ethics. Undoubtedly, they go to the training and orientation of the lawyers. Local law schools will do better to impress upon their students on the role of ADR and arbitration in general and the fact that the two are not 'mechanisms designed by non-legal professionals to drive legal practitioners out of business.' Also, professional organizations like Law Society of Kenya and the Chartered Institute of Arbitrators-Kenya branch need to continually and adequately orient their members on ADR and adopt specific policies for the members to follow when involved in litigation affecting arbitration through continuous professional training.

The foregoing discussion renders it clear that court intervention in Kenya cannot be dismissed as detrimental to the ideals of arbitration. No doubt, the role of the court so far

[61] Gaillard, Emmanuel. "Abuse of process in international arbitration." *ICSID Review-Foreign Investment Law Journal* 32, no. 1 (2017): 17-37.

exonerates it from being a foe of the arbitral process in Kenya.[62] As demonstrated by the decisions above, the confusion is slowly but surely being addressed by the courts in Kenya especially in relation to the perceived constrictions that are imposed by the provisions of the Arbitration Act.[63] Thus, there is need for continued reforms if the role of the court is to become facilitative of arbitration and to shake off such challenges as we have seen above which unnecessarily render arbitration inexpedient and cumbersome, thus discouraging parties especially those of foreign origin from picking Kenya as their preferred seat for international arbitration.

5.6 International Cooperation

As already pointed out, international arbitration developed over the years to achieve the status of a transnational legal order. As such, its development and continued acceptance heavily relies on cooperation amongst various states in both developing and developed world to recognise and enforce the outcome of international arbitration in their jurisdictions. There is therefore a need for Kenya work closely with other likeminded states in Africa and beyond in order to build its capacity and have a ready market for its institutions.

5.7 Finality

The question of finality of arbitral decisions in Kenya is one that has attracted a heated debate with a recent court case having gone all the way to the Supreme Court of Kenya. In *Nyutu Agrovet Limited v Airtel Networks Kenya Limited;Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR*[64], an appeal to the Supreme Court of Kenya from a Ruling of the Court of Appeal which had dismissed an appeal against the decision of the High Court in *Nyutu Agrovet Ltd v Airtel Network Kenya Ltd* Nairobi H.C.C.C. No.350 of 2009**.** The Court of Appeal in its Ruling had found that there is no right of appeal to that Court following a decision made under Section 35 of the Arbitration Act 1995 (the Act), and so struck out the entire appeal to it.

The High Court had set aside the entire arbitral award *purely on the ground that the award contained decisions on matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties and for other reasons and deliberations contained in*

[62] See Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR, Petition 12 of 2016; Alison Jean Louis v Rama Homes Limited [2020] eKLR, Miscellaneous Application E235 of 2019.

[63] See issues raised in Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR, Petition 12 of 2016; Synergy Industrial Credit Limited v Cape Holdings Limited [2020] eKLR, Civil Appeal No. 81 Of 2016. Notably, *Civil Appeal No.61 of 2012 (Nyutu) was referred back to the Court of Appeal in December, 2019 by the Supreme Court in Nyutu Agrovet Limited v Airtel Networks Kenya Limited;Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR to be determined on an expeditious basis.*

[64] Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR, Petition 12 of 2016.

the learned Judge's Ruling.[65] At the Court of Appeal level, the Court of Appeal unanimously held that the decision by the High Court made under Section 35 of the Act was final and no appeal lay to the Court of Appeal; thus striking out the appeal and awarding costs to Airtel.[66] The question for determination as framed by the Court of Appeal was whether there is any right of appeal to the Court of Appeal upon a determination by the High Court under Section 35 of the Act.[67]

The Supreme Court set out to address the following issues: whether Sections 10 and 35 of the Act contravene a party's right to access justice under Articles 48, 50(1) and 164(3) of the Constitution and are therefore unconstitutional to that extent; whether there is a right of appeal to the Court of Appeal following a decision by the High Court under Section 35 of the Arbitration Act; what are the appropriate reliefs; and who should bear the costs of the Appeal.[68]
While commenting on the finality of arbitral awards, the Supreme Court observed as follows:

> [52] We note in the above context that, the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the Court process. The Act was also formulated in line with internationally accepted principles and specifically the Model Law. With regard to the reason why some provisions of the Act speak to the finality of High Court decisions, the Hansard of the National Assembly during the debate on the Arbitration Act indicates that, "*the time limits and the finality of the High Court decision on some procedural matters [was] to ensure that neither party frustrates the arbitration process [thus] giving arbitration advantage over the usual judicial process.*" It was also reiterated that the limitation of the extent of the Courts' interference was to ensure an, "*expeditious and efficient way of handling commercial disputes.*"
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> [53] Similarly, the Model Law also advocates for "limiting and clearly defining Court involvement" in arbitration. This reasoning is informed by the fact that "*parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the "finality and expediency of the arbitral process.*" Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our Constitution in Article 159(2) (c) acknowledges the place of arbitration in dispute settlement and urges all Courts to promote it. However, the arbitration process is not absolutely immune from the Court process, hence the present conundrum.
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> **[54]** The Model Law indeed advises that all instances of courts intervention must be provided for in legislation. That is the explanation that the Model Law accords

[65] Para. 4.
[66] Para. 6.
[67] Para. 7.
[68] Para. 29.

to Article 5 which is in *pari materia* with Section 10 of the Act. The said Section 10 provides, ***"Except as provided in this Act, no Court shall intervene in matters governed by this Act."*** On the other hand, Article 5 provides, ***"In matters governed by this Law, no court shall intervene except where so provided in this Law."***

[55] In illuminating the meaning of Article 5, the explanatory notes of the Model Law provide that, beyond the instances specifically provided for in the law, no Court shall interfere in matters governed by it. That further, the main purpose of Article 5 is to ensure predictability and certainty of the arbitral process. That understanding is also discerned in the Court of Appeal decision of Singapore in the case of ***L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal*** [2012] SGCA 57 where the Court stated that:

"The effect of art 5 of the Model Law is to confine the power of the Court to intervene in an arbitration to those instances which are provided for in the Model Law and to 'exclude any general or residual powers' arising from sources other than the Model Law….The raison d'être of art 5 of the Model Law is not to promote hostility towards judicial intervention but to 'satisfy the need for certainty as to when court action is permissible'."

…. …. …. ….

[57] Thus, it is reasonable to conclude that just like Article 5, Section 10 of the Act was enacted, to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a Court may intervene. Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the Courts may be invoked. According to the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds.

[58] Having stated as above therefore we reject Nyutu's argument that Section 10 is unconstitutional to the extent that it can be interpreted to limit the Court of Appeal's jurisdiction to hear appeals arising from decisions of the High Court determined under Section 35 of the Act. We have shown that Section 10 is meant to ensure that a party will not invoke the jurisdiction of the Court unless the Act specifically provides for such intervention. With regard to Section 35, the kind of intervention contemplated is an application for setting aside an arbitral award only. However, Section 10 cannot be used to explain whether an appeal may lie against a decision of the High Court confirming or setting aside an award. This is because by the time an appeal is preferred, if at all, a Court (in this case the High Court) would have already assumed jurisdiction under Section 35 and made a determination therefore. Thus, by the High Court assuming jurisdiction under Section 35, it would conform to Section 10 by ensuring that the Court's intervention is only on instances that are specified by the Act and therefore predictability and certainty commended by Article 5 of the Model Law is assured. The question whether an appeal may lie against the decision of the High Court made under

Section 35 thus still remains unanswered because, just like Section 35, Section 10 does not answer that question.

The Supreme Court went on to affirm the need for limited court intervention by stating as follows:

> **[69]** The above comparative review thus shows circumstances where a decision challenging an award may be appealable. With regard to jurisdictions that grant leave to appeal, Courts have held that leave to appeal may be *granted where there is unfairness or misconduct in the decision making process and in order to protect the integrity of the judicial process*. In addition, leave would be granted in order *to prevent an injustice from occurring and to restore confidence in the process of administration of justice.* In other cases, *where the subject matter is very important as a result of the ensuing economic value or the legal principle at issue*. An appeal may also arise when there is need to bring clarity to the law by settling conflicting decisions. However as cautioned by the Singapore Courts, an intervention by the Courts should not be used as an opportunity to delve into the merits of the arbitral award but rather that the intervention should be limited to the narrowly circumscribed instances for reviewing or setting aside an award.
> [77] In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.
> [78] In stating as above, we reiterate that Courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice. The High Court and the Court of Appeal particularly have that onerous yet simple task. A leave mechanism as suggested by Kimondo J. and the Interested Party may well be the answer to the process by which frivolous, time wasting and opportunistic appeals may be nipped in the bud and thence bring arbitration proceedings to a swift end. We would expect the Legislature to heed this warning within its mandate.
> **[79]** Having held as above, does the case at hand justify the Court of Appeal's intervention" In answer to that question, it will be noted that the High Court (Kimondo J) set aside the arbitral award on the grounds *inter alia* that the award contained decisions on matters outside the distributorship agreement, the terms of

> the reference to arbitration or the contemplation of parties. In granting leave to appeal, the learned Judge washed his hands of the matter and left it to the Court of Appeal to determine the question of the right to appeal to that Court. It so determined hence the present Appeal.
>
> **[80]** The Court of Appeal, it is now clear, never determined the substantive complaint by Nyutu as to whether the learned Judge properly applied his mind to the grounds for setting aside an award under Section 35 of the Act. We have clarified the circumscribed jurisdiction of the Court of Appeal in that regard. Without a firm decision by the Court of Appeal on that issue, we cannot but direct that the matter be remitted back to that Court to determine whether the appeal before it meets the threshold explained in this Judgment or in the words of Kimondo J, the "*journey was a false start*".

In conclusion, the majority held as follows:

> [109] Consequent upon our findings above, we make the following orders:
>
> *(a) The Petition of Appeal dated 15th July 2016 is hereby allowed as prayed.*
>
> *(b) The Order of the Court of Appeal made on 6th March 2015 is hereby set aside in its entirety.*
>
> *(c) The Notice of Motion Application dated 3rd May 2012 in Civil Appeal No.61 of 2012 Nyutu Agrovet Limited v Airtel Networks Kenya Ltd. is hereby dismissed.*
>
> *(d) Civil Appeal No.61 of 2012 aforesaid shall be heard and determined by the Court of Appeal on an expeditious basis.*
>
> *(e) Each party shall bear its own costs***.**

However, it worth pointing out that in a dissenting opinion by Justice D.K. Maraga, CJ & P, the Chief Justice held as follows:

> **[104]** Arbitration does not deny access to the Courts. Courts are but one of the means of resolving societal dispute. The other modes of dispute resolution, as stated in Article 159(2)(c) include "*reconciliation, mediation, arbitration and traditional dispute resolution mechanisms*…." Every litigant has the right to choose which mode best serves his or her interests. As AM Gleen posited, "*Parties enter into arbitration agreements for the very reason that they do not want their disputes to end up in court*."[6] Once one has made that choice, one cannot be heard to claim that one's right of access to justice has been denied or limited. As the United States' Second Circuit of

the Court of Appeal also stated in ***Parsons Whittemore Overseas Co Inc v. Société*** *Générale de l'Industrie du Papier (RAKTA),*

"By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights … [including the appellate process] in favor of arbitration with all of its well-known advantages and drawbacks.'" [7]

[105] Finally, the appellant argued that the principle of finality in arbitrations applies only to an arbitration award itself and not to any Court proceedings founded on it. I do not think this is correct.
[106] One of the main objectives of preferring arbitration to Court litigation is the principle of finality associated with doctrine of *res judicata* that is deeply rooted in public international law. Section 32A captures this principle: "*Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it*…." Most parties, especially those engaged in commercial transactions, desire expeditious and absolute determinations of their disputes to enable them go on with their businesses.[8] They require a final and enforceable outcome. That is why the Section goes on to limit recourse "*against the award otherwise than in the manner provided by this Act*."

[107] In the circumstance, I concur with the respondent that, read together, Sections 10 and 35 of the Arbitration Act restrict judicial intervention in the arbitral process to expedite dispute resolution while maintaining the sanctity of the principle of finality in the entire arbitral process. If the principle of finality is limited to the arbitral awards only and not to any court proceedings founded on them as the appellant contended, then the objectives of arbitration would be defeated and arbitration will be "*a precursor to litigation*."[9] This is because any Court proceedings that render an award unenforceable affects the principle of finality.

[108] For these reasons, I would myself dismiss this appeal with no order as to costs. However, as the majority holds a contrary opinion, the final orders of the Court shall be as set out in their Judgment.

It is therefore worth noting that the Supreme Court did not decide the question as to whether parties have a right to appeal the decision of the High Court under section 35 of the Arbitration Act but instead it referred the question back to the Court of Appeal for determination. It however provided useful but progressive principles on what factors the Court of Appeal should consider in making such determination.

However, In the *Synergy Industrial appeal*, the Supreme Court of Kenya specifically stated:

> *"[86] For the avoidance of doubt, we hereby restate the principle that not every decision of the High Court under Section 35 is appealable to the Court of Appeal. It also follows therefore that an intended appeal, which is not anchored upon the four corners of Section 35 of the Arbitration Act, should not be admitted. In this regard, an intended appellant must demonstrate (or must be contending) that in arriving at its decision, the High Court went beyond the grounds set out in Section 35 of the Act for interfering with an Arbitral Award."*

It can therefore be safely be concluded that the Supreme Court (and more so Justice Maraga's dissenting opinion) in the *Nyutu case* and even more clearly in the *Synergy case* and *GEO Chem Middle East v Kenya Bureau of Standards [2020] eKLR* affirmed the finality of arbitral awards. However, it is also noteworthy that we would have to wait for the decision of the Court of Appeal in the Nyutu case as the final position of the Kenyan courts on the issue. What is however encouraging is the positive attitude this case demonstrates towards ensuring that the court's role and intervention is limited for purposes of promoting finality of arbitral processes, thus, promoting the growth and usage of arbitration in the country.

5.8 Easy Access and Travel to Kenya

One of the factors that make any country to lag behind in attracting international arbitration practitioners and parties' preference for a country as their preferred seat for their arbitration is difficulty in accessing the same physically, should they require traveling there. As recently as June 2020, it was reported that Government officials are in the process of finalising a free trade agreement (FTA) that, if signed, is set to ease the entry of established US companies into the local market.[69] If concluded, the reciprocal trade deal would grant the US government unfettered entry for its companies into nearly all segments of Kenya's economy including the heavily guarded ones.[70] While this may come with intended and unintended repercussions for the job market for Kenyans and local companies, the same is also likely to bring some work for the local arbitrators and institutions, if they are ready to grab the opportunity and well prepared for the same.

As for foreign parties that may not have their businesses running local subsidiaries, they can benefit from government to government agreements on either complete waiver of visas or convenient arrangements that might allow business persons entering the country to get their visas on arrival. Kenya is among the very few states in the world that offer visa exemption to quite a number of particular nationalities. Currently, the citizens of 43 states can travel to Kenya without a visa, only a passport is necessary to enter the country, and

[69] Wednesday, June 3 and 2020 0:01, 'America Seeks Easy Access in New Trade Pact with Kenya' (*Business Daily*) <*https://www.businessdailyafrica.com/economy/America-seeks-easy-access-in-new-trade-pact-with-Kenya/3946234-5569764-yvybkl/index.html*> accessed 4 August 2020.

[70] Ibid.

there's no need to get a Kenyan visa.[71] The only exceptions to this rule involve the citizens of Rwanda and Uganda, part of the East African Agreement, who can travel to Kenya only with their Identity Cards.[72] As a way of promoting Kenya as a preferred seat for international arbitration, Kenyan stakeholders in arbitration may consider approaching the Government for either visa free entry or specialized processes for visa processing for parties who choose to carry out their arbitration in the country or choose Kenya as their preferred seat and decide to visit the country for business.

5.9 Effective Supporting Institutions

As already mentioned elsewhere, Kenyan courts have shown a positive attitude towards ADR and arbitration and are willing to minimise court intervention as envisaged under the relevant laws. There is a need for ensuring that this continues and also ensuring that lawyers and judicial officers are not used by parties to frustrate the arbitration process. Only then will the practice of international arbitration in the country grow and attract international clientele. The Nairobi Centre for International Arbitration (NCIA) is commendably rising and making itself known for international arbitration and ADR.[73] There is a need for all stakeholders including the Government of Kenya, arbitration practitioners and learning institutions to support NCIA in its quest to compete competitively with the global international arbitration institutions.

5.10 Modern Arbitration Law

Arbitration matters in Kenya are mainly governed by the *Arbitration Act*[74] and the Rules therein. However, arbitration is also conducted under the *Civil Procedure Act*[75], which allows a suit to be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral.[76] The provision also provides that where an award is reached under the section and the same is entered as the court's judgement, no appeal shall lie against it. Further, Order 46 of the Civil Procedure Rules, 2010 provides for arbitration under order of a court and other alternative dispute resolution mechanisms. It provides that parties can apply to court to have a matter referred to arbitration.[77] It provides for the procedural guidelines therein. Section 59D of the Act

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[71] 'Kenya Visa-Free Countries-Can I Travel Just With My Passport?' <*https://www.ivisa.com/kenya-blog/kenya-visa-free-countries-can-i-travel-just-with-my-passport*> accessed 4 August 2020; 'Countries Whose Nationals Do Not Require a Visa to Kenya' < *http://www.kenyaembassy.nl/index.php/consular/country-information* > accessed 4 August 2020.

[72] Ibid.

[73] admin, 'Permanent Court of Arbitration Signed Cooperation Agreement with NCIA' (*Nairobi Centre for International Arbitration*, 18 March 2019) <*https://www.ncia.or.ke/court-arbitration/*> accessed 28 December 2020; 'CRCICA & NCIA MoU - Nairobi Centre for International Arbitration' <*https://www.ncia.or.ke/crcica-and-ncia-memorandum-of-understanding-mou/*> accessed 28 December 2020.

[74] Arbitration Act, 1995, No. 4 of 1995(Amended in 2009).

[75] Cap 21, Laws of Kenya.

[76] S.59C(1), Cap 21, Laws of Kenya

[77] R. 46, Civil Procedure Rules, 2010

further demonstrates the courts' supportive role in arbitration and ADR mechanisms in the pursuit of justice. It provides that *all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court*.[78]

The practice of arbitration in Kenya has also been enhanced through Article 159 of the Constitution of Kenya, 2010[79] which provides for promotion of alternative forms of dispute resolution as one of the guiding principles of the Kenyan courts while exercising judicial authority. These forms include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

The current law on Arbitration, *Arbitration Act,* repealed the colonial *Arbitration Ordinance of 1914* which was a replica of the English Arbitration Act of 1889. The Ordinance was later replaced by the now repealed *Arbitration Act*, Cap 49. These two Acts gave immense powers to courts with little or no regard to the parties' autonomy. *Arbitration Act*, Cap 49 was drafted along the English *Arbitration Act* of 1950. This was later repealed by the current *Arbitration Act*, Act No. 4 of 1995. This Act was substantially amended in 2009 in order to reflect the main principles of the UNCITRAL Model law to which Kenya is a signatory[80], amongst others, minimal court intervention in matters of arbitration.[81] Regarding the scope of the Act, section 2 thereof provides that except as otherwise provided in a particular case, the provisions of this Act shall apply to domestic arbitration and international arbitration. 'Arbitration' is defined under section 2 to mean any arbitration whether or not administered by a permanent arbitral institution.

As observed above, various jurisdictions and global arbitral institutions have been amending their rules and laws periodically in order to capture the new trends in the area of arbitration. There is thus a need for Kenya and the local institutions such as the Nairobi Centre for International Arbitration to ensure that their laws and rules are always up to date and reflect the global trends in the sector.[82] This is one of the ways of ensuring that they improve their marketability globally and attract not only investments but also practitioners and parties wishing to pick Kenya as their seat for international arbitration.

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[78] Section 59D, Cap 21, Laws of Kenya.

[79] Government Printer, Nairobi, 2010.

[80] Kenya acceded to the law in 1989 but with reservation on reciprocity.

[81] Section 10, Arbitration Act, No. 4 of 1995

[82] Norton Rose Fulbright, *International arbitration report*, Issue 11, October 2018 < *https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-review---issue-11.pdf?la=en-be&revision*=> accessed 7 August 2020; '6 Trends Will Shape Future International Commercial Disputes | Insights | DLA Piper Global Law Firm' (*DLA Piper*) <*https://www.dlapiper.com/en/us/insights/publications/2018/08/6-trends-will-shape-future-international-commercial-disputes/*> accessed 7 August 2020.

5.11 Enhanced Access to Internet and Cybersecurity

With the world becoming global village due to the advancement in technology, it is possible for parties to carry out their international arbitration proceedings from different parts of the world. Technology has also become a valued part of arbitration proceedings and has been embraced by all the major arbitral institutions across the world.[83] The corona virus pandemic has forced many professions to resort to the use of virtual forums to conduct meetings.[84] While Kenya has made considerable steps in enhancing access and the use of internet in the country, the same cannot be said to be satisfactory.[85] The country has also made some progress in putting in place cybersecurity law, a step towards enhancing trust for dispute resolvers and their clients.[86] There is however a need for the local arbitration practitioners and institutions to borrow a leaf from their international counterparts and invest in the appropriate software and hardware necessary for virtual arbitration.[87] Technology can save parties valuable time and resources and still achieve justice.

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[83] See Muigua, K. & Ombati, J., 'Achieving expeditious Justice: Harnessing Technology for Cost Effective International Commercial Arbitral Proceedings,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, 7(1):1-32, (April, 2019).

[84] Martha C White, 'For Conference Planners, Virus Means a "Huge Learning Curve"' *The New York Times* (18 May 2020) <*https://www.nytimes.com/2020/05/18/business/coronavirus-business-travel-conferences.html*> accessed 5 August 2020; 'COVID-19: How Companies Are Responding' (*World Economic Forum*) <*https://www.weforum.org/agenda/2020/03/how-are-companies-responding-to-the-coronavirus-crisis-d15bed6137/*> accessed 5 August 2020; 'Will the Coronavirus Make Online Education Go Viral?' (*Times Higher Education (THE)*, 12 March 2020) <*https://www.timeshighereducation.com/features/will-coronavirus-make-online-education-go-viral*> accessed 5 August 2020; Michael PriceApr. 28, 2020 and 4:20 Pm, 'As COVID-19 Forces Conferences Online, Scientists Discover Upsides of Virtual Format' (*Science | AAAS*, 28 April 2020) <*https://www.sciencemag.org/careers/2020/04/covid-19-forces-conferences-online-scientists-discover-upsides-virtual-format*> accessed 5 August 2020.

[85] Muigua, K., 'Virtual Arbitration Amidst Covid-19 : Efficacy and Checklist for Best Practices,' *A Discussion Paper for the Chartered Institute of Arbitrators Kenya Branch (CIArb-K) Webinar ADR Talk Series 8 held on 28th May 2020* < http://kmco.co.ke/wp-content/uploads/2020/05/Virtual-Arbitration-Proceedings-Amidst-COVID-19-Efficacy-and-Checklist-for-Best-Practices69523-Revised.pdf > accessed 5 August 2020; Muigua, K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice,' < http://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New-Frontiers-Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf > accessed 5 August 2020.

[86] Muigua, K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice,' < http://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New-Frontiers-Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf > accessed 5 August 2020.

[87] Muigua, K., 'Virtual Arbitration Amidst Covid-19 : Efficacy and Checklist for Best Practices,' *A Discussion Paper for the Chartered Institute of Arbitrators Kenya Branch (CIArb-K) Webinar ADR Talk Series 8 held on 28th May 2020* < http://kmco.co.ke/wp-content/uploads/2020/05/Virtual-Arbitration-Proceedings-Amidst-COVID-19-Efficacy-and-Checklist-for-Best-Practices69523-Revised.pdf > accessed 5 August 2020.

5.12 Perception of Corruption

Kenya's justice sector and its key players have consistently been rated poorly as far as corruption index is concerned.[88]

Section 35 confers the High court powers to set aside an arbitral award under the circumstances provided under that provision. Notably, Section 35(2) sets out the grounds upon which the High Court will set aside an arbitral award upon the applicant furnishing proof. These grounds include, inter alia: where fraud, undue influence or corruption affected the making of the award. The High Court may also decline recognition and/enforcement of an award if its making was affected by fraud, corruption or undue influence.[89]

There is a need to fight corruption in order to create conducive environment for international arbitration and eliminate any notion or perception that the government is likely to interfere with private commercial arbitration matters.[90]

6. Conclusion

Kenya has a promising future as the preferred seat and venue for international arbitration. All that is required is for the stakeholders to work closely in order to eliminate the challenges identified in this paper as well as ensuring that the law and institutional practice stays up to date as far as international trends in international arbitration are concerned. Making Kenya a preferred seat for international arbitration is a valid dream that can be realized in the very near future.

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[88] Hope Sr, Kempe Ronald, 'Kenya's Corruption Problem: Causes and Consequences: Commonwealth & Comparative Politics: Vol 52, No 4' <https://www.tandfonline.com/doi/abs/10.1080/14662043.2014.955981?scroll=top&needAccess=true&journalCode=fccp20> accessed 5 August 2020; Mbate, Michael. "Who bears the burden of bribery? Evidence from public service delivery in Kenya." *Development Policy Review* 36 (2018): O321-O340.

[89] S. 37(1), No. 4 of 1995.

[90] 'Advantages Of International Commercial Arbitration - International Law - Worldwide' <https://www.mondaq.com/uk/international-trade-investment/416416/advantages-of-international-commercial-arbitration> accessed 5 August 2020.

Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice

Abstract

The COVID-19 pandemic has destabilized the traditional ways through which many professions operated. One of the sectors that have seen rapid change than it has ever experienced before is the legal profession where the use of legal technology in accessing justice has been embraced by force. This has arguably marked the beginning of a trend worldwide that may only become faster even post the pandemic. Technology is revolutionizing the way businesses and various sectors operate and although it comes with its advantages and disadvantages, this paper argues that the legal profession has more to gain if they embrace technology. It explores the various ways in which the legal sector can utilise legal technology to not only enhance access to justice but also improve the efficiency of law firms, the Judiciary and even law schools.

1. Introduction

The Coronavirus disease (COVID-19) pandemic has unsettled not only the global economy but also many professions and they are all seeking to stay afloat during the pandemic. Due to the preventive measures recommended by the World Health Organisation which include social distancing among others, it has become almost impossible for professionals to operate from their traditional physical offices. The legal profession has not been spared either. The legal practice in many parts of the world including the African continent has been by way of physical attendance in courtrooms where the judges and magistrates, advocates and witnesses physically present their cases. The physical presence of employees in law firms has also become difficult.[1] Court hearings are being conducted virtually via online platforms. Arguably, this has disrupted the profession in a way not experienced before.

Apart from the effects of pandemic, the changes in the legal sector have also been largely attributed to the ascendancy of information technology, the globalization of economic activity, the blurring of differences between professions and sectors, and the increasing integration of knowledge.[2] Technology has greatly impacted the way law and law firms are operating in this era as far as enhancing efficiency is concerned.[3]

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[1] Meganne Tillay | February 28 and 2020 at 03:39 AM, 'Baker McKenzie Shuts Down London Office Following Coronavirus Scare' (*Law.com International*) <*https://www.law.com/international-edition/2020/02/28/baker-mckenzie-shuts-down-london-office-following-coronavirus-scare/*> accessed 3 June 2020.

[2] Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' *From Washington Lawyer, May 2011* <*https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm*> accessed 4 June 2020.

[3] Abigail Hess, 'Experts Say 23% of Lawyers' Work Can Be Automated—Law Schools Are Trying to Stay Ahead of the Curve' (*CNBC*, 7 February 2020) <*https://www.cnbc.com/2020/02/06/technology-is-changing-the-legal-profession-and-law-schools.html*> accessed 5 June 2020; Alej, ro Miyar | February 06 and 2020 at 09:46 AM, 'Technology Trends That Will Affect the Legal Profession in 2020' (*Daily Business Review*) <https://www.law.com/dailybusinessreview/2020/02/06/technology-trends-

In this paper, 'legal technology' (Legal Tech) is used to mean the use of technology and software to provide and aid legal services.[4] Legal Technology applies technology and software to assist Law Firms in practice management, billing, big data, e-discoveries, predictive analytics, knowledge management and document storage.[5]

While Legal Tech is meant to enable the bigger firms improve overall efficiency in order to adapt to a progressively popular agile working environment, it also allows smaller firms and sole practitioners to compete with the leading names in the field, giving them access to powerful research tools.[6]

This paper discusses these new developments and proceeds on the hypothesis that even though the profession may resume its normal traditional mode of operation, it is now time for the legal practitioners to consider adopting this way of doing things.

The paper specifically looks at legal practice in Kenya and explores recommendations on how best the legal practitioners in the country as well as the Judiciary can tap into technology to sustain virtual attendance of courts albeit alongside the traditional court attendance. The paper however approaches the subject of legal practice generally and does not make any attempt to look at the various disciplines of practice. It adopts a generalized approach to the term 'legal practice'.

2. Use of Legal Technology within the Legal Profession in Kenya: Progressive or Conservative Profession?

A broad approach to the term "Legal profession" may be used to refer to all those who are in some capacity engaged in the working of the legal system, including judges, advocates,

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that-will-affect-the-legal-profession-in-2020/> accessed 5 June 2020; Singapore Academy of Law, 'Deep Thinking: The Future Of The Legal Profession In An Age Of Technology' (*Medium*, 19 July 2019) <*https://medium.com/@singaporeacademyoflaw/deep-thinking-the-future-of-the-legal-profession-in-an-age-of-technology-6b77e9ddb1e9*> accessed 5 June 2020; 'Disruptive Technology in the Legal Profession' (*Deloitte United Kingdom*) <*https://www2.deloitte.com/uk/en/pages/financial-advisory/articles/the-case-for-disruptive-technology-in-the-legal-profession.html*> accessed 5 June 2020; 'New Technologies and the Legal Profession' (*nyujlb*) <*https://www.nyujlb.org/single-post/2019/04/08/New-Technologies-and-the-Legal-Profession*> accessed 5 June 2020; Tanya Du Plessis, 'Competitive Legal Professionals' Use of Technology in Legal Practice and Legal Research' (2008) 11 Potchefstroom Electronic Law Journal.

[4] 'What Is Legal Technology And How Is It Changing Our Industry?' (*The Lawyer Portal*, 29 January 2019) <*https://www.thelawyerportal.com/blog/what-is-legal-tech-and-how-is-it-changing-industry/*> accessed 3 June 2020.

[5] 'Business Models for Law Firms - p.Xel Marketing Agency' <*https://www.p-xel.co/business-models-for-digital-disruption-in-the-legal-industry/*> accessed 5 June 2020.

[6] 'What Is Legal Technology And How Is It Changing Our Industry?' <*https://www.thelawyerportal.com/blog/what-is-legal-tech-and-how-is-it-changing-industry/*> accessed 5 June 2020.

government lawyers, prosecutors, academics, paralegals and law reformers.[7] All these persons play a crucial role in administration of justice and offering legal training for capacity building in the sector. They are therefore all relevant in the context of this paper as it deals with how all the stakeholders in the legal sector can embrace technology as a tool for enhancing accessing to justice for all.

With the Colonial incursion in Africa came the introduction of the formal justice systems that before then were non-existent and even unknown.[8] In Kenya especially, this was necessitated by the emergence of private ownership of property by the colonialists particularly the settlers, and there arose the need for protection of their rights to the property and also enforcing the same against others, especially the Africans who had been rendered landless.[9] However, even after the colonialists left, there was no turning back as far as formal justice system was concerned.

The Government of Kenya continued to invest, albeit at an unsatisfactory pace, in ensuring that courts were put up across the country as the main system of access to justice. The legal profession has since played a major role in facilitating access to justice. However, it is not always easy for Kenyans to access justice due to a myriad of challenges. Some of the documented challenges facing access to justice over the years include but are not limited to: legal, institutional and structural challenges; Institutional and procedural obstacles; Social barriers; and Practical and economic challenges.[10] Closely related to these are high court fees, geographical location, complexity of rules and procedure and the use of legalese.[11] These are challenges that directly impact on the general public's ability to seek and access justice.

These domestic challenges are compounded by economic turbulence due to societal and economic changes; adaption to new technology; compliance and ethical issues; and

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[7] Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014 < *https://www.kas.de/c/document_library/get_file?uuid=56ba9291-7c05-98d5-96b1-8161785ff854&groupId=252038*> 30 May 2020, p. 16.

[8] See Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya,* Glenwood Publishers, Nairobi, 2015, p.61.

[9] Ibid, p.61.

[10] Access to Justice–Concept Note for Half Day General Discussion Endorsed by the Committee on the Elimination of Discrimination against Women at its 53rd Session, p. 9. Available at *http://www.ohchr.org/Documents/HRBodies/CEDAW/AccesstoJustice/ConceptNoteAccessToJustice.pdf*> 30 May 2020.

[11] *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th& 9th March, 2012.
Available at *http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf* > 30 May 2020.

continuing professional development which directly impact on the legal profession especially the lawyers.[12] The changing times and the above listed challenges have made clients to continue to demand efficiency and responsiveness from their lawyers for less cost. Clients expect their lawyers to focus more on the outcome and less on time spent on a legal matter.[13] The legal profession is also facing competitive pressures from accountants, realtors, financial advisors, and others – enabled by the Internet which is making it easier for them to compete.[14] The lawyers also face competition from global legal service providers, as the doors to transnational practice by lawyers widen by the World Trade Organization's General Agreement on Trade in Services (GATS) and regional integration.[15]

While lawyers have long been characterized as technology antagonists who are slow to change and wary of innovation[16], law practice has slowly but surely moved from an era of using desktop phones, filing cabinets, and yellow legal pads to a period when all these have been replaced by laptops, tablets, cell phones, and other mobile devices and often virtual or cloud-based platforms.[17] In addition, majority of clients' documents are stored on hard drives or in the cloud, while layers of difficult-to-access "metadata" contain hidden information that could influence lawyers' decisions.[18] This development in technology has come with tremendous improvement in not only efficiency but has also enhanced the security of clients' data. While this has been the trend worldwide, it is not difficult to find Kenyan law firms still struggling with the 'outdated' way of doing things around the office. Indeed, it is only recently that digital signatures and service of pleadings started taking root in the country.

It is still a concern on whether the Kenyan lawyers are ready to embrace technology to enhance efficiency and cut down on costs of doing business for the general public. In 2018[19], the Law Society of Kenya (LSK) went to court to oppose a decision by the Ministry of Lands and Physical Planning to digitize the land transactions processes at the land registry through the National Land Information Management System (NLIMS) arguing

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[12] Mboya, Apollo, 'The Bar: Challenges and Opportunities', in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 242.
[13] Ibid, p. 242.
[14] Ibid, p. 242.
[15] Ibid, p. 242.
[16] 'Ready or not: artificial intelligence and corporate legal departments' <*https://legal.thomsonreuters.com/en/insights/articles/artificial-intelligence-ai-report*> accessed 5 June 2020.
[17] Gaffney Nick, 'Law Practice Management: Transforming a Law Practice with Technology' <*https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2017/september-october/law-practice-management-transforming-law-practice-technology/*> accessed 3 June 2020.
[18] Ibid.
[19] Sunday, March 18 and 2018 15:36, 'Land Ministry in Fresh Bid to Digitise Records' (*Business Daily*) <*https://www.businessdailyafrica.com/economy/Land-ministry-in-fresh-bid-to-digitise-records/3946234-4347056-goa3sg/index.html*> accessed 3 June 2020.

that the ministry had failed to consult the relevant stakeholders as required.[20] The LSK also argued that the regulations establishing the legal framework for electronic conveyancing are pending before Parliament.[21] In addition, The LSK further argued that rural Kenya still faces huge electricity and power challenges and that many Kenyans with no access to internet and online portal and risk being dispossessed of their lands.[22] While these arguments are certainly valid, and ones that may not be strictly interpreted to mean that LSK is opposed to the process, LSK must realise that the future of practice lies in embracing technology. The general public has been advocating for the digitization of land records to cut costs and for efficiency purposes.[23] The need for digitization has been demonstrated by the COVID-19 pandemic which has necessitated the closure of all registries following an advisory by the National Emergency Response Committee on the management of Covid-19.[24] The continued closure of registries negatively affected businesses with pending and anticipated land transactions.[25] With the use of technology, such challenges may be overcome. Rwanda is considered to be one of the few African nations that have managed to move all their land records online and is considering introducing blockchain.[26] In the sections below, this paper explores the various technological developments that the legal profession in Kenya can embrace and use to not only enhance access to justice but also enhance efficiency and productivity for increased business opportunities.

3. Legal Practice in the 21st Century: Challenges and Prospects

The COVID-19 pandemic has notably created an unprecedented state of affairs where lawyers and other law firm staff have left their offices and forced to work from their homes, where they now juggle their legal work with child care, household management and plenty of other obligations.[27] This has not only changed the way lawyers view their

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[20] 'Lands Ministry Wants Orders Stopping Digitisation Lifted' (*Daily Nation*) <*https://www.nation.co.kehttps://www.nation.co.ke/dailynation/news/lands-ministry-wants-orders-stopping-digitisation-lifted--38664*> accessed 3 June 2020; Kamau Muthoni, 'LSK Sues Ministry over Online Land Transactions' (*The Standard*) <*https://www.standardmedia.co.ke/article/2001277226/lsk-sues-ministry-over-online-land-transactions*> accessed 3 June 2020.

[21] Ibid.

[22] Wednesday, April 18 and 2018 10:25, 'Lawyers Reject Automation of Land Deals in Court Suit' (*Business Daily*) <*https://www.businessdailyafrica.com/economy/Lawyers-reject-automation-of-land-deals-in-court-suit/3946234-4421556-p3kd3g/index.html*> accessed 3 June 2020.

[23] Monday, March 19 and 2018 18:19, 'EDITORIAL: Fulfil Digitisation Promise' (*Business Daily*) <*https://www.businessdailyafrica.com/analysis/editorials/Fulfil-digitisation-promise/4259378-4348512-ayf632z/index.html*> accessed 3 June 2020.

[24] 'Lands CS Karoney Extends Land Registries Lockdown' (*People Daily*, 15 April 2020) <*https://www.pd.co.ke/business/economy-and-policy/lands-cs-karoney-extends-land-registries-lockdown-32930/*> accessed 3 June 2020.

[25] Ibid.

[26] 'Kenyan Lawyers Wrangle with Government over Land Registry Digitization' *Reuters* (7 May 2018) <*https://www.reuters.com/article/us-kenya-landrights-idUSKBN1I81K1*> accessed 3 June 2020.

[27] Samantha Stokes | April 27 and 2020 at 06:59 PM | The original version of this story was published on The American Lawyer, 'The Coronavirus Will Change the Legal Industry's Approach

approach to legal work but has also created an opportunity for them to weigh and reconsider how law firms will operate in the near future.

Some commentators in the legal field have reported that as law firms embrace the idea of working remotely due to the COVID-19 pandemic, there has been a growing likelihood that physical offices will look very different in the future compared to what they are now.[28] These are some of the expected and unexpected effects of the COVID-19 pandemic on law firms where remote working is expected to take off as never before and firms will operate with more prudent and flexible financial models.[29]

It has been observed that young lawyers are the set of lawyers that came into practise within the 21st century, so they face a unique set of challenges which older lawyers of the earlier generations never had to face.[30] Some of the highlighted challenges facing them include: lack of job opportunities; lack of mentorship from older lawyers; lack of funding; lack of a firm structure; location; personal branding; exposure; career projectory; resources; difficulty in getting new work; and limited networking.[31] Despite this, the 21st century lawyer is considered as one with 'staggering prospects which has the potential to pay off mightily'.[32] It has been argued that the strength of the 21st century young lawyer lies in the understanding and use of Technology as a practice tool and area of core competence.[33] This is because, it has been acknowledged, the current world has become tech-driven and information-powered, such that the entire spectrum of communications is available at the click of a button.[34] The world is becoming more interconnected and smaller with the click of a button, and as such, the 21st century lawyer who is analytical

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to Remote Work—But How?' (*Law.com International*) <https://www.law.com/international-edition/2020/04/27/the-coronavirus-will-change-the-legal-industrys-approach-to-remote-work-but-how-378-140355/> accessed 3 June 2020.

[28] Paul Hodkinson | May 05 and 2020 at 01:00 AM | The original version of this story was published on The American Lawyer, 'Welcome to the Law Firm Office of the Future: Smaller, Higher-Tech and One-Way' (*Law.com International*) <*https://www.law.com/international-edition/2020/05/05/smaller-higher-tech-and-one-way-welcome-to-the-law-firm-office-of-the-future/*> accessed 3 June 2020.

[29] Ibid.

[30] Kingsley Ugochukwu Ani, 'The 21st Century Lawyer: Challenges and Prospects' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3270279 <*https://papers.ssrn.com/abstract=3270279*> accessed 5 June 2020.

[31] Kingsley Ugochukwu Ani, 'The 21st Century Lawyer: Challenges and Prospects' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3270279 <*https://papers.ssrn.com/abstract=3270279*> accessed 5 June 2020.

[32] Ibid, p. 9.

[33]Ibid, p.9; See also 'Tech Competence a Must | Canadian Lawyer' <*https://www.canadianlawyermag.com/news/opinion/tech-competence-a-must/274463*> accessed 5 June 2020; 'Shaping the 21st-Century Lawyer - IE Law Hub' <*https://lawahead.ie.edu/shaping-the-21st-century-lawyer/*> accessed 5 June 2020; Alyson Carrel, 'Legal Intelligence Through Artificial Intelligence Requires Emotional Intelligence: A New Competency Model for the 21st Century Legal Professional' (2019) 35.

[34] Ibid, p.10; See also 'Eight Ways Technology Is Changing Business' <*https://www.gomodus.com/blog/eight-ways-technology-changing-business*> accessed 5 June 2020.

savvy and business-smart enough to navigate through the technology maze is considered lucky as they have the capacity to cast their law practice net across a huge spread of the population.[35] With increased knowledge and specialization as a result of the many areas that come with the growth and development of technology, the 21st century lawyer can use all this to shape the course of their practice. Client demands have become primary drivers of change within the legal profession.[36]

The next section looks at some of these opportunities and how modern lawyers can exploit them to their advantage in order to remain relevant in a fast changing world.

4. Enhancing Access to Justice through Embracing Technology in the Legal Practice

4.1 Artificial Intelligence for Enhanced Productivity

Artificial intelligence (AI) defined as "the science and engineering of making intelligent machines" that employ "cognitive computing" (enabling computers to learn, reason, perceive, infer, communicate, and make decisions like humans do), and it encompasses many branches such as machine learning (ML) including deep learning and predictive analytics, and natural language processing (NLP).[37]

It has been observed that while AI has made a transformative impact on every industry and profession, its potential for use in the legal profession has not been tapped adequately. This is because the legal services market remains 'profoundly under digitized, tradition-bound, and slow to embrace novel technologies and tools'.[38] However, Artificial Intelligence (AI) companies have continually developed and used technology that helps manage laborious tasks in different industries for better speed and accuracy, and the legal profession is no different as AI has already found its way into supporting lawyers and clients alike.[39] Basically, AI can and has indeed been used to: perform due diligence – litigators carry out due diligence with the help of AI tools to uncover background information; prediction technology – An AI software generates results that forecast litigation outcome; legal analytics – lawyers can use data points from past case law,

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[35] Ibid, p. 10; See also Moore, Thomas R. "The Upgraded Lawyer: Modern Technology and Its Impact on the Legal Profession." *UDC/DCSL L. Rev.* 21 (2019): 27; Anyim, Wisdom Okereke. "E-Lawyering and Virtual Law Practice: A Paradigm Shift for Law Library System." *Library Philosophy and Practice* (2019): 0_1-16.

[36] 'Future Law Office 2020: Redefining the Practice of Law | Robert Half' <*https://www.roberthalf.com/research-and-insights/workplace-research/future-law-office-2020-redefining-the-practice-of-law*> accessed 5 June 2020.

[37] Duggal Vishal, 'Role of AI in Legal Practice' (*Engineers Garage*, 23 January 2020) <*https://www.engineersgarage.com/featured/role-of-ai-in-legal-practice/*> accessed 5 June 2020.

[38] Duggal Vishal, 'Role of AI in Legal Practice' (*Engineers Garage*, 23 January 2020) <*https://www.engineersgarage.com/featured/role-of-ai-in-legal-practice/*> accessed 5 June 2020.

[39] Daniel Faggella, 'AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications' (*Emerj*) <*https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/*> accessed 5 June 2020.

win/loss rates and a judge's history to be used for trends and patterns; document automation – law firms use software templates to create filled out documents based on data input; intellectual property – AI tools guide lawyers in analyzing large Intellectual Property (IP) portfolios and drawing insights from the content; and electronic billing – lawyers' billable hours are computed automatically.[40] In addition to the foregoing, AI can and has been applied to save lawyers enormous amount of time while achieving efficiency in legal contracts review.[41] These are just examples of where AI technology may be used in enhancing legal practice in modern times going forward.

The legal profession needs to embrace AI, as it has a lot of potential to benefit from this technology in order to work more productively and spend less time on monotonous tasks, thus achieving convenience, freedom from mundane work, and saving more time for other aspects of the job such as analyses, counseling, negotiations, and court visits.[42] There is a need for law schools to work with experts and professionals in the areas of Artificial Intelligence in order to equip their students with AI certifications at the law school as a first step towards preparing them for the future. Deloitte predicts at least 100,000 legal roles will be automated by 2036 and law firms will start using new talent strategies by 2020, a prediction that is already taking shape.[43]

The initial cost of investment in infrastructure may be very high but it may be worth it to make the learning institutions relevant and competitive. While experts and stakeholders in this area continue to explore the benefits and shortcomings of use of AI in the legal

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[40] Daniel Faggella, 'AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications' (*Emerj*) <*https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/*> accessed 5 June 2020; Law Technology Today, 'Three Ways Law Firms Can Use Artificial Intelligence' (*Law Technology Today*, 19 February 2019) <*https://www.lawtechnologytoday.org/2019/02/three-ways-law-firms-can-use-artificial-intelligence/*> accessed 5 June 2020; Duggal Vishal, 'Role of AI in Legal Practice' (*Engineers Garage*, 23 January 2020) <https://www.engineersgarage.com/featured/role-of-ai-in-legal-practice/> accessed 5 June 2020.

[41] Raghav Bharadwaj, 'Applying AI to Legal Contracts – What's Possible Now' (*Emerj*) <https://emerj.com/ai-podcast-interviews/applying-ai-legal-contracts-whats-possible-now/> accessed 5 June 2020.

[42] Law Technology Today, 'Three Ways Law Firms Can Use Artificial Intelligence' (*Law Technology Today*, 19 February 2019) <https://www.lawtechnologytoday.org/2019/02/three-ways-law-firms-can-use-artificial-intelligence/> accessed 5 June 2020.

[43] Law Technology Today, 'Three Ways Law Firms Can Use Artificial Intelligence' (*Law Technology Today*, 19 February 2019) <https://www.lawtechnologytoday.org/2019/02/three-ways-law-firms-can-use-artificial-intelligence/> accessed 5 June 2020; Duggal Vishal, 'Role of AI in Legal Practice' (*Engineers Garage*, 23 January 2020) <https://www.engineersgarage.com/featured/role-of-ai-in-legal-practice/> accessed 5 June 2020; Lexology-Victoria Arnold, 'How Your Legal Department Can Benefit from AI Contract Management | Lexology' <https://www.lexology.com/library/detail.aspx?g=7fcc7e37-301d-4828-bffd-e525960e0cbb> accessed 5 June 2020.

profession and ways of overcoming the same, lawyers will need to get ready to embrace the idea since it has already started being used and this will only increase with time.

4.2 Investing in Virtual Hearings Infrastructure

With the emergence of the COVID-19 pandemic, courts in many countries around the world were forced to rethink their approach to administration of justice both quickly and efficiently in order to ensure that, where possible, hearings can proceed.[44] This has led them to adopt virtual hearings – conducting hearings remotely in order to minimise the risk of transmission of COVID-19 and ensure the health of all parties in attendance is maintained.[45] While the pandemic will certainly pass, there is a need for both courts and law practitioners to think about investing in virtual hearings post COVID-19. It is commendable that the Judiciary recently embarked on enhancing the use of technology in judicial proceedings in all courts, especially during the COVID-19 pandemic period, including the use of: (a) e-filing; (b) e-service of documents; (c) digital display devices; (d) real time transcript devices; (e) video and audio conferencing; (f) digital import devices; and (g) computers in the court.[46] All that is required now is for continued use of the same post COVID-19 pandemic period as well as infrastructural investment to ensure that the processes run smoothly and efficiently. This may also call for equipping the courts and all registries with the relevant infrastructure through setting up some permanent virtual courts and tribunals.

This technology will come in handy in not only saving time but also resources, which in many countries especially in Africa, are still limited. As for law firms, investing in virtual hearings infrastructure in their practice may lead to better administration of justice and also help reach out to a wider class of clients both within the country and across borders. It will also work for the benefit of their employees since it offers them the much needed work-life balance.

It has been suggested that while spending more time outside the office may become commonplace as law firms and legal departments adopt collaborative technologies and reduce real estate costs, easier-to-use video technologies similar to FaceTime may actually promote efficiency and job satisfaction by putting the human element back in business communications.[47]

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[44] 'Virtual Hearings: The Way Forward in the UK in Uncertain Times' <https://www.dentons.com/en/insights/alerts/2020/march/29/virtual-hearings-the-way-forward-in-the-uk-in-uncertain-times> accessed 5 June 2020.

[45] Ibid,

[46] 'Kenya Law: Electronic Case Management Practice Directions, 2020'<http://kenyalaw.org/kl/index.php?id=10211> accessed 5 June 2020, Rule 6.

[47] Zach Warren | January 15 and 2020 at 03:30 PM | The original version of this story was published on Legaltech News, 'The Future of Legal Tech Is About Transformation, Not Automation' (*The American Lawyer*) <https://www.law.com/americanlawyer/2020/01/15/the-future-of-legal-tech-is-about-transformation-not-automation/> accessed 3 June 2020.

With increased globalisation, lawyers can tap into this infrastructure to serve clients from the comfort of their homes or offices regardless of the geographical location or distance. Lawyers can use the technology to tap into the ever growing international Alternative modes of Dispute Resolution such as international arbitration, mediation and Online Disputes Resolution (ODR) especially in the face of rapidly growing networking and borderless legal practice, with the introduction of diverse social media platforms that allow interconnectivity beyond the national boundaries and enabling cross-border relationships between clients and their lawyers and law firms amongst themselves.[48] They should tap into the tremendous growth of international trade, interstate deals, bilateral and multilateral treaties, where legal practice is increasingly becoming global and smart practitioners must therefore up their game with international best practices as with the advent of internet, telecommunication systems, clients are no longer limited to lawyers in their regions nor are they limited to the need for legal services within their jurisdiction.[49] As it has rightly been pointed out, 'the COVID-19 pandemic may prove a catalyst for Courts to embrace technology and reduce their reliance on in-person hearings and hard copy documents, particularly for case management purposes, even after the pandemic. As such, developing good virtual hearing practices now is likely to pay significant dividends in the future'.[50]

4.3 Safeguarding the Privacy of Data: Transfer, Processing and Storage of Data

Most modern businesses including law firms have increasingly found themselves bound by data privacy laws at the national and international levels, requiring companies to know where they are storing Personally Identifiable Information (PII) and Personal Health Information (PHI) and wrap tight controls around the processing, use, and transfer of such PII and PHI.[51] The effect of this will become even more clearer as firms embrace technology due to the high risks and challenges posed by technology as far as such data is concerned.[52] The challenge is especially great when it comes to legal processes that require extraordinary care in the identification and handling of PII and PHI on very tight turnaround times: data breach notification workflows, Data Subject Access Requests

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[48] Emmanuel Oluwafemi Olowononi and Ogechukwu Jennifer Ikwuanusi, 'Recent Developments in 21st Century Global Legal Practice: Emerging Markets, Prospects, Challenges and Solutions for African Lawyers' (2019) 5 KIU Journal of Social Sciences 31; Samuel Omotoso, 'Law, Lawyers And The Social Media In The 21st Century: Challenges And Prospects' Law, Lawyers And The Social Media In The 21st Century: Challenges And Prospects <https://www.academia.edu/40663364/LAW_LAWYERS_AND_THE_SOCIAL_MEDIA_IN_THE_21ST_CENTURY_CHALLENGES_AND_PROSPECTS> accessed 5 June 2020.

[49] Ibid, p. 34.

[50] 'The Remote Courtroom: Tips and Tricks for Online Hearings' <https://www.ashurst.com/en/news-and-insights/legal-updates/the-remote-courtroom-tips-and-tricks-for-online-hearings/> accessed 5 June 2020.

[51] Katharine Perekslis, 'Four Strategies to Navigate Data Privacy Obligations for Compliance, Litigation, and E-Discovery Professionals' (*Law.com*) <*https://www.law.com/native/?mvi=7bd540437dde4b60991f35c257adc521*> accessed 3 June 2020.

[52] Ibid.

(DSARs), and cross-border e-discovery projects.[53] Notably, law firms have started cross broader practice where firms in different jurisdictions collaborate either directly or through legal organisations to enable them serve clients in different countries.[54] Data protection laws in one country may not be necessarily as advanced as those in another country hence the need for firms to invest heavily in this area to not only win the trust of clients and partners in another country but also to avoid the legal hurdles that may come with breach of such data privacy.[55]

There is a need for local firms to make a conscious decision to invest in data protection infrastructure that will enable them to work efficiently and protect their clients' data regardless of the status of the local data protection laws. As law firms and corporate legal departments look for cost-effective ways to enhance the delivery of legal services, they should seek paralegals and legal assistants with expertise in technology-driven systems who can help the firm operate more efficiently in order to not only facilitate efficiency but also guarantee privacy of data.[56]

There may be a need for the policymakers to work closely with other stakeholders to relook into the existing laws on data protection in order to enhance their effectiveness. Relevant law firm and Judiciary staff should also be equipped with the necessary skills and knowledge regarding data protection. Such skills and knowledge mainly include Information security management, which is a set of policies and procedural controls that Information Technology (IT) and business organizations implement to secure their informational assets against threats and vulnerabilities-information security.[57] Such staff would be responsible for managing the institution/firm's Information Security Management System (ISMS). ISMS is necessary for ensuring that any data is guaranteed confidentiality, integrity and it is easily available when required. Notably, whether the

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[53] Ibid.

[54] International Bar Association, 'What model for cross-border joint practice?' *A handbook for bar associations*, <www.ibanet.org › Document › Default> 5 June 2020; 'Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work by Jonathan Beaverstock, Daniel Muzio, Peter J. Taylor, James Faulconbridge :: SSRN' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1155048> accessed 5 June 2020.

[55] United Nations Conference On Trade And Development, 'Data protection regulations and international data flows: Implications for trade and development,' UNCTAD/WEB/DTL/STICT/2016/1/iPub, United Nations, 2016 <https://unctad.org/en/PublicationsLibrary/dtlstict2016d1_en.pdf >5 June 2020; 'How Organizations Can Stay Ahead of Changing Privacy Laws' (*Digital Guardian*, 22 August 2019) <https://digitalguardian.com/blog/how-organizations-can-stay-ahead-changing-privacy-laws> accessed 5 June 2020.

[56] 'Future Law Office 2020: Redefining the Practice of Law | Robert Half' <https://www.roberthalf.com/research-and-insights/workplace-research/future-law-office-2020-redefining-the-practice-of-law> accessed 5 June 2020.

[57] 'What Is Information Security Management?' (*Sumo Logic*) <https://www.sumologic.com/glossary/information-security-management/> accessed 5 June 2020.

data collected is maintained in digital or physical format, the discipline of Information Security Management is still critical to protecting the data from unauthorized access or theft.[58] This is because every technology-driven business process is exposed to security and privacy threats and the legal profession is no different.[59] The security controls can follow common security standards or be more focused on the industry.[60]

4.4 Rolling out E-literacy Trainings/Education

With the expected increase in the uptake and use of technology within the legal profession, there is a need for sustained and enhanced e-literacy training on not only efficient use of technology but also the potential challenges that may come along and how to overcome them. The training should target lawyers, facilitated by LSK as well as judges and magistrates and all their support staff, facilitated by the Judiciary, in collaboration with the experts and professionals in ICT and other related areas. As for lawyer students, law schools should come up with relevant courses to be included in their curricula in order to arm them with relevant skills.

In order to equip the general public, there is a need for the Government, through the Ministry of Information Communication Technology in collaboration with the other relevant stakeholders to make it easy for the public to acquire the relevant skills in technology through tailored courses at all levels of the school curriculum as well as through other simplified courses available to those already out of school and not likely to benefit from job related trainings in the area. This will also make it easier for the public to interact meaningfully with the justice sector. This is especially important considering that the Judiciary is on course to incorporate the use of technology in dispensation of justice. Empowering the disseminators/facilitators of justice while leaving out the consumers of justice will defeat the need for embracing justice-to facilitate efficient access to justice for all. Leaving them out will instead promote digital apartheid- systematic exclusion of certain communities from digital access and experience through political and business policies and practices.[61]

With the increased digitization of government services through such initiatives as the *Huduma Center service delivery model*- a Government of Kenya initiative aimed at advancing citizen-centred public service delivery through a variety of channels, including deploying digital technology and establishing citizen service centres across the

[58] Ibid.

[59] 'Introduction to Information Security Management Systems (ISMS) – BMC Blogs' <*https://www.bmc.com/blogs/introduction-to-information-security-management-systems-isms/*> accessed 5 June 2020.

[60] Luke Irwin, 'ISO 27001: The 14 Control Sets of Annex A Explained' (*IT Governance UK Blog*, 18 March 2019) <*https://www.itgovernance.co.uk/blog/iso-27001-the-14-control-sets-of-annex-a-explained*> accessed 5 June 2020.

[61] Paula Barnard-Ashton and others, 'Digital Apartheid and the Effect of Mobile Technology during Rural Fieldwork' (2018) 48 South African Journal of Occupational Therapy 20.

country[62], there is an urgent need to tackle digital illiteracy in order to enhance access by all. Virtual access to justice will benefit in the process. The Government can work with the Judiciary arm to set up Digital Villages Projects kind of structure across the country to ease access to services related to justice.[63] However, such centres would focus on offering digital trainings and education specifically related to access to justice.

In addition, the Government should liaise with tech firms both national and international to roll out internet access services across the country for ease of access to all. They should also work with the local mobile service providers to ensure that mobile data is affordable for the majority of Kenyans. Furthermore, electricity should also be made more affordable for all. It is commendable that the Government of Kenya is already striving to ensure that all Kenyans have access to electricity through the *Last Mile Electricity Connectivity Project.*[64]

4.5 Training, Regulation and Capacity Building: Role of Law and Legal Institutions

The recent amendments/enactments to enhance the use of technology in judicial proceedings in Kenyan courts are a step in the right direction.[65] There is a need to ensure that even as we seek to invest in the physical infrastructure to enhance the use of technology in the administration of justice, legal and institutional frameworks are also put in place to not only facilitate the uptake of technological developments but also to ensure

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[62] Sarah aru and Moses Wafula, 'Factors Influencing the Choice of Huduma Centers' Services (A Case Study of Mombasa Huduma Centre)' (2015) 5 International Journal of Scientific and Research Publications; Amir Ghalib Abdalla and others, 'Effect of Huduma Centers (One Stop Shops) in Service Delivery – A Case Study of Mombasa Huduma Centre' (2015) 5 International Journal of Academic Research in Business and Social Sciences 102; 'Study Heaps Praise on Revolutionary Huduma Centres' (*Daily Nation*) <https://www.nation.co.kehttps://www.nation.co.ke/dailynation/news/study-heaps-praise-on-revolutionary-huduma-centres-89030> accessed 5 June 2020.

[63] 'Broadband in Kenya | Broadband Strategies Toolkit' <http://ddtoolkits.worldbankgroup.org/broadband-strategies/case-studies/broadband-kenya> accessed 5 June 2020.

[64] 'Last Mile Connectivity Program Kenya - Inclusive Infrastructure' <https://inclusiveinfra.gihub.org/case-studies/last-mile-connectivity-program-kenya/> accessed 5 June 2020; 'Kenya - Last Mile Connectivity Project II' <https://projectsportal.afdb.org/dataportal/VProject/show/P-KE-FA0-013> accessed 5 June 2020; African Development Bank, 'Kenya - Last Mile Connectivity Project - Project Appraisal Report' (*African Development Bank - Building today, a better Africa tomorrow*, 24 January 2020) <https://www.afdb.org/en/documents/kenya-last-mile-connectivity-project-project-appraisal-report> accessed 5 June 2020; 'Last Mile Project – Ministry of Energy' <https://energy.go.ke/?p=914> accessed 5 June 2020.

[65] Civil Procedure (Amendment) Rules, 2020 (26 February 2020); Electronic Case Management Practice Directions, 2020. The Law of Contract Act, Cap 23 of the Laws of Kenya was recently amended vide the Business Laws (Amendment) Act, No. 1 of 2020, (18 March 2020) to recognize use of advanced electronic signatures. Notably, Electronic signatures are not a new concept to Kenyan law, as they are already provided for under the Kenya Information and Communication Act No. 2 of 1998, as amended. The new amendments however sought to align the same with particular laws.

that there is an effective regulatory framework to deal with the myriad of issues that will arise therefrom.

There have been calls for the Kenyan law schools to ensure that in their curriculum they also take into account the changing dynamics in the legal world and design programmes that equip the future lawyers to deal with the changes.[66] The modern lawyer ought to be well endowed with basic technological knowledge to enable them build on the same to fit in a fast growing globalized world where geographical boundaries and physical offices may no longer matter.

After qualification, lawyers should continually be subjected to technological knowledge and skills through the Continuing Professional Development (CPD) trainings which must be re-looked at to make them more receptive and richer. The CPD committee of the Law Society of Kenya should consider working closely with Information communication technology and other relevant experts and professionals who may not necessarily be lawyers and invite them to CPD events in order to deliver more practical skills and knowledge on the area. It is not enough for lawyers to get theoretical talks on the area from fellow lawyers who are techno-legal savvy; the real professionals in the field must be involved as a way of impacting practical knowledge and skills. There is a need to actively involve the tech firms in and out of the country alongside other stakeholders.

Law schools in the future, like the legal profession itself, have been called to be more collaborative, diverse, international, technologically friendly, and entrepreneurial than they are today.[67] In addition, tomorrow's law school curriculum has been challenged to be more entrepreneurial to respond to the financial pressures on the legal profession and the opportunities wrought by innovation and globalization.[68] Embracing technology will also enable law schools to widen their scope of students since students from abroad can either enroll for legal education in Kenya without the need to travel all the way or even have exchange programs and this would be beneficial to both students and the institutions.

4.6 Enhanced e-filing and service of Court Pleadings and Documents

The law amendments that allowed for e-filing and service of documents in Kenya could not have come at a better time.[69] As has become the norm during the COVID-19 pandemic

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[66] Mboya, Apollo, 'The Bar: Challenges and Opportunities', in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 245.

[67] Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' *From Washington Lawyer, May 2011* <https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm> accessed 4 June 2020.

[68] Ibid.

[69] 'Kenya Law: Electronic Case Management Practice Directions, 2020' *Gazette Notice No. 2357* <http://kenyalaw.org/kl/index.php?id=10211> accessed 5 June 2020.

The objectives of the Electronic Case Management Practice Directions are to guide the integration of Information Communication Technology (ICT) in judicial proceedings and in particular to

period, Kenyan courts should consider fully adopting and shifting to electronic systems for filing documents. This would save both law firms and courts enormous resources in terms of finances and storage facilities for the hardcopy documents. It would also enhance efficiency in terms of accessibility and review of the documents as both sides can access the documents from anywhere. All that is required is enhancing the security of such data to safeguard privacy. This can be achieved through investing in modern infrastructure as well as offering information management training to the staff charged with such.

4.7 Amendment of Remuneration order to guide on Legal fees payment by clients

It has been argued that one of the biggest differences is how lawyers will practice in the future-how lawyers value and price what they sell.[70] It is suggested that there is a need to implore members of the Bar to transition away from the traditional billable time and services system to alternative billing strategies by understanding that apart from "legal services" and "time", lawyers are also selling knowledge, which may include fixed, results based, hourly, graduated, or any such combination.[71] This would all be facilitated by technology which allows one to serve clients without physically meeting clients or even attending court physically. This therefore creates a need to reconsider amending/revising the current Remuneration Order so as to accommodate these new possibilities.

4.8 Licensing and Regulation of virtual law firms

Some scholars have rightly argued that competition to the Kenyan firms by global law firms requires a reconsideration of traditional organizational structures of law firms, ethical rules and regulation mechanisms for the legal profession and restructuring of how legal services are delivered.[72] The argument is that in order for the profession to stay relevant and thrive, lawyers must examine who can invest in firms, models for publicly traded firms, and lawyer partnerships with other professionals.[73]

There is need for the law firms licensing stakeholders in Kenya to consider the idea of licensing virtual law firms, which will largely be conducting technology driven business. As a result of the COVID-19 which has forced many law firms across the world to allow employees to work from home, some firms abroad have already started reporting final decisions to close their physical offices and turning to virtual firms where their employees

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provide for —(a) electronic filing and electronic service of court documents; (b) electronic case search; (c) electronic diary; (d) electronic case tracking system; (e) electronic payment and receipting; (f) electronic signature and electronic stamping; (g) exchange of electronic documents, including pleadings and statements; and (h) use of technology in case registration and digital recording of proceedings for expeditious resolution of cases.

[70] Mboya, Apollo, 'The Bar: Challenges and Opportunities', in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 247.

[71] Ibid, p. 247.

[72] Mboya, Apollo, 'The Bar: Challenges and Opportunities', in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 243.

[73] Ibid, p. 243.

will permanently work from home.[74] Slater and Gordon, a London-based law firm is set to have its staff working from home permanently from September 2020 onwards, after almost three months of working remotely under the COVID-19 lockdown.[75] All its 200 London employees will work from home most of the time—though the firm is hoping to find a smaller office space which will be used to host meetings. The Staff are to be provided with multiple screens if they are needed and homes fitted with comfortable office equipment.[76]The firm's management rightly argued that this approach would improve the well-being and work life balance of their staff and provide flexibility to their customers.[77] Other United Kingdom based firms such as Baker McKenzie and DLA Piper have also been toying with the idea.[78]

The growth of virtual law firms will inevitably come with the challenge of regulation. The regulators of provision of legal services should adequately prepare to respond to the impact of technology on law practice and lawyer regulation, including the growth in cloud computing, virtual law offices, and outsourcing of legal services.[79]

4.9 A Possibility of Online Courts?

The Covid-19 pandemic has unintentionally fast-tracked courts' adoption of technology since courts around the world have been forced to replace face-to-face hearings with video hearings, using phonelinks and platforms such as Zoom, Teams and Skype.[80] Kenyan Judiciary has not been left behind in these latest developments.[81] Kenya still suffers from the challenge of physical accessibility to law courts due to geographical distance since some of the farthest regions still do not have physical court buildings. As a result,

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[74] Meganne Tillay | May 27 and 2020 at 10:13 AM, 'Slater & Gordon to Close London Office, Staff to Work From Home Permanently' (*Law.com International*) <https://www.law.com/international-edition/2020/05/27/slater-and-gordon-to-close-london-office-staff-to-work-from-home-permanently/?cmp_share> accessed 3 June 2020; Meganne Tillay, Simon Lock | May 29 and 2020 at 08:38 AM, 'Slater & Gordon Working From Home: How Will It Work?' (*Law.com International*) <https://www.law.com/international-edition/2020/05/29/slater-gordon-working-from-home-how-will-it-work/> accessed 3 June 2020.

[75] Ibid.

[76] Ibid.

[77] Ibid.

[78] Hannah Roberts | May 07 and 2020 at 05:16 AM, 'Baker McKenzie Surveys Staff Over London Office Return As DLA Also Mulls Reopening Base' (*Law.com International*) <https://www.law.com/international-edition/2020/05/07/baker-mckenzie-surveys-staff-over-london-office-return-as-dla-also-mulls-reopening-base/> accessed 3 June 2020.

[79] Laurel S Terry, Steve Mark and Tahlia Gordon, 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2011) 80 Fordham L. Rev. 2661, p. 2662.

[80] Jane Croft, 'Courts Test Their Online Future, from Dress-down Lawyers to Witness Appearance' (23 April 2020) <https://www.ft.com/content/936e04b6-7a8c-11ea-bd25-7fd923850377> accessed 5 June 2020; 'Remote Courts' <https://remotecourts.org/> accessed 5 June 2020.

[81] A experiência dos tribunais mundo afora durante a p and Emia Says, 'Kenyan Courts Are Using Video Calls To Keep Wheels of Justice Spinning' (*Gadgets Africa*, 31 March 2020) <https://gadgets-africa.com/2020/03/31/kenya-courts-video-call-covid-19/> accessed 5 June 2020.

advocates and witnesses travel long distances in search of justice.[82] While the Judiciary continues to invest in physical infrastructure, the stakeholders in the justice sector may also consider the idea of embracing online courts to deal with the problem. Considering that even where the Judiciary puts up courts, lawyers may still be unavailable to the litigants either due to costs or general shortage, some scholars have argued that putting online courts may come in handy in overcoming some of the challenges faced by litigants who represent themselves, *Pro Se Litigation*.[83] They argue that in most jurisdictions, including the United States of America, to date, the use of online technology to support legal self-representation has been confined primarily to the provision of educational and informational materials, such as "how-to" websites and downloadable legal forms, available mostly in the pre-filing stage.[84] Arguably, the Judiciary can go further in embracing technology through instituting "online courts; judicial online dispute resolution systems, can improve the ability of self-represented litigants to effectively participate in proceedings, as well as the ability of courts to administer them fairly and efficiently.[85]

Where parties are in far-flung areas and they do not have access to legal representation, it has been suggested that they can benefit from self-representation in online courts where they can handle all procedural and substantive aspects of their legal matters, including court appearances, without representation by counsel.[86] This is because lay people who self-represent in judicial processes typically lack knowledge of legal procedure and substance, an inherent limitation which is consistently found to impede their access to justice and the legal system's ability to deliver justice.[87] This is a viable idea since representation through legal aid or pro bono programs may not always suffice. While video-conference hearings may require documents to be filed physically and sometimes require physical presence of witnesses or parties, online courts would have every part of the process facilitated through some web-based platform from filing, payments and hearings without requiring any physical presence.[88] The system may be akin to the United

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[82] Republic of Kenya, *State of the Judiciary and the Administration of Justice Annual Report*, 2017 – 2018, The Judiciary, <https://www.judiciary.go.ke/wp-content/uploads/sojar20172018.pdf .> 4 June, 2020.

[83] Ayelet Sela, 'Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation' (2016) 26 Cornell JL & Pub. Pol'y 331.

[84] Ibid, p. 333.

[85] Ibid, p. 333.

[86] Ibid, p. 133; See also Schäfer, Saskia. "New practices of self-representation: The use of online media by Ahmadiyya and Shia communities in Indonesia and Malaysia." In *New media configurations and socio-cultural dynamics in Asia and the Arab world*, pp. 174-197. Nomos Verlagsgesellschaft mbH & Co. KG, 2015.

[87] Ibid, p. 333.

[88] Legg, Michael. "The future of dispute resolution: online ADR and online courts." *Forthcoming–Australasian Dispute Resolution Journal* (2016); Dame Hazel Genn, 'Birkenhead Lecture2017: Online Courts and the Future of JusticeGray's Inn,' 16 October 2017<

Kingdom's Money Claim Online system, which is the online portal for starting simple court claims, allowing individuals and organizations to file online specified money claims for sums of up to GBP £100,000.[89] It is a web-based service for issuing money claims and resolving fixed money disputes introduced in the judiciary of England and Wales in February 2002.[90]

The Canadian District of British Columbia also set up the Civil Resolution Tribunal which started working in 2016 and it allows the public to resolve their condominium property and small claims disputes up to $5,000 fairly, quickly, and affordably where participants use all of negotiation, facilitation and, if necessary, adjudication services from a computer or mobile device at a time that is convenient for them, and for those who are unable or unwilling to use technology to resolve their dispute, the tribunal provides paper-based or telephone-based services.[91] It has been observed that over 90 percent of parties in British Columbia's Small Claims Court are self-represented, and even if they could finance legal fees, many British Columbians in remote communities must travel great distances to a courthouse, burdening them with further costs. In addition, no matter where you live or who you are, navigating the civil justice system, even Small Claims Court, can be stressful and overwhelming, and there is little support available to help with the process.[92] Thus, the online tribunal system comes in handy. Effective July 15, 2019, British Columbia's Civil Resolution Tribunal (CRT) expanded its jurisdiction to include claims against societies incorporated under the *Societies Act* (British Columbia), changing the forum for dispute resolution for many types of claims made against a society or its directors.[93]

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https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf>5 June 2020.

[89] admin, 'Money Claim Online - Learn What It Is, Where It Is And How To Use It' (*Small Claims Court Genie. Free hints, tips and news*) <https://www.smallclaimscourtgenie.co.uk/money-claim-online/> accessed 5 June 2020.

[90] Jannis Kallinikos, 'Institutional Complexity and Functional Simplification: The Case of Money Claim Online Service in England and Wales' in Francesco Contini and Giovan Francesco Lanzara (eds), *ICT and Innovation in the Public Sector: European Studies in the Making of E-Government* (Palgrave Macmillan UK 2009) <https://doi.org/10.1057/9780230227293_8> accessed 5 June 2020.

[91] Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34 Windsor Yearbook of Access to Justice/Recueil annuel de Windsor d'accès à la justice 112, p. 114; Office of Housing and Construction Standards, 'The Civil Resolution Tribunal and Strata Disputes - Province of British Columbia' <https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal> accessed 5 June 2020.

[92] Ibid, p. 119.

[93] Millman, Bryan, 'Society Disputes May Now Be Settled by BC Civil Resolution Tribunal' (*https://www.nortonrosefulbright.com:443/en-za/knowledge/publications/2019*) <*https://www.nortonrosefulbright.com/en-za/knowledge/publications/303e1394/society-disputes-may-now-be-settled-by-bc-civil-resolution-tribunal*> accessed 5 June 2020.

Therefore, even though Kenya is in the process of putting up small claims courts[94], they may suffer the same setbacks. As a result, in future, Kenya may need to benchmark with the above countries, noting the strengths and weaknesses of this system and consider adopting the same. All the Government needs to do to facilitate is to Fast-track internet access across the country and promote setting up advanced computer centres where less fortunate members of the society can access internet. It is also encouraging that the use of smartphones is fast spreading in the country, a development that may enhance the use of online courts. Initially, the Judiciary may begin with smaller claims whose value may not be economically viable to travel long distances, spend too much or even wait in courts due to the huge backlog currently experienced in our courts.

As for the fear of coaching of witnesses, the system can incorporate measures similar to proctoring programs for ensuring witnesses do not get coached, among other quality assurance software and measures. However, where possible, courts may also consider taking written submissions and evidence in proceedings, particularly in courts where affidavit evidence is not the ordinary procedure.[95]

4.10 Enhanced collaboration Between International Law Firms and Local Firms/ Globalization of Legal Services

Notably, some Kenyan firms are already ahead in this area by collaborating with East African law firms and some with even international firms beyond the region.[96] Bowmans, a firm with nine offices (Cape Town, Dar es Salaam, Durban, Lilongwe, Lusaka, Johannesburg, Kampala, Moka and Nairobi) in seven African countries and over 400 specialist lawyers, for instance, has been extending its reach across the African continent.[97] In all these countries (Kenya, Malawi, Mauritius, South Africa, Tanzania, Uganda and Zambia), they have alliance firms with which they work closely. They are representatives of Lex Mundi, a global association with more than 160 independent law firms in all the major centres across the globe, which gives them access to firms in each jurisdiction represented.[98] There is a need for more local firms to consider the idea and possibly join the bandwagon as it may give them access to a wider clientele.

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[94] Small Claims Court Act, No. 2 of 2016, Laws of Kenya.

[95] 'The Remote Courtroom: Tips and Tricks for Online Hearings' <*https://www.ashurst.com/en/news-and-insights/legal-updates/the-remote-courtroom-tips-and-tricks-for-online-hearings/*> accessed 5 June 2020.

[96] Karangizi, S., 'Future Proofing the Legal Profession in East Africa | ALSF' <https://www.aflsf.org/director-article/future-proofing-legal-profession-east-africa> accessed 30 May 2020.

[97] 'Company Profile' (*Bowmans*) <https://www.bowmanslaw.com/our-firm/company-profile/> accessed 3 June 2020.

[98] 'Our African Footprint' (*Bowmans*) <https://www.bowmanslaw.com/our-firm/our-african-footprint/> accessed 3 June 2020.

5. Conclusion

The COVID-19 has laid bare the direction that legal practice is headed. There is a need for lawyers to reconsider the issues of *law firm structure and billing*, *law firm marketing*, *work-life balance* and *technology vis-à-vis the practice of law, cross border legal practice, educating and training new adaptable lawyers* (Emphasis added).[99] Law schools and the LSK should take this opportunity to equip lawyers with the requisite skills in order to prepare them for the fast changing legal practice the world over. Law firms should also invest in technological developments if they hope to remain relevant in the face of technological innovations and developments and globalisation. The Judiciary also needs to take up the challenge of adopting technology to facilitate remote access to justice for all.

We are moving into an era where many lawyers may find themselves working from home due to the desire to cut costs using technological investments and following clients' needs which will lead firms to embrace technology.[100] This is the time for them to invest wisely in these new technological areas and acquire the relevant skills and knowledge to enable them remain relevant. Arguably, automation technologies can make legal services more affordable and easily accessible to their clients. Additionally, law firms can leverage these technologies to develop and add alternative services, while reducing overheads and workload.[101] While clients are putting law firms under intense pressure to deliver a higher level of service by making use of the latest technological advancements, all at a reduced cost, it has been argued that this generational shift in consumer expectation is an opportunity for legal service providers to implement *innovative digital products* that meet next-generation clients' demands while increasing productivity within their own staff.[102] The future of legal practice is in embracing technology and the Kenyan legal practitioners and players in the justice sector must take up the challenge or be rendered irrelevant since legal practice is likely to become increasingly virtual. The journey into the future has already begun and there is no turning back.

Legal practice must venture into new frontiers: embracing technology for enhanced efficiency and Access to Justice is an idea whose time has come.

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[99] Mboya, Apollo, 'The Bar: Challenges and Opportunities', in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 252.

[100] Zach Warren | January 15 and 2020 at 03:30 PM | The original version of this story was published on Legaltech News, 'The Future of Legal Tech Is About Transformation, Not Automation' (*The American Lawyer*) <https://www.law.com/americanlawyer/2020/01/15/the-future-of-legal-tech-is-about-transformation-not-automation/> accessed 3 June 2020.

[101] 'Business Models for Law Firms - p.Xel Marketing Agency' <https://www.p-xel.co/business-models-for-digital-disruption-in-the-legal-industry/> accessed 5 June 2020.

[102] Ibid.

ADR: The Road to Justice in Kenya

Abstract

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

1. Introduction

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

2. Access to Justice

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

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

The term 'access to justice' has been widely used to describe a situation where people in need of help, find effective solutions available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and a greater role for alternative dispute resolution.[2]It refers to judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue. It refers also to a fair and equitable legal framework that protects human rights and ensures delivery of justice.[3]

Although the concept of access to justice does not have a single universally accepted definition, usually the term is used to refer to opening up the formal systems and structures of the law to disadvantaged groups in society and includes removing legal and financial barriers, but also social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.[4]Access to justice is said to have two dimensions to it namely: procedural access (fair hearing before an impartial tribunal) and substantive justice (fair and just remedy for a violation of one's rights).[5]

The concept of 'access to justice' involves three key elements namely: Equality of access to legal services, that is, ensuring that all persons, regardless of means, have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests; National equity, that is, ensuring that all persons enjoy, as nearly as possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy; and Equality before the law, that is, ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in all fields, use of community facilities and access to services.[6]

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[2] M.T. Ladan, 'Access To Justice As A Human Right Under The Ecowas Community Law' A Paper Presented At: The Commonwealth Regional Conference On The Theme: - The 21st Century Lawyer: Present Challenges And Future Skills, Abuja, Nigeria, 8 – 11 APRIL, 2010,
Available at
http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07- [Accessed on 20th March, 2014]

[3] Ibid.

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

[5] Ibid.

[6] Access to Justice Advisory Committee, *Access to justice: an action plan*, AGPS, Canberra, 1994. See also Louis Schetzer, et. al., 'Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW', page 7, Background Paper, August 2002, Available at *www.lawfoundation.net.au/ljf/site/articleIDs/.../$file/bkgr1.pdf* [Accessed on 10th March, 2014]

It has further been argued that in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.[7]It is noteworthy that access to justice is an essential component of rule of law. Rule of law has been said to be the foundation for both justice and security.[8]The United Nations Secretary-General (A/59/2005)[9] has been quoted as saying: "The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability."[10]

A comprehensive rule of law is said to be inclusive in that all members of a society must have equal access to legal procedures based on a fair justice system applicable to all. It promotes equality before the law and it is believed that rule of law is measured against the international law in terms of standards of judicial protection.[11]Further, rule of law is said to encompass *inter alia*: a defined, publicly known and fair legal system protecting fundamental rights and the security of people and property; full access to justice for everyone based on equality before the law; and transparent procedures for law enactment and administration.[12]Therefore, without the rule of law, access to justice becomes a mirage. If the rule of law fails to promote the foregoing elements, then access to justice as a right is defeated.

Realization of the right of access to justice requires an effective legal and institutional framework not only internationally but also nationally. Access to justice can only be as effective as the available mechanisms to facilitate the same. It has been rightly noted that a right is not just the ability to do something that is among your important interests (whatever they are), but a guarantee or empowerment to actually do it, because it is the correct thing that you have this empowerment.[13]

3. Philosophical Underpinnings of Justice

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

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[7] United Nations Development Programme, 'Access to Justice and Rule of Law'
Available at
http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/ [Accessed on 9th March, 2014]

[8] Ibid.

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

[10] Ibid.

[11] Dag Hammarskjold Foundation, 'Rule of Law and Equal Access to Justice', page 1, Discussion Paper, January 2013. Available at http://www.sida.se/PageFiles/89603/RoL_Policy-paper-layouted-final.pdf [9th March, 2014]

[12] Ibid.

[13] The Hendrick Hudson Lincoln-Douglas *Philosophical Handbook*, Version 4.0 (including a few Frenchmen), page 4, Available at *http://www.jimmenick.com/henhud/hhldph.pdf* [Accessed on 13th March, 2014]

3.1 The Naturalists' school

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

It has been asserted that "natural law" can be characterized as follows: "True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is not a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.[18]

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

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

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

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

[18] Ibid, page 212, quoting from Cicero, 1928 , Republic III.xxii.33, at 211

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

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

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

3.1.1 Natural Law and Access to Justice

It has been asserted that justice and law derive their origin from what nature has given man, from what the human mind embraces, from the function of man and from what serves to unite humanity.[25] Natural rights theory is said to play an important role in the promotion of human rights. It identifies with and provides security for human freedom and equality, from which other human rights flow. It also provides properties of security and support for a human rights system, both domestically and internationally.[26]

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[19] Ibid.

[20]Aquinas, 1993, Qu. 96, art. 4, corpus, pp. 324 – 26, quoted in Patterson, D. (Ed.), 'A Companion to Philosophy of Law and Legal Theory' op. cit.

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

[22] Alex E. Wallin, 'John Finnis's Natural Law Theory and a Critique of the Incommensurable Nature of Basic Goods', *Campbell Law Review,* Vol. 35, Iss. 1 [2012], Art. 2 page12,
Available at *http://law.campbell.edu/lawreview/articles/35-1-59.pdf* [Accessed on 19th March, 2014]

[23]EinarHimma,K., 'Natural Law', *Internet Encyclopedias of Philosophy,*
Available at *http://www.iep.utm.edu/natlaw/* [Accessed on 20th March, 2014]

[24] Ibid.

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

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

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

It has been asserted that every person possesses an inviolability founded on justice that even the welfare of the society as a whole cannot override.[33]It has also been argued that justice anchors and safeguards rights of a person and the same are not politically or socially granted.[34]Thus, there is no political or social justification for the perpetration of

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

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

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

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

[31] Reflected in the Preamble to the UDHR of 1948 which stipulates *inter alia* "whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...."

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

[33] John Rawls, *A Theory of Justice* (Revised Edn, Oxford: Oxford University Press, 1999), op. cit. p.1.

[34]Preamble to the UDHR of 1948, op. cit.

injustice on a person.[35]A legal system that does not recognize basic principles such as justice is no different from the Nazi law.[36]

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

Enforcement of rights is fundamental to their protection. It has been contended that for justice to be served there should be institutions entrusted with the mandate of ensuring that basic rights of citizens are protected.[41]The overall objective of protection of basic rights of the people is the fundamental consideration and that in light of the conception of justice as fairness, the various institutions that a community creates at the constitutional level are chosen in the spirit of perfect rather than procedural justice. They are chosen with eyes on the outcomes. The principles of justice establish the basic priorities and the question to be decided at the constitutional stage is an instrumental one: which scheme of institutions is best suited to protect those liberties?[42] Essentially, the argument is that an error in procedure should not defeat the fundamental goal of justice.The legal framework of a country should promote both substantive and procedural justice. Indeed, it has been argued that the rule of law should limit the governments from perpetrating injustice on the citizens.[43]Further, justice is realized only from good laws.[44] Unjust laws are doomed to

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

[36]Ibid, P.3.

[37] John Rawls, *A Theory of Justice*op.cit.

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

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

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

[41] John Rawls, *A Theory of Justice*op.cit.

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

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

[44] Lon Fuller, *Morality of the Law* (new haven: Yale University Press, rev.edn. (1969). Lon Fuller identifies the eight principles of a good legal system as follows: law should be general, specifying rules prohibiting or permitting behavior of certain kinds; law must be widely promulgated or

fail. Justice cannot be done until good laws have been made capturing the genuine aspirations of the people.[45]

From the foregoing, it is apparent that naturalists advocate for a just world where everyone is treated equally and they have equal protection by the law. Any law put in place should be for the promotion of the interests of all. If the existing legal framework does not achieve this, then it ought to be replaced or the better option adopted. The Constitution of Kenya 2010 adopts a naturalists' approach by guaranteeing the rights of all members of society, including the right of access to justice by various groups such as persons with disabilities[46], Minorities and marginalized groups[47], amongst others.

3.2 The Positivists' School

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

The social contract theorists argue for social justice and hold that there is a social dimension in defining justice.[50] They maintain that justice is one of terms or rules of the social contract agreed upon through legislative enactments, judicial decisions or social customs.[51] As such, justice is derived from everyone concerned or from what they would agree to under hypothetical situation. It has been averred that principles of justice are found by moral reasoning and actual justice cannot be achieved except within a sovereign state.[52] Under social contract theory, justice is highly weighed on a fairness scale. When

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publicly accessible; law should be prospective as opposed to retrospective; law must be clear; law should not be contradictory; law must not ask the impossible; law should be relatively constant; there should be congruency between written laws and how they are enforced.

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

[46] Article 54, Constitution of Kenya 2010

[47] Ibid, Article 56

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

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

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

[51] Leslie Green, "Legal Positivism" in the Stanford Encyclopedia of Jurisprudence.

[52] Thomas Hobbes, *Summa Theologica*.

justice is served, the seeker of justice is happy and feels it was fairly done.[53] Thus, justice is fairness to everyone.[54] Modern analytical positivists advance the social contract approach to justice and argue that law and justice is a creation of man through consensus. In "theory of sources' the argument is that there are no legal principles of law beyond the 'sources'.[55]

3.2.1 Positive Law and Access to Justice

It has been observed that the term 'access to justice' refers to judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue. It is also used to refer to a fair and equitable legal framework that protects human rights and ensures delivery of justice.[56]Without an effective and working legal framework, access to justice remains a mirage and subsequently, there is no legal protection of human rights. It is noteworthy that Article 48 of the Constitution of Kenya, 2010[57] places an obligation on the State to ensure access to justice by all persons. They have a positive duty to facilitate this and one can indeed compel them to do so.[58] Further, Article 47 thereof guarantees the right to fair administrative action while Article 50 guarantees the right of every person to fair hearing.

A report on the English civil justice system it was highlighted a number of principles which the justice system should meet in order to ensure access to justice and these are: be just in the result it delivers; fair treatment of litigants; appropriate procedures at a reasonable cost; deal with cases with reasonable speed; understandable to those who use it; be responsive to the needs of those who use it; provide as much certainty as the nature of the particular case allows; and be effective, adequately resourced and organized.[59]Those principles of access to justice are believed to be of general application to all systems of

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

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

[55] H.L.A Hart, *'The Concept of the Law'*(New York: Oxford University Press 2 edn, 1994) The 'sources' means materials or documents which serve as sources of law. He does not recognize an inherent sense of law.

[56] M.T. Ladan, 'Access To Justice As A Human Right Under The Ecowas Community Law' op. cit. page 3

[57] Government Printer, Nairobi

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

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

justice, civil and criminal.[60]It has been rightly postulated that rule of law abiding societies should guarantee the rights embodied in the Universal Declaration of Human Rights including *inter alia* the right to equal treatment and the absence of discrimination and the right to the due process of the law.[61]

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

3.3 Emerging Conceptions of Justice

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

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[60] Ibid.

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

[62] Universal Declaration of Human Rights, 1948

[63] Article 19, Constitution of Kenya, 2010

[64] M.T. Ladan, 'Access To Justice As A Human Right Under The Ecowas Community Law' op. cit. page 6

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

[66] Ibid

Feminist scholars attribute justice to the manner in which power is shared between men and women in the society and argue that there is unjust power sharing in that men have been given more power than women.[67] Feminists contend that a just society is one with equal power relations between men and women. They call this social justice.[68] Justice thus takes various forms but the underlying factor is that regardless of the various groups at which the same may be directed, justice requires equal treatment of all persons. It should not be dependent on the perceptions of particular judges but should instead be informed by the inherent dignity of all humans.

3.4 Choosing a Conception of Justice

From the foregoing discussion, the naturalists' theory seems better suited in advancing realization of the right of access to justice in society for all as it seeks to treat all people equally regardless of any social stratification; humans have equal and unalienable rights which accrue to them by virtue of being human. Though technically positivist, the Constitution of Kenya 2010 takes the naturalists' position of promoting the rights of all persons. Article 48 of the Constitution of Kenya which guarantees the right of every person to access justice is anchored on this theory of natural law. Indeed, the Constitution goes ahead to specifically entrench the rights of various groups including women, children and persons with disabilities.[69]

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

[67]Vijaya Mahajan, *Women Empowerment and Social Justice: A Socialist Feminist Social Work Approach* (*2012 International Conference on Humanity, History and Society IPEDR vol.34 (2012, IACSIT Press, Singapore).*
Available at http://www.ipedr.com/vol34/014-ICHHS2012-H10020.pdf [accessed on 25th February 2014].
[68] Ibid.
[69] See Articles 53-57, Constitution of Kenya
[70]*Rex v Sussex Justices; Ex parte McCarthy,* ([1924] 1 KB 256, [1923] All ER Rep 233); See also Articles 47 and 50, Constitution of Kenya, 2010

but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[71]

It is worth mentioning that whether or not the power being exercised is statutory, the rules of natural justice must be observed in exercising such power that could affect the rights, interests or legitimate expectations of individuals.[72]People's perceptions of outcome

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

> "The Commissioner's decision was an administrative act. Nevertheless, rules of natural justice apply to the act in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release from prison some 20 months earlier that if he had to serve the full sentence of imprisonment....I would say that the principle of natural justice applies where ordinary people would reasonably expect those making decisions, which will affect others to act fairly. In this instant case, reasonable people would expect the Commissioner to act fairly in considering whether or not to deprive an inmate of his right of remission earned in accordance with the provisions of the Prisons Act. Reasonable people would expect the Commissioner to act on reports, containing information concerning the appellant. The reports will obviously have been prepared by the Officer – in – charge of the Kamiti Main Prison. …… in order to act fairly, the Commissioner is expected to hear the inmate on whatever reports he has on him. As was said in *Fairmount Vs Environment Sec* [1976] 1 WLR 1255 at page 1263, For it is to be implied unless the contrary appears, that parliament does not authorize …. the exercise of powers in breach of the principle of natural justice ….There is a presumption in the interpretation of statutes that the rules of natural justice will apply and therefore that in applying the material subsection the Commissioner is required to act fairly and so to apply the principles of natural justice."

For a discussion on the recent Kenya's court practice on right to fair hearing, see generally Ongoya Z. Elisha &Wetang'ula S. Emanuel, '*From David Onyango oloo vs Attorney General To Charles Kanyingi Karina Vs The Transport Licensing Board: A Step In The Reverse*?'
Available at http://www.kenyalaw.org/Downloads_Other/A%20Step%20in%20Reverse.pdf

[72]*Natural Justice/Procedural Fairness*, Fact Series No. 14, page 1, NSW Ombudsman, August 2003, Available at
http://www.utas.edu.au/__data/assets/pdf_file/0011/434486/FS_PublicSector_14_Natural_Justice1.pdf
[Accessed on 14th March, 2014]; See also Articles 10, 20 and 159 of the Constitution of Kenya 2010

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

The criteria for determining procedural fairness has been identified as: First, people are more likely to judge a process as fair if they are given a meaningful opportunity to tell their story (i.e., an opportunity for voice); second, people care about the consideration that they receive from the decision maker, that is, they receive assurance that the decision maker has listened to them and understood and cared about what they had to say; Third, people watch for signs that the decision maker is trying to treat them in an even-handed and fair manner; and finally, people value a process that accords them dignity and respect.[77]

The principal constitutional provisions concerning to procedural claims within the administrative process are; Article 47 of the Constitution of Kenya 2010[78]which provides for an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; Article 48 which obligates the State to ensure access to justice for all persons and, if any fee is required, that it shall be reasonable and shall not impede access to justice; and Article 50(1)thereof which guarantees the right to a fair hearing by stating

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[73] Fairness: It Is All About Perception, PGP Mediation,
Available at *http://www.pgpmediation.com/blog/2013/02/fairness-it-is-all-about-perception.shtml* [Accessed on 14th March, 2014]

[74]Nancy A. Welsh, 'Perceptions of Fairness in Negotiation', *Marquette Law Review,* Vol. 87, 2004, pp. 753-767, at pp. 761-762.
Available at *http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1196&context=mulr[Accesse*d on 14th March, 2014]

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

[76] Ibid.

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

[78] Government Printer, Nairobi

that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

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

The author in this discussion uses access to procedural justice in the context referred to in the psychological definition of the concept. Justice must demonstrate *inter alia* fairness, affordability, and flexibility, rule of law, and equality of opportunity, even-handedness, procedural efficacy, party satisfaction, non-discrimination and human dignity. Any process used in facilitating access to justice must be able to rise above parties' power imbalances to ensure that the right of access to justice is enjoyed by all and not dependent on the parties' social status.

4. International Legal and Institutional Framework

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

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

The *Universal Declaration of Human Rights of 1948*(UDHR) was a proclamation for the recognition, protection and promotion of human rights the world all over. In its Preamble, the Declaration captured important concepts that include *inter alia*: recognition of the inherent dignity and the equal and inalienable rights of all members of the human family

[79] Rebecca Hollander-Blumoff and Tom R. Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', *Journal of Dispute Resolution,* Vol. 2011, Issue 1 [2011], Art. 2 ,page 3 Available at: *http://scholarship.law.missouri.edu/jdr/vol2011/iss1/2* [Accessed on 14th March, 2014]

[80]Ibid at page 3.

as the foundation of freedom, justice and peace in the world; faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and determination to promote social progress and better standards of life in larger freedom; States co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms; and a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.[81] It is noteworthy that this Declaration recognized and indeed acknowledged that recognition of the equality of all people forms the foundation of justice, freedom and peace in the world. Thus, access to justice is not a mutually exclusive concept but it is one that is greatly dependent on the human rights law framework for its actualization. Article 7 is to the effect that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination. Article 8 stipulates that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 10 further states that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. These provisions are designed to promote the right of all persons to access justice.

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

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

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

The *United Nations Principles on Access to Legal Aid in Criminal Justice Systems*[84]provides for Principles and Guidelines that are based on the recognition that States should undertake a series of measures that, even if not strictly related to legal aid, can maximize the positive impact that the establishment and/or reinforcement of a properly working legal aid system may have on the proper functioning of the criminal justice system and on access to justice.[85]The right of access to justice is not purely restricted to the criminal justice only and it is important to note that the foregoing UN principles on access to legal aid in the

[81] Preamble
[82] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 23 March 1976, in accordance with Article 49
[83] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 3 January 1976, in accordance with article 27
[84] Resolution A/RES/67/187, December 2012
[85] Ibid.

criminal justice system are important in creating avenues that can facilitate access to justice in all areas of law through facilitating access to legal knowledge and information by all. A society with information is empowered and can easily access justice without much of a problem since they are able to understand their rights. Legal aid has been broadly defined to include 'legal advice, assistance and representation for persons suspected, arrested, accused or charged with a criminal offence, detained and imprisoned and for victims and witnesses in the criminal justice process. The definition includes the concept of legal education and mechanisms for alternative dispute resolution and restorative justice processes.[86]

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

The *African (Banjul) Charter on Human and Peoples' Rights*[87]provides in its preamble that it was adopted in consideration of the Charter of the Organization of African Unity, stipulation that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples". One of the most outstanding features of all the foregoing legal instruments is their fundamental foundations of creating an environment in which all persons can access justice. However, it is noteworthy that they are just guidelines for the contracting States on putting in place frameworks to facilitate access to justice and other fundamental rights and freedoms.

4.5 The United Nations Charter

To promote realization of access to justice by all in instances if dispute, the UN Charter recognizes various methods that can be used to deal with the same. Article 33 of the Charter of the United Nations[88]outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to.[89] It provides that *the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice*[Emphasis ours].[90]The use of ADR mechanisms in disputes between parties be they states or individuals is thus recognized as a viable means that will manage conflict between parties.

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

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

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

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

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

5. Access to Justice in Kenya

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

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

6. Challenges facing Actualization of Access to Justice

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

The challenges facing access to justice encompass: legal, institutional and structural challenges; Institutional and procedural obstacles; Social barriers; and Practical and

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

[92] Ibid., Article 159(2) (d)

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

[94] Dag Hammarskjold Foundation, 'Rule of Law and Equal Access to Justice', op. cit. page 1; See also Ojwang', J. B. "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

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

Sometimes litigation does not achieve fair administration of justice due to a number of factors as highlighted above. The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.[98] Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. Litigation is often slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world.[99] Litigation should however not be harshly judged as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary. Criminal justice may also be achieved through litigation especially where the cases involved are very serious. Litigation is associated with the following advantages: the process is open, transparent and public; it is based on the strict, uniform compliance with the law of the land; determination is final and binding (subject possibly to appeal to a higher court).[100]Litigation can also be useful in advancing the human rights including the

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

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

[97] See Toope, S. J., "Legal and Judicial Reform through Development Assistance: Some Lessons", *McGill Law Journal / Revue De Droit De McGill,* [Vol. 48, 2003] , pp. 358-412, page 358,
Available at
http://pdf.aminer.org/000/266/603/bringing_it_support_for_legislative_drafting_one_step_further_from.pdf[Accessed on 21st March, 2014]

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

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

[100] Chartered Institute of Arbitrators, Litigation: Dispute Resolution,

right of access to justice.[101] It is noteworthy that the civil Rights Movement would not have prospered without recourse to litigation. Further, the outcome of ADR mechanisms such as arbitral awards relies on the court system for enforcement. However, there are also many shortcomings associated with litigation so that it should not be the only means of access to justice. Some of these have been highlighted above. Litigation is not necessarily a process of solving problems; it is a process of winning arguments.[102]

7. Towards Actualization of the Right of Access to Justice

For the constitutional right of access to justice to be actualized, there has to be a framework based on the principles of: *expedition*; *proportionality*; *equality of opportunity*; *fairness of process*; *party autonomy*; *cost-effectiveness*; *party satisfaction* and *effectiveness of remedies* [Emphasis ours].[103]Recognition of ADR and traditional dispute resolution mechanisms is thus predicated on these cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system.[104]

In a report on access to justice in Malawi, the authors appropriately noted that *'access to justice* does not mean merely access to the institutions, but *also means access to fair laws, procedures, affordable, implementable and appropriate remedies in terms of values that are in conformity to constitutional values and directives'*(emphasis ours).[105] If the foregoing is anything to go by, then litigation cannot score highly especially in terms of access to fair procedures and affordability. On the contrary, ADR mechanisms can be flexible, cost-effective, expeditious; may foster relationships; are non-coercive and result in mutually satisfying outcomes. They are thus more appropriate in enhancing access to justice by the poor in society as they are closer to them. They may also help in reducing backlog of cases in courts.[106] The net benefit to the court system would be a lower case load as the courts'

Available at *http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation* [Accessed on 7th March, 2014]

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

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

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

[104] Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, page 6

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

[106] See Shantam Singh Khadka, et al., *Promoting Alternate Dispute Resolution to reduce backlog cases and enhance access to justice of the poor and disadvantaged people through organizing Settlement Fairs in*

attention would be focused on more serious matters which warrant the attention of the court and the resources of the State.[107] Case backlog is arguably one of the indicators used to assess the quality of a country's judicial system.[108]

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

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

7.1 Actualizing Access to Justice through ADR

Alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.[111]Generally, proponents of ADR submit that its methods address many systemic problems in litigation and offer several benefits not available through traditional litigation. ADR could relieve congested court dockets while also offering expedited resolution to parties. Second, ADR techniques such as negotiation, mediation and party conciliation could give parties to disputes more control over the resolution process. The flexibility of ADR is also said to create opportunities for creative

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Nepal, Case Studies on Access to Justice by the Poor and Disadvantaged, (July 2003) Asia-Pacific Rights And Justice Initiative,
Available at *http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/Nepal-SettlementFair* [Accessed on 08th March, 2014]

[107] Ibid

[108] 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 08th March, 2014]

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

[110] Ibid, pp. 19-20

[111] Muigua, K., "*Alternative Dispute Resolution and Article 159 of the Constitution of Kenya*" Op cit. page 2; See also *Alternative Dispute Resolution*,
Available at http://www.law.cornell.edu/wex/alternative_dispute_resolution [accessed on 07th March, 2014]

remedies that could more appropriately address underlying concerns in a dispute than could traditional remedies in litigation. ADR mechanisms are likely and do often achieve party satisfaction in terms facilitating achievement of psychologically satisfying outcomes. By offering the opportunity for consensus-based resolution, ADR also is arguably better suited than litigation to preserving long-term relationships and solving community-based disputes.[112] Most of the ADR mechanisms offer resolution of conflicts as against settlement, with the exception of a few such as arbitration. It is noteworthy that although ADR generally promotes access to justice, not all of the mechanisms achieve this by resolution; others are dispute settlement, much the same way as litigation.

7.1.1 Settlement versus Resolution

Settlement is said to be an agreement over the issues(s) of the conflict which often involves a compromise.[113] A settlement process "seeks to mollify the opposition without discovering or rectifying the underlying causes of the dispute". Settlement is said to be power-based in that the outcome majorly relies on the power that is possessed by the parties to the conflict. Due to the changing nature of power the process becomes a contest of whose power will be dominant. Parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in the relationship. Basically, power is the defining factor for both the process and the outcome.[114]

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

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[112]Ray,B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases' *Utah Law Review,* (2009) [NO. 3] PP. 801-802, Available at http://epubs.utah.edu/index.php/ulr/article/viewFile/244/216 [Accessed on 12th March, 2014]

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

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

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

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

relies more on people's perceptions, personal satisfaction and emotions).The main dispute settlement mechanisms are litigation or judicial settlement and arbitration.[117]

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

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

7.1.2 Access to Justice through Negotiation

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

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[117] See generally Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management, op. cit.

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

[119] 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 08th March, 2014];

[120]See generally Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management, op. cit.

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

outcome. It is non-coercive thus allowing parties the room to come up with creative solutions.

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

It has been said that negotiators rely upon their perceptions of distributive and procedural fairness in making offers and demands, reacting to the offers and demands of others, and deciding whether to reach an agreement or end negotiations.[123]The argument is that if no relationship exists between negotiators, self-interest will guide their choice of the appropriate allocation principle to use in negotiation. A negotiator who does not expect future interactions with the other person will use whatever principle-need, generosity, equality, or equity-produces the better result for them. Relationships apparently matter in negotiators' definitions of fair outcomes.[124]

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

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

[123]Nancy A. Welsh, 'Perceptions of Fairness in Negotiation', *Marquette Law Review,* Vol. 87, pp. 753-767, op. cit. at page 753.

[124] Ibid, page 756

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

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

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

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

Interest-based negotiation shifts the focus of the discussion from positions to interests, raising a discussion based on a range of possibilities and creative options, for the parties to arrive at an agreement that will satisfy the needs and interests of the parties.[129] This way, both parties do not feel discriminated in their efforts for the realization of the right of access to justice.

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

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

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[128] Ibid, pp. 4-8

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

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

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

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

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

It has been postulated that when a problem is defined in terms of the parties' underlying interests it is often possible to find a solution which satisfies both parties' interests. Indeed, it has been observed that information is the life force of negotiation. The more you can learn about the other party's target, resistance point, motives, feelings of confidence, and so on, the more able you will be to strike a favourable agreement with parties focusing on their interests while at the same time remaining open to different proposals and positions.[134]

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

In conclusion, negotiation can be used in facilitating access to justice. What needs to be done is ensuring that from the start, parties ought identify their interests and decide on the best way to reach a consensus.[137] The advantages therein defeat the few disadvantages

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Available at http://nl.walterkaitz.org/rnicolecutts_principlednegotiation.pdf[Accessed on 19th March, 2014]
Available at http://www.colorado.edu/conflict/peace/treatment/pricneg.htm[Accessed on 15th March, 2014]
[133]Fisher,R. and Ury,w., *Getting to Yes-Negotiating Agreement Without Giving in,* Op cit., pp. 10-11
[134] See Chapter 2 'Strategy and Tactics of Distributive Bargaining' page 23,
Available at http://highered.mcgraw-hill.com/sites/dl/free/0070979960/894027/lew79960_chapter02.pdf [Accessed on 19th March, 2014]
[135]Ibid, pp. 24-25
[136] See generally, Dawson,R., '5 Basic Principles for Better Negotiating Skills'
Available at http://www.creonline.com/principles-for-better-negotiation-skills.html [Accessed on 19th March, 2014]
[137] See generally, Andrew F. Amendola, 'Combating Adversarialism In Negotiation: An Evolution Towards More Therapeutic Approaches' Nujs Law Review 4 Nujs L. Rev. (July - September, 2011)

of power imbalance in some approaches to negotiation, as already discussed. However, where parties in a negotiation hit a deadlock in their talks, a third party can be called in to help them continue negotiating. This process now changes to what is called mediation. Mediation has been defined as a continuation of the negotiation process by other means where instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the negotiations between the parties.[138] It is also a mechanism worth exploring as it has been successfully used to achieve the right of access to justice for parties.

7.1.3 Mediation and Justice

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

(a) Mediation in the political process

Mediation in the political process is informed by resolution as against settlement. It allows parties to have autonomy over the choice of the mediator, the process and the outcome. The process is also associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control, addressing root causes of the conflict, non-coerciveness and enduring outcomes. With these perceived advantages, the process is more likely to meet each party's expectations as to achievement of justice through a procedurally and substantively fair process of justice.[141]

(b) Mediation in the legal process

Mediation in the legal process is a process where the conflicting parties come into arrangements which they have been coerced to live or work with while exercising little or

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pp. 347-370, Available at *http://www.nujslawreview.org/pdf/articles/2011_3/andrew-f-amendola.pdf* [Accessed on 19th March, 2014]

[138]Makumi Mwagiru, Conflict in Africa: Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

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

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

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

no autonomy over the choice of the mediator, the process and the outcome of the process. This makes it more of a settlement mechanism that is attached to the court as opposed to a resolution process and defeats the advantages that are associated with mediation in the political process.[142]

The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship.[143]In conflict resolution processes like mediation, the goal, then, is not to get parties to accept formal rules to govern their relationship, but to help them to free themselves from the encumbrance of rules and to accept a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.[144]

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

The salient features of mediation (in the political process) are that it emphasizes on interests rather than (legal) rights and it can be cost - effective, informal, private, flexible and easily accessible to parties to conflicts. These features are useful in upholding the acceptable principles of justice: *expedition*; *proportionality*; *equality of opportunity*; *fairness of process*; *party autonomy*; *cost-effectiveness*; *party satisfaction* and *effectiveness of remedies (*emphasis ours), thus making mediation a viable process for the actualization of the right of access to justice.[146]

One criticism however is that in mediation, power imbalances in the process may cause one party to have an upper hand in the process thus causing the outcome to unfavourably

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[142] Ibid, Chapter4; See also sec.59A,B,C& D of the Civil Procedure Act on Court annexed mediation in Kenya.

[143] Lon L. Fuller, *Mediation – Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray,B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases' *Utah Law Review,* (2009) [NO. 3] op. cit. PP. 802-803]

[144] Ibid.

[145] Ibid, page 803

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

address his or her concerns or interests at the expense of the other.[147]Nevertheless, in any type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party. However, it may be claimed that inequality in the relationship does not necessarily lead to an exercise of that power to the other party's disadvantage.[148] Another weakness of mediation is that it is non-binding. It is thus possible for a party to go into mediation to buy time or to fish for more information.

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

7.1.4 Justice via Conciliation

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

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

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

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

[149] No. 14 of 2007, Laws of Kenya

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

[151] Article 6 (4) of the Model law states that —The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute, UNCITRAL Model Law on

A conciliator who is more knowledgeable than the parties can help parties achieve their interests by proposing solutions, based on his technical knowledge that the parties may be lacking in. This may actually make the process cheaper by saving the cost of calling any other experts to guide them.

7.1.5 Seeking Justice through Arbitration

Arbitration is a dispute settlement mechanism. Arbitration arises where a third party neutral (known as an arbitrator) is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award. The *Arbitration Act*, 1995 defines arbitration to mean ―any arbitration whether or not administered by a permanent arbitral institution. This definition is not an elaborate one and hence regard has to be had to other sources. Arbitration has also been described as a private consensual process where parties in dispute agree to present their grievances to a third party for resolution.[152] Lord Justice Raymond defined who is an arbitrator some 250 years ago and which definition is still considered valid today, in the following terms:

An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them, and arbitrators are so called because they havearbitrary power; for if they observe the submission and keep within their due bonds, their sentences are definite from which there lies no appeal.[153]
An arbitrator is also defined as a legal arbitrator; a person appointed by two parties to settle a conflict, arbitrate, and decide by arbitration, judge between two parties to a conflict (usually at the request of the two parties).

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

International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002). Available at
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html [Accessed on 08th March, 2014]

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

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

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

In disputes involving parties with equal bargaining power and with the need for faster settlement of disputes, especially business related, arbitration offers the best vehicle among the ADR mechanisms to facilitate access to justice.

7.1.6 Justice through Med-Arb

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

Med-Arb can be successfully be employed where the parties are looking for a final and binding decision but would like the opportunity to first discuss the issues involved in the dispute with the other party with the understanding that some or all of the issues may be settled prior to going into the arbitration process, with the assistance of a trained and experienced mediator.[154] This is likely to make the process faster and cheaper for them thus facilitating access to justice. Elsewhere, the courts have held, the success of the hybrid mediation/arbitration process depends on the efficacy of the consent to the process entered into by the parties.[155]

7.1.7 The Arb-Med Justice Option

This is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. It is best to have different persons mediate and arbitrate. This is because a person arbitrating may have made up his mind who is the successful party and thus be biased during the mediation process if he transforms himself into a mediator. For instance in the Chinese case of *GaoHai Yan & Another v Keeneye Holdings Ltd & Others* [2011] HKEC 514 and [2011] HKEC 1626 ("Keeneye"), the Hong Kong Court of First Instance refused enforcement of an arbitral award made in mainland China on public policy

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

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

grounds. The court held that the conduct of the arbitrators turned mediators in the case would "cause a fair-minded observer to apprehend a real risk of bias".[156] Although the decision not to enforce the award was later reversed, the Court of Appeal did not have a problem with the observation on risks involved but with the particular details of that case where the parties were deemed to have waived their right to choose a new third party in the matter.[157]

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

7.1.8 Adjudication and expedited Justice

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

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

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

[157] Ibid

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

7.1.9 Traditional Justice Systems

It is noteworthy that there is an overlap between the forms of ADR mechanisms and traditional justice systems. The Kenyan communities and Africa in general, have engaged in informal negotiation and mediation since time immemorial in the management of conflicts. Mediation as practised by traditional African communities was informal, flexible, voluntary and expeditious and it aimed at fostering relationships and peaceful coexistence. Inter-tribal conflicts were mediated and negotiated in informal settings, where they were presided over by Council of Elders who acted as 'mediators' or 'arbitrators'.[159]

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

However, the scope of application of these traditional mechanisms, especially in the area of criminal law is not yet settled. For instance, in the case of *Republic v. Mohamed Abdow Mohamed*[162] the accused was charged with murder but pleaded not guilty. On the hearing date, the court was informed that the family of the deceased had written to the Director of Public Prosecutions (DPP) requesting to have the murder charge withdrawn on grounds of a settlement reached between the families of the accused and the deceased respectively. Subsequently, counsel for the State on behalf of the DPP made an oral application to have the matter marked as settled, contending that the parties had submitted themselves to traditional and Islamic laws which provide as avenue for reconciliation. He cited Article 159 (1) of the Constitution which allowed the courts and tribunals to be guided by alternative dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The issues were whether a murder charge can be withdrawn on account of a settlement reached between the families of an accused and the deceased; and whether alternative dispute resolution mechanisms as espoused by the Constitution of Kenya, 2010 extended to criminal matters. It was held that under article 157 of the Constitution of Kenya, 2010, the Director of Public Prosecutions is mandated to exercise state powers of prosecution and may discontinue at any stage criminal

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

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

[161] Ibid.

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

proceedings against any person; and that the ends of justice would be met by allowing rather than disallowing the application. The Application was thus allowed and the accused person discharged.

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

The answers to the foregoing questions may have an impact on how the whole process is handled and further the decision on which one to use depends on such factors as other laws that may only provide for retributive justice in some of the criminal cases while at the same time limiting use of restorative justice. Which ever the case, what remains clear is that restorative justice in criminal matters considered serious, which may involve use of ADR more than use of litigation may have to wait a little longer.

8. The Road to Justice

So far, the discussion in this paper has traced the philosophical foundations of access to justice, identifying the major attributes of justice in an attempt to conceptualize the real meaning of access to justice. One thing that emerges is that access to justice as a right is perceived in diverse ways by the persons concerned. This depends on the unique circumstances of the case and what the parties in that case really need to see addressed for them to feel satisfied. It therefore follows that one general approach to addressing these needs, like litigation only, can turn out to be very ineffective and often unsuccessful in

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

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

[165] Ibid, page 258

addressing the unique needs of justice of each party. While litigation would be useful in addressing some of the needs, especially if a party was seeking retributive justice, it may fail to address the needs of a party who were more after achieving restorative justice rather retributive justice depending on the nature of the dispute in question. It is against this background that the discourse herein now focuses on how true or real justice, as perceived by the parties can be achieved through diversification of the means used to address the dispute.

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

The UN Secretary-General has indicated that justice is: "an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Its administration involves both formal judicial and informal/customary/traditional mechanisms." Indeed, most African countries still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.

It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.[167]Another author confirms that access to justice has always been one of the fundamental pillars of many African societies. He notes that 'Igbo justice is practised in land matters, inheritance issues, socio-communal development strategies, interpersonal relationships and sundry avenues'.[168]

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

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

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

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

Courts can only handle a fraction of all the disputes that take place in society. Courts have had to deal with an overwhelming number of cases and as one author notes 'one reason the courts have become overburdened is that parties are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Again, as already discussed elsewhere justice is a multi-faceted concept that requires the satisfaction of various concerns for any process to be deemed effective. Courts cannot address some of the ingredients of justice as conceived in this paper. For instance, courts will not address the real problem or allow parties to air their genuine expectations especially when they are not legally conceivable. Courts will seek to settle the disputes by striking a balance between the conflicting interests. ADR on the other hand seeks to achieve more than that; some of the mechanisms seek to come up with a mutually satisfying outcome. In fact, ADR has been successfully employed in addressing matrimonial causes, inter-community conflicts, business related disputes, amongst others. Indeed, the *Civil procedure Act* and *Rules*, which govern the conduct of litigation in the Kenyan courts have provisions for encouraging the use of mediation and other ADR in place of trials before a judge.[170] This is just one of the many laws in Kenya that promotes the use of ADR mechanisms in the formal sector.[171] However, it is important to keep in mind the possible shortcomings of mediation in the legal process, as already discussed elsewhere in this paper.

8.1 Addressing Root Causes of Conflict

ADR mechanisms such as negotiation and mediation seek to address the root cause of conflicts unlike litigation which concerns itself with reaching a settlement. Settlement

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[169] Article 159(3)

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

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

implies that the parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. Since a settlement is power-based and power relations keep changing, the process becomes a contest of whose power will be dominant.[172]Rights-based and power-based approaches are used at times when parties cannot or are not willing to resolve their issues through interest-based negotiation.[173] It has been observed that a settlement is an agreement over the issue(s) of the conflict which often involves a compromise.[174]

Settlement practices miss the point by focusing only on interests and failing to address needs that are inherent in all human beings, parties' relationships, emotions, perceptions and attitudes. Consequently, the causes of the conflict in settlement mechanisms remain unaddressed resulting to conflicts in future.[175] Examples of such mechanisms are litigation and arbitration. In litigation the dispute settlement coupled with power struggles will usually leave broken relationships and the problem might recur in future or even worse still the dissatisfied party may seek to personally administer 'justice' in ways they think best. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed. ADR mechanisms are thus better suited to resolve conflicts where relationships matter.

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

8.2 Resolving Conflicts

Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying,

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[172] Ibid, page 80

[173] See generally Chapter-V, 'Non Adjudicatory Methods of Alternative Disputes Resolution' op.cit. page 165

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

[175] Kariuki Muigua, *Resolving Conflicts through Mediation in Kenya, Op cit.,* Page 81

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

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

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

9. Conclusion

It is not enough that the right of access to justice is guaranteed both under the international and national frameworks on human rights. Making the enjoyment of these rights a reality requires the efforts of all concerned stakeholders, in reforming the existing frameworks as well as taking up new measures to facilitate the same. The ability to access justice is of

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

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

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

[179] Ibid

critical importance for the enjoyment of all other human rights.[180]As already noted litigation plays an important role in disputes management and must therefore be made available for clients. However, this should not be the only available option since it may not be very effective in facilitating realization of the right of access to justice in some other instances. The application of ADR to achieve a just and expeditious resolution of conflicts should be actively promoted since it is a very viable option for parties whose conflict's nature requires either specialized expertise or requires preservation of relationships.

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

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

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

Constitutional Supremacy over Arbitration in Kenya

Abstract

The Constitution of Kenya, 2010 is the Supreme law of the land, a principle entrenched under Article 2 thereof. Kenya has in place an Arbitration Act to define the scope, responsibilities and limitations of arbitral tribunals so as to allow parties determine disputes in a manner consistent with law. Against the backdrop of the constitutional supremacy, the author argues that while Article 159(2) of the Constitution acknowledges the use of Alternative Dispute Resolution (ADR) mechanisms, arbitration practice in Kenya must be carried out in a manner consistent with constitutional principles and values. Any deviation from such manner can potentially be challenged as unconstitutional and thus invalid. This is important in ensuring that arbitration remains relevant even in the current constitutional dispensation. Examined in this paper is the interpretation of the concept of constitutional supremacy by Kenyan courts. This paper examines constitutional supremacy in Kenya and its likely implication on arbitration law and practice, through scrutinizing the existing relationship between the Constitutional Bill of Rights and the rules of Arbitration practice. This is also illustrated through the use of case law.

The paper also identifies possible conflict areas between the concept of constitutional supremacy and arbitration law and practice as carried out in Kenya. The author argues that there is a growing need to revisit the essentials of the law and practice of arbitration in Kenya so as to ensure conformity with the concept of constitutional supremacy and ultimately safeguarding the interests and rights of those who prefer arbitration to settle their arising disputes.

1. Introduction

For a long time, though state-sanctioned, Arbitration generally remained outside the scope of constitutional law. However, this might change in light of the current Constitution of Kenya 2010. Article 159 (2)(c)of the Constitution provides that in exercising judicial authority, the courts and tribunals should be guided by the principles of, inter alia, — alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms should be promoted, subject to clause (3) requires that traditional dispute resolution mechanisms should not be used in a way that— contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law.

This paper examines possible implications of the constitutional supremacy clause on Arbitration in Kenya. It identifies possible areas of conflict between the concept of constitutional supremacy and Arbitration and especially with regard to the relationship between the Constitutional Bill of Rights and the rules of Arbitration practice in Kenya.

2. Supremacy of the Constitution

Supremacy of the Constitution refers to a situation where the highest authority in a legal system is conferred on the Constitution.[1] The legal norms and/or statutes, institutional structure of the organs of the State and the legislators all rank lower than the Constitution.

This principle of the supremacy of the constitution is commonly believed to have originated from the American jurisdiction. It is believed to have first come up when Alexander Hamilton, while writing the *Federalist Papers,* argued that there is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.[2] He further argued that no legislative act, therefore, contrary to the constitution can be valid. He posited that to deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise but what they forbid.[3]

His argument was that all exercisable powers vested in leaders originate from the people, who by their own, volition delegated the same to those in authority. The leaders must therefore exercise their legislative powers in a way that is consistent with the constitution.[4]

This principle of constitutional supremacy later appeared in the American Constitution under Article 6 section 2 which states, *inter alia,* that 'the American Constitution shall be the supreme law of the land; that the Judges in every State shall be bound thereby, and anything in the Constitution or Laws of any State to the Contrary notwithstanding.'

In the American case of *Marbury v. Madison*,[5] it was held that it was the duty of the Judicial Department to say what the law is. The Court stated that those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each. If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

The American Supreme court also *inter alia* held that "...*the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he*

[1] Limbach, J., 'The Concept of the Supremacy of the Constitution' *The Modern Law Review*, Vol. 64, No. 1 (Jan., 2001), pp. 1-10 at p.1.
[2] See Hamilton, A., *The Federalist No. 78*, The Judiciary Department, From McLean's Edition, New York.
[3] Ibid
[4] Ibid
[5] 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).

receives an injury. One of the first duties of government is to afford that protection."[6] All laws which are repugnant to the Constitution are null and void.[7]

This historic court case reinforced the concept of Judicial Review or the ability of the Judiciary Branch to declare a law unconstitutional. It has been suggested that there exists three notions of the principle of supremacy of the constitution which are: The possibility of distinguishing between constitution and other laws; the legislators being bound by the constitutional law,[8] which presupposes special procedures for amending constitutional law; and an institution with the authority in the event of conflict to check the constitutionality of governmental legal acts.[9]

It has been argued that '*Constitution Supremacy represents a quality of the constitution being in the top of the juridical system of the society….In this way accomplishment of the objectives of the state of right results especially regarding the citizen's fundamental freedoms and rights*(sic).'[10]

It has also been posited that "the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."[11] To guard against that accumulation of power, the Constitution has built-in protections.[12]

The supremacy of the Constitution is, thus, seen as one of the fundamental pillars that are important for the realisation of the other constitutional guarantees. It is also important for the implementation and enjoyment of the Bill of Rights and fundamental freedoms. Laws that purport to infringe on any of the constitutionally guaranteed rights would be defeated by the supremacy clause by being declared unconstitutional and thereby invalid.

3. Constitution of Kenya, 2010 and the Supremacy Clause

The principle of the supremacy of the Constitution is entrenched in Kenya's Constitution, 2010 under Article 2 thereof.[13] Clause (1) is to the effect that *the Constitution is the supreme*

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[6] Ibid.
[7] Ibid, 1803.
[8] *Speaker of the senate and another vs Attorney General and 4 others, Advisory opinion reference number 2 of 2013*.
[9] Limbach, J., 'The Concept of the Supremacy of the Constitution' *The Modern Law Review*, Vol. 64, No. 1 (Jan., 2001), pp. 1-10, *op. cit.* p. 3.
[10] Mariana, L., 'The Constitution Supremacy' p. 1. Available at *http://www.sustz.com/.../Jurj_Liliana_Mariana_2.pdf accessed on 23 November, 2013*
[11] Madison, J., *Federalist Papers*, No. 48, From the New York Packet, Friday, February 1, 1788.
[12] Ibid.
[13] The supremacy clause was captured in the now *repealed Constitution of Kenya* (1963) under section 3 thereof, which was to the effect that 'the Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, and subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of inconsistency, be void.'

law of the Republic and binds all persons and all State organs at both levels of government. Clause (3) also provides that the validity or legality of the Constitution is not subject to challenge by or before any court or other State organ. Further, clause (4) provides that any law, including customary law, that is inconsistent with the Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. These provisions notably follow Limbach's assertion of the three notions of constitutional supremacy.[14]

Article 1(1) of the *Constitution of Kenya*, 2010 (hereinafter the Constitution of Kenya) provides that all sovereign power belongs to the people of Kenya and should be exercised only in accordance with the Constitution. Clause (2) thereof provides that the people may exercise their sovereign power either directly or through their democratically elected representatives. Further, Clause (3) provides that Sovereign power under the Constitution is delegated to the following State organs, which should perform their functions in accordance with the Constitution: Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. Clause (4) is to the effect that the sovereign power of the people is exercised at: the national level; and the county level.

Article 159 (1) provides that Judicial authority is derived from the people and vests in, and should be exercised by the courts and tribunals established by or under the Constitution. Article 94(1) provides that the legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament. Further, Article 129(1) provides that the Executive authority derives from the people of Kenya and should be exercised in accordance with the Constitution. Clause (2) thereof further provides that the Executive authority should be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

The foregoing provisions trace the source of the constitutionally conferred powers from the people. This position is also captured in the Preamble which provides, *inter alia,* that in exercising the people's sovereign and inalienable right to determine the form of governance of their country and having participated fully in the making of the Constitution, adopt, enact and give the Constitution to themselves and their future generations.[15] The fact that the Constitutional powers emanate directly from people has been used to justify the supremacy of the Constitution over every other law or law-making body in the land. It has been argued that the Constitution is 'a charter containing the pact that is the social contract....'[16]

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[14] Limbach, J., op. *cit.* p. 3.

[15] Preamble, Constitution of Kenya, 2010, Government Printer, 2010, Nairobi.

[16] Muigai G., "The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication," *Constitutional Law Case Digest,* Vol. 2, pp. 159-189 at p. 160 (2005), International Commission of Jurists (Kenya).

The constituent power is said to be a primordial power, that is, it pre-exists a constitution. The Constitution thus only comes in to delegate such power.[17] The various national legal and institutional arrangements are thus bound by the Constitution in their application and functioning. Article 3(1) provides that every person has an obligation to respect, uphold and defend this Constitution. The concept of constitutional supremacy has also been subjected to judicial interpretation by the Kenyan Courts. For instance, in the case of *Githunguri vs Republic*[18] the High Court held *inter alia* that it has inherent powers to exercise jurisdiction over tribunals and individuals acting on administrative or quasi-judicial capacity.

In *Albert Ruturi & Others vs A.G & The Central Bank of Kenya,*[19] the High Court held that any law that is inconsistent with the Constitution should, to the extent of the inconsistency, be void and the Constitution should prevail.[20] It is noteworthy that the current Constitution of Kenya provides that 'any law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid.'[21]

Supremacy of the Constitution was also discussed in the case of *Kamlesh Mansukhlal Damji Pattni and Goldenberg International Limited vs the Republic*.[22] 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. This was also affirmed in the current Constitution of Kenya 2010 which provides that the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.[23]

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[17] *Njoya and Others v Attorney-General and Others* (2004) AHRLR 157 (KeHC 2004)
[18] Criminal Application No. 271 of 1985 (1986).
[19] High Court at Nairobi, Miscellaneous Civil Application No. 905 of 2001.
[20] s.3 of the repealed Constitution of Kenya.
[21] Art. 2(4).
[22] High Court Misc. Application No. 322 of 1999 and No. 810 of 1999
[23] Art. 23(1), Constitution of Kenya 2010. However, it is noteworthy that Clause (2) thereof provides that Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. This has since been achieved through the enactment of the Magistrates' Courts Act, 2015, No. 26 of 2015, which was passed to give effect to Articles 23(2) and 169(1) (a) and (2) of the Constitution; to confer jurisdiction, functions and powers on the magistrates' courts; to provide for the procedure of the magistrates' courts, and for connected purposes. S. 8(1) provides that subject to Article 165 (3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

However, clause (2) provides that the applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25 (a) and (b) of the Constitution. Clause (3) states that nothing

The manner of Constitutional interpretation, being the supreme law of the land, was considered in the East African case of *Republic vs El mann*,[24] where the Court held that the Constitution is not different from any other statute and should be interpreted in the same manner. The Court held that the Constitution has to be interpreted according to the intention expressed in the Constitution itself. The Kenyan Courts, however, have since rejected the holding in the *El Mann case*.[25] In *Crispus Karanja Njogu vs Attorney General (Unreported)*[26] the Constitutional Court stated that "*the Constitution is not an Act of Parliament but it exists separately and it is supreme. Further, when an Act of Parliament is in any way inconsistent with the Constitution, the Act of Parliament, to the extent of the inconsistency, becomes void....It is our considered view that, constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the Constitution, of necessity, has principles and values embodied in it; that a Constitution is a living piece of legislation. It is a living document*." (Per Oguk, Etyang and Rawal, J.J.J) (Emphasis added).

The Constitutional court in the *Njogu case* ruled that due to its supremacy over all other written laws, when one interprets an Act of Parliament in the backdrop of the Constitution, the duty of the court is to see whether that Act meets the values embodied in the Constitution. The *El Mann case* position was also challenged and rejected in another Kenyan case of *Njoya & others vs Attorney General & others,*[27] where the Court followed the *Njogu case* and held that unlike an Act of Parliament which is subordinate, the Constitution should be given a broad liberal and purposive interpretation to give effect to its fundamental values and principles.

The supreme nature of the Constitution was also well captured by the Tanzanian Court of Appeal in *Ndyanabo vs Attorney General*[28] where the Court stated that firstly, the Constitution is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with lofty purposes for which its makers framed it. The Court asserted that so construed, the instrument becomes a solid foundation of

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in this Act may be construed as conferring jurisdiction on a magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.

[24] [1969] EA 357

[25] For a further discussion on this, see Thiankolu, M., 'Landmarks from El Mann to the Saitoti Ruling; Searching a Philosophy of Constitutional Interpretation in Kenya' *Kenya Law Reports,* January, 2007, Nairobi, Available at *http://www.kenyalawreports.or.ke/Downloads_Other/Landmarks_from_El_Mann_to_the_Saitoti_Ruling.pdf* [Accessed on 29/11/2013].

[26] High Court Criminal Application No 39 of 2000.

[27] [2004] 1 EA 194.

[28] [2001] 2 EA 485, p. 493.

democracy and the rule of law. Secondly, the provisions touching on fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that the people enjoy their rights, the democracy not only functions but grows, and the will and dominant aspirations of the people prevail. The Court stated that restrictions on fundamental rights must be strictly construed.

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.[29] The Constitution has also provided for the general principles and national values of governance which must guide the application of all laws as well as the operation of all state organs and persons. Article 10(1) thereof provides that the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.[30] To promote the observation of such values and principles in the area of human rights, Chapter Four of the Constitution (Articles 19-59) has been dedicated to The Bill of Rights and Fundamental freedoms that must apply to all law and bind all State organs and *all persons*(*Emphasis added*).[31] Article 19(1) 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. This, therefore, means that all the necessary measures must be put in place to ensure that it is promoted and protected for the wellbeing of general populace.

To avoid any interference with constitutional supremacy, the Constitution provides for the procedure to be followed in its amendment.[32] Article 255(1) of the Constitution provides that a proposed amendment to the Constitution should be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to *inter alia* such matters as: the supremacy of the Constitution; the sovereignty of the people; the national values and principles of governance referred to in Article 10 (2) (*a*) to (*d*); and the Bill of Rights.

[29] Art. 259(1), Constitution of Kenya 2010.
[30] Art. 10(2), Constitution of Kenya, 2010, has laid out such principles and national values as follows: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.
[31] Art. 20(1).
[32] Chapter sixteen (Art. 255-257).

4. Arbitration Practice under the Kenyan law

Kenya has a law on arbitration whose scope is to define the scope, responsibilities, and limitations of the arbitral tribunals, to allow parties to determine disputes in a manner consistent with law. Arbitration in Kenya is governed by various laws which include the Constitution, *The Arbitration Act* 1995[33] (hereinafter the *Arbitration Act*), the *Arbitration Rules*, *Civil Procedure Act*[34] and the *Civil Procedure Rules* 2010[35].

Section 59 of the *Civil Procedure Act*[36] provides that all references to Arbitration by an order in a suit, and all proceedings thereunder, should be governed in such manner as may be prescribed by rules. Further, Order 46 of the *Civil Procedure Rules* provides, *inter alia*, that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the Court for an order of reference wherever there is a difference.

The *Arbitration Act* 1995 generally provides for arbitral proceedings and the enforcement of the arbitral awards by national courts. Section 3(1) of the Act attempts to define the scope of the Act and defines "Arbitration" to mean any Arbitration whether or not administered by a permanent arbitral institution. The Act thus applies to a wide range of Arbitration matters.

The *Arbitration Act* defines the extent of Arbitration tribunals' operation in Kenya, as well as the point to which courts may intervene in Arbitration.[37] Arbitration among parties is instituted by a contractual agreement.[38] The parties select one or more neutral, qualified arbitrators to hear the dispute and then agree to be bound by whatever decision is rendered. The arbitrators scrutinize existing evidence and testimony, and then make conclusions based upon legal principles specified in the Arbitration agreement.[39]

Several benefits have been attributed to Arbitration as an alternative dispute resolution mechanism. Firstly, Arbitration accords the parties a considerable amount of control over the proceedings. Unless parties agree otherwise in an Arbitration agreement or choose later to resort to court, all the aspects of the case are confidential. Secondly, Arbitration is a private and consensual process. For instance, they can select one or more neutral arbiters to hear their dispute.[40]

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[33] No. 4 of 1995(As amended in 2009), Laws of Kenya.
[34] Cap 21, Laws of Kenya.
[35] Legal Notice No. 151 of 2010, Rules under Section 81, Cap 21, Las of Kenya.
[36] Cap 21, Laws of Kenya
[37] S. 10, No. 4 of 1995
[38] S. 4, No. 4 of 1995, Arbitration Agreement
[39] S. 32, No. 4 of 1995
[40] See Muigua K., *Settling Disputes Through Arbitration in Kenya*, pp.3-4, (Glenwood Publishers Ltd, Nairobi, 2012)

For parties who dread humiliation or condemnation or for those who simply do not want sensitive information to be disclosed, Arbitration allows settlement of disputes without exposure. Besides the choice of arbitrators, parties can control aspects of the proceedings as well. In Arbitration agreements, parties can spell out certain procedural changes to the operation of the tribunal, lay down the level of formality of discussion, and most notably, oblige arbitrators to follow their choice of law.[41] Thirdly, since parties can exercise control and because proceedings tend to be less formal than in court trials, Arbitration often creates a less tense atmosphere for dispute settlement. Lastly, awards arising out of Arbitration can be binding or nonbinding on the parties, depending on the Arbitration agreement. The *Arbitration Act* allows Arbitration parties to resort to courts only where the parties have agreed that an appeal can be filed.[42] In the absence of such an agreement the arbitrators' decision will be binding on the parties and enforceable by courts. In *Nyutu Agrovet Limited v Airtel Networks Limited*,[43] one of the issues was whether in the absence of an express provision of a right of appeal in an arbitration agreement a party to arbitral proceedings has a right of appeal to the Court of Appeal from a decision of the High Court given under section 35 of the Arbitration Act, 1995.

It was held that the right to appeal was expressly granted by law and not by implication. And a party had to show which law donated the right of appeal intended to be exercised. The Court also held that the principle on which arbitration was founded, namely that the parties agree on their own, to take disputes between or among them from the courts for determination by a body put forth by themselves and adding to all that as in the instant case, that the arbitrators' award had to be final. It could be taken that as long as the given award subsisted it was theirs. But in the event it was set aside as was the case, that decision of the High Court was final. The High Court's decision was final and must be considered and respected to be so because the parties voluntarily choose it to be so. They put that in their agreement. They desired limited participation by the courts in their affairs and that had been achieved. Despite the loss or gain either party might impute to, the setting aside remained where it fell. The courts, including the Court of Appeal, should respect the will and desire of the parties to arbitration.

Arbitration practice in Kenya has increasingly become more formal and cumbersome due to lawyers' entry to the practice of Arbitration.[44] This has had the effect of seeing more matters being referred to the national Courts due to the disputants' dissatisfaction. The referrals have been based on matters touching on substantive as well as procedural aspects of the Arbitration. Recourse to Courts may be necessary due to some unique characteristics of Arbitration which, though positive, may also adversely affect the certainty of one party

[41] S. 20
[42] S. 39
[43] Nyutu Agrovet Limited V Airtel Networks Limited [2015] eKLR, Civil Appeal (Application) No 61of 2012.
[44] Muigua K., *Settling Disputes through Arbitration in Kenya*, op. cit. p. 10.

to access justice. These include lack of a harmonized framework for supervision or accountability of arbitrators,[45] a relaxation of evidentiary rules, decreased opportunities for thorough discovery,[46] insufficient or nonexistent explanations of arbitrators' reasoning in decisions,[47] and limited protections for vulnerable parties.

Despite the holding in *Nyutu case*, arbitration tribunals are however subject to certain restrictions imposed by the courts. Further, the court has the power, on application from one or more of the parties, to remove an arbitrator on grounds of bias, lack of qualifications or physical or mental capacity, or a refusal or failure to conduct proceedings properly.[48] A court may determine a question of law which it finds "substantially affects the rights of one or more of the parties" upon application from a party involved in the Arbitration proceedings and upon the agreement of all parties or the Arbitration tribunal.[49] A court may also issue orders confirming, varying, or setting aside awards granted by the tribunal, after one party makes an application to the court.[50] In *Nyutu Agrovet Limited v Airtel Networks Limited*, it was held that the salient features of section 35 underline the deliberate policy of the Act to limit intervention by courts in arbitral proceedings. The serious nature of the grounds recognized to justify setting aside an arbitral award serves, to eliminate run-of-the mill complaints, grievances and disaffections as basis for intervention.

Arbitration process is one of the administrative actions by tribunals contemplated under the current Constitution of Kenya. Although the foregoing does not provide the exhaustive list of the ways in which a court can supervise and regulate Arbitration tribunals in the Kenya, it illustrates that courts can keep Arbitration panels in check, and ensure they do not act unconstitutionally.

Article 159(2) (c) of the Constitution provides that in the exercise of judicial authority, the Courts and tribunals must be guided by the principle of *inter alia* promotion of alternative forms of dispute resolution (ADR) including reconciliation, mediation, Arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3). Notable are the provisions of the Clause (3) which are to the effect that Traditional dispute resolution mechanisms shall not be used in a way that: contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law.

It therefore follows that Arbitration must be carried out in a way that is consistent with Constitutional principles and values and any derogation thereof may be challenged as

[45] Supervision is mostly Institution-based.
[46] Limited timeframes are usually allocated for this.
[47] Parties may agree on whether they will expect an award with reasons thereof or otherwise.
[48] S. 13, No. 4 of 1995.
[49] S. 39(3)(b), No. 4 of 1995.
[50] Ibid, s. 39(2)(b)

being unconstitutional and thus invalid. In the Ugandan case (which has been upheld by Kenyan courts) of *Zachary Olum and Anor vs Attorney General,*[51] it was held that in order to determine the constitutionality of a statute, the Court had to consider the purpose and effect of the impugned statute or section thereof; if the purpose was not to infringe a right guaranteed by the Constitution, the Court had to go further and examine the effect of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the Constitution, the Statute or section in question would be declared unconstitutional. If the government creates a statutory regime to facilitate Arbitrations, then it has an obligation to ensure that the regime does not violate any of the constitutional principles and values.[52] While acknowledging the need for finality of arbitral processes, it is important to bear in mind procedural fairness of the processes as this is one of the commonest grounds upon which the arbitration process and outcome may be challenged in court.

5. Arbitration and the Constitution of Kenya, 2010

The law of Arbitration in Kenya has not been one without challenges as to its unconstitutionality due to alleged violation of the rules of natural justice. One such instance, occurred in the case of *Epco Builders Limited v Adam S. Marjan-Arbitrator & Another*[53]where the Appellant had filed a constitutional Application under sections 70 and 77 of the Constitution of Kenya[54], section 3 of the *Judicature Act* and section 3A of the *Civil Procedure Act*. The Applicant argued that their constitutional right to a fair Arbitration had been violated by a preliminary ruling of the arbitrator. The Applicant argued that it was unlikely to obtain fair adjudication and final settlement of the dispute before the arbitral tribunal due to the arbitrator's "unjustified refusal to issue summons to the Project Architect and Quantity Surveyor" who would have allegedly played an important role as witnesses in ensuring fair and complete settlement of the matters before the Tribunal. Counsel for the Chartered Institute of Arbitrators-Kenya Branch (CIArb), an interested party, submitted that while CIArb did not refute the application under section 77(9) of the Constitution, it argued that the procedure laid down under the *Arbitration Act* should be exhausted first before such an application.

Justice Deverell, while supporting the view of the majority stated:

> If it were allowed to become common practice for parties dissatisfied with the procedure adopted by the arbitrator(s) to make constitutional applications during

[51] (1) [2002] 2 EA 508

[52] Chotalia, S. P., '*Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective*' p. 67. Available at *http://www.ejournals.library.ualberta.ca/.../constitutional.../8499* Accessed on 24/11/2013]

[53] Civil appeal No. 248 of 2005 (unreported).

[54] Repealed by the Constitution of Kenya, 2010.

> the currency of the Arbitration hearing, resulting in lengthy delays in the Arbitration process, the use of alternative dispute resolution, whether Arbitration or mediation would dwindle with adverse effects on the pressure on the courts. This does not mean that recourse to a constitutional court during Arbitration will never be appropriate. Equally it does not mean that a party wishing to delay an Arbitration (and there is usually one side that is not in a hurry) should be able to achieve this too easily by raising a constitutional issue as to fairness of the "trial" when the *Arbitration Act* 1995 itself has a specific provision in section 19 stipulating that "the parties shall be treated with equality and each party shall be given full opportunity of presenting his case," in order to secure substantial delay. If it were to become common, commercial parties would be discouraged from using ADR.[55]

Justice Deverell's assertion was, therefore, that Alternative Dispute Resolution should be encouraged while reducing the instances where disputants sought court's intervention. This was supposedly to make the process 'expedient'. The dissenting judge, Justice Githinji, was however of the opinion that Arbitration disputes are governed by private law and not public law and by invoking section 84(1) of the constitution, the Appellant was seeking a public remedy for a dispute in private law.[56]

The foregoing argument may not be compelling under the current *Constitution of Kenya* 2010 and specifically the Bill of rights. The repealed Constitution was fundamentally different from the current Constitution of Kenya with regard to such matters as fundamental rights and freedoms, with the latter having substantive and elaborate provisions on the same. The current Constitution provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State.[57] The law cannot 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.[58] The Constitution guarantees every person's right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[59] Further, *Fair Administrative Action Act, 2015*[60] which is meant to give effect to Article 47 of the Constitution, applies to all state and non-state agencies, including any person- exercising administrative authority; performing a judicial or quasi-judicial function under the Constitution or any written law; or whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.[61]

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[55] Ibid.
[56] Ibid
[57] Art. 19(3).
[58] See Cherednychenko. O.O., 'Fundamental rights and private law: A relationship of subordination or Complementarity?' *Utrecht Law Review*, Volume 3, Issue 2 (December, 2007).
[59] Art. 47(1).
[60] No. 4 of 2015, Laws of Kenya.
[61] Ibid, S. 3.

A stance similar to Justice Githinji's opinion that private matters cannot be decided in the sphere of public law would, therefore, probably not hold under the current Constitution of Kenya. For instance, Article 10(1) provides that the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them *inert alia*: enacts, applies or interprets *any (*emphasis ours*)* law; or makes or implements public policy decisions. This clause binds all persons and demands that any law (including private law) must be consistent with its provisions. The Bill of Rights and Fundamental Freedoms binds all persons and applies to all law[62] and requires equal treatment of every person[63] including *persons/parties to a private law governed dispute settlement process* (Emphasis added).

Apart from facilitating and giving effect to private choice, the law must also protect the interests of all the members of the society.[64] Failure to do so may create the impression of selective application of such law.

Article 22(1) of the Constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. With regard to the *Arbitration Act*, section 5 provides that a party who *knows* that any provision of this Act from which the parties may derogate or any requirement under the Arbitration agreement has not been complied with and yet proceeds with the Arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object. This provision is well meaning for ensuring expediency and fair play in an Arbitration.

However, the wording of the section has not ousted the jurisdiction of the constitutional Court. It deals with situations where such an aggrieved party was reasonably expected to have known or was well aware of such derogation or statutory requirements under the Act. Where does that leave those who were genuinely ignorant of the foregoing?[65] They could justifiably raise objections especially where fundamental rights and freedoms are concerned, notwithstanding the time limit prescription.

5.1 Principles of Natural Justice

In the English case of *Ridge v Baldwin*,[66] the watch committee had sacked Ridge, the chief constable of Brighton, after he had been acquitted on charges relating to corruption. On

[62] Art. 20(1), See also Art. 2(4) of the Constitution.
[63] Art. 27 on Equality and freedom from discrimination.
[64] See Burnett, H., *Introduction to the legal system in East Africa*, East African Literature Bureau, Kampala, 1975, pp267-412
[65] Though ignorance of the law is no defence (*Ignorantia juris non excusat or Ignorantia legis neminem excusat*)
[66] [1964] AC 40; (1964) HL

appeal, he won since Police Regulations had set down a procedure that should have been followed and the fact that there was lack of natural justice; he had neither been told of the reasons for dismissal nor given the opportunity to put his case to the watch committee. The House of Lords held that the decision to dismiss Ridge was void because the watch committee had not observed the principles of natural justice. The court of appeal had held that the committee was acting merely in an administrative capacity but, the House of Lords differed by holding that the committee had not wholly observed the rules of natural justice and therefore its decision was void.

In the case of *Breen Vs Amalgamated Engineering Union*[67] the court noted that 'as regards the right to a hearing, the crucial question seems to be not whether a person is or is not an office holder but whether a statutory or other requirement provides or is to be interpreted as providing the elementary safeguard of a right to a hearing.' It held that '...[I]f he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive without a hearing, or reasons given, then these should be afforded him according as the case may demand.'

The principles of natural justice entail the right to be heard (*Audi alteram partem)*[68] and the right to a fair and unbiased administrative process (N*emo judex in re causa sua).*[69] The common law rules of natural justice or procedural fairness ensures that administrative decision makers follow a fair and unbiased procedure when making decisions.

Natural justice requires that the decision maker must provide sufficient opportunity for the affected person to present their case and respond to the evidence and arguments being advanced by other side or in the knowledge of the decision maker.

Lord Hewart, in *Rex v Sussex Justices; Ex parte McCarthy* had earlier expanded the scope of natural justice by holding that "*… it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done*."[70]

The current Constitution of Kenya has taken the foregoing standards a notch higher by incorporating natural justice principles into the Bill of rights and fundamental rights. Article 48 provides that the State shall ensure access to justice for all persons and, if any fee is required, it should be reasonable and should not impede access to justice. This provision is not biased towards people dealing with public law only but also protects those dealing with private law.

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[67] (1971) 2 QB 175.
[68] Latin for 'hear the other side; hear both sides.'
[69] Latin for 'no man should be a judge in his own cause'
[70] ([1924] 1 KB 256, [1923] All ER Rep 233)

A number of reasons justify the need for constitutional regulation of administrative tribunals. These are: they are at times held in private so the basic requirements for justice may be ignored; parties are sometimes not permitted to be represented by lawyers; rights of appeal are sometimes limited; there is a wide discretion of a tribunal at times, which may lead to inconsistent and illogical decisions; and the officials do not act impartially in most of the cases.[71]

In the case of *David Onyango Oloo vs The Attorney general,*[72] it was held, *inter alia,* that rules of natural justice apply to an administrative act in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit application of a law. This was affirmed in the *Nyutu Agrovet* case, where the Court held that the grounds upon which the courts may set aside an arbitral award are of a pretty serious nature, such as incapacity of a party; illegality of the arbitral proceedings; *breach of the rules of natural justice*; excess of jurisdiction; fraud; bribery; corruption; undue influence and breaches of public policy. A decision maker must also discharge their administrative duties in an independent and unbiased manner.

5.2 Fairness in Administrative Processes

Article 50 of the Constitution provides for the right to a fair hearing. Clause (1) provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Such persons or parties to a dispute also have a right to *inter alia* have adequate time and facilities to prepare a defence and to adduce and challenge evidence. The information disclosed to the person must be satisfactorily accurate to facilitate the person to properly present his or her case.

Section 19 of the *Arbitration Act*, dealing with equal treatment of parties, provides that the parties shall be treated with equality and each party shall subject to section 20, be given a fair and reasonable opportunity to present their case. This provision would be subject to Articles 27 and 50 of the Constitution on equality and fair hearing respectively. Justice Deverrel's argument in the *Epco case* that the *Arbitration Act* conclusively provides that 'parties shall be treated with equality and each party shall be given full opportunity of presenting his case' and thus application for upholding of constitutionally guaranteed rights should not be 'easily' allowed could be challenged. It is noteworthy that the *Arbitration Act*'s provision on fair trial does not in itself suffice to guarantee this right. Any provision on fair and/or equal treatment that apparently contradicts other provisions therein renders it ineffective in realisation of justice. The Constitution requires that such a hearing must be guided by *inter alia* transparency, rule of law, inclusion, human rights and

[71] ICJ Kenya, 'Strengthening Judicial Reforms in Kenya: Public Perceptions of the Administrative Tribunals in Kenya' Vol. VI, p. 6, 2003.
[72]David Onyango Oloo vs The Attorney general [1987] K.L.R 711.

non-discrimination.[73] Any deviation from such may subject it to challenge on grounds of unconstitutionality.

One cannot give up their constitutionally guaranteed rights and fundamental freedoms. If Arbitration is to be regarded as one of the options or means to access justice as guaranteed under Article 48 and 159 of the Constitution, then it must conform to the general principles of fairness, impartiality and equality, to mention but a few. Justice requires that both substantive and procedural aspects of the administrative process demonstrate fairness. Granting arbitrators the right to choose unconstitutional laws to govern the proceedings is similar to delegation of legislative authority, something that would normally be subject to Constitutional scrutiny.

Arbitration statutes generally provide for limited rights of review by superior courts from arbitral awards. For instance, the Kenyan *Arbitration Act*, 1995 provides for court intervention through on limited grounds. One such possibility is where the *Arbitration Act* expressly provides for intervention of the court under section 10.[74] The other instance is where the Court intervenes on grounds of public interest if substantial injustice is likely to be occasioned. While the State should continue to respect the role of private Arbitration and the need to avoid recourse to the courts in private dispute settlement, they must not permit private arbitrators to use laws that are likely to violate constitutional principles. The Rule of law is the foundation of democracy in Kenya.[75]

In the case of *Sadrudin Kurji& another v. Shalimar Limited & 2 Others* the Court held *inter alia* that:

> *"...Arbitration process as provided for by the Arbitration Act is intended to facilitate a*
>
> *quicker method of settling disputes without undue regard to technicalities. This however, does not mean that the courts will stand and watch helplessly where cardinal rules of natural justice are being breached by the process of Arbitration.*
>
> *Hence, in exceptional cases in which the rules are not adhered to, the courts will be perfectly entitled to set in and correct obvious errors."*[76]

Law making bodies must set reasonably clear and specific standards in circumstances where the grant of an unfettered discretion would lead to arbitrary, discriminatory, or otherwise unconstitutional restrictions. A limit on Constitutional rights must be clearly determinable. A limit must set an intelligible standard. Limitations on rights cannot be left

[73] Article 10, Constitution of Kenya 2010
[74] S. 10, 'Except as provided in this Act, no court shall intervene in matters governed by this Act'
[75] Preamble, Constitution of Kenya, 2010
[76] [2006] eKLR

to the unregulated discretion of administrative bodies, in this case arbitral tribunals.[77] Indeed, Article 24(1) of the Constitution provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including *inter alia:* the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation;…and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

It is however important to note that Article 25 provides for those rights and freedoms that may not be limited under any circumstances. These are: freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus.* It therefore follows that the rights contemplated under Article 25 must be upheld and promoted in all proceedings and instances including Arbitration.

One of the advantages of Arbitration is that private parties are entitled to choose the Arbitration law to govern their private relationships. The Act assumes that the parties have equal bargaining power and therefore disregards the likelihood of violation of any constitutional rights in the process. However, it is already settled law that persons cannot contract out of constitutional and human rights protections.[78]

5.3 Fundamental Freedoms

The Bill of Rights and fundamental freedoms applies to all irrespective of status and thus, and no one, unless clearly authorized by law to do so, may contractually consent to shelve its operation and in so doing put oneself beyond the scope of its protection. The Bill of Rights and fundamental freedoms must therefore be observed and promoted in all situations and by all persons.[79]

6. Arbitrator's notes and access to Information

Generally, arbitrators are not under legal obligation to supply their arbitrator's notes to the parties. Any party who wishes to have the proceedings of the Arbitration must hire a stenographer at their own cost. The constitutional question that arises here is the right of the parties to obtain information necessary for realization of justice. Article 48 of the Constitution obligates the State to ensure that justice is done and the same is not defeated

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[77] Chotalia, S. P., '*Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective*' op. cit. at p. 68.

[78] Article 19(2) provides that 'the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individual and communities and to promote social justice and the realisation of the potential of all human beings.' Clause (3) further provides that 'the rights and fundamental freedoms in the Bill of Rights: belong to each individual and are not granted by the State;….and are subject only to the limitations contemplated in this constitution.'

[79] See Chapter 4 (Arts. 19-59).

by a requirement for any fee to be paid. Article 35(1) of the constitution provides that every citizen has the right of access to: information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom. Would the arbitrator be thus compelled under this constitutional provision to provide a copy of the arbitrator's notes to any party who insists of his or her right to access information as a constitutionally guaranteed right?

Article 165(3) of the Constitution defines the High Court's jurisdiction and provides that subject to clause (5),[80] the High Court shall have *inter alia*: jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;[81] and jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of— (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.[82]

Article 165(6) further provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. Clause (7) thereof is to the effect that for the purposes of clause (6), the High Court may call for the *record of any proceedings*(emphasis added) before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

Going by the wording of clause (7), the record of proceedings would probably include the arbitrator's notes. Further, section 6(1) of the *Fair Administrative Action Act, 2015* provides that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5.

Arbitration and ADR generally, has undoubtedly been gaining popularity especially the court-annexed Arbitration. Arbitration has been recognised under various statutes and most importantly under the Constitution as a viable option for settlement of disputes. Its higher degree of formality as compared to other mechanisms under the ADR makes it closely resemble litigation and thus requires law's intervention to ensure that the rights of all parties are not only upheld but also promoted. This is because it is susceptible to the

[80] Art. 165(5) 'The High Court shall not have jurisdiction in respect of matters— (*a*) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (*b*) falling within the jurisdiction of the courts contemplated in Article 162 (2)'
[81] Art. 165(3)(b)
[82] Art. 165(3)(d)

procedural rules and technicalities that are synonymous with courts. Indeed, Arbitration is not merely a mechanism to provide for private dispute settlement, but rather, is a means of providing quasi-judicial, comprehensive dispute management.[83] Arbitration proceedings may arguably be subjected to the foregoing provisions particularly Article 165.

7. Arbitrator's fees and Access to Justice

Section 32B of the *Arbitration Act* 1995 provides for the Arbitration Costs and expenses in an Arbitration proceeding. Subsection (1) is to the effect that unless otherwise agreed by the parties, the costs and expenses of an Arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the Arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5). The arbitral tribunal is thus mandated to determine their fees.

Arbitration fees are mostly determined by the arbitral tribunal and where the Arbitration is institutional, there exist institutional guidelines on how this should be done. The parties thus have little if any say on the amount to be charged. Lately, there have been concerns on the actual cost effectiveness of Arbitration with some arguing that Arbitration is becoming more expensive than litigation.[84]

The *Constitution of Kenya* provides under Article 48 that in accessing justice, if any fee is required, it shall be reasonable and shall not impede access to justice. The problem comes in when Arbitration involves persons who do not have the financial muscle as against a party who would not have any problem settling their share of the fees charged as the Act requires. A good example is where an individual person enters into Arbitration with a body corporate. There is the risk of one party failing to access justice due to lack of finances. Indeed, section 32B (3) provides that (3) the arbitral tribunal may withhold the delivery of an award to the parties until full payment of the fees and expenses of the arbitral tribunal is received. The question that arises is whether Article 48 applies selectively and who determine the reasonableness of the arbitrator's fees as some of them

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[83] See Bremer (Handelsgesellschaft mbH) vs. EtsSoules [1985] 1 Lloyd's Rep160; [1985] 2 Lloyd's Rep 199. Sir Nicolas Browne-Wilkinson V-C *inter alia* stated: "*...On appointment, the arbitrator becomes a third party to that Arbitration agreement, which becomes a trilateral contract....Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status*."

[84] Daily Nation, *Business Daily,* "Is Arbitration of disputes better than litigation?" Sunday, March 24 2013, Available at *http://www.businessdailyafrica.com/Is-Arbitration-of-disputes-better-than-litigation/-/539546/1729318/-/rm6n5az/-/index.html* Accessed on 25 November, 2013; See also International law Office, *Arbitration may no longer be viable as an ADR method*, August 09 2012, Available at *http://www.internationallawoffice.com/newsletters/detail.aspx?g=70d89bd9-87cc-45e4-a73d-b740f96797d0* [Accessed on 25/11/2013]

are fixed by the particular institutions involved. It is noteworthy that arbitrators are paid on hourly basis and according to their level of experience and/or expertise.

Would withholding of the award in absence of proper determination of the 'reasonableness' of the fees charged amount to violation of the constitutional right of access to justice? Subsection (4) thereof provides that if the arbitral tribunal has, under subsection (3), withheld the delivery of an award, a party to the Arbitration may, upon notice to the other party and to the arbitral tribunal, and after payment into court of the fees and expenses demanded by the arbitral tribunal, apply to the High Court for an order directing the manner in which the fees and expenses properly payable to the arbitral tribunal shall be determined. This provision makes it even harder for the aggrieved/affected party to access justice if the Court comes in *after* payment into court of the fees and expenses demanded by the arbitral tribunal. What if a party failed to pay the moneys due to lack of the same? Arbitration then becomes expensive and violates the right of access to justice since such a person, if litigating in courts, would probably have access to pauper brief scheme.[85]

This remains a contentious issue as to how it should be approached since it seems to be beyond the parties' autonomy in the process if section 32B (7) is anything to go by. The provisions of this section are to the effect that the provisions of subsections (3) to (6) have effect notwithstanding any agreement to the contrary made between the parties. Would a group/class of persons be allowed to join forces and enter into Arbitration especially where corporations are involved so as to do cost sharing? If not, how is the power imbalance to be handled in order to facilitate access to justice for the weaker party? In the American case of *American Express Co. et al. v. Italian Colors Restaurant et al,*[86] it was held that The *Federal Arbitration Act* (FAA) does not permit courts to invalidate a contractual waiver of class Arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.[87] The plaintiffs in *American Express* had claimed that American Express used monopoly power in the market for charge cards to extract higher rates for processing American Express credit cards. When American Express moved to compel individual Arbitration pursuant to the Arbitration agreement, plaintiffs had protested, alleging that a class action was essential because the costs of their expert reports alone would run into the hundreds of thousands of dollars, and each individual merchant could hope to recover only a fraction of that amount. A class action thus was essential, plaintiffs argued, to "effectively vindicate" their claims. This argument was rejected by the Supreme Court and had observed that one could not be coerced into class litigation in absence of agreement to that effect.

[85] No legal aid scheme is available in Arbitration
[86] Certiorari to the United States Court Of Appeals for the Second Circuit, No. 12–133, Argued February 27, 2013—Decided June 20, 2013
[87] Ibid.,Pp. 3–10.

The effect of such a decision, though in foreign jurisdiction would be incapacitation of vulnerable persons to access justice especially where they would be seeking justice against large corporations or companies. It is therefore unlikely that an individual would afford the costs of Arbitration with companies and especially where purportedly 'estopped' from seeking justice through courts due to an Arbitration clause in a contractual agreement.[88]

8. Conclusion

There is need to ensure that even as parties enjoy autonomy and other advantages that are associated with Arbitration, the 'weaker' party's interests in the process are protected. Anything less would only delay the process through court applications especially in case of breach of procedural fairness, the very problem that ADR seeks to cure, as the party would resort to constitutional court to seek justice. The *Arbitration Act* needs to be reviewed to seal such loopholes and/or vacuum as relating to the procedural fairness and the manner of conducting the Arbitration process. It is important to note that in this era of human rights as well as the supreme constitution of Kenya 2010, any law, practice, or conduct including *Arbitration Act* which does not reflect the gains made in the constitution would easily be challenged in Court as being unconstitutional. In a society that is increasingly becoming litigious, it is important that such concerns be addressed. Otherwise, references from Arbitration would not only be on the now common ground of public policy but would perhaps see new cases being based on the Bill of rights and alleged violation of fundamental freedoms.

Arbitrators and ADR Practitioners must be cognizant of the constitutional rights of the parties that appear before them. The Constitution of Kenya reigns supreme over Arbitration and its practice. The *Arbitration Act* does not have satisfactory procedural and substantive safeguards against violation of the constitutional Bill of rights and fundamental freedoms. The Supremacy clause in Article 2 of the Constitution means that application of any law in violation of the national values and principles of governance as well as the Bill of Rights and fundamental freedoms would be challenged in Court and even held unconstitutional.

The constitution of a nation state has been said to be the Supreme Act within the hierarchy of regulatory instruments and must thus reign over all other laws.[89]

Arbitrators must be fair, observe the rules of natural justice and comply with Constitutional provisions that guarantee parties rights. Constitutional supremacy over arbitration in Kenya is a reality that cannot be wished away.

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[88] Ibid. 'An agreement between American Express and merchants who accept American Express cards, demands that all of their disputes be resolved by Arbitration and provides that there "shall be no right or authority for any Claims to be arbitrated on a class action basis."

[89] Tanchev, E., 'Supremacy of Constitutions in the Context of Constitutional Pluralism' p. 1, available at *http://www.enelsyn.gr/papers/w4/Paper%20by%20Prof.%20Evgeni%20Tanchev.pdf* Accessed on 14/11/2013

Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms

Abstract

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

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

1. Introduction

This paper explores how Alternative Dispute Resolution (ADR) can be employed as a tool for the empowerment of the Kenyan People through conflicts management and participation in governance matters touching on socio-economic aspects of their lives. The author argues that if the aspirations of the Kenyan People are to be met, then it has to be in a secure and peaceful environment and one that allows people to make decisions regarding their own affairs and access justice. Such an environment would be based on the values of human rights, equality, freedom, democracy, social justice and the rule of law as envisaged in the preamble to the current Constitution of Kenya 2010[1].The paper explores the viability of ADR mechanisms in empowering the Kenyan people.

2. Background

During the colonial period the political and legal systems of the colonial masters were superimposed upon the traditional and customary political and legal processes of African peoples. In an attempt to safeguard own interests, the colonial masters suppressed the African customs and practices, only allowing them to continue 'only if they were not repugnant to justice and morality'.[2] A misconception of the African communal way of life, conflict resolution institutions and prejudice against their traditional way of life saw the Europeans introduce the Western ideals of justice which were not based on political negotiations and reconciliation.[3]Although certain minor disputes could be settled in the

[1] Government Printer, Nairobi 2010.

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

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

customary manner, the English Common Law was the ultimate source of authority.[4]The effect of this was disempowerment of the Kenyan people as far as control of their lives was concerned.

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

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

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

[5]Cornell University Law School, Legal Information Institute, 'Self-determination (international law)'.Available at *https://www.law.cornell.edu/wex/self_determination_international_law* [Accessed on 25/02/2015].

[6] See generally, Forje, J.W., "Self-Determination, Nationalism, Development and Pan-Africanism Stuck on the Runway: Are Intellectuals to be Blamed?" *African Journal of International Affairs,* vol. 6 nos 1 & 2, 2003, pp.54–86; See also Obeng-Odoom, F., "Avoiding the Oil Curse in Ghana: Is Transparency Sufficient?" *African Journal of International Affairs*, Vol.13, Numbers 1&2, 2010, pp. 89–119; See generally, Dersso, S.A., "Post-Colonial Nation-Building And Ethnic Diversity In Africa" in Kenyan Section of the International Commission of Jurists, *Ethnicity, Human Rights And Constitutionalism In Africa*, 2008.
Available at
http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.icj-kenya.org%2Findex.php%2Fresources%2Fpublications%2Fbooks-dl%3Fdownload%3D15%3Aethnicity-human-rights-and-constitutionalism-in-kenya&ei=GOD9VNHtLdPYatCogtgP&usg=AFQjCNGx3i7FgPXxxC27UBEi8b6SKYBeAg&bvm=bv.87611401,d.d2s

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

[8] Ibid, p. 25.

3. Conceptualising Empowerment

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

Empowerment theory has been described as one that connects individual well-being with the larger social and political environment, and suggests that people need opportunities to become active in community decision making in order to improve their lives, organizations, and communities.[12]

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

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

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

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

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

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

[13]Ibid.

of persons into the socio-economic and political system. This is by way of inclusion, influence and representation of various disadvantaged or marginalised social groups within the governance structures in the country.

4. Current challenges in Empowerment of the Kenyan People

The search for a society based on the values of human rights, equality, freedom, democracy, social justice and the rule of law informed the promulgation of the current Constitution of Kenya 2010. This is because Kenya's history is one that is marked with human rights violation, inequality, curtailed freedom, autocracy, social injustice and lack of the rule of law. There have also been widespread ethnic, political and even inter-clan conflicts.[14] The effect of these has been underdevelopment or non-development in the country, despite the fact that it is richly endowed with natural resources.[15] The local people find themselves struggling to meet their basic needs of right to life, shelter, health, food and water.[16]

4.1 Violation of Human Rights

Human rights are the equal and inalienable rights, in the strong sense of entitlements that ground particularly powerful claims against the state, which each person has simply as a human being.[17] Individual human rights are increasingly viewed not merely as moral ideals, but as both objectively and subjectively necessary to protect and realize human dignity.[18] Human rights abuses in Africa have been mainly attributed to racism, post-colonialism, poverty, ignorance, disease, religious intolerance, internal conflicts, debt, bad management, corruption, the monopoly of power, the lack of judicial and press autonomy and border conflicts.[19] It is noteworthy that among the list, conflicts feature prominently. As such, it is arguable that the creation of a peaceful and secure environment where every African enjoys human rights heavily relies on the management of these conflicts.

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[14] UNESCO, "Human Security and Human Development: A Deliberate Choice," *Kenya National Human Development Report,* 2006. P. 55.

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

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

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

[18]Howard, R.E. and Donnelly, J., "Human Dignity, Human Rights, and Political Regimes," *op. cit.* p.805.

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

There has been widespread violation of social, cultural and economic rights which are vital for the empowerment of the ordinary people.[20]

The *Universal Declaration of Human Rights*[21] (UDHR 1948) affirms in its Preamble that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Human dignity is indeed inviolable and it must be respected and protected.[22] In addition to the foregoing, UDHR 1948 states that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.[23] The Constitution of Kenya 2010 also guarantees that every person in Kenya has inherent dignity and the right to have that dignity respected and protected.[24]

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

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

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

[21] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III),

[22] See also Art. 1, UDHR, 1948.

[23] Art. 22.

[24] Art. 28.

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

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

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

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

4.2 Lack of Access to Justice and Inequality

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

The concept of 'access to justice' involves three key elements namely: *Equality of access to legal services*, *national equity* and *equality before the law* (emphasis ours).[32]Equality of access to legal services, means ensuring that all persons, regardless of means, have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests.[33]National equity is ensuring that all persons enjoy, as nearly as

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

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

[29] Uganda Land Alliance, "Campaign against Land Grabbing". Available at *http://ulaug.org/data/smenu/34/Campaign%20against%20Land%20Grabbing.html* [Accessed on 06/03/2015].

[30]Global Alliance against Traffic in Women (GAATW), op. cit.

[31] Ibid.

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

[33] Ibid.

possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy.[34]Equality before the law means ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in all fields, use of community facilities and access to services.[35] A framework that does not guarantee these may therefore not facilitate access to justice.

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

In Kenya, this right is guaranteed under the Constitution of Kenya 2010,[39] although the actual implementation or realisation is yet to be seen due to various factors that hinder its effective implementation. The Judicial system in Kenya has been affected by various barriers to accessing justice which include high legal fees, complex rules of procedure, geographical location of Courts that does not reflect the demographic dynamics, cultural, economic and socio-political orientation of the society and selective application of laws.[40] It is difficult for Kenyans to seek redress from the formal court system. The end result is that these disadvantaged people harbour feelings of bitterness, marginalization, resentment and other negative feelings that also affect the stability and peace of the country. Such scenarios have been the causes of ethnic or clan animosity in Kenya.[41]

4.3 The Rule of Law

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

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[34] Ibid.
[35] Ibid.
[36] Art. 7.
[37] Art. 8.
[38] Art. 10.
[39] Art. 27.
[40]Muigua, K., *Resolving Conflicts through Mediation in Kenya, op. cit.*, p.22; *Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution,* ICJ Kenya, Vol.III, May, 2002; Jackton B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29, p. 29.
[41] See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*', (the 'Akiwumi Commission'), published in 1999. Government Printer, Nairobi.
[42] United Nations Development Programme, 'Access to Justice and Rule of Law'
Available at

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

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

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

4.4 Poverty

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

http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/ [Accessed on 24/02/2015]

[43] Ibid.

[44]Dag Hammarskjold Foundation, 'Rule of Law and Equal Access to Justice', p.1, Discussion Paper, January 2013. Available at *http://www.sida.se/PageFiles/89603/RoL_Policy-paper-layouted-final.pdf* [Accessed on 26/02/2015]

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

[46] The Danish Institute for Human Rights, "Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors." *A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, 2011.*Available at *http://www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_dihr_study_final.pdf*[Accessed on 06/03/2015].

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

tribal animosity. [48]They continue suffering in abject poverty despite the presence of natural resources in their areas of residence.[49]

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

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

5. Towards Empowerment

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

There is need to explore means of ensuring that there is actual empowerment of the Kenyan people to enable them take advantage of the gains brought about by the current Constitution of Kenya, including the devolved system of governance. Even though we have the legal framework for the devolved system of governance in place, more needs to be done to equip the ordinary *Mwananchi*[53] to enable them participate in governance

[48] See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*', the 'Akiwumi Commission', published in 1999. Op.cit.
[49] Daily Nation, *Kakamega the poorest county in Kenya*, Monday, November 10, 2014. *Op cit.*
[50] Art. 60(1).
[51] See Articles 10, 69, 118 and 196.
[52] Ibid, p. 24; See also "Protection of Human Rights Concerns OAU," African News Service, 15 April 1999. Available at *http://allafrica.com/stories/199904150006.html*[Accessed on 25/02/2015].
[53] Mwananchi means the Kenyan citizen.

matters and enable them have more say in how the allocated resources should be used to improve their lives. In the absence of this, the politicians continue to take advantage of the disempowered and ignorant people to misuse resources and perpetrate bad governance. An empowered people are also able to participate in addressing the inevitable conflicts that arise from time to time.

5.1 ADR and Empowerment

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

The *United Nations Declaration on the Rights of Indigenous Peoples* guarantees that indigenous peoples have the right to access to and prompt decision through just and fair procedures for the management of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision is to give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.[55] This provision contemplates conflicts and disputes management mechanisms that give the indigenous peoples control over the processes and to a large extent the outcome of the process. The role of the local people in empowerment is crucial and it has actually been argued that that even in the face of extreme poverty, conflict and crisis, civilians often play a critical role in responding to threats to their safety and dignity and violations of their fundamental rights.[56]

The desire for dignity is said to be a motivating force behind all human interaction and when it is violated, the response is likely to involve aggression, even violence, hatred, and

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

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

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

vengeance.[57] The United Nations observes that today, some of the most serious threats to international peace and security are armed conflicts that arise, not among nations, but among warring factions within a State.[58] Further, the human rights abuses prevalent in internal conflicts are said to be now among the most atrocious in the world.[59]

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

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

Conflict management mechanisms may either result in settlement or resolution. Settlement is an agreement over the issue(s) of the conflict which often involves a compromise.[63] Settlement practices miss the point by focusing only on interests and failing to address needs that are inherent in all human beings, parties' relationships, emotions, perceptions and attitudes. Consequently, the causes of the conflict in settlement mechanisms remain unaddressed resulting to conflicts in future.[64] Settlement implies that the parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. Since a settlement is

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[57] Hicks, D. and Tutu, D., *Dignity: The Essential Role It Plays in Resolving Conflict*. Yale University Press, 2011.
[58] United Nations, Human Rights and Conflicts: A United Nations Priority. Available at *http://www.un.org/rights/HRToday/hrconfl.htm* [Accessed on 25/02/2015].
[59] Ibid.
[60] Hicks, D., *Dignity: Its Essential Role in Resolving Conflict*, Yale University Press; Reprint edition (January 29, 2013)
[61] Mkangi K, "Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualised Paradigm for Examining Conflict in Africa", Available at www.payson.tulane.edu.
[62]McConnaughay, P.J., 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles' *PKU Transnational Law Review,* Volume 1, Issue 1, pp. 9-31, p.23.
[63] Bloomfield,D., Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, *Journal of Peace Research,* vol. 32 no. 2 May 1995, pp. 151-164.
[64] Muigua, K., *Resolving Conflicts through Mediation in Kenya, Op cit.,* Page 81.

power-based and power relations keep changing, the process becomes a contest of whose power will be dominant.[65] Examples of such mechanisms are litigation and arbitration. Courts can only handle a fraction of all the disputes that take place in society. Courts have had to deal with an overwhelming number of cases and as noted one reason the courts have become overburdened is that parties are increasingly turning to the courts for relief from a range of personal distresses and anxieties.[66]

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

Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.[67]

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

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

[66] Waddell, G.G. and Keegan, J.M., "Christian Conciliation: An Alternative to Ordinary ADR - Part 1". *The Institute for Christian Conciliation.*
Available at
http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5369217/k.9B7D/Christian_Conciliation_An_Alternative_to_Ordinary_ADR__Part_1.htm

[67]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*.

[68] Idornigie, P.O., "Overview of ADR in Nigeria", 73 (1) *Arbitration* 73, (2007), p. 73.D.

[69]Merry, S.A. and Milner, NA. (Eds), *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States*, University of Michigan Press, 1995. p.67.
Available at
http://books.google.co.ke/books?hl=en&lr=&id=guIG64KCttYC&oi=fnd&pg=PA67&dq=adr+and+political+empowerment&ots=I4QWemArtq&sig=B2eIL1rqu5Nub5vl8daDEqojg7c&redir_esc=y#v=onepage&q=adr%20and%20political%20empowerment&f=false [Accessed on 25/02/2015].

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

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

It is noteworthy that adopting a community-based approach to empowerment does not automatically translate into greater participation and inclusion. It cannot be overstressed that some of the traditional practices have negative impacts such as discrimination of women and disabled persons.[74] In fact, it is against this fact that the Constitution retains the test of non-repugnancy while applying traditional justice systems.[75] This is where the Courts come in as the legal guardians of the Bill of Human rights as envisaged in the Constitution.[76]

5.1.1 Legal and Institutional Framework on ADR Mechanisms in Kenya

The Constitution of Kenya guarantees the right of every person access justice.[77] To facilitate this, it provides that in exercising judicial authority, the courts and tribunals are to be guided by the principles of *inter alia*: justice is to be done to all, irrespective of status; justice is not to be delayed; alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms* are to be promoted, subject

[70]Haider, H., "Community-based Approaches to Peace building in Conflict-affected and Fragile Contexts", *Governance and Social Development Resource Centre Issues Paper*, November 2009, p. 6.Available at http://www.gsdrc.org/docs/open/EIRS8.pdf [Accessed on 28/02/2015].
[71]Ibid.
[72]*276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*.
[73]*African Commission on Human and Peoples Rights V Republic of Kenya,* Application 006/2012.
[74] See generally, Muigua, K., "Securing the Realization of Environmental and Social Rights for Persons with Disabilities in Kenya". Available at *http://www.kmco.co.ke/attachments/article/117/Securing%20the%20Realization%20of%20Environmental%20and%20Social%20Rights%20for%20Persons%20with%20Disabilities%20in%20Kenya.pdf*; See also generally Human Rights Watch, *World Report 2013,* available at http://www.hrw.org/sites/default/files/wr2013_web.pdf[Accessed on 28/02/2015].
[75] Art. 159(3).
[76] Art. 23.
[77] Art. 48.

to clause(3)[78] (emphasis ours); justice is to be administered without undue regard to procedural technicalities; and the purpose and principles of this Constitution are to be protected and promoted.[79]

Access to justice could also include the use of informal conflict management mechanisms such as ADR and traditional dispute resolution mechanisms, to bring justice closer to the people and make it more affordable.[80]ADR mechanisms mainly consist of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures. The Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.[81] The traditions, customs and norms of a particular community have always played a pivotal role in conflict resolution and they were highly valued and adhered to by the members of the community.[82]

Article 159 (1) of the Constitution provides that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and that it is administered without undue regard to procedural technicalities.[83] Article 159(1) echoes the right of all persons to have access to justice and also reflects the constitutional spirit of every person's equality before the law and the right to equal protection and equal benefit of the law.[84]

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

Recognition of ADR and traditional dispute resolution mechanisms is thus predicated on these cardinal principles to ensure that everyone has access to justice (whether in courts

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

[79] Art. 159(2).

[80] See Muigua, K. and Kariuki F., 'ADR, Access to Justice and Development in Kenya'. Paper Presented at Strathmore Annual Law Conference 2014 held on 3rd& 4th July, 2014 at Strathmore University Law School, Nairobi.

[81] Art. 11(1).

[82] Muigua, K., *Resolving Conflicts through Mediation in Kenya, op. cit.*, p. 35.

[83] Article 159(2) (d).

[84] Article 27.

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

or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system.[86]

It is also borne out of the recognition of the diverse cultures of the various communities in Kenya as the foundation of the nation and cumulative civilization of the Kenyan people and nation. Most of these mechanisms are entwined within the cultures of most Kenyan communities which are also protected by the Constitution.[87] ADR mechanisms are flexible, cost-effective, expeditious, foster relationships, are non-coercive and result in mutually satisfying outcomes. They are thus more appropriate in enhancing access to justice by the poor in society as they are closer to them. They may also help in reducing backlog of cases in courts.[88] As such, these mechanisms provide an opportunity for empowering the Kenyan people through saving resources such as time and money, fostered relationships and mutually satisfying outcomes.

a. Negotiation

Negotiation is an informal process that involves the parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It has been hailed as one of the most fundamental methods of conflict resolution, offering parties maximum control over the process.[89] The Constitution requires cooperation between national and county governments.[90]The two levels of government are to *inter alia,* assist, support and consult and, as appropriate, implement the legislation of the other level of government; and liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.[91]In case of any dispute between the governments, they are to make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation. Such national legislation are to provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.[92]

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[86] Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, p. 6.
Available at
http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf

[87] Art. 11.

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

[89]Muigua, K., *Resolving Conflicts through Mediation in Kenya, op. cit.*, p.11.

[90] Art. 189.

[91] Art. 189(1) (b) (c).

[92] Art. 189(3) (4).

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

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

b. Mediation

Negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.[95] Mediation is a voluntary, informal, consensual, strictly confidential and non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated solution.[96] It is also defined as a method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussion and the flow of information, and thus aiding in the processes of reaching an agreement.[97] Mediation can be classified into two forms namely: Mediation in the political process and mediation in the legal process. Mediation in the political process is informed by resolution as against settlement. It allows parties to have autonomy over the choice of the mediator, the process and the outcome. The process is also associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control, addressing root causes of the conflict, non-coerciveness and enduring outcomes.

Mediation in the legal process is a process where the conflicting parties come into arrangements which they have been coerced to live or work with while exercising little or no autonomy over the choice of the mediator, the process and the outcome of the process. This makes it more of a settlement mechanism that is attached to the court as opposed to

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[93] Art. 196.

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

[95] Makumi, M., *Conflict in Africa: Theory Processes and Institutions of Management.* Op.cit. P. 15.

[96]Fenn, P., "Introduction to Civil and Commercial Mediation", In Chartered Institute of Arbitrators, *Workbook on Mediation,* (CIArb, London, 2002), p. 10.

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

a resolution process and defeats the advantages that are associated with mediation in the political process.[98]

The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship.[99] In conflict resolution processes like mediation, the goal, then, is not to get parties to accept formal rules to govern their relationship, but to help them to free themselves from the encumbrance of rules and to accept a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.[100]

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

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

c. Traditional Justice Systems

It is noteworthy that there is an overlap between the forms of ADR mechanisms and traditional justice systems.[104] The Kenyan communities and Africa in general, have engaged in informal negotiation and mediation since time immemorial in the management of conflicts. For instance, in relation to women, it has been argued that for Kenyan women,

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

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

[100] Ibid.

[101] See generally Muigua, K., "Resolving Environmental Conflicts through Mediation in Kenya" Ph.D Thesis, 2011, *Unpublished.*

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

[103]Ibid, p. 20.

[104]Ibid, pp.20-21. Art. 159 (2) treats traditional justice systems as part of ADR.

custom is particularly important as it defines their identity within society, and mediates their family relationships, entitlements and access to resources.[105] In addition, informal justice systems which constitute the most accessible forms of dispute resolution utilize localized norms derived from customary law.[106]

Culture has been identified as an essential component of sustainable development and a critical element of human rights-based approaches as it represents a source of identity, innovation and creativity for the individual and community and is an important factor in building social inclusion and eradicating poverty, providing for economic growth and ownership of development processes.[107]Indigenous knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment.[108]Indeed, this has been recognised in the current Constitution of Kenya and it provides that it recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.[109] It also obligates the state to recognise the role of science and indigenous technologies in the development of the nation and to promote the intellectual property rights of the people of Kenya.[110]

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

It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed

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

[106] Ibid.

[107] United Nations Development Group, *Delivering The Post-2015 Development Agenda: Opportunities At The National And Local Levels*, 2014. p. 28.
Available at http://www.undp.org/content/dam/undp/library/MDG/Post2015/UNDP-MDG-Delivering-Post-2015-Report-2014.pdf [Accessed on 28/02/2015].

[108]*United Nations Declaration on the Rights of Indigenous Peoples*, Preamble.

[109] Art. 11(1).

[110] Art. 11(2).

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

[112]Johnstone, G., *Restorative Justice: Ideas, Values, Debates*, Willan, 2002.
Available at
http://books.google.co.ke/books?id=Fu5GKPqVUnAC&printsec=references&dq=adr+and+political+empowerment&lr=&vq=%22The+Possibility+of+Popular+Justice%22&source=gbs_citations_module_r&cad=5 [Accessed on 25/02/2015].

in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.[113] It has been observed that in Tanzania, customary and religious laws are both recognised alongside state law, an indication of the decisive role of state in validating each body of law while attempting to reconcile customary laws with national laws and international laws.[114]
The traditional justice systems can effectively be used alongside the formal systems in giving people a voice in decision-making.

d. Arbitration

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

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

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

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[113]Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at www.payson.tulane.edu. [Accessed on 24/02/2015].
[114]Derman, Bill, *et. al.* (Eds), *Worlds of Human Rights: The Ambiguities of Rights Claiming in Africa*, *BRILL*, 2013. p. 198. Available at *https://books.google.co.ke/books?id=lhv8qTTsBocC&pg=PA198&lpg=PA198&dq=adr+and+political+empowerment&source=bl&ots=47tIVGJoSS&sig=vrAEzhGPcL8r7UhEFyC4GWwRo30&hl=en&sa=X&ei=VhbwVKjqA4fraL3LgrAP&redir_esc=y#v=onepage&q=adr%20and%20political%20empowerment&f=false* [Accessed on 27/02/1015].
[115] R. Stephenson, *Arbitration Practice in Construction Disputes,* (Butterworths, London, 1998), p.123.
[116] Muigua, K., *Settling Disputes Through Arbitration in Kenya.* (Glenwood Publishers Ltd, Nairobi, 2012).
[117] Osei-Hwedie, K. and Rankopo, M.J., *Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana.* Available at *http://home.hiroshima-u.ac.jp/heiwa/Pub/E29/e29-3.pdf*[Accessed on 27/02/1015].

facilitate access to justice. Arbitration can be useful in helping parties take control of their disputes and help in saving costs, time and emotional stress that may come with courts. However, arbitration, as practised today still requires courts for enforcement of awards.[118]

e. Conciliation

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

The Constitution provides for *re*conciliation (emphasis added) which is believed to connote a deeper implication.[120] While conciliation is concerned with finding peace and harmony by putting an end to a conflict, reconciliation seeks to reestablish relations. As such, it can be said to be a restorative process which is desirable in building lasting peace and ensuring that competing interests are balanced. Conciliation and reconciliation can play a significant role in empowering parties to a dispute by giving them substantial control over the process.

5.2 Human Rights Protection and Empowerment

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

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[118] S. 36, Arbitration Act, No. 4 of 1995 (2009), Laws of Kenya. Government Printer, Nairobi.

[119] 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.

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

[121] Ibid, Article 5.

[122] Miller, B., "Political empowerment, local—central state relations, and geographically shifting political opportunity structures: Strategies of the Cambridge, Massachusetts, Peace Movement", *Political Geography, (*Special Issue: Empowering Political Struggle), Volume 13, Issue 5, September 1994, Pages 393–406. Available at *http://www.sciencedirect.com/science/article/pii/0962629894900493* [Accessed on 26/02/2015].

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

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

Further, the Constitution of Kenya tasks the State and every State organ with the duty to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.[127] It also gives every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.[128] The problem however arises where the aggrieved person is not even aware of their rights or the redress available to them.

Courts ought to actively take up their role of upholding and enforcing the Bill of Rights as envisaged in the Constitution.[129] The Court's role is especially important where the application of ADR risks perpetrating violation of human rights such as discrimination.[130] The Constitution provides for specific application of rights to specific groups of persons. These groups include children, persons with disabilities, youth, minorities and marginalised groups, and the older members of society.[131] The Constitution advocates for pro-poor changes to policy, law and regulation of resource allocation and service delivery in different sectors of the economy through such means as requiring the State to put in

[123]Government Printer, Nairobi 2010.
[124] Art. 19(1).
[125] Art. 10(2).
[126] Art. 10(2).
[127] Art. 21(1).
[128] Art. 22(1).
[129] Art. 23.
[130]Art. 159(3)(c)
[131] Part 3 (Articles 52-57)

place affirmative action programmes designed to ensure that the above-mentioned groups of persons are empowered to participate in the development agenda of the country as well as self actualisation.[132] These measures are also meant to facilitate redress for rights violations and injustices perpetrated against the vulnerable groups in the society.

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

5.3 Accountability/Public Participation and Empowerment

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

The effect of this has been massive poverty on the citizenry since the available resources are not properly utilized to empower the people. Indeed, this informed the formation of the current devolved system of governance in Kenya.[136] Devolution is expected to improve the performance of government by making it more accountable and responsive to the needs and aspirations of the Kenyan people and secondly, to facilitate the development and consolidation of participatory democracy.[137] This is because it entails moving away from the state-centric resource control towards approaches in which the local people and authorities play a much more active role in managing the resources around them.[138] Their

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[132] Ibid.

[133] Art. 10(2).

[134] Art. 73(2) (d).

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

[136]Chapter 11, Constitution of Kenya 2010.

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

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

involvement increases resource user participation in natural resource management decisions and the accruing benefits.[139]Transparency and accountability with regard to government management of natural wealth and the revenues it generates are crucial.[140] People are able to voice their views and engage the authorities through *negotiation* (emphasis ours) especially in relation to their most preferred use of the resources in their area for purposes of coming up with economic investments that will ultimately benefit most people and in a better way. The Government's priority development projects may not always necessarily be the most beneficial to the targeted groups of persons at least in addressing their immediate needs. There arises a need to consider the implications of these projects on the social, cultural, political and economic aspects of the affected communities. As such, the use of ADR mechanisms such as *negotiation, convening, facilitation* or *dispute resolution panels* (emphasis ours) can go a long way in enabling the State authorities and the local communities work together in development projects that have the social acceptability in those particular areas.The overall effect of this may be eradication of poverty as a result of the all-round empowerment of people in social, cultural, political and economic aspects of their lives.

5.4 Environmental Justice and Empowerment

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

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

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

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

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

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

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

Increasing the local people's access to resources is useful in increasing their control over those resources. The element of control in empowerment is used to refer to participation in collective processes and is the effectiveness or perception of the ability to influence decisions, mobilize resources and solve problems, building an effective personal and group participation.[145] Control enables the participation process to be gradual and coherent to people's critical awareness which implies a redistribution of power, so the process can be meaningful and real, and participation can boost an empowerment process.[146]

This comes with increased economic empowerment which in turn affects many other areas. Improved communication and flow of information amongst communities help them gain more control over the economic resources and they contribute to the development agenda in their counties.
The end result of the implementation of the elements of environmental justice would be empowerment of people to enable them utilize the resources at their disposal to better their lives.[147]

5.5 Education and Empowerment
Education is a fundamental human right and one that is essential for the exercise of all other human rights since it promotes individual freedom and empowerment and yields important development benefits.[148] Education is important for promoting sustainable development and improving the capacity of people to address environment and

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[143] United Nations Department of Economic and Social Affairs, *Online Survey on Promoting Empowerment of People in achieving poverty eradication, social integration and full employment integration and full employment and decent work for all*. p. 6.Available at *http://www.un.org/esa/socdev/publications/FullSurveyEmpowerment.pdf* [Accessed on 05/03/15].
[144]Ibid, p. 8.
[145] Aguiar, J., "Empowerment – a relational challenge", *Global Journal of Community Psychology Practice*, Vol. 3 Issue 4 Jan 15, 2013.
[146] Ibid.
[147] See generally, Muigua, K., "Utilizing Africa's Natural Resources to Fight Poverty". Available at *http://www.kmco.co.ke/attachments/article/121/Utilizing%20Africa%27s%20Natural%20Resources%20to%20Fight%20Poverty-26th%20March,2014*.pdf
[148] UNESCO, 'The Right to Education', *visithttp://www.unesco.org/new/en/education/themes/leading-the-international-agenda/right-to-education/* [Accessed on 28/02/2015].

development issues.[149] It promotes the realisation of the basic aspects of empowerment namely participation, control and critical awareness.[150]

Environmental education is thus important in empowering people to participate in finding viable solutions for environmental protection and conservation.[151]This education would include traditional knowledge which plays an important role in enabling communities appreciate such concepts as sustainable development in environmental management and conservation as well as using this knowledge in coming up with decisions that work within their socio-cultural contexts.[152]

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

6. Conclusion

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

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

[150] Zimmerman, M.A., "Empowerment Theory: Psychological, Organizational and Community Levels of Analysis," op. cit. p. 52.

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

[152] See Puri S.K., "Integrating Scientific With Indigenous Knowledge: Constructing Knowledge Alliances for Land Management in India." *MIS Quarterly,* Vol. 31 No. 2, pp. 355-379/June 2007; United Nations University, "Why Traditional Knowledge Holds the Key to Climate Change." 2011. Available at http://unu.edu/publications/articles/why-traditional-knowledge-holds-the-key-to-climate-change.html [Accessed on 28/02/2015]; Tavana, N.G.V., "Traditional knowledge is the key to sustainable development in Samoa: examples of ecological, botanical and taxonomical knowledge."
Available at http://www1.mnre.gov.ws/documents/forum/2002/4-Tavana.pdf [Accessed on 28/02/2015]; Kothari, A., "Traditional Knowledge and Sustainable Development." International Institute for Sustainable Development, 2007. Pp. 5-6. Available at http://www.iisd.org/pdf/2007/igsd_traditional_knowledge.pdf [Accessed on 28/02/2015].

[153] Art. 37.

devolved Governments for reforms in natural resources management and general governance in the country.

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

Negotiating Dispute Settlement terms in Bilateral Investment Treaties (BITS) and Economic Partnership Agreements (EPAs)

Abstract

This paper critically discusses the investor-state dispute settlement and other aspects of investment treaties or agreements that are likely to defeat the original purpose of BITs, that is, promoting trade and investment for national development for both the domestic and host states. The discussion is mainly in the context of developing world and focuses on the main aspects that negotiators should look out for in order to ensure that such treaties facilitate trade and investment in a mutual way between contracting states, especially where the host country is from the developing world.

1. Introduction

Bilateral treaties on the promotion and protection of investments of investors of one contracting party in the territory of the other contracting party can be traced back to 1959, when the first BIT was signed between the Federal Republic of Germany and Pakistan.[1] It is estimated that the international investment framework consists today of a web of roughly 3,000 investment treaties, including bilateral investment treaties between two states, regional agreements, and investment protection provisions in free trade agreements between two or more countries.[2] A key driver of these instruments has historically been the desire of developed, capital-exporting states to ensure that their nationals are financially and legally protected when investing in developing, capital-importing states. Consequently, the majority of investment treaties are between developed countries and developing countries or economies in transition, though this is slowly changing.[3]

It has been observed that since the first BIT, they had a relatively uniform content that had not changed markedly, apart from the introduction of provisions on national treatment and investor–State dispute resolution in the 1960s.[4] These treaties are not mere friendly diplomatic instruments, as some countries had first expected, but are actual treaties setting out hard legal obligations for the state hosting the investment and enforceable rights for the foreign investor.[5] Indeed, performance of the arising obligations and rights is buttressed by the provision for dispute settlement clauses in these treaties, to deal with

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[1] United Nations Conference on Trade and Development, 'Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking,' (United Nations, New York and Geneva, 2007), p. 1. Available at http://unctad.org/en/docs/iteiia20065_en.pdf [Accessed on 9/11/2016].

[2] International Institute for Sustainable Development, 'Investment Treaties,' available at *http://www.iisd.org/investment/law/treaties.aspx* [Accessed on 2/11/2016].

[3] Ibid.

[4] United Nations Conference on Trade and Development, 'Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking,' op cit. p.1.

[5] Ibid; See also generally Potesta, M., 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (July 9, 2012). Society of International Economic Law (SIEL), 3rd Biennial Global Conference. Available at SSRN: *https://ssrn.com/abstract=2102771* [Accessed on 2/11/2016].

any violation or breach. This is evidenced by the fact that one of the key provisions to be captured in these agreements is the Investor-State Dispute Settlement (ISDS) mechanism. The implication is that negotiating parties must take the contents of these treaties or agreements very seriously considering that their performance is not optional and could lead to legal action. The majority of the investment protection treaties still include potentially broad and vague standards, providing little legal certainty and allowing tribunals to interpret the standard in ways that significantly limit the governments' regulatory powers.[6]

It is therefore possible to have unintended outcomes from the interpretation and enforcement of dispute settlement clauses. This paper mainly focuses on this aspect of investment treaties or agreements. It discusses the ISDS factors that are likely to defeat the original purpose of BITs, that is, promoting trade and investment for national development for both the domestic and host states.

2. Need for Bilateral Investment Treaties (BITS) and Investment Agreements in the Developing World

Generally, investment treaties are concluded between two or more governments to offer covered foreign investors protection for their investments from host government conduct in violation of the treaty such as expropriation without compensation, discrimination or treatment that is not in accordance with "fair and equitable treatment" obligations.[7] They include both stand-alone investment treaties (often referred to as bilateral investment treaties or BITs) and investment chapters in broader trade and investment agreements such as the North American Free Trade Agreement (NAFTA), the Transpacific Partnership agreement (TPP) or the Economic Partnership Agreement (EPA) in our case.[8]

BITs are negotiated with two very distant interests: on the one hand, one state aims to protect its investors with money in another state against any incidental changes to the legislation of the host country, while the recipient state wishes to achieve a high economic growth.[9] This is especially so with reference to BITs agreed between either capital exporting or capital importing countries.[10]

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[6] International Institute for Sustainable Development, 'Investment Treaties,' available at http://www.iisd.org/investment/law/treaties.aspx [Accessed on 2/11/2016].

[7] OECD, 'Chapter 8: The impact of investment treaties on companies, shareholders and creditors,' *OECD Business and Finance Outlook 2016*, P. 224. Available At *http://www.oecd.org/daf/inv/investment-policy/BFO-2016-Ch8-Investment-Treaties.pdf* [Accessed on 2/11/2016].

[8] Ibid, p. 224.

[9] Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' op cit., p. 16; See also Yackee, J.W., 'Conceptual Difficulties In The Empirical Study Of Bilateral Investment Treaties,' *Brooklyn Journal of International Law*, Vol. 33, 2008, p. 405.

[10] See generally, Balassa, B., 'Trade between Developed and developing Countries: The Decade Ahead,' available at *http://www.oecd.org/eco/growth/2501905.pdf* [Accessed on 2/11/2016].

BITs are also meant to reduce the risk of unfair treatment where a host state can give preference to nationals to the detriment of international investors.[11] Furthermore, BITs are also designed to minimise political or economic instability that are likely to arise in relation to such processes as building a plant, hiring people and transferring technology.[12] This may especially arise where the investors' obligations does not meet the local people's expectations as per such national policies as benefit sharing arrangements and other local initiatives that are geared towards promoting equitable national development.

It has been observed that while some commentators view bilateral investment treaties as a development tool, arguing that BITs channel much needed capital to poor countries, others fear that the favourable treatment given to foreign investors through BITs can worsen the environmental or human rights practices of states amongst a number of other negative effects.[13]

Generally, EPAs are said to be designed to 'lock-in' policy reforms by establishing binding regulations in the areas of trade, investment and other trade-related issues.[14] The *Cotonou Agreement*[15] set the stage for Economic partnership agreements to be negotiated during the preparatory period which was to end by 31 December 2007 at the latest. The Cotonou Agreement's main objectives are the reduction and eventual eradication of poverty and

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[11] Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' op cit., p. 16; See also generally, Mahmood, N., 'Democratizing Investment Laws: Ensuring 'Minimum Standards' for Host States,' *The Journal of World Investment & Trade*, Vol. 14, 2013, pp.79–113; See also Falsafi, A., 'The International Minimum Standard Of Treatment Of Foreign Investors' Property: A Contingent Standard,' *Suffolk Transnational Law Review*, No. 30, 2007, p.317.

[12] Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' op cit., p. 16.

[13] Bodea, C. & Ye, F., 'Bilateral Investment Treaties (BITs): The Global Investment Regime and Human Rights,' 2015, p.1, available at *http://wp.peio.me/wpcontent/uploads/PEIO9/102_80_1432544970788_Bodea_Ye_25_05_2015_peio.pdf* [Accessed on 2/11/2016]; See also Kerner, A., 'Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties,' *International Studies Quarterly*, Vol.53, 2009, pp.73–102; See also Bodea, C. & Ye, F., 'Bilateral Investment Treaties (BITs): The Global Investment Regime and Human Rights,' (2015). Available at *http://wp.peio.me/wp-content/uploads/PEIO9/102_80_1432544970788_Bodea_Ye_25_05_2015_peio.pdf* [Accessed on 2/11/2016]

[14] Meyn, M., Economic Partnership Agreements: A 'historic step' towards a 'partnership of equals'? Overseas Development Institute Working Paper 288, March 2008, p.2. Available at *https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/1714.pdf* [Accessed on 2/11/2016].

[15] 2000/483/EC: Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, *Official Journal of the European Communities*, OJ L 317, 15.12.2000.

the gradual integration of African, Caribbean and Pacific States into the global economy, whilst adhering to the aims of sustainable development.

Formal negotiations of the new trading arrangements were to start in September 2002 and the new trading arrangements were to enter into force by 1 January 2008, unless earlier dates were agreed between the Parties.[16] Negotiations of the economic partnership agreements was to be undertaken with ACP (African, Caribbean and Pacific Group of States) countries which consider themselves in a position to do so, at the level they consider appropriate and in accordance with the procedures agreed by the ACP Group, taking into account regional integration process within the ACP.[17]

According to the Cotonou Agreement, negotiations of the economic partnership agreements were to aim notably at establishing the timetable for the progressive removal of barriers to trade between the Parties, in accordance with the relevant WTO rules. On the Community side trade liberalisation was meant to build on the acquis and was aimed at improving current market access for the ACP countries through inter alia, a review of the rules of origin. Negotiations were to take account of the level of development and the socioeconomic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to the liberalisation process. Negotiations are therefore meant to be as flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors, and the degree of asymmetry in terms of timetable for tariff dismantlement, while remaining in conformity with WTO rules then prevailing.[18]

It is noteworthy that the East African Community (EAC) is yet to agree on a number of issues concerning the signing of the foregoing EPA with the European Union. While Kenya and Rwanda had already signed the deal, other EAC member states have been adamant to do the same.[19]

It is noteworthy that Kenya has in the past concluded Investment Promotion and Protection Agreements with France, Finland, Germany, Italy, Netherlands, Switzerland, China, Libya, The Islamic Republic of Iran, Burundi and the United Kingdom, and is currently negotiating a number of others with various countries.[20] The most recent BIT was with Japan and it was signed on 28th August 2016 although it is yet to come into force.

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[16] Ibid, Art. 37(1).
[17] Ibid, Art. 37(5).
[18] Ibid, Art. 37(7).
[19] Crawford, R., 'Tanzania & Uganda stand up against unfair EU-East Africa trade deal,' (Stronger Unions, 29 Jul 2016). Available at *http://strongerunions.org/2016/07/29/tanzania-and-uganda-stand-up-against-unfair-eu-east-africa-economic-partnership-agreement/* [Accessed on 4/11/2016].
[20] Kenya Investment Authority, 'Frequently Asked Questions,' available at http://investmentkenya.com/index.php?option=com_content&view=article&id=33&Itemid=161

Kenya is also a member of the Multilateral Investment Guarantee Agency (MIGA) and the African Trade Insurance Agency (ATIA), which guarantees investors against non-commercial risks, and the International Centre for Settlement of Investment Disputes (ICSID).[21] These are meant to make Kenya an attractive foreign investments destination.

3. Investor-State Dispute Settlement mechanism (ISDS) And the International Centre for Settlement of Investment Disputes

One of the arguments in favour of BITs is that they aim to guarantee standards of protections for investors such as compensation for expropriation, national treatment of foreign investors or most favored nation treatment.[22] Even more, it has been argued, investors can enforce their rights in a timely manner and through investor chosen venues that are unlikely to favor host states: Early BITs provided investor protection through state to state dispute resolution, via the establishment of tribunals or submission to the International Court of Justice. However, more recent BITs grant foreign investors the right to adjudicate alleged violation of rights in international tribunals, without the need to exhaust local remedies, and, in case of non-compliance with the arbitration decisions, broad rights to request the confiscation of host government's property from around the world.[23]

One such international tribunal that is preferred in settlement of state investment disputes is the International Centre for Settlement of Investment Disputes (the Centre). The Centre was established in order to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.[24]

Since Investor-State Dispute Settlement (ISDS) is a mechanism that allows foreign individuals and foreign companies to sue host-country governments through ad hoc

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[21] United Nations Conference on Trade and Development, *Kenya: Report on the Implementation of the Investment Policy Review*, UNCTAD/DIAE/PCB/2012/6 (United Nations, 2013), p.5.
Available at *http://unctad.org/en/docs/iteipc20061_en.pdf* [Accessed on 2/11/2016].

[22] International Institute for Sustainable Development, 'Investment Treaties,' op cit, p.6; See also Mestral A.D., 'Investor-State Arbitration Between Developed Democratic Countries,' CIGI Investor-State Arbitration Series
Paper No. 1 — September 2015. Available at
https://www.cigionline.org/sites/default/files/isa_paper_series_no.1.pdf [Accessed on 2/11/2016].

[23] International Institute for Sustainable Development, 'Investment Treaties,' op cit, p.6; See also Ngobeni, L. & Fagbayibo, B., 'The Investor-State Dispute Resolution Forum under the SADC Protocol on Finance and Investment: Challenges and opportunities for effective harmonization,' *Law, Democracy and Development,* Vol.19, 2015, pp.175-192. https://dx.doi.org/10.4314/LDD.V19I1.9 [Accessed on 2/11/2016]; See also Junngam, N., 'An MFN Clause and Bit Dispute Settlement: A Host State's Implied Consent to Arbitration by Reference,' *UCLA Journal of International Law and Foreign Affairs*, Vol. 15, 2010, p. 399.

[24] Art. 1, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes* [ICSID]) 575 UNTS 159 (Came into force on 14 October 1966).

arbitration proceedings rather than through normal domestic administrative and judicial channels, it has been argued that the ISDS provision in trade and investment agreements poses a risk to the development, enforcement and application of domestic law.[25] In respect of this, it has been argued that access to international arbitration, as opposed to access to municipal courts in the host state, is essentially because investors typically assume that municipal courts in developing countries will lack the technical competence or neutrality to adequately and fairly resolve investment disputes.[26]

It has been observed that whereas Bilateral Investment Treaties (BITs) have become the dominant source of rules on foreign direct investment (FDI), they vary significantly in at least one important respect: whether they allow investment disputes to be settled through the International Centre for the Settlement of Investment Disputes (ICSID).[27] Indeed, among the issues that are carefully negotiated by BIT signatories are procedures for the settlement of any future disputes that might arise between foreign firms and the governments in which they invest.[28]

Africa, being one of the main destinations of foreign direct investments, has also not been left out as far as investment disputes are concerned. For instance, out of all cases registered under the International Centre for Settlement of Investment Disputes (ICSID), Sub-Saharan Africa accounts for 16% of these cases.[29] It is also reported that in 2014, cases against Sub-Saharan Africa amounted to 20% of the overall number of new cases brought under ICSID during that year.[30]

International arbitration is preferred to domestic courts because: one, an investor in possession of a favourable international arbitral award has the very real ability to enforce the terms of the award even in the face of continued host state resistance due to a network of important international treaties, including most prominently the New York Convention

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[25] Johnson, L., et al, 'Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law' (Columbia Center on Sustainable Investment, May 2015), p. 1. Available at *http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf* [Accessed on 2/11/2016].

[26] Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' (The George Washington University School of Business & Public Management Institute of Brazilian Issues – IBI, Spring 2011), p.11. Available at *https://www2.gwu.edu/~ibi/minerva/Spring2011/Alexandre_Martins.pdf* [Accessed on 3/11/2016].

[27] Allee, T., & Clint P., "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions." *International Studies Quarterly*, vol. 54, no. 1, 2010, pp. 1–26. www.jstor.org/stable/40664235.

[28] Ibid, p. 2.

[29] Mohamadieh, K. & Uribe, D., 'The Rise of Investor-State Dispute Settlement in the Extractive Sectors,' March, 2016. Available at *http://www.ipsnews.net/2016/03/the-rise-of-investor-state-dispute-settlement-in-the-extractive-sectors/* [Accessed on 2/11/2016].

[30] Ibid.

on the Recognition and Enforcement of Foreign Arbitral Awards and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which empowers investors to seek award enforcement against host state property located in third-party states.[31] Secondly, authoritative, impartial arbitration awards are believed to have the tremendous potential to increase the reputation costs of the host state's breach by publicly clarifying both the facts surrounding the dispute and the content of the relevant legal rules, and by applying those facts to the rules.[32]

Under international trade and investment, parties to treaties and agreements are bound by the non-discrimination principle which basically consists of two clauses: the most-favored nation (MFN) clause and the national treatment clause. Under these clauses, BITs require that a state should confer the other state-party's investors the same beneficial rights as the ones offered to third states' investors (most-favored nation clause), and should also mandatorily offer the other state-party's investors a treatment not less favourable than the one granted to national investors (national treatment clause).[33]

However, it has been argued that the final verdict in the case of investor-state litigation is oftentimes unpredictable if the core argument of the plaintiff is based on a violation of either the MFN clause or the national treatment clause.[34] Both in the trade and investment areas, the disputes submitted to arbitration reveal a constant friction between the trend to liberalize trade and investment flows and the state's right to regulate its tax system and public policies.[35]

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[31] Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' op cit., p. 12; See also Puig, S., 'Investor-state tribunals and constitutional courts: The Mexican sweeteners saga,' *Mexican Law Review*, Volume 5, Issue 2, January–June 2013, pp. 199–243.

[32] Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' op cit., p.12.

[33] Ibid, p. 17; See also United Nations Conference On Trade And Development, *Most-Favoured Nation*
Treatment: A Sequel, UNCTAD Series on Issues in International Investment Agreements II (United Nations, New York, 2010). Available at *http://unctad.org/en/Docs/diaeia20101_en.pdf* [Accessed on 2/11/2016].

[34] Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' op cit., p. 18.

[35] Ibid, p. 18.

4. EPAs and BITs: The Downside

Notably, bilateral investment treaties include provisions that guarantee investor rights as well as mechanisms that investors can use to legally enforce such provisions.[36] The world economy under a globalized market is run by a number of international economic institutions whose functions are policy formulation, managing and monitoring global markets. The main international economic institutions that impact on African policies are: World Bank, International Monetary Fund (IMF), the UN Conference on Trade and Development (UNCTAD), African Development Banks, European Bank for Reconstruction and Development and Canadian International Development Agency.[37]

Some of these institutions are specialized agents of the international community while others are a coalition of States drawing membership from State members. Whereas developing countries are part of the international economic institutions, decision making on policy is done by developed countries which enjoy international market dominance.
BITs and other investment agreements have thus been seen as instruments domination used by the developed world to secure economic fortunes for their people and countries in general, from the developing world. This is due to a number of negative factors that result from their implementation.

4.1 Human Rights Violation

It has been argued that BITs have the potential to negatively influence human rights practices because they lock in legally enforceable conditions attractive to investors, both retrospectively and into the future. Further, the lock-in effect of BITs can force the hand of the government to favour multi-national corporations or foreign investors even at the cost of violating the rights of their own citizenry.[38]

4.2 Hindered National Development

It was recently reported that Tanzania and Uganda refused to sign the Economic Partnership Agreement between the EU and East African Community countries — Kenya, Uganda, Tanzania, Burundi and Rwanda —partly due to concerns about the negative

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[36] Bodea, C. & Ye, F., 'Bilateral Investment Treaties (BITs): The Global Investment Regime and Human Rights,' 2015, p.1, available at *http://wp.peio.me/wpcontent/uploads/PEIO9/102_80_1432544970788_Bodea_Ye_25_05_2015_peio.pdf* [Accessed on 2/11/2016].

[37] The WTO and other organizations - World Trade Organization, www.wto.org › ... › wto & other organizations

[38] Bodea, C. & Ye, F., 'Bilateral Investment Treaties (BITs): The Global Investment Regime and Human Rights,' 2015, p.2, available at *http://wp.peio.me/wpcontent/uploads/PEIO9/102_80_1432544970788_Bodea_Ye_25_05_2015_peio.pdf* [Accessed on 2/11/2016];cf. Fry, J.D., 'International Human Rights Law In Investment Arbitration: Evidence Of International Law's Unity,' (2007). Available at *http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1077&context=djcil* [Accessed on 4/11/2016].

impact of the agreement on democracy and development.[39] This has been attributed to the argument that EPAs require countries to remove tariffs from all but a few products, depriving them of a key source of income and undermining their ability to protect their industries that are not able to compete with European goods.[40]

Africa has lost huge revenues to fraudsters. For example, Democratic Republic of Congo has in the past lost an estimated US$ 1.36 billion through a protracted systematic undervaluation and sale of mineral assets to unknown buyers.[41] Members of the international community should put in place measures to deal with false companies in their jurisdictions.

4.3 Unfair Trade Practices and Unequal Bargaining Power

There has been a contention that international arbitration through ICSID is not a substitute for poor domestic institutions in host countries, but rather is a commonly preferred course of action for powerful countries, who often, but not always, attain their preferred outcomes in BIT negotiations.[42]

The African continent arguably lies on the greatest percentage of earth's natural resources comprising rare minerals, huge oil deposits and a variety of physical features. This also makes Africa become possibly one of the biggest contributors to the percentage of the world's natural resources.[43] The result of this is that the rest of the world seeks to have a stake in the exploration and exploitation of these resources.

Economic talks about African economy observe that Africa's resources have fueled economic growth but most Africans have not benefited.[44] While Africa is recognised as rich in unexploited natural resources, the same may not be said for governance structures. Some of the channels through which opportunities to benefits from these resources are

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[39] Crawford, R., 'Tanzania & Uganda stand up against unfair EU-East Africa trade deal,' (Stronger Unions, 29 Jul 2016). Available at http://strongerunions.org/2016/07/29/tanzania-and-uganda-stand-up-against-unfair-eu-east-africa-economic-partnership-agreement/ [Accessed on 4/11/2016].

[40] Ibid.

[41] Rajaram, A., "*Rich Countries, Poor People; Will Africa's Commodity Boom Benefit the Poor*" available on http://blogs.worldbank.org/africacan/rich-countries-poor-people-will-africa-s-commodity-boom-benefit-poor

[42] Allee, T., & Clint P., "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions," op cit., p. 3.

[43] Global Policy Forum, *Poverty and Development in Africa*, Available at http://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html [Accessed on 17/11/2016].

[44] Robb, C.K., Executive Director of Africa Progress Panel "*How Africa's resources can Lift Millions out of Poverty.*" Available at www.cnn.com/2013/07/25/opinion/africas-natural-resources-millions-overty/>[accessed on 14/11/2016]

lost include skewed economic agreements where investors from the developed world may get away with huge returns from their investments but giving little or nothing to the host states. Any attempts by host governments to go after such violators of national laws and policies come with the potentially high cost risk of complaint and dispute before international tribunals. It cannot also be ruled out that some African governments have arguably played a role in making the continent poor. There has been collusion between dishonest leaders and foreign companies to sell out resources and manipulate national laws for easy access by the foreign companies.[45] It is noteworthy that many at times African governments do not uphold the key principles of democracy, transparency and accountability in governance especially during negotiation of key international treaties.[46]

5. Dispute Settlement terms in Bilateral Investment Treaties (BITS) and Economic Partnership Agreements (EPAs)

Over the years, there has been a shift in negotiations where some BITs have undertaken to address *investor–State dispute settlement* procedures in greater detail, providing more guidance to the disputing parties concerning the conduct of arbitration and strengthening the rule orientation of adjudication mechanisms.[47] This is unlike the traditional approach of only sketching out the main features of investor–State dispute settlement, relying on specific arbitration conventions to regulate the details.[48]

5.1 Implications of Investment Disputes on States: Forestalling Trouble

It is at the negotiations stage that parties to treaty can agree whether or not the BIT in question should allow foreign investors to challenge a government's actions before ICSID. This is arguably driven by the particular parties interests.[49] For instance, it has been contended that governments whose firms engage in considerable outward FDI ("home" governments) typically prefer investment disputes to be settled through international arbitration, whereas governments that receive substantial inward FDI ("host" governments) generally prefer to have disputes over the treatment of foreign investment handled by domestic courts.[50]

The government's decision in the foregoing case has implications on its economic fortunes. On the one hand, a host government that allows its actions to be challenged before ICSID

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[45] Dare, S., 'A Continent in Crisis: Africa and Globalization,' Third World Traveller, Dollars and Sense magazine, July/August 2001, available at http://www.thirdworldtraveler.com/Africa/Continent_Crisis.html

[46] Akindele, S.T., et. al., Globalization, Its Implications and Consequences for Africa.

[47] United Nations Conference on Trade and Development, 'Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking,' (United Nations, New York and Geneva, 2007), p. xiii. Available at *http://unctad.org/en/docs/iteiia20065_en.pdf* [Accessed on 9/11/2016].

[48] Ibid, p. xiii.

[49] Allee, T., & Clint P., "Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions," op cit., p. 3.

[50] Ibid, p. 3.

faces potential new costs, as it stands to lose the benefits of any "taking" if the action is deemed by an ICSID tribunal to be a breach of BIT obligations. Furthermore, being found "guilty" in one or more ICSID disputes could cause broader damage if outside investors then begin to question the environment within the host state.[51]

5.2 Dealing with Unintended Beneficiaries: Treaty Shopping

It is possible for countries from the developing world to sign treaties that may later impact them negatively and fail to achieve the main goals of development. This is attributable to the fact that the negotiators may not have fully grasped the full implications of the treaty at the time of signing. This is especially more pronounced where investors from non-signatory countries identify and exploit the existing loopholes for forum shopping.

It has been argued that treaty shopping violates the principle of reciprocity, where, investment treaties, like most bilateral treaties, establish reciprocal rights and obligations between the contracting states. Treaty shopping runs counter to this principle, in that an entity with no substantial ties to a contracting state could avail itself of the treaty protections that its own state may not be willing to reciprocate to investors from the host state.[52] For instance, whereas conditions related to human rights should be included in a reciprocal deal around investment protection, this could be undermined by investors who shop around for the most attractive jurisdiction to invest from.[53] It has also been observed that treaty shopping can expose a host country to claims by companies to which it would not otherwise allow entry.[54]

It is therefore advisable that negotiators ensure that such loopholes are sealed to avoid unintended consequences of the treaty on the host country. It should be clear from the treaty or agreement who the covered parties are, especially through clear and substantive provisions on what entails investment and the contemplated meaning of investor under the legal instrument in question. This is the only way to ensure that any potential human rights violations are preempted, and that there are no social and environmental impacts of (foreign) investments in the host states.[55] The wording of these treaties is especially important considering that once a dispute arises, the host state's legal framework does not apply and interpretation is entirely left to the international tribunal.

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[51] Ibid, p. 3.

[52] Organisation for Economic Co-operation and Development, 'Investor-State Dispute Settlement Public Consultation: 16 May – 23 July 2012' Comments received as of 30 August 2012, (OECD, Paris, 2012), p. 77.

[53] Ibid, p.77.

[54] Ibid, p. 77.

[55] Organisation for Economic Co-operation and Development, 'Investor-State Dispute Settlement Public Consultation: 16 May – 23 July 2012' op cit. p.77.

5.3 Choice of Forum for Investment Disputes Settlement

Investor-state dispute settlement provisions in BITs vary, with some treaties providing investors with direct access to international arbitration through one or more permanent venues, some allowing for ad hoc arbitration, and others dictating the use of domestic courts to resolve disputes.[56] However, the most notable difference among treaties is believed to be whether they include dispute settlement via the International Centre for the Settlement of Investment Disputes (ICSID), an independent organization affiliated with the World Bank.[57]

It has been observed that access by foreign investors to international arbitration as provided by the ISDS clauses of a vast majority of IIAs is a specific feature that has no equivalent in other areas of international economic law, granted to foreign investors as one of extraordinary legal nature insofar as it derogates from customary international law, which requires that any acts or measures taken by the State must be challenged before the national jurisdictions of the State.[58] Only after the investor has exhausted local remedies can the State from which it derives its nationality file an action against the host State, but never the investor himself.

5.4 Scope of Issues for Investment Disputes Settlement

It is important that parties clarify during negotiations what issues or scope of breach is to be covered by the particular agreement or treaty since this can be contentious in future. For instance, in *Salini v Morocco,*[59] the dispute resolution clause of the applicable bilateral investment treaty (BIT) in that case allowed for international arbitration with respect to "[a]ll disputes or differences…between a Contracting Party and an investor of the other Contracting Party concerning an investment." The tribunal held that the terms of that provision were "very general" and that "[t]he reference to expropriation and nationalization measures, which are matters coming under the unilateral will of a State, cannot be interpreted to exclude a claim based in contract from the scope of application of this Article." The approach has been inconsistent considering that in *Vivendi v. Argentina* annulment decision of 2002, the ad hoc committee was called upon to determine—in the context of the exercise by the investor of its jurisdictional option under the treaty's fork in the road clause—the scope of a dispute resolution clause providing for international arbitration as regards disputes "relating to investments made under th[e] Agreement between one Contracting Party and an investor of the other Contracting Party." The

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[56] Allee, T., & Clint P., "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions," op cit., p. 2.

[57] Ibid, p.2.

[58] United Nations Conference On Trade And Development, *Most-Favoured Nation Treatment: UNCTAD Series on Issues in International Investment Agreements II*, (United Nations, New York and Geneva, 2010), p.4.

[59] *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco,* Decision on jurisdiction, July 16, 2001, 42 ILM 606 (2003), para. 59

committee held that that provision "does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT."[60] Further, in 2004, the arbitral tribunal in *SGS v. Philippines*, also gave wide effect to the dispute resolution provision of the Swiss-Philippines BIT, which provided for ICSID arbitration as regards "disputes with respect to investments" between an investor and the host state. The tribunal held that "[t]he term 'disputes with respect to investments'…is not limited by reference to the legal classification of the claim that is made. A dispute about an alleged expropriation contrary to Article VI of the BIT would be a 'dispute with respect to investments;' so too would a dispute arising from an investment contract such as the CISS Agreement."[61] It further held that "the phrase 'disputes with respect to investments' naturally includes contractual disputes."[62]

This is an important aspect that needs to be well articulated since it may create the impression of erosion of state sovereignty especially in the case of most African states which are the main recipients of these treaties and are more often than not included in these disputes as respondents. There is also little evidence of these states ever winning these disputes especially the ones before the ICSID.

Investment dispute clauses should clarify whether the same covers both treaty obligations and contractual obligations. However, it may be advisable only treaty obligations covered and exclude contractual obligations to other channels to minimise the number of possible instances when host governments may be dragged to the international tribunals such as ICSID.

5.5 BITs Enforcement Procedure

It has been argued that one of the most constraining elements of BITs are their enforcement procedures especially with regard to the procedures for investor-state dispute settlement.[63] Also relevant is the assertion that BITs that allow disputes to be resolved through ICSID impose the greatest constraints on signatories since they transfer the important functions of the treaty interpretation and enforcement from the domestic level to the international level.[64] In addition, by providing multinational corporations with direct recourse before ICSID, the host governments risk having their actions toward

[60] Compañía de Aguas del Aconquija, S.A. et Compagnie Générale des Eaux (Vivendi Universal) v. Argentine Republic, Decision of July 3, 2002, 41 ILM 1135 (2002), para. 55.
[61] [SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, Decision on jurisdiction, Jan. 29, 2004, 19 MEALEY'S: INT'L ARB. REP. C1 (Feb. 2004), para. 131].
[62] Ibid, para. 132.
[63] Allee, T., & Clint P., "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions," op cit., p. 4.
[64] Ibid, p.4.

foreign investment reviewed by impartial legal tribunals, which could order them to pay billions of dollars in damages to aggrieved multinationals.[65]

5.6 Host states Before ICSID: Disturbing the Tilt

Oil and mineral extraction in Africa is carried out by multinational companies. These companies enter into agreements with African Governments for the extraction of resources. They have high bargaining power in the negotiations due to their influential position and backing from their governments. On the other hand, African governments have low bargaining power in these contracts or agreements because they are less influential. They are more flexible in negotiations than their foreign counterparts. In exchange, they end up giving what rightfully belongs to the people to foreigners.[66] For instance, there is a need to tackle tax avoidance and tax evasion by foreign companies carrying out resource extraction in Africa. Tax avoidance is one of the biggest problems bedeviling African economies because it is reported that the revenue lost in Africa through tax avoidance is greater than the combined revenue from international aid and direct foreign investment.

The right of a people to own, utilize and control natural resources within their countries is an internationally recognized right.[67] It is a right provided for in the various international legal instruments on human rights and this has since been adopted in the national legislation of various countries around the world including African countries. However, this right is likely to be defeated where investors use international tribunals such as ICSID to interfere with the host government's efforts to mainstream its international policy framework for the achievement of this right. It should be clarified during negotiations as to what actions amount to violation of treaty obligations and the ones that are merely state's exercise of their sovereign rights through the government.

6. Conclusion

Bilateral investment treaties and other investment treaties have the potential to promote mutual benefit between domestic states and host states as contracting states to a treaty. Equitable international trade can enable countries to achieve food security, generate decent employment opportunities for the poor, promote technology transfer[68], ensure national economic security and support infrastructure development, not only for moving

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[65] Ibid, p.4.

[66] Africa Development Bank, "Resource companies ripping-off Africa"-AFDB Chief Available at *http://uk.reuters.com/article/2013/06/16/uk-africa-economy-idUKBRE95F0EH20130616* [Accessed on 10 February, 2014]

[67]UDHR, ICCPR, ICESCR, Banjul Charter.

[68] Article 7 of the TRIPS states that: "The protection and enforcement of intellectual property should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

goods to and from ports, but also for basic services such as health, education, water, sanitation and energy.[69]

The Agenda 2030 for Sustainable Development aims at ensuring that there is significant increase in the exports of developing countries, in particular with a view to doubling the least developed countries' share of global exports by 2020.[70] The Agenda 2030 also affirms that international trade is an engine for inclusive economic growth and poverty reduction, and contributes to the promotion of sustainable development.[71] As such, it seeks to continue to promote a universal, rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable multilateral trading system under the World Trade Organization, as well as meaningful trade liberalisation. It also calls upon all members of the World Trade Organization to redouble their efforts to promptly conclude the negotiations on the Doha Development Agenda.[72]

International trade and investment is one of the tools employed by national governments in their quest to improve the livelihoods of their people and eradication of poverty in general. Poverty does not merely mean lack of adequate income or inability to meet basic human needs. Notably, some people have good health and can live a productive life but are deprived of suitable opportunities.[73] The implied denial of opportunities pushes them into unemployment resulting in loss of income and finally inability to meet the basic human needs.[74] Lack of opportunity in economic and political life is the root cause of poverty and therefore should not be neglected while defining poverty.[75]

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[69] Galmés, G.V., 'Trade as an enabler of sustainable development and poverty eradication,' in United Nations, *The Road from Rio+20*: *Towards Sustainable Development Goals*, Issue 4, September 2014, p. 10. UNCTAD/DITC/TED/2014/1 Available at *http://unctad.org/en/PublicationsLibrary/ditcted2014d1_en.*pdf [Accessed on 05/09/2016].

[70] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015, para. 17.11.

[71] Ibid, para. 68. This is a restatement of para. 281 of the Rio+20 Conference outcome document (The Future We Want) which reaffirmed that international trade is an engine for development and sustained economic growth, and also reaffirmed the critical role that a universal, rules-based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalisation, can play in stimulating economic growth and development worldwide, thereby benefiting all countries at all stages of development as they advance towards sustainable development. In this context, the participants in the conference expressed their focus on achieving progress in addressing a set of important issues, such as, inter alia, trade-distorting subsidies and trade in environmental goods and services.

[72] Ibid, para. 68.

[73] See Sarshar, M., 'Amartya Sen's Theory of Poverty', *From the Selected Works of Mubashshir Sarshar,* January 2010. Available at: *http://works.bepress.com/mubashshir/16/* [Accessed on 20/11/2016].

[74]Ibid.

[75] Ibid.

Despite all the potential held by these treaties and other investment agreements, it is possible for a host government to lose all the opportunities that may come with foreign direct investments through unfair investment practices coupled with skewed investment dispute settlement provisions. Investor-state dispute mechanisms should be able to protect both the investor and the state from losses through such means as ensuring that while the investors may have recourse to international tribunals, the same are not used to defeat the right of host governments to hold these investors accountable.

It is suggested that developing countries especially in Africa should invest more time and resources in getting these BITs and other trade and investment agreements right considering that poor negotiations may lead to more adverse outcomes as against promotion of investments and development. States must ensure that its negotiators have the skills and the competence to safeguard the interests of their countries, since treaty negotiation is basically a skill that can and should be perfected. This is the only way to ensure that BITs become more of a blessing to the developing states than a curse to be shunned.

Reawakening Arbitral Institutions for Development of Arbitration in Africa

Abstract

This paper examines the current trends, successes and challenges facing the arbitration institutions in Africa. Due to the importance of international arbitration and its ever growing popularity across the world, it is important that the African Continent, being a key global economic partner is not left behind in entrenching the practice of arbitration in settling international commercial disputes. The author analyses the international arbitration institutions in the East African region with a view to highlighting the state of legal and institutional frameworks for the effective determination of international disputes through arbitration. The discussion highlights some of the emerging trends with regard to the users of international arbitration in the region. The ultimate goal is to recommend ways of reawakening arbitral institutions for development of arbitration in the East African region and Africa as a whole.

1. Introduction

With increased globalisation, arbitration has become the preferred mechanism for settling international disputes.[1] Actually, it has been argued that international arbitration should grow in tandem with the globalisation of trade.[2]Arbitration has thus gained popularity over time amongst the business community due to its advantages over litigation. One of the most outstanding benefits of arbitration over litigation is its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties confidence of realizing justice in the best way achievable. Further, it has been observed that among the primary advantages of international arbitration are its finality and the relative ease of enforcement of arbitral awards throughout the world.[3]

Countries and various regions around the world have thus embarked on promoting international arbitration as the best dispute settlement approach in international disputes.[4]It is in this recognition of international arbitration as one of the most viable

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[1] S.D. Franck, "The Role of International Arbitrators," p.1. Available at *https://www.international-arbitration-attorney.com/wp-content/uploads/Microsoft-Word-ILW-ILSA-Article.docsfranck2.pdf* [Accessed on 27/04/2015].

[2] P. Cresswell, "International Arbitration: Enhancing Standards," *The Resolver, Chartered Institute of Arbitrators,* United Kingdom, February 2014, pp.10-13 at p.10; See also Court's comment in the American case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614 (1985) where the Court stated that: "the expansion of [American] business and industry will hardly be encouraged if, notwithstanding solemn contracts, [we] insist on a parochial concept that all disputes must be resolved under [our] laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."

[3] W.L. Kirtley, "Bringing Claims and Enforcing International Arbitration Awards against Sub-Saharan African States and Parties," *The Law and Practice of International Courts and Tribunals* 8 (2009) pp.143-169, p. 143.

[4] K.P. Sauvant and F. Ortino, *Improving the international investment law and policy regime: Options for the future*, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at http://ccsi.columbia.edu/files/2014/03/Improving-The-International-

approaches to international disputes management that structures/institutions for arbitration are being established across the continent.

This discussion focuses on their commonalities and differences, scope and quality of their services with a view to identifying the challenges, if any, that hinder their effectiveness towards placing the institutions at the forefront of dispute management in Africa and subsequently suggest the best ways to overcome them. The author focuses on the current trends, development of domestic and international arbitration in the East African region and highlights the successes, failures and the way forward for arbitration in the region.

The scope of the paper is therefore limited to arbitration in Kenya, Tanzania, Uganda, Rwanda and Burundi, being the Member States for the East African Community. The discourse briefly highlights the legal and institutional frameworks in the foregoing countries and examines their effectiveness in developing arbitration in the region. Finally, there are recommendations on improving the same for effective arbitration practice in the region.

2. Institutional Arbitration in Africa

Increased globalization has brought about the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions thus resulting in emergence of transnational dispute management mechanisms. The mechanisms now universally used for their management are negotiation, mediation, arbitration and conciliation. These mechanisms work best when a well-resourced, neutral and credible body administers the process.[5] One of the most preferred approaches is international arbitration which has more popularity over litigation due to its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties confidence of realizing justice in the best way achievable. However, Africa as a continent has not been quite at par with the rest of the world as far as international commercial arbitration is concerned.

3. Commercial and International Arbitration in the East African Region

3.1 Kenya

The scope of the Kenya's *Arbitration Act* extends to cover both domestic and international arbitration. This is provided for under section 2 of the Act which provides that *except as otherwise provided in a particular case the provisions of this Act shall apply to domestic arbitration and international arbitration*. Section 3(2) defines what arbitration is domestic arbitration

Investment-Law-and-Policy-Regime-Options-for-the-Future-Sept-2013.pdf [Accessed on 27/04/2015].

[5] "Africa ADR – a new African Arbitration Institution", available at *http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution* [Accessed on 27/04/2015]; See also Article 33 of the United Nations Charter.

while section 3(3) stipulates the requisite conditions for an arbitration to qualify as an international one.

Arbitration is domestic if the arbitration agreement provides expressly or by implication for arbitration in Kenya: and at the time when proceedings are commenced or the arbitration is entered into; where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya; or where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya; or where the arbitration is between an individual and a body corporate firstly, the party who is an individual is a national of Kenya or is habitually resident in Kenya; and secondly, the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject-matter of the dispute is most closely connected, is Kenya.[6]

Arbitration is international if the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or one of the following places is situated outside the state in which the parties have their places of business: firstly, the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or secondly, any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.[7]

The *Arbitration Act 1995* generally provides for arbitral proceedings and the enforcement of the arbitral awards by national courts. Section 3(1) of the Act defines arbitration as contemplated in the scope of the Act to mean any arbitration whether or not administered by a permanent arbitral institution. There exist a few arbitral institutions in the country that have been established under specific regimes and are therefore mandated with conducting arbitration under such laws. This is because the *Arbitration Act*, 1995 does not establish a sole arbitral institution and its provisions therefore apply to institutional and sole arbitrators operating under other Rules. However, other institutions exist under different regimes of law in Kenya.

3.1.1 Chartered Institute of Arbitrators-Kenya Branch (CIArb-K)

The Chartered institute of Arbitrators (Kenya Chapter) was established in 1984, as one of the branches of the Chartered Institute of Arbitrators, United Kingdom which was founded in 1915 with headquarters in London. It is registered under the *Societies Act*.[8] It

[6] Sec. 3 (2) of the 1995 Act as amended by the Amending Act.
[7] Section 3(3) (Act No. 11 of 2009, s. 2)
[8] Cap 108, Laws of Kenya

promotes and facilitates the determination of disputes by arbitration and other forms of Alternative Dispute Resolution (ADR), which includes mediation and adjudication. The Kenya Branch, now with over 700 members, has a wide pool of knowledgeable and experienced Arbitrators and facilitates their appointment.[9] The Institute also runs a secretariat with physical facilities for Arbitration and other forms of ADR. To further support the process of Arbitration and ADR, the Branch has published the Arbitration, Adjudication and Mediation Rules. The arbitrators are governed by the Chartered Institute of Arbitrators Arbitration Rules when conducting the arbitral proceedings.[10]

3.1.2 Nairobi Centre for International Arbitration (NCIA)

The institution was established under the Nairobi Centre for International Arbitration Act as seen earlier in this paper. Its functions are set out in section 5 of the Act as inter alia to: first, promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act;[11] second, administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices;[12] third, ensure that arbitration is reserved as the dispute resolution process of choice;[13] fourth, develop rules encompassing conciliation and mediation processes.[14] Further functions include: to organize international conferences, seminars and training programs for arbitrators and scholars;[15] to coordinate and facilitate, in collaboration with other lead agencies and non-state actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation;[16] to maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives;[17] to in collaboration with other public and private agencies, facilitate, conduct, promote and coordinate research and dissemination of findings on data on arbitration and serve as repository of such data;[18] to establish a comprehensive library specializing in arbitration and alternative dispute resolution;[19] to provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties;[20] to provide advice and assistance for the enforcement and translation of arbitral awards;[21] to

[9] The Chartered Institute of Arbitrators Kenya Branch Website, available at *http://ciarbkenya.org/* [Accessed on 08/05/2015]
[10] Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules, December 2012
[11] S.5(a), No. 26 of 2013
[12] Ibid, S. 5(b)
[13] Ibid, s.5(c)
[14] Ibid, s. 5(d)
[15] Ibid, s.5(e)
[16] Ibid, s. 5(f)
[17] Ibid, s.5(g)
[18] Ibid, s. 5(h)
[19] Ibid, S.5(i)
[20] Ibid, S.5(j)
[21] Ibid, S.5(k)

provide procedural and technical advice to disputants;[22] to provide training and accreditation for mediators and arbitrators;[23] educate the public on arbitration as well as other alternative dispute resolution mechanisms;[24] and, to enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre achieve its objectives,[25] *inter alia*. The Centre is administered by a Board of Directors provided for under section 6 of the Act. Section 9 of the Act provides for the appointment of a Registrar by the Board of Directors. Section 9 (3) mandates the Registrar to oversee the day to day management of the affairs and staff of the Centre and shall be the secretary to the Board.

There is also an Arbitral Court established under section 21 of the Act which court has exclusive original and appellate jurisdiction to hear matters that are referred to it under the Act.[26] Section 10 of the Act confers the Registrar with the powers to oversee the business of the court including enforcement of decisions of the Court. The Court has a President and two Deputy Presidents and the Registrar. The Court also has fifteen other members all of whom are leading international arbitrators.[27] The Centre has the capacity to handle domestic and international arbitration. It is hoped this potential will be exploited to its maximum in the years to come so as to prominently place Kenya on the global map of international arbitration.

3.1.3 Centre for Alternative Dispute Resolution (CADR)

The Centre for Alternative Dispute Resolution is another registered institution that is aimed at enhancing settlement of disputes through ADR Mechanisms. With the recognition of ADR in Article 159 of the current Constitution of Kenya, 2010, it is hoped that this Centre will enhance the services of ADR mechanisms in dispute settlement in Kenya.[28] Its Membership is drawn from the Chartered Institute of Arbitrators (Kenya branch).[29]

3.1.4 Kenya National Chamber of Commerce and Industry (KNCCI)

The Kenya National Chamber of Commerce and Industry (KNCCI), is a non-profit, autonomous, private sector institution and membership based organization.[30] It was established in 1965 from the amalgamation of the then three existing Chambers of

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[22] Ibid, S.5(l)
[23] Ibid, S.5(m)
[24] Ibid, S.5(n)
[25] Ibid, S.5(o)
[26] S. 22, No. 26 of 2013.
[27] Ibid, S. 21(2)
[28] The Centre was registered under the *Companies Act* Cap 486 of the Laws of Kenya as Company limited by guarantee.
[29] CIArb-K members become automatic members of CADR.
[30] Kenya National Chamber of Commerce and Industry website, visit http://www.kenyachamber.or.ke/ [Accessed on 9/05/2015].

Commerce: the Asian, African and European chambers, to protect and develop the interests of the business community. It works in close collaboration with the Government, stakeholders and business development organizations internationally. It is an affiliate member of the International Chamber of Commerce and Industry (ICC), the G 77 Chamber of Commerce and Industry, Pan African Chamber of Commerce and Industry (PACCI), the Common Market for Eastern and Southern Africa (COMESA), the East African Chamber of Commerce, Industry and Agriculture (EACCIA), and the East African Business Council (EABC), among others.[31]

KNCCI works towards promoting, protecting and developing commercial, industrial and investment interests of members in particular and those of the entire business community in general. They aim at influencing development policies, strategies and support measures so as to achieve the best economic climate for these varied interests.[32] It thus follows that the Chamber would be involved in effective mechanisms of handling business and commercial related disputes. The Chamber operates through a Committee form of management, with several Standing Committees, although the operations are essentially executed by the Chamber Secretariat. The Legislation and Local Authorities Committee is charged with *inter alia,* domestic and international arbitration and International Chambers of Commerce (ICC) matters.[33]
The Chamber can therefore play a significant role in promoting institutional arbitration in the region.

3.2 Tanzania

The Tanzanian *Arbitration Act*[34] was enacted in 1931 to provide for arbitration of disputes. The Act has general provisions relating to arbitration by consent out of court[35] as well as provisions on court-annexed arbitration.[36] Further, provisions on arbitration are contained in the *Arbitration Rules of 1957*,[37] made under the Arbitration Act.[38] It has been noted that the arbitration legislation in force (both the Arbitration Act and the Rules) pre-dates the UNCITRAL model law and has never been changed to take into account its provisions.[39] Tanzania is also a contracting state to the Convention on the Settlement of Investment

[31] Ibid.
[32] Kenya National Chamber of Commerce and Industry, 'Vision, Mission and Objectives,' available at http://www.kenyachamber.or.ke/the-chamber/mission-vision [Accessed on 9/05/2015].
[33] Kenya National Chamber of Commerce and Industry, 'Operations of the Chamber,' available at http://www.kenyachamber.or.ke/the-chamber/chamber-operations [Accessed on 9/05/2015].
[34] Cap 15, Laws of Tanzania (2002 Revised Edition).
[35] Ibid, ss. 3-26
[36] Tanzania's Civil Procedure Code (the Code) deals with arbitration where it arises in the course of court proceedings (see Schedule 2 of the Code).
[37] Published in Government Notice 427 of 1957.
[38] *'Tanzania', Arbitration in Africa,* June 2007. p. 5.
Available at http://www.nortonrosefulbright.com/files/tanzania-25762.pdf [Accessed on 27/04/2015].
[39] *Ibid.* p.6.

Disputes between States and Nationals of Other States (ICSID) of 1965 since 17 June 1992.[40] It has been argued that the arbitration system in Tanzania lacks active and competent arbitration institutions and practitioners to facilitate arbitration process for the construction disputes.[41] It is noteworthy that there are two main institutions that carry out institutional arbitration and they are discussed herein below.

3.2.1. Tanzania Institute of Arbitrators (TIA)

The Tanzania Institute of Arbitrators (TIA) is a Non-Governmental Organisation registered under the Societies Act (cap 337).[42] Together with the National Construction Council, TIA act as facilitators, enabling the parties (in consultation with their arbitrators) to set ad hoc rules on the procedures which will bind them.[43] They also jointly arrange short professional courses and
examination for arbitrators and then compile a list of arbitrators available for proceedings.[44]

3.2.2. National Construction Council (NCC)

This is a statutory body created under the *National Construction Council Act*.[45] The Council is mandated with *inter alia*; promoting and providing strategic leadership for the growth, development and expansion of the construction industry in Tanzania with emphasis on the development of the local capacity for socio-economic development and competitiveness in the changing global environment; and facilitating efficient resolution of disputes in the construction industry.[46] The arbitration services of this institution are mainly available to persons in the construction industry although it also offers its services to persons outside the industry albeit at a lower scale.[47]

For a vibrant institutional framework on international arbitration in Tanzania, much more needs to be done to project these two institutions into international arena and change the idea that they deal with arbitration on domestic matters only or even the perception that they are industry-specific. These way users of arbitration in Tanzania can confidently approach them for international arbitration services.

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[40] W. Kapinga, *et. al*., 'Getting the Deal through - Arbitration- Tanzania', Chapter 2014, p. 406. Available at https://www.academia.edu/9872218/Getting_the_Deal_Through_-_Arbitration-_Tanzania_Chapter_2014 [Accessed on 27/04/2015].

[41] G. Mandepo, "Resolving Construction Disputes Through Arbitration - An Overview of Tanzanian Legal Framework," p. iv. Available at *https://www.scribd.com/doc/104535725/66/Tanzania-Institute-of-Arbitrators* [Accessed on 03/05/15]

[42] Cap 337, Laws of Tanzania.

[43] *'Tanzania', Arbitration in Africa,* June 2007. *Op cit* p. 5.

[44] *Ibid*.

[45] No. 20 of 1979, cap 162.

[46] National Construction Council (NCC) Functions, available at http://www.ncc.or.tz/functions.html [Accessed on 27/04/2015].

[47] *Ibid.*

3.3 Uganda

Uganda's *Arbitration and Conciliation Act* was enacted to amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, to define the law relating to conciliation of disputes and to make other provision relating to the foregoing.[48] Its provisions on arbitration apply to both domestic arbitration and international arbitration.[49] The national Courts may assist in taking evidence,[50] setting aside arbitral awards[51] and recognition and enforcement of the arbitral awards.[52]

3.3.1. Centre for Arbitration and Dispute Resolution (CADRE)

Uganda's *Arbitration and Conciliation Act* establishes the Centre for Arbitration and Dispute Resolution (CADRE).[53] This Centre is charged with *inter alia*: to make appropriate rules, administrative procedure and forms for effective performance of the arbitration, conciliation or Alternative Dispute Resolution process; to establish and enforce a code of ethics for arbitrators, conciliators, neutrals and experts; to qualify and accredit arbitrators, conciliators and experts; to provide administrative services and other technical services in aid of arbitration, conciliation and alternative dispute resolution; to facilitate certification, registration and authentication of arbitration awards and conciliation settlements; to avail skills, training and promote the use of alternative dispute resolution methods for stakeholders; and to do all other acts as are required, necessary or conducive to the proper implementation of the objectives of the Act.[54]

This is the main arbitral institution in the country. It is therefore necessary to have more institutions in Uganda as well as improve information dissemination in order to promote international arbitration in the country.

3.4 Rwanda

Rwanda has been a party since 1979 to the *Washington Convention on the Settlement of Investment Disputes*, which provides for protection for investors and direct arbitral recourse against the State. On November 3, 2008, Rwanda became the 143rd country to accede to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention). The Convention entered into force for Rwanda on January 29, 2009.[55]

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[48] CAP 4, Laws of Uganda, Preamble.
[49] *Ibid*, S. 1.
[50] *Ibid*, s. 27.
[51] *Ibid*, s. 34.
[52] *Ibid*, ss. 35 &36.
[53] *Ibid*, s. 67.
[54] *Ibid*, s. 68.
[55] Rwanda Accedes to UN Convention on Commercial Arbitration', UN NEWS CENTRE, Nov. 3, 2008, available at

Rwanda Parliament enacted a law in February 2011 establishing Kigali International Arbitration Center (KIAC) as an independent body which carries out mediation, adjudication and arbitration.[56]

3.4.1 Kigali International Arbitration Center (KIAC)

Kigali International Arbitration Center (KIAC) was established as an independent body which carries out mediation, adjudication and arbitration. The Centre has a panel of domestic and international arbitrators.[57] Parties to KIAC arbitrations are free to nominate their arbitrators, subject to by the Centre in accordance with the KIAC Rules. However, when KIAC is called upon to appoint an arbitrator, it does so primarily from its panel of arbitrators.[58] It is noteworthy that until the establishment of the Kigali International Arbitration Centre (KIAC), there was no formal mechanism for amicable dispute resolution, more so international commercial arbitration.[59] KIAC holds a potent potential to promote development of international arbitration in the region and Africa as a whole.

3.5 Burundi

In 2007, the Burundian Government created a Centre for Arbitration and Mediation to deal with commercial and investment disputes.[60] In 2009, *Investment Code of Burundi*[61] was enacted with its purpose being to encourage direct investments in Burundi.[62] This Investment Code allows the competence of international arbitration chambers for disputes arising over investments made in Burundi. In 2014, Burundi became the 150th state party to the *New York Convention* 1958. Burundi however made a "commerciality reservation" to the Convention, which means that the Convention will only apply to disputes characterized as commercial under municipal law. The Convention was to come in force in the country on 21 September 2014 thus enabling arbitral awards made in Burundi to be enforceable in all states that are party to the New York Convention, and awards made in other states to be enforceable in Burundi.[63] International commercial arbitration in Burundi is thus supported by the legal framework. The framework casts a ray of hope for arbitration in Burundi and beyond.

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http://www.un.org/apps/news/story.asp?NewsID=28799&Cr=Trade&Cr1=Convention [Accessed on 28/04/2015].

[56] Law No 51/2010 0f 10/01/2010, Laws of Rwanda.

[57] Kigali international Arbitration Centre website, available at http://kiac.org.rw/spip.php?rubrique25 [Accessed on 26/04/2015].

[58] *Ibid*.

[59] Kigali International Arbitration Center, *Annual Report July 2012-June 2013.* P. 4

[60] Law No.1/08 of 17 March 2005, Code on the Organization and Competence of the Judiciary.

[61] Law No. 1/24 of 10 September 2008 Establishing the Investment Code of Burundi.

[62] Ibid, Art. 2.

[63] Herbert Smith Freehills Dispute Resolution, 'Burundi becomes 150th state party to the New York Convention'. Available at *http://hsfnotes.com/arbitration/2014/09/03/burundi-becomes-150th-state-party-to-the-new-york-convention/* [Accessed on 29/04/2015].

4. Challenges

A number of challenges affect the effectiveness of the East African regional international arbitral centres and thus affect their popularity amongst the users of their services in the region.

4.1 Confidentiality Requirements

The fact that arbitration is a private process makes it enjoy confidentiality, an important aspect in private matters. Unlike litigation where there is official law reporting, arbitral awards or proceedings are never published without the parties' approval. It has been argued that while confidentiality is an important aspect of international commercial arbitration, there should be adoption of a presumption that arbitral awards should be made publicly available, unless both parties object.[64] This argument is based on the justification that the benefits of greater transparency in arbitration brought about by the publication of awards often outweigh concerns for confidentiality.[65] The *Arbitration Act*[66] which is the principal law regulating arbitration in Tanzania does not provide for confidentiality. If the parties want the proceedings or the award to remain confidential, they should enter into a confidentiality agreement between themselves and the arbitrators.[67] In such a scenario, if parties do not sign such an agreement, it is therefore possible to publish the outcome of the matter with obvious impact on the perceived advantage of confidentiality. This trend may soon affect the way arbitration is viewed and carried out considering that it emanates from the users of arbitration services and not the arbitrator or a third party.

Normally, arbitrators cannot take such steps as to violate confidentiality requirement on their part. For instance, Rule 8 of the *Chartered Institute of Arbitrators Code of Professional and*

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[64] C.G. Buys, "The Tensions between Confidentiality and Transparency in International Arbitration," *American Review of International Arbitration*, Vol. 14, No. 121, 2003. Available at SSRN: http://ssrn.com/abstract=1330243 [Accessed on 27/04/2015].

[65] *Ibid.* It is however important to point out that the International Centre for Settlement of Investment Disputes (ICSID), an international arbitration institution which facilitates legal dispute resolution and conciliation between international investors, publishes its arbitral awards and has always published information on the institution, conduct, and disposition of proceedings administered by the Centre. Article 48(5) of ICSID's constituent Convention requires the consent of both parties for any publication by ICSID of the award rendered in their case. A.R. Parra, "Enhancing transparency at ICSID," Oxford University Press's Blog, 17th February 2014. Available at http://blog.oup.com/2014/02/enhancing-transparency-at-icsid/ [Accessed on 10/05/2015]; See also New York City Bar, "Publication of International Arbitration Awards and Decisions," *Report by the Committee on International Commercial Disputes of the Association of the Bar of the City of New York,* February 2014.
Available at *http://www2.nycbar.org/pdf/report/uploads/20072645-PublicationofInternationalArbitrationAwardsandDecisions.pdf* [Accessed on 10/05/2015].

[66] Cap 15, Revised Edition 2002.

[67] "Arbitration in Africa," Tanzania, June 2007, p. 3.
Available at *http://www.nortonrosefulbright.com/files/tanzania-25762.pdf* [Accessed on 27/04/2015].

Ethical Conduct for Members provide that a member must abide by the relationship of trust which exists between those involved in the dispute and (*unless otherwise agreed by all the parties*, or permitted or required by applicable law), both during and after completion of the dispute resolution process, must not disclose or use any confidential information acquired in the course of or for the purposes of the process. This position is thus similar to the Tanzanian one where parties can decide to go public on their award.

Sometimes arbitration matters will be litigated all the way to the highest court of the law of the land in search of setting aside of awards.[68] This obviously affects the confidentiality requirements since more often than not the matter becomes public especially after the court's decision which may find its way into the national or international official law reports. The effect of this is that parties thereto are left with little or no understanding of the difference between arbitration, with its perceived advantages, and litigation. While it is generally agreed that arbitration does have adversarial aspects, it is normally less adversarial than court litigation. The parties' actions may impact on arbitration in two ways. Firstly, if such parties find themselves in another dispute in future, they may decide to go straight to litigation without trying arbitration at all and this suppresses the growth of arbitration especially if they felt they did not obtain justice.[69] Secondly, it may have the effect of changing arbitration practice across the continent since arbitral institutions respond to the needs of the parties.

This may even explain why the trust and confidentiality clauses of these institutions only bind their practitioners and not the parties and even so the practitioners can always opt out if parties so agree. As it has been observed, the role of an arbitrator is a professional role and not a business one.[70] For the parties, they are in business looking out for their best interests and the transnational disputes management institutions can only facilitate the process of realizing what is best for the parties. Interested parties may also put pressure on the tribunal to do away with confidentiality. A good example is an arbitration involving

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[68] S. 35(1) of the Act. K. Muigua, *Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration in Kenya*, Kenya Law Review (2010).
Available at http://www.kenyalaw.org/klr/index.php?id=824. For instance, the Arbitration between *Kanyotta Holdings Limited and Chevron Kenya Limited (CALTEX*) made its way to the Kenya High Court and Court of Appeal after the award was challenged (2012 eKLR). See also *Glencore Grain Ltd V T.S.S.S Grain Millers Ltd* [2012] eKLR; Daily Nation, 'Not again! Pattni's new Sh4bn scandal,' Saturday, May 11, 2013. Available at *http://www.nation.co.ke/News/Not-again-Pattnis-new-Sh4bn-scandal/-/1056/1849756/-/14axo7az/-/index.html* [Accessed on 09/05/2015].
The Newspaper partly read "Controversial businessman Kamlesh Pattni is set to pocket Sh4.2 billion worth of taxpayers' money if the High Court upholds a hefty award issued in his favour by an arbitrator." It went further to state "But it is the hefty award against the government authority that is likely to attract public attention given that it is *wananchi* (meaning citizens) and taxpayers who will foot the Sh4.2 billion bill."
[69] See the case of *Airtel Networks Kenya Limited V Nyutu Agrovet Limited* [2011] eKLR.
[70] P. Cresswell, "International Arbitration: Enhancing Standards," *The Resolver, Chartered Institute of Arbitrators, op cit* at p.13.

a Government as one of the parties of course using public funds for the same.[71] Public interest may require openness or accountability to the citizens. Confidentiality is thus a fluid concept as far as parties to arbitration are concerned since they greatly influence whether the matter will remain confidential or not.

4.2 Institutional Capacity

It has also been observed that there exists a challenge on the capacity of existing institutions to meet the demands for international commercial arbitration matters. Much more needs to be done to enhance their capacity in terms of the number and quality of arbitrators, adequate staff and finances to ensure that they are up to task in facilitation of international arbitration.[72]

4.3 National Courts' Interference

It has been noted that even when an African state has become a party to the relevant treaties, there might still be the perception that its courts could not be relied on to apply the text correctly or in good faith, with a further argument that national legal frameworks are not conducive for the constitution of arbitral tribunals and to the conduct of arbitration, permitting the 'local court' to interfere unduly in arbitral proceedings.[73] It has been argued that traditional litigation in a national court can be a costly, time-consuming, cumbersome and inefficient process, which obstructs, rather than facilitates, the resolution of business disputes.[74]

Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending.[75]This delays finalization of the matter as well as watering down the perceived advantages of arbitration and ADR in general. This can only be corrected through setting up tribunals or courts with finality in their decisions and operating free of national courts interference.

National courts are also not popular because as it has been argued the formal adversarial structure and the possibility of national bias can destroy the business relationships which

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[71] See the case of *Erad Suppliers 7 General Contracts Limited v National Cereals 7 Produce Board & another* [2013] eKLR

[72] K. Muigua, 'Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya', page 14. Available at http://www.kmco.co.ke/attachments/article/114/Making%20East%20Africa%20a%20Hub%20for%20International%20Commercial%20Arbitration.pdf [Accessed on 06/07/2014].

[73] *Ibid,* p.6.

[74] J.T. McLaughlin, "Arbitration and Developing Countries," The *International Lawyer*, Vol. 13, No. 2 (Spring 1979), pp. 211-232 at p. 212.

[75] See generally, K. Muigua, *Role Of The Court Under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration In Kenya*, Kenya Law Review (2010), Available at http://www.kenyalaw.org/klr/index.php?id=824

are conducive to the smooth flow of international trade.[76] The intricacies of the national procedures may also be unknown to one or more of the parties.[77] For instance, it has also been observed that the Tanzanian national Courts have immense powers to intervene on any matter of law in an arbitration proceeding.[78] As such, party autonomy is restricted thus severely affecting investors'' confidence in the Tanzania's law on arbitration.

It has also been observed that the arbitration process is becoming more and more litigation-minded and less conciliation-minded and as such the spirit of arbitration has been lost.[79] This is especially so if many new issues are raised in the course of arbitration proceedings or in the context of proceedings before domestic courts.[80] Arbitration practice in Kenya has been said to have increasingly become more formal and cumbersome due to lawyers' entry to the practice of Arbitration. This has had the effect of seeing more matters being referred to the national Courts on due to the disputants' dissatisfaction.[81]

The issue of Courts' interference does not however always hold true. For instance, in the Kenyan case of *Anne Mumbi Hinga v Victoria Njoki Gathara*[82] the Court stated that the concept of finality of arbitration awards and pro-arbitration policy is something shared worldwide by the States whose Arbitration Acts such as Kenya's have been modeled on the UNCITRAL Model Law.[83] It went further to state that the common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the necessary review to that specified in the Act. It concluded by stating that the provisions of the Act are wholly

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[76] J.T. McLaughlin, "Arbitration and Developing Countries," *op cit* at p. 212.
[77] *Ibid.*
[78] See generally, N.S. Mkumbukwa, 'Is the Commercial Court Jealous of Arbitration?' Available at http://www.comcourt.go.tz/comcourt/wp-content/uploads/2013/08/Mkumbukwa-Nuhu-S.-Is-the-Commercial-Court-Jealous-of-Arbitration_-Commercial-Court-Roundtable-8th-Oct.-2009.pdf [Accessed on 27/04/2015]; K. Kepher, 'Procedural Laws of Commercial Arbitration in Tanzania: An Analysis'. ISSN 2321 – 4171. Available at http://jsslawcollege.in/wp-content/uploads/2013/12/PROCEDURAL-LAWS-OF-COMMERCIAL-ARBITRATION-IN-TANZANIA-AN-ANALYSIS.pdf [Accessed on 27/04/2015].
[79] F. De Ly, "The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning," *12 Nw. J. Int'l L. & Bus. 48 (1991-1992), pp. 48-85* at p. 50.
[80] *Ibid*.
[81] K. Muigua, "Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises," p. 15. Available at http://www.kmco.co.ke/attachments/article/122/Emerging%20Jurisprudence%20in%20the%20Law%20of%20Arbitration%20in%20Kenya.pdf
[82] Civil Appeal No. 8 of 2009 [2009 eKLR].
[83] The Model of the United Nations Commission on International Trade Law (UNCITAL) was adopted in 1985 with a view to encouraging arbitration and processes that would have global recognition. [The Arbitration Agreement, Kenya Law Resource, Available at http://kenyalawresourcecenter.blogspot.com/2011/07/arbitration-agreement.html [Accessed on 28/04/2015]

exclusive except where a particular provision invites the court's intervention or facilitation.[84]

This position confirms that courts are not always against arbitration, at least in Kenya, although this does not reflect the state of affairs across Africa.

4.4 Inadequate Legal and Institutional Framework on international commercial Arbitration

There have been inadequate legal regimes and infrastructure for the efficient and effective organization and conduct of international commercial arbitration in some of the East African countries with some countries still having archaic laws.[85] This has denied the local international arbitrators the fora to display their skills and expertise in international commercial arbitration since disputants shun the local arbitral institutions, if any, for foreign institutions. There is need to ensure that African countries review and harmonise their arbitration laws so as to ensure that even as arbitration institutions emerge across Africa, they will find conducive environment for the enforcement of foreign awards if need be. One way of achieving this is adoption of UNCITRAL Model law provisions for those countries that are yet to streamline their domestic arbitration laws in line with the Model law. This is important since the Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.[86] The justification for this harmonization is the need for improvement and it's based on findings that domestic laws are often inappropriate for international cases and that considerable disparity exists between them.[87]

4.5 Appointment of International Arbitrators by Parties

Despite there being individuals with the relevant knowledge, skill and experience on international dispute resolution and competent institutions, which specialize in, or are devoted to facilitating international arbitration, there has been a general tendency by

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[84] S. 10 of Kenya's Arbitration Act is to the effect that the Court shall not intervene in the arbitral process except as provided in the Act.

[85] K. Muigua, 'Promoting International Commercial Arbitration in Africa', page 14, available at http://www.kmco.co.ke/attachments/article/119/PROMOTING%20INTERNATIONAL%20COMMERCIAL%20ARBITRATION%20IN%20AFRICA.pdf

[86] United Nations Commission on International Trade Law, 'UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006,'
available at *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html* [Accessed on 05/05/2015]

[87] Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration (UNCITRAL Model Law on International Commercial Arbitration *(United Nations document Al40117, annex I)*
(As adopted by the United Nations Commission on International Trade Law on 21 June 1985)

parties to a dispute doing business in Africa to go back to their home turfs to appoint arbitrators.[88]

Most disputants prefer to appoint their non-nationals as arbitrators in international disputes, thus resulting in instances where even some Africans go for non-Africans to be arbitrators. Indeed, it has been observed that the near absence of African arbitrators in ICSID arbitration proceedings can in part be explained by the fact that African states predominantly appoint international lawyers to represent their interests.[89] A good example is the Kigali International Arbitration Centre (KIAC) (and probably many others across Africa) where the panel of international arbitrators mainly consist of Non-Africans.[90]

Although it is important to borrow from the established institutions outside of Africa, the fact that more than half of the international arbitrators in KIAC are non-African may portray Africa to the outside world as a place where there are no qualified arbitrators (real or perceived) to be appointed as international commercial arbitrators. To the users of international arbitration in Africa, it is therefore possible to argue that it makes more sense to hold their arbitration proceedings outside Africa where the Non-African arbitrators will not only handle the matter but there is also (perceived or real) added benefit of non-interference from national courts as well as ease of enforcement of awards.

The above scenario thus raises the issue of bias. It has been observed that Parties to disputes rarely select African cities as venues for international arbitration, and this is so even for some international arbitral institutions or arbitrators, when asked to make the choice.[91] This is especially true considering that the arbitral institutions normally allow the parties who submit their disputes to them to decide whether they will pick the arbitrator themselves or will allow the institution to make the choice on their behalf. For example, the Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules provide that the written request for appointment of an arbitrator submitted to the Institute should include *inter alia,* if the arbitration agreement calls for party nomination of arbitrators, the name and address of the Claimant's nominee, and any particular qualification or experience which the parties wish the Arbitral Tribunal to possess.[92]

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[88] *Ibid, p. 3.*

[89] J. Lew, 'Comparative International Commercial Arbitration', 237, [London: Kluwer Law International, 2003]

[90] KIAC Panel Of International Arbitrators,
available at *http://www.kiac.org.rw/IMG/pdf/final_list_of_international_arbitrators.pdf* [Accessed on 27/04/2015] 19 out of the 34 international arbitrators are Non-Africans.

[91] LexisNexis and Mayer Brown International LLP, "Arbitration in sub-Saharan Africa," p.1. Available at *http://www.mayerbrown.com/files/News/937b1c45-31e5-437f-bbe3-39e5f01dd1d/Presentation/NewsAttachment/6fb0a0bf-0164-4c30-a54d-63eccc1dd65f/LexisNexis_2012_arbitration-in-sub-aharan-Africa.pdf* [Accessed on 27/04/2015]

[92] Rule 1(2) & (8).

It is therefore arguably possible for parties to pick persons of their choice in terms of preference and expertise since the institutions (and many others across the region) have a database with their arbitrators' qualifications. This flexibility allows parties to appoint arbitrators that have specific expertise in their area of business or nature of their dispute. In relation to Non-Africans acting in African institutions, the question that arises is how well they separate the differing cultures (African and their home country's) so as to ensure that the same does not affect their effectiveness. It has been argued that Arbitration's effectiveness will always depend upon how well it satisfies the needs of the parties.[93] To ensure that African parties gain confidence with African international arbitration institutions, such institutions need to ensure that they have appointed the best persons with capacity and expertise to handle the matters at hand so that parties will have their fears of inadequacy (of African arbitrators) addressed.

Cultural, economic, religious, and political differences also come into play. It has been observed that diversity - of a cultural, economic, religious, and political kind - exists not only among nation-states and in the sources and interpretation of international law, but also among the group of commentators who study the interactions of transborder actors and institutions.[94] It is noteworthy that an arbitration matter may have different interested parties and many players who include the arbitral panel as well as the parties. Each of the interested parties has expectations which they expect to be met in the process and they may differ based on cultural background of parties or arbitrators.

4.6 The Challenge of Arbitrability

Arbitrability is used to refer to the determination of the type of disputes that can be settled through arbitration and those which are the domain of the national courts. It deals with the question of whether specific classes of disputes are barred from arbitration because of the subject matter of the dispute.[95] Courts often refer to "public policy" as the basis of the bar.[96] The challenge arises when a matter that is arbitrable in one jurisdiction fails the test of arbitrability in a different jurisdiction. It has been observed that international arbitration law and its practice have become more and more complex and this has been attributed partly to changes in domestic arbitration laws.[97]

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[93] J.T. McLaughlin, "Arbitration and Developing Countries," *op cit* at p. 215.

[94]T.E. Carbonneau, "Diversity or Cacophony? New Sources Of Norms In International Law Symposium: Article: Arbitral Law-Making," *Michigan Journal of International Law*, Summer, 2004, 25 Mich. J. Int'l L. 1183. Available *athttps://litigationessentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=25+Mich.+J.+Int%27l+L.+1183&srctype=smi&srcid=3B15&key=fbda375b78b7e9439f6c5b862e60a262* [Accessed on 27/04/2015].

[95] F. Kariuki, "Redefining Arbitrability: " Assessment of Articles 159 & 189(4) of the Constitution of Kenya," *Alternative Dispute Resolution Journal*, Vol.1, (CIArb (K), 2013), pp.175-189.

[96] *Ibid*.

[97] F. De Ly, "The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning," *op cit* at p. 48.

Arbitrability may either be subjective or objective.[98] Subjective arbitrability refers to a situation where states or state entities may not be allowed to enter into arbitration agreements at all or may require a special authorization. Objective arbitrability refers to restrictions based on the subject matter of the dispute.[99] National laws often restrict or limit the matters, which can be resolved by arbitration. It has been observed that certain disputes may involve such sensitive public policy or national interest issues that it is accepted that they may be dealt only by the courts, for instance criminal law.[100]

In Tanzania, the Arbitration Act is not clear on arbitrability of subject matter under the Arbitration Act.[101] It has been argued under Kenyan law, that arbitrability might have acquired a broader definition after the passage of the current Constitution of Kenya, 2010, which elevates the status of Alternative Dispute Resolution (ADR) as one of the guiding principles of the Judiciary in the exercise of judicial authority by Courts and tribunals.[102] In this respect, the scope of arbitrability is broad under the Constitution of Kenya, 2010 as opposed to its scope under the Arbitration Act No. 4 of 1995 (As amended in 2009).[103] However, the effectiveness of this in promoting ADR and specifically arbitration remains to be seen especially due to the subjection of the same to repugnancy clause.

4.7 Recognition of International Arbitral Awards

The *Arbitration Act*,1995 under section 36 (2) notably provides that an international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.[104] This is a show of Kenya's commitment to

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[98] K.H. Böckstiegel, "Public Policy as a Limit to Arbitration and its Enforcement," p.5. Presented at the 11th IBA International Arbitration Day and United Nations New York Convention Day "The New York Convention: 50 Years" in New York on 1 February 2008.
Available at *http://www.arbitrationicca.org/media/0/12277202358270/bckstiegel_public_policy...iba_unconfererence_2008.pdf* [Accessed on 09/05/2015].

[99] Ibid.

[100] See K. Chovancová, "Arbitrability (Extract)". Available at *http://www.paneurouni.com/files/sk/fp/ulohy-studentov/2rocnikmgr/arbitrability-students-version.pdf* [Accessed on 09/05/2015].

[101] R. Rana, 'The Tanzania Arbitration Act: meeting the Challenges of Today With Yesterday's Tools?', in Chartered Institute of Arbitrators, Kenya, *Alternative Dispute Resolution Journal*, Vol. 2, No. 1, 2014. pp. 229-237 at p.231.

[102] Article 159 of the Constitution of Kenya. They are to be guided by the principle that *inter alia* alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms are to be promoted subject to clause (3). Clause (3) provides that the traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law.

[103] F. Kariuki, *op cit;* See also, Articles 159 (2), 67 (2) (f) and 189(4), Constitution of Kenya.

[104] This was included in the Act through the Act No. 11 of 2009, s. 27. (2009 amendment to the Arbitration Act, 1995).

adopting international best practices in arbitration and consequently existence of requisite legal infrastructure for promotion of international arbitration in the country.

The Kenyan Act on Arbitration was drafted along the lines of the Model Law. Article 35 (1) of the Model Law provides that an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36. The *Nairobi Centre for International Arbitration Act* provides that subject to any other rules of procedure by the Court, the Arbitration Rules of the United Nations Commission on International Trade Law, with necessary modifications, shall apply.[105] The foregoing provisions which recognise international legal instruments on arbitration therefore place Kenya in a competitive position to engage with the other regional players in the promotion of Eastern Africa as a hub for International Commercial Arbitration.

4.8 Perception of Corruption/ Government Interference

At times governments are also perceived to be interfering with private commercial arbitration matters. For instance, the government may try to influence the outcome of the process especially where there are its interests at stake and put forward the argument of grounds of public policy. This impacts negatively on investor confidence and uptake of international commercial arbitration.

4.9 Challenge of Arbitration Clause

It has been argued that an arbitration clause should take into consideration the applicable law, state and attitude of concerned countries towards arbitration as well as the effect of host domestic law on arbitration proceedings and outcome so as to ensure that the parties' intentions are not defeated by technicalities.[106] This is because it is the arbitration clause that dictates where the proceedings will be held and the applicable law. As such, it is important to a have a clear non-ambiguous clause as this will not only save time but will also save resources for the parties by way of minimized challenges to the whole process.[107] In drafting the clause, a number of factors touching on the potential arbitral institutions are considered.

5. International Arbitration Users' Concerns

Although the foregoing challenges affect the arbitration users' perception of arbitral institutions in Africa, their concerns go beyond these and touch on other but equally

[105] *Nairobi Centre for International Arbitration Act,* S. 23.

[106] J.T. McLaughlin, "Arbitration and Developing Countries," *op cit* at p. 215.

[107] See generally P. Ngotho, "Pathological Arbitration Clauses in Ad Hoc Arbitrations: Kenya's Experience." Paper presented at the Chartered Institute Of Arbitrators (Kenya Branch) & Centre For Alternative Dispute Resolution (CADR) International Arbitration Conference held at Whitesands Beach Hotel, Mombasa, 7- 8th August, 2014. Available at http://www.ngotho.co.ke/PathologicalArbitrationClauses.8.8.14.pdf [Accessed on 09/05/2015].

significant issues. The insecurity problem facing East Africa and Africa in general does affect the development of international arbitration in the region. Potential users shy away from Africa due to the instability and even where they have their place of business in Africa, they prefer to have their disputes settled elsewhere. The insecurity arises from persistent conflicts across the globe some of which of which are natural resource-based, political, religious and terrorism.

Government bureaucracy is another concern especially in matters that involve Government institutions as one of the parties. This may even be complicated if the proceedings are in a Government supported arbitral institution that is funded by the same Government. Naturally, there is fear or bias or excessive bureaucracy due to power differences and influence which may defeat the need for arbitration. For instance, Government proceedings Acts may require special procedures for some aspects of the process and this may clash with the established international arbitration laws and procedures. The concern may be real or perceived but there is need to ensure that the same is dealt with.

Lack of adequate Information Communication Technology (ICT) infrastructure and other relevant physical infrastructure in the existing arbitral centres is another concern. It is debatable whether the existing institutions have modern ICT equipment that facilitate efficiency in arbitral proceedings. Potential users are also concerned with the issue of institutional capacity in Africa's institutions. Institutional capacity touches on both physical infrastructure as well as arbitrators' expertise in handling diverse matters arising mainly in commercial world.

It is also noteworthy that the issue of infrastructure extends to the country as a whole since there is also need for developed support facilities such as airports, transport system, hotel facilities and the like. These are important as they help in marketing a country to the rest of the continent as well as the rest of the world.

6. Way Forward

There is a need to employ mechanisms that will help awaken arbitral institutions in Africa and demonstrate the Continent to the outside world as a place with international commercial arbitrators with sufficient knowledge and expertise to be appointed to arbitrate international matters.

Although the author has observed elsewhere that government intervention can raise fears of bias and undue influence, it is important to point out it is possible for the arbitral institutions to get support from the government while still retaining their independence. The government can extend goodwill by helping the institutions get on their feet through financial support as well as marketing while ensuring that it does not meddle with the internal affairs and overall running of the institutions. The state institutions such as courts

can also play a critical role in helping the arbitral centres take their place in settlement of international institutions in the region. The assistance can be in form of supporting or facilitating enforcement of international and domestic arbitral awards as well as ensuring that there is minimal interference in the process so as to win the confidence of the potential users inside and outside the region. Parliament and Courts should also work in tandem in promoting law reforms to reflect the current trends in arbitration practice in the world.

There is also need for putting up the relevant infrastructure which includes ICT and other physical structures. This should be coupled enhanced training for purposes of capacity building. Training should start at school level as opposed to institutional professional courses as is the case with most countries. A good example is the University of Nairobi School of Law which currently offers international commercial arbitration as a course in its Masters of Law Programme (GPR 625). The students who take this course can apply directly to become members of CIArb-K at Associate level. This not only boosts the number of persons eligible to pursue arbitration at a higher level but also helps in creating awareness in the country and the region, a powerful tool for awakening arbitral institutions and boosting the development and practice of arbitration.

Government collaboration is important as in the case of NCIA and KNCCI in Kenya. KNCCI collaborates with the Government of Kenya in promoting business in the country. Some of the investors come into the African countries through government partnerships and the government can thus help sell and promote these institutions as capable of handling their disputes.

7. Conclusion

Effective and reliable application of international commercial arbitration has the capacity to encourage investors to carry on business with confidence knowing their disputes will be settled expeditiously. This can enhance users' confidence in arbitral institutions in the African continent and consequently awaken the seemingly dull arbitral institutions and arbitration practice in Africa. There is hope for the future. Arbitral institutions and arbitration practice in Africa have the potential to grow and flourish. The time to awaken and nurture arbitration for a better tomorrow is now.

Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems

1. Introduction

This paper contains the findings and analysis of the outcomes of the research and field study undertaken for TDRs and other community justice systems in Kenya. This includes: an analysis of the status of TDRs, ADR and other community justice systems; a status analysis of the existing policies, legislation and administrative procedures designed to facilitate the promotion and support of TDRs and other informal community justice systems; the gaps that require immediate intervention; recommendations for policy formulation towards the implementation of Article 159(2) and (3) of the Constitution of Kenya 2010; and legislative proposals to address gaps in legislation and regulations to implement Article 159(2) (c) and (3) of the Constitution. In addition, the paper contains the presentations made during the stakeholder forums and workshops as well as the study tools used for data collection.

The Constitution of Kenya, 2010 recognizes application of TDRs and ADR mechanisms in dispute resolution for efficient dispensation of justice.[1] The Constitution establishes a strong elaborate human rights framework embodying the fundamental rights and freedoms entitled to the citizens. To achieve this, the Constitution dedicates an entire Chapter on human rights, that is, Chapter Four which embodies the Bill of Rights. However, the fundamental rights and freedoms cannot be enjoyed in the absence of an enabling framework for their enforcement.[2] To this end, the Constitution provides for the right of access to justice under Article 48 and enjoins the state to ensure access to justice for all persons and stipulates that if any fee is required, the same shall be reasonable and not impede access to justice. The Constitution contemplates 'justice in many rooms' and promotes access to justice through informal systems such as TDRs and ADR mechanisms in addition to the court process.[3] Indeed, a high percentage of disputes in Kenya are resolved outside courts or before they reach courts by use of TDRs or ADR mechanisms.[4] TDRs and other community justice mechanisms are widely used by communities to resolve conflicts owing to their legitimacy and accessibility.

Access to justice is critical in the enforcement of human rights. Undoubtedly, traditional dispute resolution mechanisms guarantee access to justice at the community level especially for those who feel alienated from the formal processes in terms of the cost for justice and technical procedures. Certainly, a robust legal system based on a hybrid of

[1] See Article 159 (2) (c) of the Constitution of Kenya 2010.

[2] See generally, Eide, A., "Making Human Rights Universal: Achievements and Prospects," *Human Rights in Development: Yearbook* 2000 (1999).

[3] See generally, Galanter, M., "Justice in many rooms: Courts, private ordering, and indigenous law," *The Journal of Legal Pluralism and Unofficial Law*, Vol.13, No. 19 (1981), pp. 1-47.

[4] See generally, Wily, L. & Mbaya, S., "Land, People, and Forests in Eastern and Southern Africa at the Beginning of the 21st Century: The Impact of Land Relations on the Role of Communities in Forest Future," *Community involvement in forest management in Eastern and Southern Africa: Issue 7 of Forest and social perspectives in conservation*, (IUCN, 2001).

formal and informal justice systems strengthens the capacity of citizens to access justice. This is because the two justice systems complement each other and citizens are at liberty to choose the most appropriate and affordable system for themselves. The hybrid system should be coherent and articulate specifying the nature of each system, the advantages and disadvantages and setting out a clear interface between formal and informal systems. In order to guarantee access to justice for Kenyans, the Constitution embraces dynamism in justice systems by encouraging the utilization of formal and informal justice systems. In this regard, Article 159 recognizes the use of TDRs and ADR mechanisms in addition to the court process. Article 159 (2) envisages the underlying principles for the exercise of judicial authority in Kenya. It stipulates that 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 and (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause 3. Clause 3 thereof provides that TDRs shall not be used in a way that (a) contravenes the Bill of Rights, (b)is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality, or (c) is inconsistent with the Constitution or any written law.

The role of TDRs in implementing access to justice cannot be gainsaid. In Kenya as well as many other African countries, it is trite that TDRs constitute the most basic and fundamental dispute resolution process. From time immemorial, even before the transplantation of the English legal system in Kenya, communities used to resolve a myriad of disputes through traditional justice systems.[5] In most African communities, TDRs derive their validity from the customs and traditions and are deemed to be the primary pillar of the justice system in an African context.[6]

1.1 Background

Article 159(2) (c) of the Constitution of Kenya 2010 recognizes the use of other justice mechanisms in dispute resolution other than the court process. This Article envisages that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. Further, courts and tribunals are enjoined, in exercising judicial authority, to be guided by principles that: (*a*) justice shall be done to all**,** irrespective of status;(*b*) justice shall not be delayed; and (*c*) alternative forms of dispute resolution including reconciliation, mediation, arbitration and

[5] Mkangi K, "Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for
Examining Conflict in Africa‖," available at www.payson.tulane.edu. [Accessed on 20/04/2017]; See also Joireman, S.F., "Inherited legal systems and effective rule of law: Africa and the colonial legacy," *The Journal of Modern African Studies* Vol.39, No. 04, 2001, pp. 571-596; See also Fullerton J.S., "The evolution of the common law: Legal development in Kenya and India," *Commonwealth & Comparative Politics* Vol.44, No. 2 (2006), pp. 190-210.

[6] Ibid.

traditional dispute resolution mechanisms shall be promoted, subject to clause(3). Drawing from 159 2(c) Clause 3 provides that traditional dispute resolution mechanisms shall not be used in a way that (*a*) contravenes the Bill of Rights; (*b*) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (*c*) is inconsistent with the Constitution or any written law.

The Constitution envisages the overriding objective of the justice system in Article 48 on the right of access to justice and Article 159 that sets out the guiding principles. Thus, the goal of Article 159 is to ensure that every Kenyan can access justice without any impediment. Indeed, Article 159 as read together with Article 27 embodies the principle of rule of law which guarantees every citizen equal treatment, protection and benefits of the law. By strengthening access to justice, citizens are empowered to readily and affordably access the justice system to seek redress for violation of rights.[7]

Moreover, the constitutional guarantees on access to justice are designed to protect the rights of the economically disadvantaged as well as the vulnerable and marginalized groups.[8] Undoubtedly, TDR and other community based mechanisms are critical in promoting access to justice among many communities in Kenya.[9] Indeed, a great percentage of disputes in Kenya are resolved at the community level through the use of community elders and other persons mandated to keep peace and order.[10]

Despite formal recognition coupled with a constitutional mandate for their promotion in appropriate dispute resolution strategies, TDRs and other community justice systems

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[7] United Nations Development programme, "Access to Justice: Practical Note," 9/3/2004, p.3. Available at *http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf.*

[8] *See generally, United Nations General Assembly, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights,' Sixty-seventh session, Item 70 (C) Of the Provisional Agenda (A/67/150), Promotion and Protection of Human Rights: Human Rights Situations and Reports of Special Rapporteurs and Representatives, A/67/278, 9 August 2012; See also generally, Inter-American Commission on Human Rights,* "Access To Justice As A Guarantee Of Economic, Social, And Cultural Rights: A Review of the Standards Adopted By the Inter-American System of Human Rights," OEA/Ser.L/V/II.129 Doc. 4, 7 September 2007. Available at
http://www.cidh.org/pdf%20files/ACCESS%20TO%20JUSTICE%20DESC.pdf

[9] See generally, Wojkowska, E., *Doing Justice: How Informal Justice Systems Can Contribute*, (United Nations Development Programme – Oslo Governance Centre, December 2006). Available at
http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf

[10] See Muigua, K., "Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms," Paper Presented at the *CIArb Africa Region Centenary Conference 2015,* held on 15-17, July 2015. Available at
https://profiles.uonbi.ac.ke/kariuki_muigua/files/empowering_the_kenyan_people_through_alternative_dispute_resolution_mechanisms_-_21st_docx.pdf ; See also generally, Kariuki, F., "Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology," available at
http://www.strathmore.edu/sdrc/uploads/documents/books-andarticles/Paper%20on%20Traditional%20justice%20terminology.pdf

have to date attracted inadequate attention in the ongoing judicial reforms. Recent studies carried out by civil society organisations indicate that TDRs and informal justice systems play a critical role in guaranteeing social order in many communities. They take the form of community council of elders, chieftains, peace committees and other indigenous community-based dispute resolution mechanisms. However, there has not been adequate attempt to give meaningful recognition, promotion and support for these invaluable strategies. There exists no policy or legislative framework to guide the promotion and use of these mechanisms despite their constitutional recognition and limitations prescribed in Article 159(2) and (3). Consequently, these systems remain untapped with a view to effectively support and complement the conventional justice system that presently spreads too thin over a wide geographical expanse despite the ever-pressing need for accessible and effective judicial services.

The constitutional guarantees in regard to access to justice call for appropriate policy, statutory and administrative interventions to ensure the efficacy of both conventional and alternative dispute resolution mechanisms (ADR) including traditional dispute resolution strategies and community-based justice systems. To this end, research was undertaken and its outcomes form the substance of this paper. The paper explores appropriate policy, statutory and administrative intervention designed to ensure that: (a) TDR strategies and other informal justice systems find their rightful place in the conventional judicial system; (b) the requirements of Article 159(2) and (3) of the 2010 Constitution are meaningfully implemented; and (c) all traditional and informal justice systems observe the minimum standards prescribed in Article 159(3) of the Constitution.

1.2 Methodology and Research Design

The research adopted a hybrid approach comprising of desk research and a field study where the Meru and Luo communities were sampled for field interviews. The research was guided by the constitutional provisions on application of TDRs and ADR. This is mainly Article 159 (2) (c) and (3). Overall, the research adopted a social-legal approach by conducting a study on community justice systems and the analysis of the legal, policy and administrative structures that promote or impact on TDR processes in Kenya. Firstly, the desk research was undertaken on the status of TDRs and other community justice systems, the legal and policy framework impacting on TDRs and their adequacy while identifying gaps and barriers that need to be filled to strengthen application of TDRs. To this end, the research revealed that the legal and policy framework fall short of the constitutional threshold for TDRs and ADR. These gaps have been pointed out in this paper and recommendations suggested to align the legal and policy framework with the Constitution.

Secondly, a field study was conducted in a few selected communities on the status of the TDRs and other community justice systems. For background information, the researcher reviewed and analyzed reports of studies conducted by several civil society organisations

as well as academic commentaries on the subject. Moreover, the writer undertook a survey of TDR practice in other jurisdictions in Africa and beyond. Drawing from lessons of best practices in other jurisdictions, the report makes recommendations for harnessing TDRs in dispute resolution. The paper points out the key weaknesses of TDR systems and makes recommendations for addressing the same in order to mainstream the application of TDRs in line with Article 159 (2) (c) and (3) of the Constitution.

1.3 Stakeholder Consultative Forums

The stakeholder consultations were conducted in form of field interviews in various communities where TDRs are used in dispute resolution. The study focused on the nature and structure of various TDR mechanisms, their jurisdiction and the extent to which they satisfy the requirements of Article 159(2) and (3) of the Constitution. Six local communities where TDR mechanisms have been used to manage conflicts and resolve civil disputes were identified. These included the Digo, Meru, Kikuyu, Somali, Luhya and the Luo communities; where council of elders *(Kaya elders among the Digo community, the Njuri Ncheke of Meru, the Kiama of the Kikuyu community and Ker among the Luo community*) are community gate keepers. In addition, Court User Committees (CUCs) and Local Administrators (Chiefs) were identified as respondents. Due to logistical reasons, actual interviews were conducted in two communities: Luo and Meru. The findings point to the use of TDR mechanisms in managing conflicts and resolve civil disputes and will contribute to the development of policy on Article 159(2) and (3) of the Constitution.

1.4 Limitations

The researcher was able to undertake research on the legal, policy and institutional framework relating to TDRs and other community justice systems. In the analysis, it was established that there is no distinct legal, policy or institutional framework for TDRs but there are various laws that promote the use of TDRs and other community justice systems in dispute resolution.

The writer undertook a comparative analysis of TDRs and other community justice systems in Africa and beyond and identified key best practices that Kenya can emulate. Moreover, it was established that most TDRs in Africa and beyond face almost identical challenges for instance failure to meet constitutional human right threshold, poor documentation, undefined jurisdiction and subjection to formal laws.

The main challenge that the author faced was in respect of the field interview. Out of the targeted 342 respondents drawn from six local communities (Digo, Meru, Kikuyu, Somali, Luhya and Luo), Court User Committees and Local Administrators (Chiefs) only 81 respondents from two communities (the Luo community (Kisumu, Siaya and Homabay counties) and the Meru community of Tharaka Nithi County), the Local Administration and Court User Committee members were involved in the study. The study outcome is

based on information from respondents drawn from six local communities and does not fully represent the diversity of the Kenyan community.

1.5 Recommendations

The overall objective of the project was to undertake a status analysis of Traditional Dispute Resolution Mechanisms and informal community justice systems and to make recommendations and provide guidelines for formulation of policies and legislation to support TDR strategies. The recommendations are contained in section 5 of this paper.

PART II

2. Status of TDRs and ADR in Kenya

This section presents the findings of the research and field study conducted on the status of TDRs, ADR and other community based justice systems in Kenya. The research and field study focused on the nature and structure of various TDR mechanisms, their jurisdiction and the extent to which they satisfy the requirements of Article 159(2) and (3) of the Constitution. Further, the research examined the advantages and disadvantages of TDRs and the challenges in their application. In addition, the research explored the historical basis of TDRs in Kenya vis-a-vis the formal court process and how the two have been applied by Kenyan courts. A comparative survey of TDRs in other jurisdictions in Africa and beyond was undertaken. The findings of the field study were used to verify the research outcomes and finalize the report.

For the field study, six local communities where TDR mechanisms have been used to manage conflicts and resolve civil disputes were identified. These included the Digo, Meru, Kikuyu, Somali, Luhya and the Luo communities; where council of elders *(Kaya elders among the Digo community, the Njuri Ncheke of Meru, the Kiama of the Kikuyu community and Ker among the Luo community*) are community gate keepers. In addition, Court User Committees (CUCs) and Local Administrators (Chiefs) were identified as respondents. Due to logistical reasons, actual interviews were conducted in two communities: Luo and Meru.

Overall, the field study attracted a total of 81 respondents, 80% male and 20% female who were interviewed from four (4) counties: Kisumu, Siaya and Homabay for the Luo community and the Tharaka Nithi County for the Meru Community (Fig. 1). The respondents comprised of members of the Council of Elders (Luo and Meru) forming 26% of the respondents, local administration (22% of the respondents) and the Court User Committee members (49% of respondents).

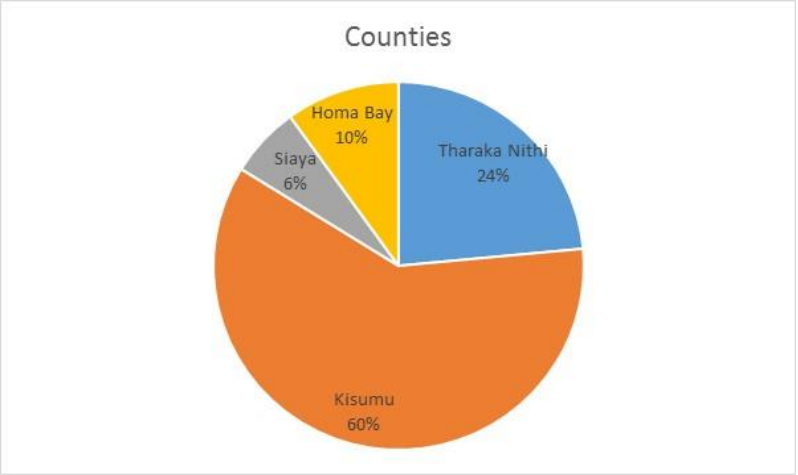

Figure 2*: Respondents by County*

2.1 Overview of TDRs and ADR in Kenya

The recognition of ADR and TDRs under Article 159 of the Constitution is a restatement of the customary jurisprudence of Kenya.[11] This is because TDRs existed from time immemorial and are therefore derived from the customs and traditions of the communities in which they operate.[12] In most African communities, TDRs existed even before the other alternative dispute resolution mechanisms were invented. The key guiding principles for successful application of TDRs among traditional African communities was that the tribunal (chiefs, councils of elders, priests or kings) should be properly constituted. The disputants ought to have confidence in them and submit to their jurisdiction.[13]

The main aspects of TDRs and other ADR mechanisms which make them unique and community oriented is that they focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by formal common law and statutory regimes.[14] The main objective of TDRs in African societies is to resolve emerging

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[11] See Muigua, K., "Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010," p. 2. Available at *http://www.chuitech.com/kmco/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf*; See also Oraegbunam, I. K. E. "The Principles and Practice of Justice in Traditional Igbo Jurisprudence," *OGIRISI: a New Journal of African Studies* 6, no. 1 (2009): 53-85, p.53.

[12] See Brock-Utne, B., "Indigenous conflict resolution in Africa," In *weekend seminar on indigenous solutions to conflicts*, 2001, pp. 23-24; see also Ntuli, P.P., "Indigenous knowledge systems and the African renaissance." *Indigenous knowledge and the integration of knowledge systems: Towards a philosophy of articulation* (2002): 53-66.

[13] Anjayi, A.T., "Methods of Conflict Resolution in African Traditional Society," An *International Multidisplinary Journal*, Ethiopia, Vol. (8) Serial No.33, April, 2014, p.142.

[14] See Muigua, K., 'Effective Justice for Kenyans: Is ADR Really Alternative?' pp. 12-13. Available at *http://www.kmco.co.ke/attachments/article/125/Alternative%20Dispute%20Resolution%20or%20Appropriate%20Dispute%20Resolution.pdf*; see also Shamir, Y. and Kutner, R., *Alternative dispute resolution approaches and their application*, Unesco, 2003. Available at

disputes and foster harmony and cohesion among the people.[15] TDRs derive their validity from customs and traditions of the community in which they operate. The diversities notwithstanding, the overall objective of all TDRs is to foster peace, cohesion and resolve disputes in the community. The practice of TDRs is not recorded in any form of documentation or record keeping but the rules are handed down from one generation to the next.[16]

Historically, the use of TDRs and other ADR mechanisms in dispute resolution existed even before the introduction of a formal legal system. Conflict resolution among the traditional African societies was anchored on the ability of the people to negotiate. However, with the introduction of colonial legal systems, western notions of justice such as the principles of the common law of England were introduced in Kenya. The formal courts, being adversarial in nature, greatly eroded the traditional conflict resolution mechanisms.[17]

The use of TDRs in access to justice and conflict management in Africa is still relevant especially due to the fact that they are closer to the people, flexible, expeditious, foster relationships, voluntary-based and cost-effective.[18] For this reason, most communities in Africa still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.[19] The use of TDRs fosters societal harmony over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa.[20] Such values have contributed to social harmony in African

*http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.468.2176&rep=rep1&type=pdf[*Accessed on 20/04/2017]

[15] Hwedie, K.O. and Rankopo, M.J., Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, p. 33, University of Botswana. Available at *http://ir.lib.hiroshima-u.ac.jp/files/public/33654/20141016194149348069/ipshu_en_29_33.pdf* [Accessed on 20/04/2017]

[16] See generally, Biobaku, S.O., "The problem of traditional history with special reference to Yoruba traditions," *Journal of the Historical Society of Nigeria* Vol.1, No. 1, 1956, pp.43-47.

[17] See generally, Mac Ginty, R., "Indigenous peace-making versus the liberal peace." *Cooperation and conflict*, Vol.43, No. 2 (2008), pp.139-163.

[18] See generally, Singer, L. R., "Non-judicial Dispute Resolution Mechanisms-The Effects on Justice for the Poor." *Clearinghouse Review Dated :(* (1979), pp. 569-583; Osi, C., "Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods in Lieu of Litigation," *Cardozo J. Conflict Resol.,* Vol.10, 2008, p.163.

[19] See Justice, D., "How informal justice systems can contribute." *Oslo, United Nations* (2006); Bamikole, L., "An Indigenous Yoruba Socio-political Model of Conflict Resolution," *Philosophy Study* Vol.3, No. 2 (2013), p.144; Edossa, D.C., et al, "Indigenous systems of conflict resolution in Oromia, Ethiopia," *Community-Based Water Law and Water Resource Management Reform in Developing Countries* (2007), p.146; Murithi, T., "African approaches to building peace and social solidarity," *African Journal on Conflict Resolution* Vol.6, No. 2 (2006), pp. 9-33; Akinwale, A.A., "Integrating the traditional and the modern conflict management strategies in Nigeria," *African Journal on Conflict Resolution*, Vol.10, No. 3, 2010.

[20] Muigua, K. and Kariuki, F., "ADR, access to justice and development in Kenya," Paper presented, at the Strathmore Annual Law Conference 2014 held on 3rd and 4th July, 2014 at Strathmore

societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts. Unlike the court process which delivers retributive justice, TDRs encourage resolution of disputes through restorative justice remedies.[21]

2.1.1 The Repugnancy Test

The transplantation of the English legal system in Kenya overhauled the hitherto African traditional dispute resolution systems and subjected them to a foreign legal system. The various TDRs were deemed to be backward, uncouth and uncivilized. The exclusion of customary law posed a big challenge to the formal courts in determining disputes emanating from customs and traditions of Kenyan Africans. Evidently, most judgments resulted in great injustice since African disputes which could have been better resolved by application of customary law were determined on the basis of notions and jurisprudence of a foreign law. This led to resistance and contempt by Africans against the colonial courts which prompted the colonial administration to integrate customary laws within the formal legal system but they were subordinated to English laws. In this regard, customary law was deemed valid as long as it did not contradict the common law or any written law. This was the origin of the repugnancy clause encapsulated in section 3(2) of the Judicature Act[22].

The policy behind subjection of customary law to the repugnancy test was founded on the contention that there are certain aspects of customary laws that do not augur well with human rights standards.[23] This has resulted in continued subjection of customary laws to the repugnancy clause by courts hence undermining the efficacy of traditional justice systems.

However, there is an ongoing debate in academia with scholars positing that there is need for customary laws to be recognized at the same pedestal with formal laws as their usefulness in certain social and cultural aspects is now settled bearing in mind international human rights standards.[24] Besides, it is argued 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

University Law School, Nairobi. Available at *http://www.kmco.co.ke/index.php/publications/138-adr-access-to-justice-and-development-in-kenya-kariuki-muigua-kariuki-francis* [Accessed on 21/04/2017].

[21] Mkangi, K., "Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contexualised Paradigm for Examining Conflict in Africa," op cit.

[22] Judicature Act, Cap 8, Laws of Kenya.

[23] See Merry, S.E., "Human rights law and the demonization of culture (and anthropology along the way)," *Polar: Political and Legal Anthropology Review* Vol.26, No. 1, 2003, pp.55-76.

[24] See generally, Donnelly, J., "Cultural relativism and universal human rights," *Human Rights Quarterly*, Vol. 6, No. 4, 1984, pp. 400-419; See also Cerna, C.M., "Universality of human rights and cultural diversity: implementation of human rights in different socio-cultural contexts," *Human rights quarterly*, Vol. 16, No. 4, 1994, pp.740-752; See also Cobbah, J.A.M, "African values and the human rights debate: an African perspective," *Human Rights Quarterly*, 1987, pp.309-331.

morality.[25] 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.[26]

2.1.2 Conflict Resolution versus Dispute Settlement

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.[27] Since resolution is non-power based and non-coercive, it follows then that conflict resolution entails the mutual satisfaction of needs and does not rely on the power relationships between the parties.[28] The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based out-comes.[29] A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.[30]

On the other hand, dispute settlement mechanisms only address the issues raised by disputants and aims at resolving the issues without venturing into the root causes of the dispute.[31] Examples of dispute settlement mechanisms are arbitration and adjudication.
Traditional justice systems are dispute resolution mechanisms. This is because TDRs utilize resolution mechanisms such as negotiation, mediation and conciliation to ensure that the root causes of the dispute are addressed and assist the parties to explore mutually satisfying and durable solutions. Where these mechanisms have been employed they have been effective in managing conflicts and their declarations and resolutions have been

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[25] See Donnelly, J., "Human rights and human dignity: An analytic critique of non-Western conceptions of human rights," *American Political Science Review*, Vol. 76, No. 02, 1982, pp.303-316; See also generally, Heard, A., "Human rights: Chimeras in sheep's clothing." *Simon Fraser University* (1997). Available *at https://www.sfu.ca/~aheard/intro.html* [Accessed on 20/04/2017]; See also Donnelly, J., "The relative universality of human rights," *Human rights quarterly,* Vol. 29, No. 2, 2007, pp. 281-306; See also Cerna, C.M., "Universality of human rights and cultural diversity: implementation of human rights in different socio-cultural contexts," *Human rights quarterly*, Vol. 16, No. 4, 1994, pp.740-752; Harris, B., "Indigenous Law in South Africa-Lessons for Australia," *James Cook UL Rev.* Vol.5,1998, p.70.

[26] See Juma, L., "Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes," *Thomas L. Rev.*, Vol.14, 2001, p.459.

[27] Bloomfield, D., "Complementarity in Conflict Management Theory: Resolution and Settlement Approaches7," In *Peacemaking Strategies in Northern Ireland*, pp. 67-95. Palgrave Macmillan UK, 1997.

[28] Cloke, K., "The Culture of Mediation: Settlement versus Resolution," *The Conflict Resolution Information Source*, Version IV, December 2005.

[29] Ibid.

[30] Ibid; Bloomfield, D., "Towards complementarity in conflict management: Resolution and settlement in Northern Ireland," *Journal of Peace Research*, Vol.32, No.2, 1995, pp.151-164.

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

recognized by the formal institutions.[32] For instance, in passing the Modogashe Declaration the people of Garissa, Mandera and Wajir districts agreed to resolve the problems of banditry, trafficking of arms, livestock movements, socio-economic problems, identifying role of peace committees among others.[33] It also outlined decisions made by the community around the issues affecting the community especially unauthorized grazing, cattle rustling, trafficking of arms, control of livestock diseases and trade, highway banditry, identity cards by non-Kenyans and others.[34]

2.2 Findings and Analysis

The research conducted on TDRs and other community justice systems indicate that they are distinct from other justice processes and are the most preferred mode of conflict resolution by communities. The main characteristics of TDRs are: they do not adhere to a prescribed or written set of rules; they draw from customs and traditions of the community in which they operate; easily accessible to all people and use local language which is widely understood by people; proceedings are oral and usually there is no record keeping; Veracity of customs and values/rules depends on the memory of the mediators; mostly fail to adhere to the Bill of Rights; remedies are couched on restorative justice; wide and undefined jurisdiction; TDRs practitioners need no formal education and training.

2.2.1 Advantages of TDRs and Other Community Based Justice Systems

The study assessed the advantages of TDRs and other community based justice systems and found out that; traditional values are part of the heritage of the people hence people subscribe to its principles; promotes social cohesion, peace and harmony; proximity to the people/accessibility and use of language that the people understand; the mechanisms are affordable; TDRs are resolution mechanisms; are cost effective since parties can easily represent themselves in such forums; proceedings undertaken are confidential; TDRs and ADR mechanisms are flexible since they do not adhere to strict rules of procedure or evidence and they yield durable solutions. The majority of the respondents (91%) interviewed do consider community justice systems as valuable. (See Fig. 2 below)

[32] See generally, Ertel, D., "How to design a conflict management procedure that fits your dispute." *MIT Sloan Management Review*, Vol. 32, No. 4, 1991, p.29.

[33] See generally, Biko, A.S., *The role of informal peace agreements in conflict management: modogashe declaration and its implementation in North Eastern, Kenya* (Doctoral dissertation, University of Nairobi, 2011).

[34] See National Cohesion and Integration Commission, "Review of Modogashe Declaration," available at *http://www.cohesion.or.ke/index.php/programmes/review-of-modogashe-declaration* [Accessed on 20/04/2017]

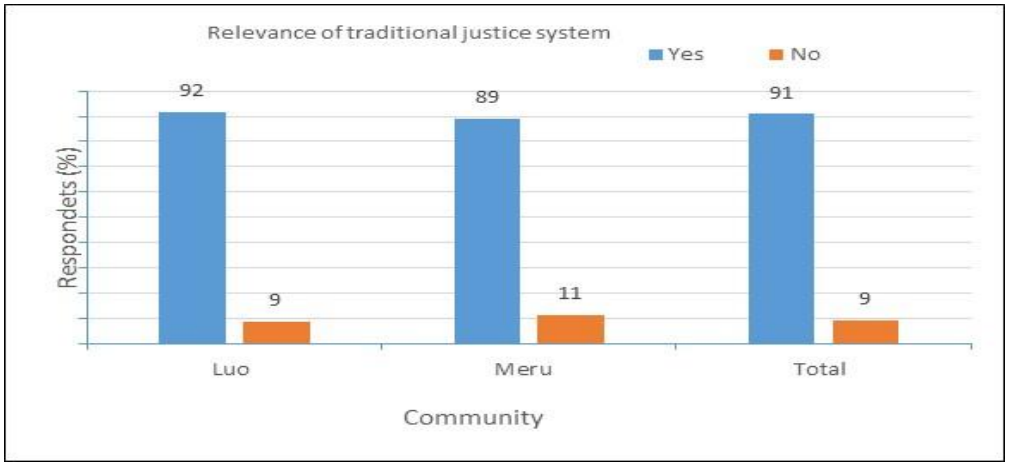

Figure 3: Relevance of Traditional Justice Systems

Further, the respondents were of the view that TDR mechanisms are valuable because: they decongest the courts and prisons, respect the traditional cultures and traditions, decisions emanating from such mechanisms are easily acceptable to communities, they promote peace, harmony, co-existence among communities and security, they are expeditious and most cases are resolved by elders who have background knowledge and understanding of cases and the people hence allow for handling matters discreetly for quick resolution, they are less costly and easy accessible to the poor, resolve disputes at grass-root level and enhance access to justice, they also provide local solutions which are more acceptable to people and they are agents of change and promote economic development, foster love, cohesion, integrity and promote respect for each other. (See table 1 below on the perceptions on relevance of TDRs)

Reasons	**Number of respondents**	
	Yes	**No**
Decongest courts and prison	18	0
Respect traditions of communities	17	0
Promotes peace, harmony and coexistence among communities and security	16	0
Expeditious and most cases are resolved- Allow for handling matters discretely to allow resolution	16	0
Less costly and Easy access by poor	17	0
Resolve disputes at grass-root level and enhances access to justice	10	0
Local solution/more acceptable to people	8	0
Elders understand history of the case and people and have experience	6	0

Reasons	Number of respondents	
	Yes	No
Agent of change and promotes economic development	9	0
Foster love, cohesion and integrity and promotes respect for each other	7	0
mediate political issues and advise leadership on how to conduct themselves	2	0
Inclusiveness and non-discriminatory	2	0
Lack of framework and policies to enforce and not legally binding	0	2
little involvement of women and there is need for inclusion	0	2
Ignorance of legal knowledge	0	2
Lack of resources and limited financial ability	0	1
Communities have evolved and integrated a lot and sets of common laws do not exist	0	1
Disrespect of resolutions of TDR by many	0	1
Favoritism /biasness at times	0	1

Table 1: Perception on relevance of TDR in community

2.2.2 Disadvantages of TDRs and Other Community Based Systems

However, TDRs were found to have various disadvantages such as: disregard for basic human rights (For example where women as discriminated against or where corporal punishment is meted out); application of abstract rules and procedure/lack of a legal framework; lack of documentation/record-keeping; limited resources and financial inability of the systems; 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. Further, the study conducted indicates that there was some form of documentation of TDRs although it is poorly done. Documentation of cases and outcomes creates a historical data for reference. In the traditional setting, documentation was majorly by memorization. The research established that 77% of the respondents said their proceedings are recorded. The recordings are recorded to provide future references in case of need, during appeals and for forwarding the cases to the next level, whether in the same line of the TDR or to the courts of law. (See Fig. 3 below).

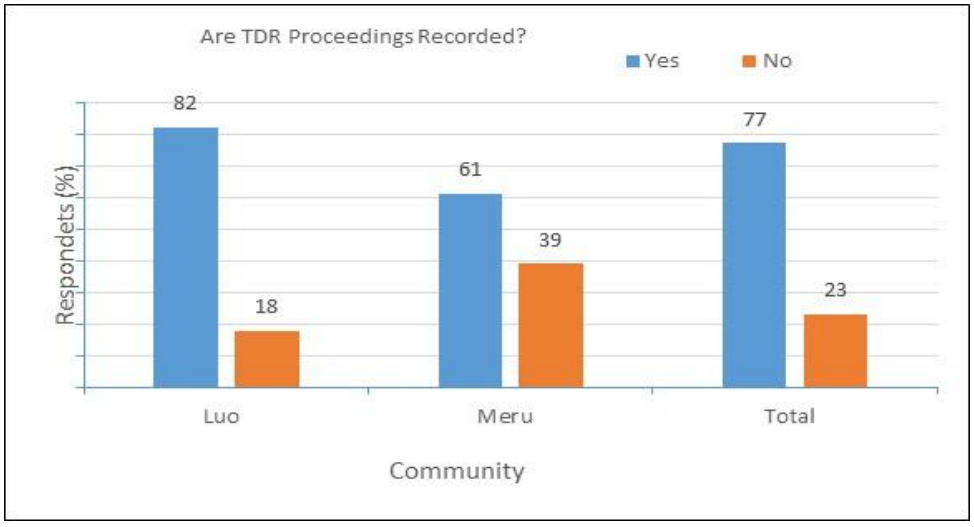

Figure 4: Recording of TDR proceedings in writing

The main challenges reported from the field study include: inadequate resources to finance the meetings and facilitation of the elders to participate actively in the meetings in form of transport. The services are usually voluntary and as such are dependent on the income level of the elders. Some of the meetings fail to take off, as indicated elsewhere in this paper, due to lack of quorums or non-availability of the elders mainly because of lack of transport. 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 TDRs and general rights, among others. (See Table 2 below)

Challenge	**Number of respondents**		
	Luo	Meru	Total
Limited resources and lack of funds and lack of transport facilities	33	6	39
Inadequate recognition and empowerment of elders - through protection and security, identification, negative attitudes towards elders	24	2	26
Not recognized by law and lack of enforcement mechanism	13	4	17
Non-compliance to rules	9	2	11
Illiteracy and lack of modern technology- illiterate clerks leading to inaccurate records, no records of how resolutions are arrived at	5	6	11
Gender imbalance and lack of representation and bias	10	0	10

Challenge	Number of respondents		
	Luo	Meru	Total
Lack of exposure and capacity building	9	0	8
Vested interests in subject matter and lack on honesty with some elders looking at task as gainful employment and not service	5	0	5
No laid down standards/ framework for filing complaints and resolving disputes, how to behave as an elder	2	2	4
Lack of infrastructure and stationery-office space and furniture, buildings for holding courts	0	3	3
Political interference	2	0	2
Lack of quorum and reducing number of elders	2	0	2
Lack of awareness on rights and freedoms of public	4	1	5
Multiplicity of hearings and apathy	2	0	2

Table 2: Challenges facing traditional dispute resolution processes in the community

2.2.3 Disputes Resolved By Use of TDRs

These are anti-communal acts that require resolution through the traditional dispute resolution mechanisms without being referred to courts. The disputes could range from the criminal to the anti-social behavior such as violent acts, disputes over resources, and social misconduct such as murder, theft, sexual misbehavior, etc. The five main disputes, according to the study, requiring resolution under the TDR mechanisms in the communities include land disputes, marriage, gender violence, family cases including inheritance, clan disputes, and welfare issues such as nuisance, child welfare and neglect of elderly in that order.

(See figure 4 below).

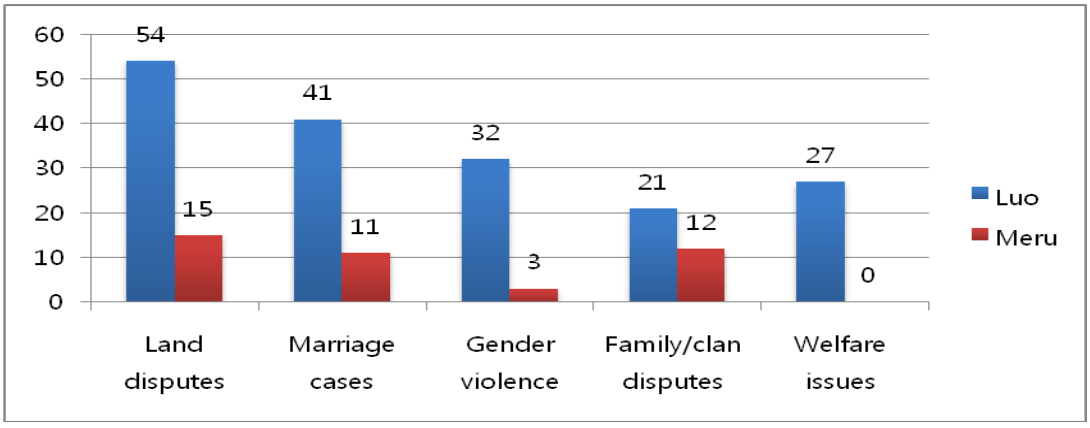

Figure 5: Five main disputes requiring resolution under the TDR mechanisms in the two communities

The Respondents reported that other disputes which required resolution using TDR mechanisms include cattle rustling, debt recovery, crop damages, overall community conflicts and resolution of political disputes in the community. (See table 3 below).

Nature of Dispute	Number of respondents		
	Luo	Meru	Total
Inheritance cases	23	2	25
Theft including cattle rustling	20	4	24
Resource scarcity	11	4	15
Debt recovery	12	3	15
Crop damage	10	0	10
Witchcraft cases	0	2	2
Political dispute	3	0	3
Assault	6	3	9

Table 3: Disputes requiring resolution under TDR

Basically majority of respondents indicated that many cases are resolvable through TDRs except for serious criminal offences that require the intervention of the courts. The offences suitable for trial in the court of law in addition to compensation under the traditional dispute resolution mechanism were reported as murder, manslaughter, sexual offences, grievous harm and stock theft.

2.2.4 Role of Women in the Community Justice System

Most TDRs are dominated by men. Women do not hold any substantive stake in TDR proceedings. The literature available on TDRs indicates that they mostly discriminate against women on matters where their rights are involved. This is because TDRs are based on customary law which discriminates against women. However, the study undertaken indicates that women play a significant role in the community justice system. Similarly, there is overall perceived fairness in the determination of women matters (73%). However, the perceived significance of women's role in the TDR mechanisms and fairness in the determination of matters affecting them varied between the communities with more respondents (89%) reporting significant roles in the Luo community compared to 53% in the Meru community. (See figures 5 and 6 below).

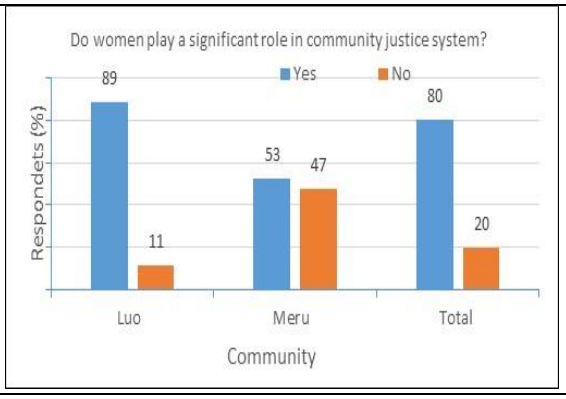

Figure 6: Significance of role of women in TDR

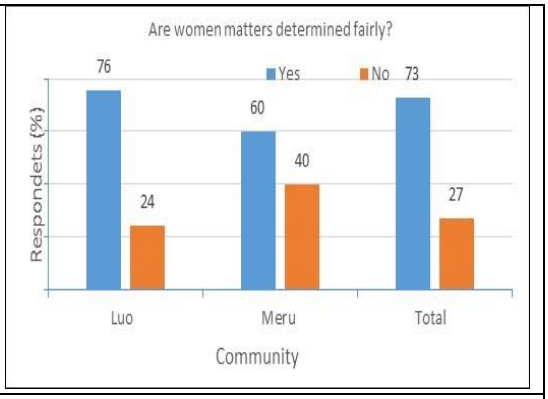

Figure 7: Determination of Women Matters in TDR

Some of the reasons offered to show that there is fair determination of disputes include the fact that elders are always concerned with the lives of the women and the children and are more keen on promoting their (women and children) welfare (25%), women are represented in most of the tribunals (38%), and that there is always room for fair hearing and appeals. Other reasons given were that women have the opportunity to appeal where not satisfied (19%) and tribunals are meticulous in conducting investigations to establish the truth (19%) before any determination. In addition, it was reported that most members of the tribunals have a good understanding of the community and yield fair and just determinations. Finally, councils of elders operate under an oath to do justice and they observe this responsibility without fear or favor. (See figure 7 below).

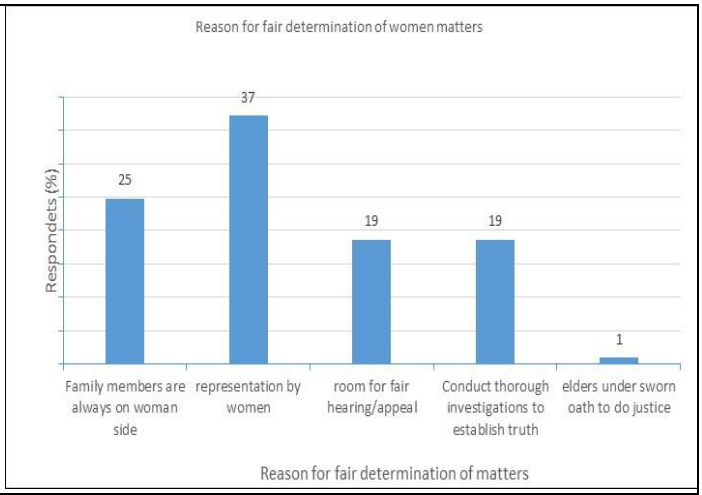

Figure 8: Reason for Fair Determination of Women Matters in TDR

However, some respondents felt that women matters are not (always) determined fairly. The reasons given include limited representation in terms of numbers, negative attitudes towards women by members, limited influence of tribunal outcomes by the women

members, inability of women to communicate well and unfair and biased cultural practices and traditions. (See figure 8 below).

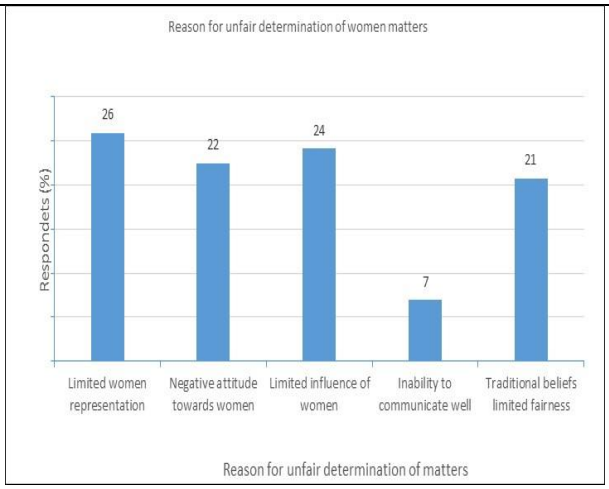

Figure 9: Reason for unfair determination of women matters

2.2.5 TDR Tribunal Proceedings

At the community level, dispute resolution through TDRs involves an informal hearing before a council of elders, local administration such as chiefs and assistant chiefs or highly respected and knowledgeable village elders. TDRs differ from the formal system in that whereas the formal system is a codification of written laws and common law, TDRs draw from communal customary law which is drawn from a community's culture and traditions. The formal system is characterised by retribution, hierarchy, defined jurisdiction and is highly adversarial. On the other hand, TDRs are inconsistent, uncoordinated, scattered and the jurisdiction is abstract. Whereas the formal legal system is individual-oriented, the TDRs are communal-based. Further, the focus of formal law is allocation of rights hence retributive and punitive in nature while the primary goal of TDRs is reconciliation, restoration and peaceful co-existence in the community.

Traditional dispute resolution proceedings are conducted in the open according to majority of the respondents (84%). The open sessions allow for free and open participation and contribute to fairness in the determination of disputes. (See figure 9 below).

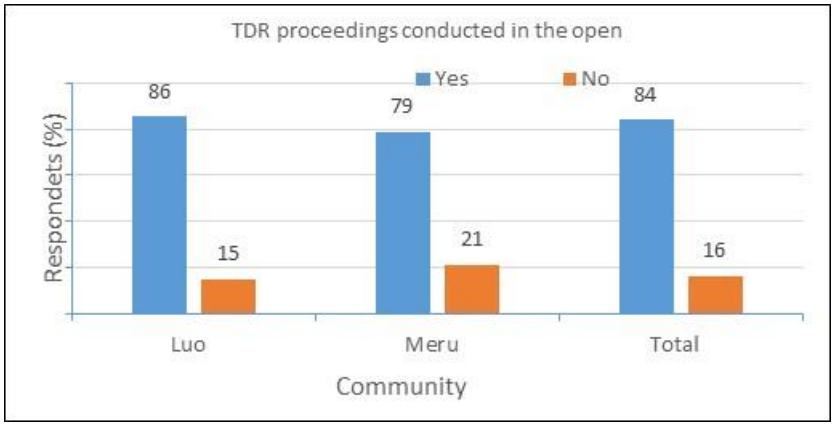

Figure 10: TDR proceedings conducted openly for members of the community to attend

In terms of compensation of council of elders or members of the alternative dispute resolution committees for their work, it was found that the council of elders in the Meru community is usually compensated. For the Luo community payment is mainly made to the committees or tribunals by the local administration including clan elders, village elders, and assistant chiefs. But no payment is made to the committee of the council of elders.

Where payments are made to the committees, the rates were reported to be largely fair, reasonable and affordable to majority of the people (79%). Such payments are usually agreed on between the disputants and can take any of two forms, in kind (in terms of animals or farm produce) or cash. Each of the disputants has to pay similar amounts to avoid any feeling of perceived biasness. The negotiated rates take into consideration the income levels of the disputants and are often made as a token. Sometimes the compensation takes the traditional form of slaughtering animals (goats) for the elders.

2.2.5.1 Composition of TDR Tribunals

The common traditional dispute resolution (tribunals/council of elders) committees mentioned are the Council of elders (Council of elders for the Luo and the Njuri Ncheke for the Meru community), the Local administration (Nyumba Kumi initiative, clan/village elders, Assistant chiefs and Chiefs' barazas), church elders and the children's departments. The councils of elders are mainly composed of men while in the local administration TDR mechanisms include women in the committees. Where both men and women are involved, the majority are men (the average being at 74%) with women forming only 26% of the membership. However the composition is slightly higher in the Luo community with 74% compared to the Ameru's 67% proportion of men to women. *(See figure 10 below).*

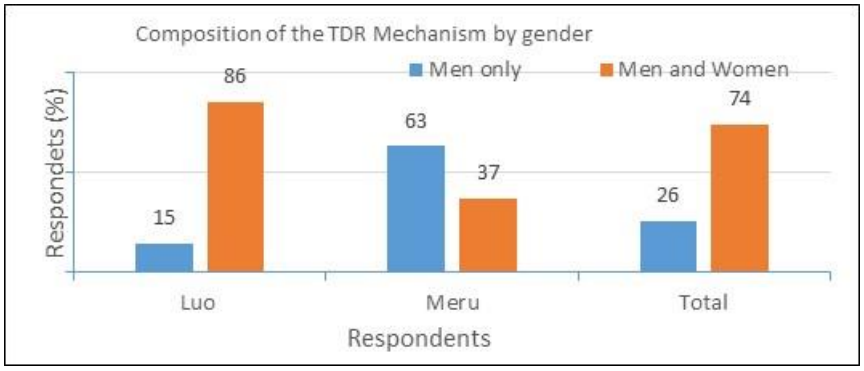

Figure 11: Composition of panels in TDR Mechanisms by Gender

In the Meru community, the membership of the council of elders is predominantly men with women being common mostly in the committees constituted to resolve certain specific issues under the local administration (mostly under the Chief and Assistant Chief's offices). The Luo community has women in both local administration and the council of elders. However participation of women in the Luo council of elders and to some extent in the committees is rather low due to the fact that elders engage in volunteer and free jobs which are not compensated and as such do not attract more women. It was also reported that women are mostly busy in household chores and therefore have limited time to engage in traditional committees.

It was established that a person's age is an important determinant factor in a person's membership to TDR tribunals/committees and especially with respect to membership in the council of elders. Most Councils of elders are constituted by persons who are above 50 years according to majority (79%) of the respondents, with the younger elders (51-50 years) being mostly clan/village elders under the local administration. In the Luo community, to be a member of the Council of Elders one has to be at-least 55 years for women and at least 65 years for men. The Meru have an age limit of over 50 years for one to be a member of the Njuri Ncheke. *(See figure 11 below).*

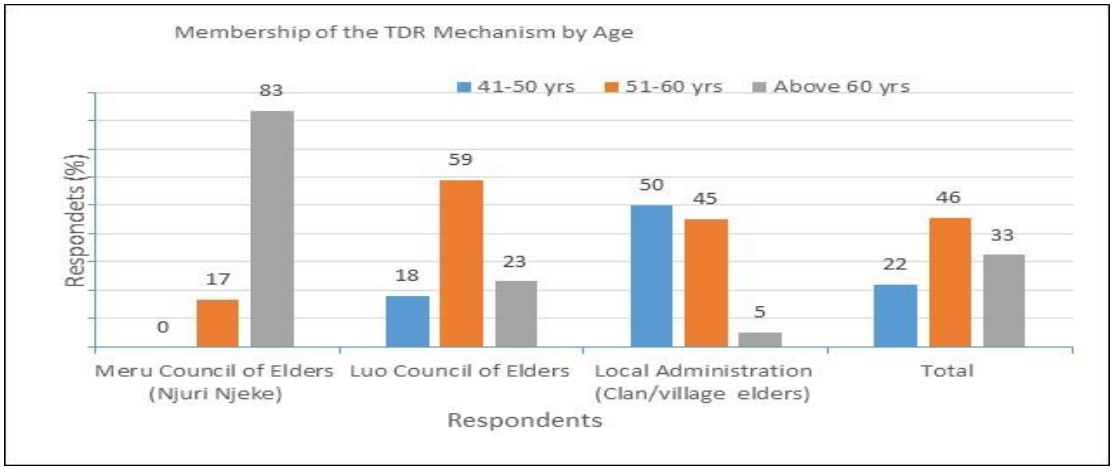

Figure 12: Age of the Members in TDR Tribunals/Committees

Other considerations for membership into these committees include gender, experience, knowledge and understanding of the traditions. Others are the overall status in the community including the social standing, integrity and commitment, maturity and family status such as marital status and success in raising a family. Special considerations among the communities include the residency status, clan representation, desire to volunteer, ability to keep matters confidential, foresightedness for the Luo and religious background among the Meru.

2.2.5.2 Accessibility of Traditional Dispute Resolution Mechanisms

Any dispute resolution mechanism should ensure access to justice for all persons and should be fair and affordable. The overall results from the field study indicate that majority of the respondents (84%) perceived TDR mechanisms as being accessible to all in the community. Among the Luo and Meru communities 85% and 83% of the respondents respectively, reported that TDR mechanisms are accessible. In cases where respondents felt some members of the community did not have equal opportunity to access traditional dispute resolution mechanisms, that was attributed to factors such as age, the status in the community, health/sanity, a person's character/behaviour with errant members of the community being dismissed, awareness of the TDRs with many people not being aware of the existence of the TDRs, lack of harmony between the TDRs and the statutes, conflict of interest, gender, high fees for some communities, knowledge of meeting venues and time, and proximity to the office.

The length of time taken to resolve most of the disputes in the two communities was found to be relatively short. According to 69% of respondents, disputes take less than 1 month to resolve, while 20% thought cases take 1-2 months. In the Meru community, majority of respondents (47%) said that cases take 1-2 months to resolve while 35% think cases take less than 1 month. In the Luo community, according to majority of respondents (79%), cases take less than 1 month to resolve, with only 12% expressing the view that cases take 1-2 months to resolve. (See figure 12 below).

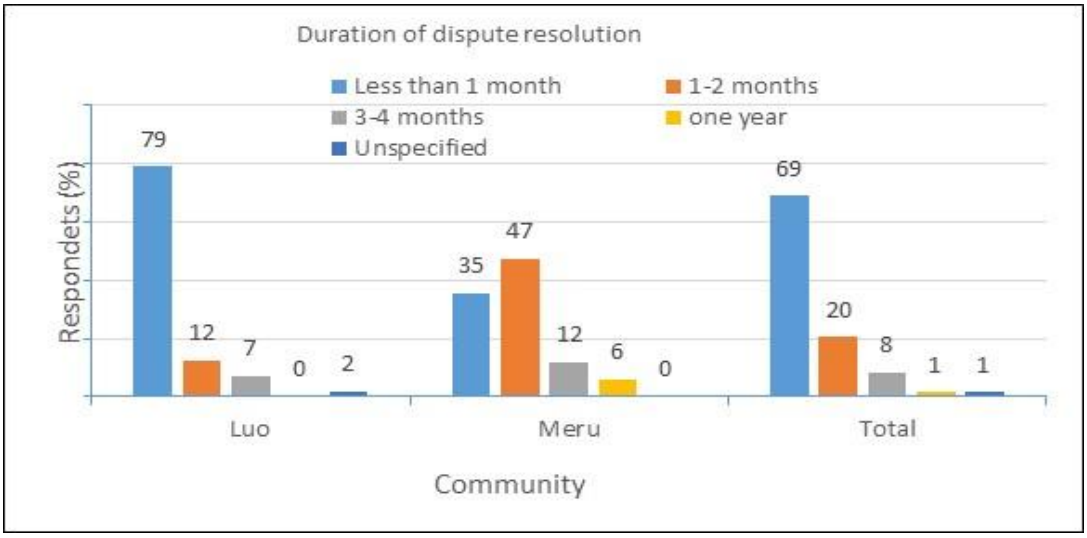

Figure 13: Duration of dispute resolution using the TDR mechanism

The period taken to resolve a dispute is heavily dependent on a number of factors including; the nature of the dispute with complex disputes involving land, communities and clans taking longer to resolve. Other determinants include the types of parties with the inter-clan and community disputes taking longer, the availability of the elders with cases being postponed severally due to lack of quorum or where the elders fail to turn up owing to lack of resources. The availability and number of witnesses and compliance of parties to the agreements is also crucial with longer periods taken where witnesses are many and do not comply with requirements. Accessibility of records and availability of adequate information about the issue under dispute is also important in determining the duration with longer durations taken to resolve cases which require time for further investigations and consolidation of background information. In some instances, the disputants appeal to the elders to take a longer period to resolve the dispute.

2.2.5.3 Outcomes of Traditional Dispute Resolutions

Traditional dispute resolution processes often take various forms including arbitration, mediation or conciliation. The main forms in the communities include agreements facilitated by reconciliation (64%), mediated agreements (63%) and arbitral awards of the council of elders (35%). Other forms specific to the Luo community include peace building, cohesion and friendship (6%), advisory opinions and counseling (1%) and compensation of aggrieved parties (1%).

Usually the expected outcomes of traditional dispute resolution processes are transformation and overall behavior change, compensation of the complainant (restorative) and retribution or punishment of the offender for the offence. Other results common to the Luo community include reconciliation and maintenance of peace, security and harmony, enhanced development and self-sustenance, overall reduction of poverty, cohesion, integrity and avoidance of recurrence of the dispute.

2.2.5.4 Enforcement of Traditional Dispute Resolutions

The success of a mechanism depends on the enforceability of its resolutions. The field study found that parties are always willing to comply with resolutions and that court assistance may not be necessary to enforce the outcomes. However, in some complex cases, TDR Tribunals will require enforcement by courts of law. *(See figures 13 and 14 below).*

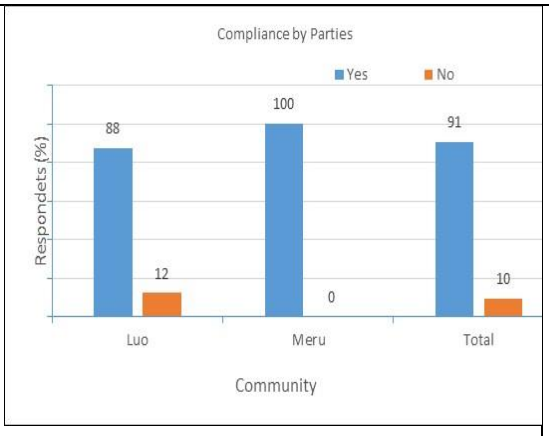

Figure 14: Willingness of parties to comply

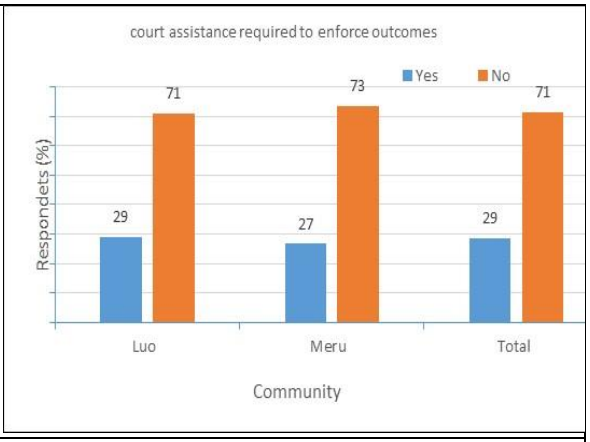

Figure 15: Requirement of court assistance to enforce outcomes

Awards emanating from traditional dispute resolution mechanisms are enforced through the elders and the communities who make follow-ups and observations to take note of the compliance, behavioral changes and existence of peace. There is also self-enforcing or individual persuasion where individuals opt to comply with the agreements made for fear of curses from the elders and the community. Parties are also required to report back to the committees and community on the compliance status after specified periods.

Other enforcement mechanisms include symbolism and oath taking by parties, which increase compliance for fear of curses, award of penalties with double fines awarded in case of non-compliance. Parties are forced to make formal decrees of compliance through signed agreements and involvement of government officers including the chiefs, ministry of agriculture officials in case of crop damage, among others. *(See table 4 below)*

Enforcement	Number of Respondents		
	Luo	Meru	Total
By Elders and community- through follow-ups and observance of the changes in a person's behavior, compliance and existence of peace	26	4	30
Self-enforcing -Individual persuasion since parties agree and that people fear curses from elders	5	8	13
Parties report back at specified period	12	0	12
Symbolism and oath taking- people fear curses from elders	6	2	8

Enforcement	Number of Respondents		
	Luo	Meru	Total
Penalties and fines-Offenders forced to give according to verdict and fine is doubled in case of failure	2	4	6
Signature of decree/formal decrees	5	1	6
Involvement of government officials (local administration)	4	0	4
Compensation and awards done in public	4	0	4
Unleashing of threats	3	0	3
Appeal system	1	0	1

Table 4: Enforcement of the decisions/awards of the TDR mechanisms

Non-compliance to resolutions/decisions of the TDR Tribunals has various consequences. The main consequences include review of the resolutions through an appeal mechanism to establish if they are reasonable, forwarding of cases to the courts or disputants advised to appeal to a higher level. There is also provision for forceful enforcement by authorities including the chiefs, police and the elders. This could be through forceful payment of awards and confiscation of properties to pay the awards. Other consequences include heavy punishments and penalties, performance of rituals and invocation of curses on the party, unleashing of threats of excommunication from the community or being outlawed and sanctioned by the community.

2.2.5.5 Appeal Mechanisms in TDR

The field study found the existence of appeal mechanisms in Traditional Dispute Resolution mechanisms among the Luo and Meru communities. Overall, 70% of respondents indicated that the community dispute resolution process has appeal mechanisms through which unsatisfied disputants can lodge their complaints. The purpose of the existence of appeal mechanisms is to guarantee the disputants quality assurance in the decisions rendered by TDR Tribunals at all times. (See figure 15 below)

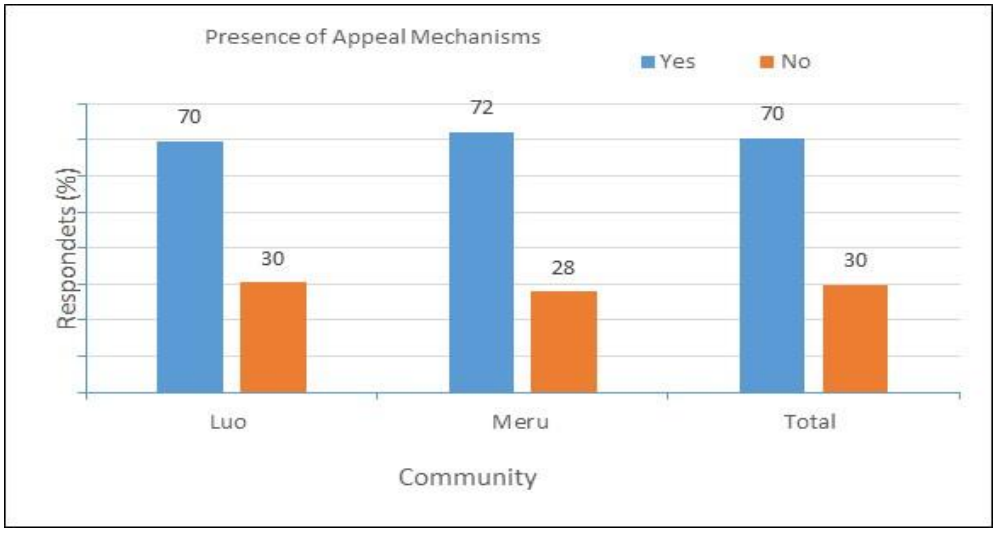

Figure 16: Presence of Appeal Mechanisms

The place to lodge an appeal is dependent on the nature and level of the dispute. Overall the disputants can either appeal at the same level in which case a new committee will be constituted to look into the case or at a higher level. Where disputes are handled by the local administration, the Nyumba Kumi groups are the first to consider the dispute. In the event a resolution is not reached, the dispute can then be referred to the Assistant Chief, then to the Chief. If the dispute is not resolved by the latter, it is referred to the Assistant County Commissioner and finally to the Deputy County Commissioner. Cases that cannot be resolved at that level are then referred to a court of law.

Where a dispute is heard by a Council of Elders, an unsatisfied disputant can appeal to the same committee of the council of elders, in which case a new committee chaired by a different council of elders will be formed to look into the case. The dispute can then proceed to the next level from village to location, to sub-county, to county, to president of the council of elders. Unsatisfied disputants at this level are then advised to go to court. It is noteworthy that the Luo council of elders is organized into counties and sub-counties in line with the Constitution.

2.3 Other Field Studies

The Federation of Women Lawyers conducted a study on Traditional Justice Systems among communities in the coast province of Kenya. The main objective of the field research was to study traditional justice systems in the selected communities and come up with recommendations for legal reform that would result in the mainstreaming of traditional justice institutions into the Kenyan justice system, with a view to promoting access to justice by vulnerable groups, particularly women.[35]

[35] The study found that there is a hierarchy of Traditional Justice Systems (TJS) from village, locational, divisional and district levels. TJS members are predominantly elders drawn from the community, except for the Council of Imams and Preachers of Kenya (CIPK) in Mombasa which is composed of Imams and religious leaders. TJS members are mostly elected by community members, but in some cases they are appointed by the chiefs.

With regard to the composition of the Traditional Justice Systems in the communities, the study found that in most TJS, the members are men only, although there are a few TJS made up of both men and women with men comprising the majority. Two exceptional TJS exist among *Had Gasa* of the Orma community and the *Kijo* of the Pokomo community, whose TJS is made up of women only. TJS members are older, married, residents of the area, knowledgeable and respected in the community. Many male TJS members are religious leaders or knowledgeable in religious matters, for example Islam or Christianity.

The study found that Traditional Justice Systems are employed to resolve particular disputes at certain levels. At the village or locational level, TJS is used to resolve family and neighbourhood disputes while at the divisional and district levels they deal with issues such as security, livestock theft, grazing patterns, land disputes etc. Serious offences such as homicides and robberies are referred to the police. Women-only TJS deal with matters related to women's sexuality, for example rape or defilement, as well as social issues such as HIV/AIDS and FGM.

As regards the procedure during the proceedings, once a complaint is made the Respondent is summoned either orally or in writing and a date for the hearing of the dispute is set. On the date of

The International Commission of Jurists also published a report on the interface between the formal and informal justice systems in Kenya. The report examines and analyses the different forms of TJS and ADR using the integrity 'lenses' and elucidates on them. The research makes a concise comparison between the formal and informal justice systems drawing key lessons which can be used to integrate an efficient and responsive justice system in the country. The research also explores the existing efforts to mainstream the use of IJS as an alternative to the court administered justice, the successes, challenges and way forward. It also assessed the adequacy of existing legal, legislative and policy framework on the same and suggests amendments.[36]

The Chartered Institute of Arbitrators also organized a forum for ADR stakeholders in Kenya which was held on 22-23rd October 2014 at the Windsor Golf Hotel. The forum observed that Traditional Dispute Resolution is the oldest system of dispute resolution with clear foundations and acceptance by its users. It therefore does not require legitimization from the state.

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the hearing each party presents their side of the case and call witnesses. Thereafter, the TJS members deliberate and either reach a decision on the same day or a decision is communicated at a later date. If a disputant is dissatisfied with the decision made he/she may appeal to the next level of the TJS. Where a TJS decision is not complied with, the matter may be referred to the chief. Enforcement of decisions by a TJS consists of social sanctions, for example shunning, ostracism and in some cases banishment from the community. Enforcement may also take a spiritual form such as cursing. In the women-only *Had Gasa* punishment may be meted out in the form of beating but the Chief has to be notified of such punishments.
The study found that men and women generally consider TJS accessible, affordable and fair. However, as far as outcomes are concerned many women perceive TJS, particularly men-only ones, to be biased against women due to the TJS negative perceptions of women. The invocation of traditional beliefs often operates to deny women's claims, for example to land. TJS are also vulnerable to vested interests of the community. Women's lower socio-economic position relative to men may sometimes result in detrimental outcomes, particularly for poor women or widows.

[36] The report finds that many Kenyans are frustrated and dissatisfied with the court process hence the tendency to trust alternative means of accessing justice. TJS are viewed as being accessible, impartial and affordable. It is also incorruptible, proceedings and language are familiar, accessible at all times, affordable, utilizes local resources, decisions are based on consensus, and seek to heal and unite disputing parties. This is unlike the formal system that is seen as breeding hatred.
The TJS hardly differentiates between criminal and civil cases. Land matters, family disputes, domestic violence, theft, marriage and divorce are some of the cases that are dealt with by TJS. Cases which cannot be resolved through the chiefs are often referred to the courts. There is a tendency to confuse 'referral' and 'appeal'. Since the formal justice system does not expressly recognize TJS the cases which are 'appealed' to the law courts have to start afresh.
The report finds that the TJS is trusted by communities because it is close to the people, it exhausts the issues between the parties, it is less expensive and is less time consuming due to the absence of elaborate procedures.
Traditional Justice Systems though widely accepted and used possess some negative traits which include their anarchical nature as a result of the laws and procedures being unwritten, inconsistency with the constitution and rule of law, infrequency and lack of structure, lack of defined jurisdictions, systemic biasness and lack of adequate mechanisms to enforce decisions.

The fact that communities have differing practices with regard to traditional dispute resolution, poses a significant challenge in the development of rules and standardization of practice for traditional dispute resolution.

2.4 Alternative Dispute Resolution Mechanisms (ADR)

Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms a society utilizes to resolve disputes without resort to costly adversarial litigation. All African communities had their own defined dispute resolution mechanisms. Similarly, each African community had/has 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 Kenyan communities include mediation, arbitration, negotiation, reconciliation and adjudication.

i. Negotiation

Negotiation is an informal process and one of the most fundamental methods of dispute resolution, offering parties maximum control over the process. It involves the parties meeting to identify and discuss the issues at hand to arrive at a mutually acceptable solution without the help of a third party. It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.[37] The focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both mutual and individual interests. The aim in negotiations is to arrive at "win-win" solutions to the dispute at hand.

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.[38] The aim of negotiation is to harmonize 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. If agreed upon by the other party, the dispute is deemed to have been resolved amicably.

[37] See generally, "Negotiations in Debt and Financial Management", *United Nations Institute of Training and Research*, (UNITAR), (December 1994).

[38] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 115.

ii. Mediation

It has been said that negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.[39] In the TDR process through 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. The mediator usually endeavours that peace and harmony reign supreme in the society at whatever level of mediation. In mediation, there is no victor nor vanquished.[40]

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.

iii. Adjudication

In adjudication, the elders, Kings or Councils of Elders would summon the disputing parties to appear before them and orders would be made for settlement of the dispute.[41] These were in form of fines or other appropriate remedies. The end product of adjudication is reconciliation, where after the disputants have been persuaded to end the dispute, peace is restored.[42]

iv. Reconciliation

Once a dispute was heard before the Council of Elders, the parties would be bound to undertake certain obligations towards settlement.[43] These were mainly through payment of fines by the party found to be on the wrong. Once this obligation is discharged, there was reconciliation which would result in restoration of harmony and mending relationships of the parties.[44]

v. Problem-Solving Workshop

The focus of this method is to create and maintain an environment where the parties can analyze their situations and create solutions for themselves. The workshop provides an

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[39] Ibid.

[40] Stein, D., "Community mediation and social harmony in Nepal," (2013). Available at *http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.844.1074&rep=rep1&type=pdf*

[41] Ajayi, A.T and Buhari, L.O., "Methods of Conflict Resolution in African Traditional Society," op cit at p. 150.

[42] Ibid, p.150; See generally also, Simiyu, V.G., "The democratic myth in the African traditional societies," *Walter Oyugi et. al* (1988), pp. 49-70.

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

[44] Ibid.

opportunity for the parties to understand the root causes of the conflict and explore the available options for settlement.[45] For instance, in pastoral communities such as the Somali and Borana, the community leaders would arrange the problem solving meetings in which members drawn from each community come together to brainstorm on the most appropriate ways to resolve disputes over grazing lands and watering points.[46]

3. Analysis of the Legal, Policy and Administrative Framework for TDRs and Other Community Based Justice Systems

3.1 Legal Framework

Currently, there is no single statute on traditional dispute resolution in Kenya. In communities where traditional dispute resolution process is utilized in conflict management, the rules and procedure used is derived from customs and traditions of the community. The customs and traditions are handed down from one generation to the next. In addition, there is no sort of documentation for TDRs in most Kenyan communities. Consequently, there is a danger of distortion or neutralization of customs and traditions in the context of modern notions of Western civilization. To safeguard this, a few communities have introduced record keeping for agreements made at the conclusion of the TDR process. However, the problem persists due to illiteracy among traditional leaders and lack of formal training in record keeping.

3.1.1 The Constitution, 2010

An attempt to bring TDRs within the ambit of formal law has been achieved through the promulgation of the Constitution in 2010. In this regard, Article 159 (2) (c) and (3) envisages the substantive constitutional provisions for TDRs. Article 159 (1) provides that judicial authority is derived from the people and vests in and shall be exercised by courts and tribunals established by or under the Constitution. In exercise of judicial authority courts and tribunals shall be guided by principles, *inter alia*, that:

> *(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);*
> *(d) Justice shall be administered without undue regard to procedural technicalities; and*
> *(e) The purpose and principles of this Constitution shall be protected and promoted.*

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[45] See generally, Organization for Security and Co-operation in Europe (OSCE), "Perspectives of the UN & Regional Organizations on Preventive and Quiet Diplomacy, Dialogue Facilitation and Mediation: Common Challenges and Good Practices," February 2011. Available at *http://peacemaker.un.org/sites/peacemaker.un.org/files/PerspectivesonPreventiveandQuietDiplomacy_OSCE2011_0.pdf*

[46] See generally, Walton, R.E., "A problem-solving workshop on border conflicts in Eastern Africa," *The Journal of Applied Behavioral Science* Vol.6, No. 4, 1970, pp. 453-489.

By stipulating that Justice shall be done to all, irrespective of status, Article 159 echoes the right of all persons to have access to justice as guaranteed by Article 48 of the Constitution. Undoubtedly, access to justice is the overall goal of traditional justice systems in most communities. Article 159 also mirrors the spirit of Article 27(1) which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

Article 48 envisages the right of access to justice and provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. The rationale of the constitutional recognition of TDRs is to validate alternative forums and processes that provide justice to Kenyans. Technically, the Constitution contemplates "access to justice in many rooms" such that people can seek redress for violations of their rights in other forums of their choice rather than the formal courts.

3.1.2 Civil Procedure Act and Rules, Cap 21

The Civil Procedure Act and rules embodies the procedural law and practice in civil courts in Kenya. These include the High Court and Subordinate Courts. An analysis of the Act and Rules shows that the Act and Rules envisage enabling provisions within which TDRs can be supported.

To start with, *Section 1A (1)* of the Civil Procedure Act encapsulates the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The judiciary is enjoined to exercise its powers and interpretation of the civil procedure to give effect to the overriding objective.[47] Within this framework, the court has inherent power to explore dispute resolution options that further the overriding objectives. TDRs are definitely part of such options. The wording of Section 1A is as follows:

> *(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.*
> *(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*
> *(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

[47]Section 1A (2). The overriding objective has been viewed as the gate keeper to the just practice of litigation and the cornerstone upon which the Civil Procedure Rules are built.

Section 1B provides that the aims of ensuring a just, expeditious, proportionate and affordable resolution of civil disputes include the just determination of proceedings, efficient disposal of Court business, efficient use of judicial and administrative resources, timely disposal of proceedings, affordable costs and use of appropriate technology. In most civil matters emanating from customary law such as family disputes (marriage, divorce and matrimonial property), succession and inheritance often turn to customs and traditions of the communities of the parties. Thus, use of traditional processes in such cases facilitates achievement of the overriding objective.

Pursuant to the inherent powers of the court under *Section 3A* which empowers courts to make orders that may be necessary for the ends of justice; the court can promote the use of TDRs. In this regard, where a matter has been referred to TDRs, the Court ought to have powers to extend limitations set under the Limitation of Actions Act. Section 3A read together with Article 159 of the Constitution ought to be instrumental in extending time limitations on a case by case basis. Similarly, in reliance to the inherent powers, the courts can enforce any agreement, orders or fines imposed in TDR proceedings.

Mediation is one of the key dispute resolution mechanisms in traditional justice systems. *Section 59A* establishes the Mediation Accreditation Committee (MAC). The Committee's role is to determine the criteria for certification of mediators and propose rules for the certification of mediators. The Chief Justice has since appointed Members to the Committee and had them gazetted.[48] The *Mediation (Pilot Project) Rules, 2015* have also been gazetted.[49] These rules are to apply to all civil actions filed in the Commercial and Family Divisions of the High Court of Kenya at Milimani Law Courts, Nairobi, during the Pilot Project.[50] The *Mediation (Pilot Project) Rules, 2015* provide for:

(a) Training of mediators
(b) Accreditation of mediators
(c) Registration of mediators
(d) Conduct of mediators
(e) Confidentiality
(f) Evidence in mediation
(g) Immunity of mediators
(h) Code of Ethics for mediators
(i) Disciplinary action against mediators; and
(j) Court annexed mediation

[48] Kenya Gazette, Vol. CXVII-No. 17, Gazette Notice No. 1088, Nairobi, 20th February, 2015, p. 348.
[49] Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170,* 9th October, 2015, pp. 1283-1291 (Government Printer, Nairobi, 2015).
[50] Rule 2: "Pilot project" means the mediation program conducted by the court under these Rules. (R. 3).

The pilot project is ongoing on trial basis in Nairobi Milimani Court and its success rate will determine if and how the same will be rolled out to the rest of the stations in the country.

Further, the use of TDRs in resolution of civil disputes can be promoted under *Order 46 rule 20* of the Civil Procedure Rules which provides as follows;

> *"Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act."*

Order 46 Rule 20 read together with Sections 1A and 1B of the Civil Procedure Act therefore obligates the court to employ ADR and TDRs or any other appropriate mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. There is a need therefore to introduce court-annexed TDRMs and ADR as it will go a long way in tackling the problem relating to backlog of cases, enhance access to justice, encourage expeditious resolution of disputes and lower costs of accessing justice.

*Under Order 46 rule 20 (*2), a court may adopt any ADR mechanism for the settlement of the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism. Judges will thus need to be thoroughly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the particular mechanism that will lead to the attainment of the overriding objectives under sections 1A and 1B of the Act. Nonetheless, Order 46 Rule 20 needs to be reviewed to put it into conformity with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases.

3.1.3 Evidence Act, Cap 80

The application of TDRs in dispute resolution can be promoted under this Act by introducing amendments to relax the rules of evidence in informal hearings such as rules relating to character evidence, statements by persons who cannot be called as witnesses (Part I of the Act), competency of witnesses and rules as to examination of witnesses.

The strict rules of evidence have caused substantial injustice for many litigants. Even lawyers find difficulties in following these rules strictly. There is therefore a need to simplify these evidential rules to cover situations where informal systems of dispute resolution are being used. Indeed, Article 159 (2) (d) of the Constitution puts emphasizes on substantive justice rather than strict adherence to rules of procedure. In Kenya, adherence to the strict rules of evidence under the Act has resulted in substantial injustices

to many litigants. Thus, the entire Act should be reviewed with a view of promoting substantive justice.

3.1.4 Judicature Act, 1967

The Judicature Act makes provisions to govern the jurisdiction of the High Court, the Court of Appeal and subordinate courts and the judges and officers of courts. Section 3 of the Act provides for the sources of law in Kenya and stipulates that the jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with;

> *(a) the Constitution;*
>
> *(b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;*
>
> *(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August,1897, and the procedure and practice observed in courts of justice in England at that date.*

Notably, a proviso has been introduced into this section to enable courts consider circumstances of Kenya when applying English Law. The proviso reads that the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

Section 3(2) encapsulates the repugnancy clause and states *that 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.*

In effect, Section 3(2) of the Act ranks African customary law at the bottom of the hierarchy of laws that are to guide courts in civil cases. This Act should be reviewed in view of the recognition that culture and traditional dispute resolution mechanisms are now recognized under the Constitution. The rider in section 3 (2) of the Act on the application of customary law may thus not be applicable in view of Articles 11 on culture and 159 of the Constitution which recognize the use of traditional dispute resolution mechanisms in the interest of enhancing access to justice.

3.1.5 Limitation of Actions Act, Cap 22

This Act sets down the statutory period after the expiry of which a cause of action lapses. For instance, Section 4 of the Act provides that actions based on contract may not be brought after the end of six years from the date on which the cause of action arose and actions founded on tort may not be brought after the end of three years from the date on which the cause of action arose. An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action. Section 22 which provides for extension of the limitation period in cases of disability should be reviewed to provide other instances where a suit may be brought in the interest of justice notwithstanding the lapse of time.

To promote TDRs in dispute resolution, Parliament should amend this Act such that matters that are the subject of traditional dispute resolution proceedings can still be taken to court if no agreement is reached at the conclusion of the TDR process.

3.1.6 Kadhis' Courts Act, Cap 11

The Kadhis' Courts Act provides for the law and procedure to be adhered to in matters before the Kadhi Courts. Section 5 of the Kadhis' Courts Act provides that a Kadhi's Court shall have and exercise jurisdiction in matters involving the determination of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion. Muslim/Islamic law is derived from the customs and traditions of persons who profess Islamic faith.

There are very few Kadhis' courts and Kadhis to meet the justice needs of the Kenyan Muslim population. Although the Kadhis' Courts Act requires the Chief Justice to make rules of practice and procedure for these courts, this has not been done to date. For these courts to fulfill their mandate, the Chief Justice needs to make these rules so that they can use the correct Islamic law procedures, practice and evidence. The Act needs further review to make provision for the appointment of women kadhis. Rules of procedure of Kadhi Courts should be developed and enacted to standardize the procedures and practices of these courts in line with the constitutional right to enhance access to justice for all.

3.1.7 Appellate Jurisdiction Act, Cap 9

The Appellate Jurisdiction Act governs the procedure for appeals from the High Court to the Court of Appeal. Just like the Civil Procedure Act, Section 3A of the Appellate Jurisdiction Act embodies the overriding objective which is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act. Pursuant to the overriding objective, the Court of Appeal is enjoined to give effect to the overriding objective during the exercise of its powers under the Act or the interpretation of any of its provisions. In the same way, advocates in an appeal to the Court of Appeal are under a duty to assist the Court to further the overriding objective and, to that effect,

to participate in the processes of the Court and to comply with directions and orders of the Court. The application of TDRs in the appellate process can further the achievement of the overriding objective where the matter in dispute emanates from customary law.
Moreover, section 3B specifies the duty of the Court in furtherance of the overriding objective in appeals. To this end, courts are enjoined to handle all matters presented before them for the purpose of attaining the just determination of the proceedings, the efficient use of the available judicial and administrative resources, the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties and through the use of suitable technology.

3.1.8 Land Act, 2012

The Land Act is the substantive regime for matters pertaining to land in Kenya. It was enacted with a view to harmonize land regimes which were scattered in different pieces of legislation. The procedural law on land matters is embodied in the Land Registration Act 2012. Section 4 of the Land Act lays down the guiding values and principles of land management and administration. These include:

(a) equitable access to land;
(b) security of land rights;
(c) sustainable and productive management of land resources;
(d) transparent and cost effective administration of land;
(e) conservation and protection of ecologically sensitive areas;
(f) elimination of gender discrimination in law, customs and practices related to land and property in land;
(g) encouragement of communities to settle land disputes through recognized local community initiatives;
(h) participation, accountability and democratic decision making within communities, the public and the Government;
(i) technical and financial sustainability;
(j) affording equal opportunities to members of all ethnic groups;
(k) non-discrimination and protection of the marginalized;
(l) democracy, inclusiveness and participation of the people; and
(m) alternative dispute resolution mechanisms in land dispute handling and management.

This Section promotes the application of ADR mechanisms which in this case include traditional dispute resolution mechanisms. Thus, TDRMs can effectively be utilized within the framework of providing access to justice. In particular, disputes involving communal land can be better resolved through application of TDRMs.

3.1.9 Marriage Act, 2014

The Marriage Act 2014 is the current marriage regime in Kenya. This Act repealed pre-existing legislation on various types of marriages.[51] Under section 3 of the Act, a marriage is defined as a voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Act. Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage. All marriages registered under the Act have the same legal status. The Act recognizes the following marriages; Christian marriages, Civil marriages, customary marriages, Islamic marriages and Hindu marriages.

Part V deals with customary marriages and envisages rules to govern customary marriages. These include rules pertaining to notification of marriage, celebration of marriage and payment of dowry. Part X of the Act provides for resolution of matrimonial disputes and specifies the relevant laws to be applied depending on the type of marriage. Section 68 provides for mediation of disputes in customary marriages. It stipulates that parties to a customary marriage may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of marriage. The process of mediation or traditional dispute resolution should conform to the principles of the Constitution.

3.1.10 Matrimonial Property Act, 2013

Section 11 of this Act stipulates that during the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including (a) the customary law relating to divorce or dissolution of marriage; (b) the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife/wives.

3.1.11 Industrial Courts Act, 2011

The Industrial Courts Act governs the procedure to be used in Industrial Courts (now known as the Employment and Labour Relations Court)[52] while adjudicating on labour and employment related disputes. Under section 15, the Act empowers the court to adopt alternative dispute resolution mechanisms in dispensation of justice. Section 15 reads:

> *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*

[51] The Marriage Act, cap 150, the African Christian Marriage and Divorce Act. Cap 151, the Matrimonial Causes Act. Cap 152, the Subordinate Court (Separation and Maintenance) Act. Cap 153, the Man Marriage and Divorce Registration Act. Cap 155, the Mohammedan Marriage Divorce and Succession Act. Cap 156, the Hindu Marriage and Divorce Act. Cap 157

[52] Statute Law (Miscellaneous Amendments) Act No. 18 of 2014.

> *means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.*

To strengthen the utilization of ADR and TDR mechanisms in resolution of labour and employment disputes, this section mandates the court to avoid determining any dispute, other than an appeal or review before the Court, if the Court is satisfied that there has been no attempt to effect a settlement through ADR or TDRs. Further, the Act empowers the courts to refer a dispute to conciliation at any stage of the proceedings if it becomes apparent that the dispute ought to have been referred for conciliation or mediation. In this case, the Court is required to stay the proceedings and refer the dispute for conciliation, mediation or arbitration.

The Industrial Courts Act also embodies the concept of access to justice as envisaged in section 29. This section states that the Court shall ensure reasonable, equitable and progressive access to the judicial services in all counties. Pursuant to the need for access to justice, the Chief Justice is empowered to designate a Judge in a county as a Judge to determine labour or employment disputes in the particular county. This may be done by notice in the *Gazette* pursuant to which the CJ appoints certain magistrates to preside over cases involving employment and labour relations for a particular area.

3.1.12 Commission on Administrative Justice Act, 2011

Section 3 establishes the Commission and confers it with the mandate under section 8 to perform various functions. Under section 8 (f), the Commission is mandated to work with various public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration. In the last five years, the Commission on Administrative Justice has received complaints with the numbers increasing annually since the promulgation of the Constitution in 2010.[53] The largest percentage of these complaints emanates from Police service, Judiciary land related issues, to mention but a few.[54] In this regard, the utilization of ADR and TDR mechanisms enables the Commission to explore the root causes of the disputes and the most appropriate options for resolution.[55]

3.1.13 The National Land Commission Act, 2012

Under section 3, the object of the Act is to provide for the management and administration of land in accordance with the principles of national land policy and the Constitution of Kenya. It also provides for the operation, powers, responsibilities and additional functions

[53] The Commission on Administrative Justice (The Office of The Ombudsman), *Annual Report 2015*, No. 29/2016, ISBN: 978-9966-1735-5-3, pp. 8-10.
[54] Ibid, p.10.
[55] See Amollo, O., "Constitutional and Statutory Regime of Alternative Dispute Resolution in Kenya," *Alternative Dispute Resolution*, Vol. 2, No.1, 2014, pp. 92-105 at pp.101-105.

of the Commission pursuant to Article 67(3) of the Constitution; a legal framework for the identification and appointment of the chairperson, members and the secretary of the Commission pursuant to Article 250(2) and (12) (a) of the Constitution; and for a linkage between the Commission, county governments and other institutions dealing with land and land related resources.

Under section 5 (f)[56] the Commission is mandated to encourage the application of traditional dispute resolution mechanisms in land conflicts. Further, under sub-section 2(f), the Commission is mandated to develop and encourage alternative dispute resolution mechanisms in land dispute handling and management. Section 6 provides for the powers of the Commission and subsection 3 thereof provides, *inter alia*, that in the exercise of its powers and the discharge of its functions the Commission is not bound by strict rules of evidence.

There is need to amend section 17 on consultations to the effect that the Commission can consult or seek assistance from community leaders on matters pertaining to land. Section 18 provides for the establishment of County Land Management Boards tasked with managing public land. It is imperative that the section be amended in terms of the composition of the Boards so as to include community leaders.

3.1.14 National Cohesion and Integration Act, 2008

Section 49 provides for conciliation to be conducted by the National Cohesion and Integration Commission in appropriate cases**.** Under this section, if the Commission considers it reasonably possible that a complaint may be conciliated successfully, the Commission shall refer the complaint to the Secretary. Section 50 provides for the procedure to be used in cases where conciliation is inappropriate. In accordance to this section, if the Commission does not consider it reasonably possible that a complaint may be conciliated successfully, it shall notify the complainant and the respondent in writing. Within sixty days after receiving the Commission's notice under subsection (1), the complainant, by written notice, may require the Commission to set the complaint down for hearing and the Commission shall comply with such notice.

Section 51 mandates the Commission to conduct conciliation. It provides that the Commission shall make all reasonable endeavours to conciliate a complaint referred to it under section 49 and may, by written notice, require any person to attend before the Commission for the purpose of discussing the subject matter of the complaint or produce any documents specified in the notice.

Section 52 provides for conciliation agreements where the parties to the complaint reach an agreement with respect to the subject matter of the complaint. The Secretary is required

[56] National Land Commission Act, No. 5 of 2012, Laws of Kenya.

to record the agreement and the parties to be bound to comply with such agreement as if it were an order of the Commission.

3.1.15 Supreme Court Act No.7 of 2011

This Act provides for the jurisdiction of the Supreme Court of Kenya and provides the procedure to be followed by the court. Section 3 stipulates the objects of the Act which include:

> (a) asserting the supremacy of the Constitution and the sovereignty of the people of Kenya;
> (*b*) provide authoritative and impartial interpretation of the Constitution;
> (*c*) ***develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth;***
> (*d*) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya;
> (*e*) improve access to justice; and
> (*f*) provide for the administration of the Supreme Court and related matters.

Rule 54 of the Supreme Court Rules 2012 provides for the attendance of Amicus curiae, experts or advocates assisting the court in determining technical matters**.** It states:

The Court may;

(a) in any matter allow an amicus curiae;

(b) appoint a legal expert to assist the Court in legal submissions; or

(c) at the request of a party or on its own initiative, appoint an independent expert to assist the Court on any technical matter.

This section should be accorded a wide interpretation and application to provide an opportunity for community leaders to assist the court in matters pertaining to customary law.

3.1.16 Environment and Land Court Act, 2011

Under section 3, the objective of the Act is stated as to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act and that the parties and their representatives shall assist the court in furthering the overriding objectives. Section 4 establishes the Environment and Land court which is a superior court of record with the status of the High Court. Section 13 specifies the jurisdiction of the Court and states that:

> The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of the Act or any other written law relating to environment and land.

Pursuant to subsection 2, the court is empowered to hear and determine disputes relating to environment and land including disputes:

> 1.Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rent, valuations, mining, minerals and other natural resources;
> 2.Relating to compulsory acquisition of land;
> 3.Relating to land administration and management;
> 4.Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
> 5.Any other dispute relating to environment and land.

Section 18 embodies the guiding principles to guide the court and they include the principle of sustainable development including the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law. Section 20 provides for the application of ADR and empowers the court to adopt and implement on its own motion with the agreement of or request of the parties any appropriate mechanism such as mediation, conciliation and TDR mechanisms in accordance with Article 159(2) (c) of the Constitution. Further, the Act provides that in cases where ADR is a condition precedent to any proceeding before the Court, the court stays proceedings until such condition is fulfilled.

Section 26 provides for the right of access to justice and provides that the court shall ensure reasonable and equitable access to justice to its services in all counties.

3.1.17 The Legal Aid Act, 2016

The Legal Aid Act is meant 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. The Act is relevant in the mainstreaming of TDR and ADR mechanisms as it defines "legal aid" to include:[57]

> (a)legal advice;
> (b)legal representation;
> (c)assistance in —

[57] S.2., The Legal Aid Act, No. 6 of 2016, Laws of Kenya.

(i)resolving disputes by alternative dispute resolution;
(ii)drafting of relevant documents and effecting service incidental to any legal proceedings; and
(iii)reaching or giving effect to any out-of-court settlement;

(d)creating awareness through the provision of legal information and law-related education; and
(e)recommending law reform and undertaking advocacy work on behalf of the community.

Section 3 thereof provides that the object of the Act is to establish a legal and institutional framework to promote access to justice by —

(a) providing affordable, accessible, sustainable, credible and accountable legal aid services to indigent persons in Kenya in accordance with the Constitution;
(b) providing a legal aid scheme to assist indigent persons to access legal aid;
(c) promoting legal awareness;
(d) supporting community legal services by funding justice advisory centers, education, and research; and
(e) promoting alternative dispute resolution methods that enhance access to justice in accordance with the Constitution.

Section 5 (1) establishes the National Legal Aid Service, whose one of the functions include to, inter alia: establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable; encourage and facilitate the settlement of disputes through alternative dispute resolution; undertake and promote research in the field of legal aid, and access to justice with special reference to the need for legal aid services among indigent persons and marginalized groups; promote the use of alternative dispute resolution methods; and take appropriate measures to promote legal literacy and legal awareness among the public and in particular, educate vulnerable sections of the society on their rights and duties under the Constitution and other laws.[58]

3.1.18 Community Land Act, 2016

The Community Land Act, 2016[59] encourages the use of TDR and ADR in management of community land disputes. Section 39(1) provides that a registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land. Section 40(l) provides that where a dispute relating to community land arises, the parties to the dispute may agree to refer the

[58] S.7 (1), The Legal Aid Act, No. 6 of 2016, Laws of Kenya.
[59] Community Land Act, 2016, No. 27 of 2016, Laws of Kenya.

dispute to mediation. Section 41(1) provides that where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to arbitration.

3.1.19 The High Court (Organization and Administration) Act, 2015

The High Court (Organization and Administration) Act[60] was enacted to give effect to Article 165(1) (a) and (b) of the Constitution; to provide for the organization and administration of the High Court of Kenya and for connected purposes.

Section 3(1) provides that in exercise of its judicial authority, the Court shall —

(a) be guided by the national values and principles set out in Article 10 of the Constitution;
(b) be guided by the principles of judicial authority set out in Article 159 of the Constitution;
(c) be guided by the values and principles of public service set out in Article 232(1)(c), (e) and (f) of the Constitution;
(d) be independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice; and
(e) uphold the Constitution and administer the law without fear, favour or prejudice.

Section 3(2) provides that the Court shall develop jurisprudence that respects the Constitution and responds to Kenya's social, economic and political needs.

With regard to ADR, section 26(1) provides that 'in civil proceedings before the Court, the Court may promote reconciliation amongst the parties thereto and shall encourage and permit the amicable settlement of any dispute.'

Section 26(2) provides that 'the Court shall, in relation to alternative dispute resolution be guided by the Rules developed for that purpose.'

Section 26(3) provides that 'nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.'

Section 26 (4) provides that 'where an alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall by order, stay the proceedings until the condition is fulfilled.'

[60] The High Court (Organization and Administration) Act, No. 27 of 2015, Laws of Kenya.

3.1.20 The Court of Appeal (Organization and Administration) Act, 2015

The Court of Appeal (Organization and Administration) Act, 2015[61] was enacted to give effect to Article 164 (1) (a) and (b) of the Constitution; to provide for the organization and administration of the Court of Appeal and for connected purposes. Section 3(1) provides that in exercise of its judicial authority, the Court shall —

(a) be guided by the national values and principles set out in Article 10 of the Constitution;
(b) be guided by the principles of judicial authority set out in Article 159 of the Constitution;
(c) be guided by the values and principles of public service set out in Article 232(1)(c), (e) and (f) of the Constitution;
(d) be independent and subject only to the Constitution and the law, which it shall apply impartially without fear, favour or prejudice;
(e) not be subject to any person or authority; and
(f) uphold the Constitution and administer the law without fear, favour or prejudice.

Section 3(2) provides that the Court shall develop jurisprudence that respects the Constitution and responds to Kenya's social, economic and political needs.
Section 36(1) provides that the Court shall ensure reasonable access to its services in all parts of the Republic.

3.2 Policy Framework

Currently there is no policy on TDRs and other community based justice systems in Kenya. Thus, dispute resolution through TDRs and other community justice systems is communal based. The rules governing the TDRs processes differ from one community to another depending on the customs and traditions of the communities. In this regard, there is a gap owing to the absence of a comprehensive policy to guide dispute resolution through TDRs. The lack of a TDRs policy is an unfortunate situation since TDRs are widely used to resolve both interpersonal and inter-communal conflicts hence restoring peace and harmony amongst communities. The aim of a TDRs policy framework should be to recognize and affirm the importance of TDRs in the administration of justice and establish a clear interface between TDRs and the formal processes. The policy should be targeted at promoting access to justice while preserving customs and traditions of the people of Kenya. The policy framework should be designed in a way that harmonizes traditional systems with the core principles of the Constitution and international law.

[61] The Court of Appeal (Organization and Administration) Act, No. 28 of 2015, Laws of Kenya.

3.2.1 Objectives of the policy framework

1. To harmonize and align TDRMs with the Constitution.
2. To establish a basis for an overarching legislation to align TDRMs with the Constitution.
3. To strengthen TDRMs as alternative justice framework in Kenya.
4. To determine/define the jurisdiction of TDRMs.
5. To recognize, protect and perpetuate positive cultures and traditions of the people of Kenya.
6. To establish/provide for a clear interface between TDRMs and formal justice systems.

The traditional justice systems policy framework should promote and preserve the African values of justice, which are based on reconciliation and restorative justice. The role of traditional justice systems in access to justice goes beyond dispute resolution. For instance, TDRs promote social cohesion, coexistence, peace and harmony besides the reactive role of dispute resolution.

The essence of the traditional justice system lies in the participation of communities in resolving their disputes. This differs from the formal judicial system where disputes are referred to the courts to be adjudicated by judicial officers who pass arbitrary judgments. The traditional methods of dispute resolution were not litigious in the courts as they are understood in the Western concept of justice. National policy on ADR and TDRs 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.

3.2.2 Policy Proposals

i. Provide minimum qualifications of TDRMs practitioners

Just like the Constitution provides for qualifications of judges for various courts, there is need to have a policy framework setting out the qualifications or designations of persons to preside over dispute resolution through TDRMs. For instance, the policy may require that the council of elders, traditional leaders or community leaders be knowledgeable and respected in the community, possess high integrity and impartiality.

ii. Accountability of TDRMs practitioners

Mechanisms should be put in place to ensure that TDRMs practitioners exercise their role and functions in line with culture and traditions of the community. These safeguards should be designed to prevent deviation from the applicable rules of the community.

There should be mechanisms to ensure adherence to due process by the community and observance of the principles of natural justice.

iii. Continuous training of TDRMs practitioners

In order to link TDRMs to formal justice systems, there is a need to train TDRMs practitioners on the minimum requirements of formal law such as constitutional requirements as to the Bill of Rights and best practices regarding TDRMs. Such curriculum should include themes such as human rights, restorative justice and social cohesion. Further, an enactment on TDRMs is necessary to provide for training programmes designed to promote efficient functioning of TDRMs.

iv. Defining the jurisdiction of TDRMs

In most Kenyan communities, traditional dispute resolution systems have a wide and undefined jurisdiction comprising of both civil and criminal matters. There is no clear line as to which matters should be subjected to the TDR process and which matters should be taken to court. In defining jurisdiction, matters that emanate from customary law such as disputes involving land, marriage and inheritance, succession and property can be better resolved through TDRs. Similarly, some criminal matters such as petty thefts and trespass can be resolved through TDRs while felony offences like murder, robbery with violence, etc should be subjected to the court process.

v. Defining sanctions/remedies to be imposed in TDRs

The sanctions imposed in TDR processes should not contravene the Bill of Rights. For instance, the sanctions should not be discriminatory or of such a nature as to infringe on fundamental rights of the individuals. For instance, sanctions such as corporal punishment, banishment from the community and cursing are unconstitutional. It is highly recommended that remedies in TDRs be of a restorative nature.

The essence of restorative sanctions is expressed as follows: If a person realizes that he is wrong, or it is apparent to him that his fellow lineage members deem him so, he may impose a fine of a sheep, goat or even a beast on himself to indicate his contrition and to wash away his offence. It is an expression of an admission of guilt and an indication to the court of the sincerity of repentance. The sanctions may be individual sanctions or communal sanctions depending on the nature of the dispute.

vi. Provision for procedure in TDR processes

The policy framework should outline minimum procedural requirements in TDR proceedings in order to entrench due process and rules of natural justice. These include requirements as to submitting a dispute, service of processes and whether or not there needs to be representation, the hearing, among others.

vii. Provisions for Review and Appeal

The policy framework should clearly provide for recourse of any party who is aggrieved with a decision delivered in TDR processes. This is in line with the Constitution and due process for a fair hearing and access to justice. These mechanisms include review or appeal. The formal courts should be expressly conferred with jurisdiction to review decisions made in TDR proceedings.

viii. A clear referral system

There should be a clear interface between TDR processes and formal courts and tribunals. To this end, there is a need to formulate a clear referral system indicating how disputes from TDR proceedings can be referred to court and vice versa. The framework should be clear on the stage of the dispute process at which a referral may or may not be done.

ix. **Provision for record keeping**

It is fundamentally prudent to keep records in a dispute resolution process whether formal or informal. The framework should provide for record keeping in TDR processes for instance through notes taking, videos, filming etc. To achieve this, there is need to embrace information technology in TDR processes. The government should provide resources to equip these processes with record keeping equipment and skills.

x. Entrenchment of the Bill of Rights

The practice of TDRs should adhere to human rights standard. In this regard, the mechanisms used and the proceedings should be conducted in a way that does not violate fundamental rights and freedoms stipulated in the Bill of Rights. This can be achieved through sensitizing TDR practitioners about human rights such as gender equality and non-discrimination, fair hearing, public participation, access to justice, etc.

3.3 Administrative /Institutional Framework

3.3.1 Courts and Tribunals

Article 159 (2) (c) of the Constitutions requires courts and tribunals in the exercise of judicial authority promote the application of TDRs and ADR. In addition, the Civil Procedure Act under sections 1A provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The judiciary is enjoined to exercise its powers and interpretation of the civil procedure to give effect to the overriding objective.[62] Within this framework, the court has inherent power to explore dispute resolution options that further the overriding objectives.

[62]Section 1A (2)

3.3.2 Independent Commissions

The Constitution 2010 created Independent Commissions to exercise oversight over other public bodies and mode of service delivery in various sectors. Some of the Commissions are involved in access to justice programmes for example human rights, land matters, public complaints and investigations, etc. Each Commission has an establishing Act which also provides for their constitution, mandate and powers. From the foregoing discussion on the legal framework for TDRs, it will be noted that some of the Acts establishing the Independent Commissions envisage provisions for promoting ADR and other appropriate dispute resolution mechanisms such as TDRs. These include the National Land Commission Act 2012, the National Integration and Cohesion Act 2008, Commission on Administrative Justice Act 2011 and the Kenya National Human Rights Act 2011.

3.3.3 Rules Committee of the Judiciary

The Rules Committee is established under section 81 of the Civil Procedure Act and tasked with enacting rules of practice for efficient dispensation of justice by the civil courts. Section 81(2) enlists matters for which such rules may be enacted. Paragraph (ff) provides for enactment of rules for the selection of mediators and hearing of matters referred to mediation pursuant to court mandated mediation under the Act.

3.3.4 County Governments

Kenya has 47 counties each with a county government formed under Chapter Eleven of the Constitution which Article 176 provides that there shall be a county government for each county consisting of a county assembly and a county executive. Although most government services have been devolved, the justice system is not devolved. However, there are courts of law in most counties in Kenya. Article 174 envisages the objects of devolution which include, inter alia, to foster national unity by recognizing diversity, promoting public participation in decision making and to recognize the rights of communities to manage their own affairs and further development. Notably, county governments are proximate to the communities and are best placed to promote dispute resolution by TDRs and ADR.

3.3.5 Civil Society Organizations

Kenya has many civil society organizations which undertake advocacy and community programmes on areas of public interest such as human rights, land and environment. Most civil society organizations conduct peaceful campaigns and encourage communities to resolve dispute through mediation and reconciliation.

The leading civil society organizations in Kenya are religious based organizations such as National Council of Churches of Kenya and the Council of Imams and Preachers of Kenya (CIPK). Others include Maendeleo ya Wanawake, FIDA Kenya, Kenya Human Rights Commission, Muslims for Human Rights, Kituo Cha Sheria, etc.

3.3.6 Councils of Elders

In most Kenyan Communities, the institution of Council of Elders remains a strong regulatory institution. Most disputes are submitted to the elders for resolution before parties consider the court process. The Councils of Elders exercise jurisdiction over both interpersonal disputes relating to land, marriage and inheritance and minor crimes such as assaults as well as inter-community disputes such as conflicts over pastures and water points. These include the *Kaya elders among the Digo community, the Njuri Ncheke of Meru, the Kiama of the Kikuyu community and Ker among the Luo community*.

3.3.7 Local Administration

The local authority plays a fundamental role in the justice system. The local chiefs and headmen resolve minor personal and community based disputes. Chiefs have statutory powers to summon people within their jurisdiction and conduct hearings involving minor conflicts such as family feuds, inheritance/succession and breach of peace. The chief works closely with community leaders and elders to promote peace and harmony in the community.

4. A Survey of TDRMs from Other Jurisdictions

In traditional African societies, the emergence of conflict was inevitable as long as people interacted in various activities for instance in market places, cultural festivals, livestock grazing/watering, etc. In most communities, conflict resolution was conducted by council of elders, king's courts, chiefs and other open place assemblies and through use of other intermediaries.[63] The disputes were diverse and would differ from community to community. Thus, there is no uniform definition of a dispute in an African perspective. Some of the disputes in traditional African societies manifested themselves in the form of disagreements, family and market brawls, skirmishes and wars.

Once a conflict emerged, each community had its own approaches towards the resolution of the same. The essence of dispute settlement and conflict resolution in traditional African societies include: to remove the root-causes of the conflict; reconcile the conflicting parties genuinely; to preserve and ensure harmony, make each disputant happy and be at peace with each other again which required getting at the truth; to set the right atmosphere for societal production and development; to promote good governance, law and order, to provide security of lives and property and to achieve collective well-being.[64]

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[63] See generally, Murithi, T., "African approaches to building peace and social solidarity," *African Journal on Conflict* Resolution, Vol. 6, No. 2, 2006, pp.9-33; See also Aredo, D. and Yigremew, A., "Indigenous institutions and good governance in Ethiopia: Case studies," *Good Governance and Civil Society Participation in Africa* (2008), p.141.

[64] See generally, Golwa, JHP, "Overview of Traditional Methods of Dispute Resolution (TMDR) In Nigeria," *Perspectives on Traditional African & Chines Methods of Conflict Resolution* (2013), pp. 14-43.

In this section, the paper discusses the traditional dispute resolution in selected countries in Africa and beyond. These countries include Nigeria, South Africa, Rwanda, Botswana, Ghana, Malawi and Australia.

i. Nigeria-Yoruba Community

The Yoruba community derives their traditional justice rules from customs and traditions which have been practised over a long period of time.[65] The Yoruba traditions, like in most African communities were unwritten.[66] Memory and verbal art were paramount since the veracity of a tradition largely depended on the memory and knowledge of the forbearers who were regarded as wise men and women.[67] To maintain the traditions and safeguard them against distortion, the Yoruba people would arrange performances in which the traditions were dramatised and any inconsistency would be pointed out and rectified.[68] Whenever a dispute arose, the disputant would submit it to a council of elders who would sit under a tree and ventilate the dispute and explore the most appropriate option to address the matter.[69] The talks were conducted with absolute decorum and solemnity. The principle of truth reigned in the dispute resolution process especially because the elders invoked the spirits of their ancestors and would warn parties of the aftermath of failure to tell the truth.[70] Oaths were administered at the commencement of the conflict resolution talks to subject the parties to the jurisdiction of the elders and commit them to tell the truth.[71]

Among the Yoruba, conflict resolution process had a hierarchy. Dispute resolution would be done at the family level (*Idile*-nuclear family), extended family level *(Ebi)* and village or town level. These levels comprised the political organisation of the Yoruba.[72] Disputes resolved at the family level were mainly family disputes such as conflicts between co-

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[65] Idowu, W., "Law, morality and the African cultural heritage: the jurisprudential significance of the Ogboni institution," *Nordic Journal of African Studies*, Vol.14, No. 2, 2005, pp.175-192; see also Ademowo, A.J. and Adekunle, A., "Law in Traditional Yoruba Philosophy: A Critical Appraisal," *Caribbean Journal of Philosophy*, Vol. 2, No. 1, 2013, pp.345-354.

[66] Asiwaju, A. I., "Political Motivation and Oral Historical Traditions in Africa: The Case of Yoruba Crowns, 1900-1960," *Africa: Journal of the International African Institute,* Vol. 46, No. 2, 1976, pp. 113-127; See also Law, R., "How Truly Traditional Is Our Traditional History? The Case of Samuel Johnson and the Recording of Yoruba Oral Tradition," *History in Africa,* Vol.11, 1984, pp.195-221.

[67] See generally, Biobaku, S.O., "The problem of traditional history with special reference to Yoruba traditions," *op cit*.

[68] See Biobaku, S.O., "The problem of traditional history with special reference to Yoruba traditions," *Journal of the Historical Society of Nigeria* Vol.1, No. 1, 1956, pp.43-47 at p.44.

[69] See generally, Bamikole, L., "An Indigenous Yoruba Socio-political Model of Conflict Resolution," *Philosophy Study* 3, No. 2, 2013, p.144.

[70] Ibid, p.147.

[71] See generally, Golwa, JHP, "Overview of Traditional Methods of Dispute Resolution (TMDR) In Nigeria," *op cit*.

[72] Ibid, p.148; See also Ojigbo, A.O., "Conflict Resolution in the Traditional Yoruba Political System (La résolution des conflits dans le système politique traditionnel des Yoruba)," *Cahiers d'études africaines* (1973), pp. 275-292.

wives and sibling disagreements. These disputes would be easily resolved by scolding and warning the guilty party and appeasing the victim.[73]
During the hearings, women were supposed to be on their knees unless the Chief or King asked them to stand or sit. In criminal cases, the Chief-in -Council had jurisdiction to hear criminal cases and even pass a death sentence.[74]

In terms of remedies available to the innocent party, the Yoruba mediators rarely awarded damages in civil matters. To them, restoration of peace and harmony was of paramount importance than awarding damages.[75] This notwithstanding, the mediators would award damages in some cases as a way of deterring the re-occurrence of a particular anti-social behaviour.[76]

ii. South Africa

In South Africa, there are traditional courts which operate parallel to the formal courts system.[77] The traditional courts have jurisdiction on matters emanating from the customary laws of the various communities.[78] In addition, some communities have their own internal dispute resolution structures. For instance, in the Pondo community, there were institutions of *Mat association* which presided over the distribution of foods at social gatherings.[79] Disputes would be heard at a higher level involving at least two *Mat associations*. The Mats applied mediation and reconciliation in dispute settlement. The court of headmen had powers to compel parties to comply with orders made for resolution of the dispute**.** Appeals from the lower courts (Mat associations) would go to the higher court, the chief's court.[80] The proceedings before the chief's court were formal and examined the decisions of the headman in light of the proven testimony and the sanctions imposed.[81]

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[73] Ajayi, A.T. and Buhari, L.O., "Methods of conflict resolution in African traditional society," *African research review*, Vol.*8*, No.2, 2014, pp.138-157, at pp.143-144.
[74] Ibid, p.144.
[75] Ibid, p.148; See also generally, Oko E.O., et al, "Restoring justice (ubuntu): an African perspective," *International Criminal Justice Review*, Vol.20, No. 1, 2010, pp.73-85.
[76] Ibid, pp.144-145; See also generally, Gbenda, J.S., "Age-long land conflicts in Nigeria: a case for traditional peacemaking mechanisms," *Ubuntu: Journal of Conflict Transformation* Vol.1, No. 1_2 (2012), pp. 156-176.
[77] Chirayath, L., et al, M., "Customary law and policy reform: Engaging with the plurality of justice systems," *Background paper for the WDR*, 2006, at pp.20-25. Available at http://documents.worldbank.org/curated/en/675681468178176738/pdf/336550Customary1Law01WDR060bkgd0paper1.pdf [Accessed on 22/04/2017].
[78] Ibid, pp.20-25.
[79] Ajayi, A.T. and Buhari, L.O., "Methods of conflict resolution in African traditional society, op cit, at p.148.
[80] Ibid, p.149.
[81] Ibid, p.149.

iii. Botswana

Botswana is a country well known for preservation of its cultural heritage.[82] In Botswana, there is a well-organized system of traditional courts. The Botswanan justice system is dualistic comprising of formal courts and customary courts.[83] The customary courts are established by the Minister pursuant to the Customary Courts Act of 1974. The customary court structure comprises of the Customary Court Commissioner, Customary Court of Appeal and the Customary Courts.[84]

The dispute resolution process commences at the family level where the father as the head of the family presides over disputes between family members.[85] The next level is the family group level which comprises of a number of families which are closely related. After the family group level, there is the ward level which comprises of many family groups. The wards are headed by a headman in some tribes as well as headman and sub-chiefs in other tribes.[86]

The customary courts are headed by presidents appointed by a Minister.[87] Customary courts handle minor disputes mostly involving land matters, marriage and property disputes.[88] Notably, there is no legal representation in customary courts and the rules of evidence are relaxed. Judges are tribal, appointed by a community or tribal leader.[89] The sentences passed by judges may be appealed in a formal court system. The jurisdiction of

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[82] See generally, Mnjama, N., "Preservation and Management of Audiovisual Archives in Botswana," *African Journal of Library, Archives & Information Science* Vol.20, No. 2 (2010); See also Denbow, J.R. and Thebe, P.C., *Culture and customs of Botswana* (Greenwood Publishing Group, 2006).

[83] Sharma, K.C., "Role of Traditional Structures in Local Governance for Local Development: The Case of Botswana," (*Washington DC: World Bank*, 2005); See also Sklar, R.L., *The significance of mixed government in Southern African Studies: A preliminary assessment*, (University of the Witwatersrand, 1994); See also generally, Sanders, A.J.G.M., "The Internal Conflict of Laws in Botswana," *Botswana Notes and Records*, Vol.17, 1985, pp.77-88.

[84] Fombad, C.M., "Customary courts and traditional justice in Botswana: present challenges and future perspectives," *Stellenbosch Law Review= Stellenbosch Regstydskrif*, Vol.15, No. 1, 2004, p-166.

[85] See generally, Moumakwa, P.C., *The Botswana Kgotla system: a mechanism for traditional conflict resolution in modern Botswana: case study of the Kanye Kgotla* (Master's thesis, Universitetet i Tromsø, 2011); See also Adamolekun, L. and Morgan, P., "Pragmatic institutional design in Botswana--Salient features and an assessment," *International Journal of Public Sector Management*, Vol. 12, No. 7, 1999, pp.584-603.

[86] See generally, Nyati-Ramahobo, L., *Minority tribes in Botswana: The politics of recognition*, (London, Minority Rights Group International, 2008); See also Proctor, J.H., "The House of Chiefs and the political development of Botswana," *The Journal of Modern African Studies*, Vol.6, No. 01, 1968, pp.59-79.

[87] S.41 (3), Customary Courts Act of 1974, Laws of Botswana.

[88] Ss 11, 12 &13, Customary Courts Act of 1974, Laws of Botswana.

[89] U.S. Department of State, *Botswana Human Rights Practices*, 1995, Available at *http://dosfan.lib.uic.edu/ERC/democracy/1995_hrp_report/95hrp_report_africa/Botswana.html* [Accessed on 23/2017].

customary courts is stipulated under the Customary Courts Act in respect of the causes of action as well as the geographical limits. The Act also prescribes the constitution of the court, the order of precedence among its members and the powers and duties of any persons who may be appointed to act as assessors.

iv. Ghana

The institution of chieftaincy is guaranteed by Article 270 of the Constitution of the Republic of Ghana, 1992.[90] The Chieftaincy Act of 1970 (Act 370) regulates chieftaincy in Ghana and sets up the traditional councils, as well as regional and national Houses of Chiefs.[91] The National House of Chiefs, the Regional Houses of Chiefs, and the traditional councils each have judicial committees with the authority to decide and resolve disputes affecting chieftaincy.[92] Despite the recognition of chieftaincy, traditional courts ceased to exist after independence.[93] The institution of chieftaincy does not have any legislative, administrative or judicial functions.[94] Nevertheless, chiefs still exert considerable authority, respect and influence at the local level, and fulfill quasi-judicial roles. Chiefs and their traditional councils have extended their jurisdiction beyond strictly chieftaincy-related matters to family and property matters, including divorce, child custody and land disputes.[95] The essentials of the traditional justice system are well articulated in the case law in Ghana, and customary law is also enforced in the district and other courts, depending on the nature of the dispute.[96]

Moreover, the use of TDR in conflict resolution was successfully applied in Ghana to resolve a long-standing conflict between the Alavanyo and Nkonya communities who occupy the Volta region of Ghana. These communities lived as neighbours in the 19th century but there was a perpetual conflict over the decades. In 2006, a peace initiative was

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[90] See Constitution of the Republic of Ghana, Chapter Twenty-Two: Chieftaincy *http://www.ghanaweb.com/GhanaHomePage/republic/constitution.php?id=Gconst22.html* [Accessed on 21/04/2017].

[91] Ghana Legal, *http://laws.ghanalegal.com/acts/id/81/chieftaincy-act*[Accessed on 21/04/2017].

[92] S.1., *Chieftaincy Act of 1970* (Act 370), Laws of Ghana.

[93] See generally, Rathbone, R., "Native courts, local courts, chieftaincy and the CPP in Ghana in the 1950s," *Journal of African Cultural Studies* Vol.13, No. 1, 2000, pp. 125-139; See also Kumado, C. E. K., "Chieftaincy and the law in modern Ghana," *U. Ghana LJ* Vol.18,1990, p.194.

[94] See generally, Dzivenu, S., "The politics of inclusion and exclusion of traditional authorities in Africa: Chiefs and justice administration in Botswana and Ghana," *Political Perspectives*, Vol.2, No. 1, 2008, pp.1-30; See also Kumado, C. E. K., "Chieftaincy and the law in modern Ghana," *U. Ghana LJ* Vol.18, 1990, p.194.

[95] See generally, Ray, D.I., "Chiefs in their millennium sandals: traditional authority in Ghana—relevance, challenges and prospects," *Critical Perspectives in Political and Socioeconomic Development in Ghana. African Social Studies Series*, Vol. 6, 2003, pp. 241-271.

[96] See generally, Woodman, G., "Customary law, state courts, and the notion of institutionalization of norms in Ghana and Nigeria," *People's Law and the State* (1985), pp. 143-163; See also Sutton, I., "Law, Chieftaincy and Conflict in Colonial Ghana:The Ada Case." *African Affairs*, Vol.83, No. 330, 1984, pp. 41-62.

commenced involving a mediation committee, consultative committee and community pacesetters from the two communities.[97]

v. Australia

Australia is the home of the famous indigenous Aboriginal community. In South Australia, the Aboriginal Courts were established as pilots in 1999 and conferred with jurisdiction over matters involving the Aboriginal community.[98] However, the Aboriginal people felt that as litigants they had limited input into the trial process and in sentencing.[99] In their view, the courts were culturally alienating, isolative, and unwelcoming to them and their families.[100] To address these concerns, reforms were introduced to address the fears raised by the Aboriginal community. These reforms include the magistrates sitting at the same level and in close proximity to each other to facilitate direct communication and inclusion of a member of the Aboriginal community to sit with magistrates to advise the court on issues involving the Aboriginal customs and traditions.[101]

vi. Rwanda

There are other cultures around Africa where TDR based systems have worked relatively well. The establishment of the Gacaca courts was meant to transform Rwanda from the colonial ideology of power dominance and redefine relations between the state and the society.[102] They would also re-unite the Rwandan people by eradicating the disunity ideology and encouraging reconciliation.[103] Through the framework of the Gacaca courts, home-grown traditions derived from Rwandan society replaced the divisive foreign ideologies.[104] The Gacaca are meant to build a democratic culture and provide a policy of creating a true post-colonial state and restoring unity.[105]

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[97] Perpertua, F.M. and Imoro, R.J., "Assessing the Effectiveness of the Alternative Dispute Resolution Mechanism in the Alavanyo-Nkonya Conflict in the Volta region of Ghana" *Institute of Development Studies; Department of Sociology University of Cape Coast, Ghana*, 2011.

[98] See generally, Harris, M., "From Australian courts to aboriginal courts in Australia-bridging the gap," *Current Issues Crim. Just.* Vol.16, 2004, p.26; Freiberg, A., "Problem-oriented courts: Innovative solutions to intractable problems?" *Journal of judicial administration*, Vol.11, No. 1, 2001, pp.8-27.

[99] See generally, Burgess, S., "Aboriginals in the courtroom: recognising cultural differences," *Bulletin (Law Society of South Australia)* Vol. 32, No. 11, 2010, p.12; See also Marchetti, E. and Kathleen, D., "Indigenous sentencing courts: towards a theoretical and jurisprudential model," *Sydney Law Review, The*, Vol.29, No. 3, 2007, p. 415.

[100] Ibid.

[101] Ibid.

[102] See generally, Meyerstein, A., "Between law and culture: Rwanda's Gacaca and postcolonial legality," *Law & social inquiry*, Vol.32, No. 2, 2007, pp.467-508.

[103] Raper, J., "The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide," *Pepperdine Dispute Resolution Law Journal*, Vol.5, No., 2012, p.1.

[104] Ibid, pp.5-7; Rettig, M., "Gacaca: truth, justice, and reconciliation in post conflict Rwanda?" *African Studies Review*, Vol.51, No. 03, 2008, pp.25-50.

[105] Ibid.

The choice and installation of the Gacaca courts fit perfectly into this vision. They are a home-grown, almost pre-colonial resource. The courts are meant to fight genocide and eradicate the culture of impunity and have a mandate of reconciling Rwandans by re-enforcing unity.[106]

vii. Malawi

The Malawian justice system has undergone remarkable reforms over the last decade and now has justice forums described as customary justice forums.[107] The forums operate under approximately 217 court centers presided over by magistrates.[108] They are estimated to handle about 90% of disputes in Malawi. They have jurisdiction over matters whose subject matter involves land, marriage, inheritance and property.[109]

5. Summary of Recommendations

5.1 General Recommendations

1. It is critical to identify the aspects of Traditional Dispute Resolution Mechanisms that contravene morality and are repugnant to the constitution and the law with a view to modifying them or have them eliminated.
2. There is a need to raise awareness on customary and religious laws and how they impact on women's rights. In particular, any customary practices that encourage or promote gender discrimination ought to be abandoned.
3. In order to eliminate the perception of bias and discrimination, Traditional Dispute Resolution Mechanisms ought to be restructured to ensure inclusiveness by involving women, youth and people with disabilities through policies and legislation.
4. More effort is needed in creating awareness to the public and the formal justice system on the existence, role and effectiveness of Traditional Dispute Resolution Mechanisms. This can be achieved through having clear provisions in law that promote the use of Traditional Dispute Resolution Mechanisms.

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[106] International Institute for Democracy and Electoral Assistance, "the Gacaca Courts in Rwanda", 2008, extracted from *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 32.

[107] See generally, Schärf, W., et al., "Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums." (2011). Available at *http://www.eldis.org/vfile/upload/1/document/1110/Access%20to%20justice%20for%20the%20poor%20of%20Malawi.pdf* [Accessed on 22/04/2017].

[108] See generally, Forsyth, M., "A typology of relationships between state and non-state justice systems," *The Journal of Legal Pluralism and Unofficial Law*, Vol. 39, No. 56, 2007, pp.67-112.

[109] See DeGabriele, J., and Jeff, H., "Justice for the people: strengthening primary justice in Malawi," *African Human Rights Law Journal*, Vol. 5, No. 1, 2005, pp.148-170.

5. There is a need to train everyone involved in Traditional Dispute Resolution Mechanisms and especially the decision-makers in TDRMs on the constitutional provisions and the need to ensure that their decisions and the procedures they use to arrive at their decisions is in conformity with the constitution. Such training should especially ensure that the decision-makers are aware of the Bill of Rights.
6. Introduction of technology in TDRs practice would greatly help in documentation and record keeping in TDR processes.

5.2 Legal and Policy Framework Recommendations

5.2.1 Policy Framework Recommendations

1.There is need to formulate an enabling Policy framework for ADR and TDRs. The framework to be enacted ought to address the following issues:

i)Define and clarify the jurisdiction of TDRs and ADR. The matters that can be dealt with through TDRs and those which ought to be subjected to the formal court process need to be clearly prescribed;

ii)Provide a framework for development of programmes, plans and actions for creation of awareness and the establishment of institutional mechanisms for promotion of TDR practice in all the applicable sectors of society;

iii)The operationalization of Article 159 (2)(c) and (3)(a)-(c) of the Constitution and the development of a comprehensive regulatory and institutional framework to govern TDRMs;

iv)Regulation and training of the various players involved in TDRMs;

v)Restructuring of the TDRMs to ensure inclusiveness in the composition of TDRs;

vi)Documentation of TDR proceedings;

vii)Maintain informality in the TDR proceedings;

viii)Identification of the most suitable system to be employed with respect to TDRMs in the formal legal systems;

ix)Mapping of TDR and stakeholders Remuneration of TDRMs practitioners;

x)Enforcement of outcomes of TDR processes;

xi)Development of a multi-sectoral policy implementation forum comprising of key stakeholders drawn from the justice sector;

xii)Ethical framework for TDRM and ADR practitioners;

xiii)Setting ethical standards for TDR practice; and

xiv)Protection of TDRMs and ADR consumers from unconstitutional or unlawful outcomes.

2. In formulating the policy framework for TDRMs the following guidelines should be taken into account:

i. TDRMs need to meet the constitutional threshold set out under Article 159 of the constitution;
ii. The composition of TDRs needs to be all inclusive;
iii. The outcomes of TDRMs and their enforcement need to be streamlined with constitutional requirements;
iv. TDRMs need to be kept as informal as possible;
v. Introduction of record-keeping and clear references for purposes of accountability and pursuit of justice through TDRs appeal mechanisms and the formal justice system;
vi. Remuneration of TDRMs practitioners and the necessary resources to run TDRs;
vii. Creation of awareness about TDRMs and their effectiveness in resolving disputes; and
viii. Uniformity of TDRs procedures throughout the country to ensure that the process of arriving at outcomes is fair.

3.A continuous monitoring and evaluation programme should be undertaken to appraise the implementation of the policy framework on TDRMs.

5.2.2 Legal Framework Recommendations

1. In order to foster an effective working relationship between the formal justice system and TDRMs, there is need to introduce court-annexed TDRMs and ADR. This would tackle the problem of backlog of cases, enhance access to justice, encourage expeditious disposal of disputes and lower costs of accessing justice;
2. In order to ensure a smooth interaction between TDRMS and the formal justice systems, laws providing for strict and convoluted procedures need to be reviewed with a view to simplifying the rules and procedures. In particular, the following laws need to be reviewed and amended in order to accommodate TDRMs in their application:

(i)The Civil Procedure Act and Rules, Cap 21- Order 46 Rule 20 needs to be reviewed to put it into conformity with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases;

(ii)The Evidence Act, Cap 80 should be reviewed so as to simplify the evidential rules to cover situations where informal systems of dispute resolution are being used. Simplified procedures should be introduced to ensure that courts and tribunals focus on substantive rather than procedural justice as contemplated under Article 159(2) (d);

(iii)The Judicature Act, 1967 should be reviewed in view of the recognition that culture and traditional dispute resolution mechanisms are now recognized under the Constitution (Articles 11 and 44).

(iv)Parliament should amend the Limitation of Actions Act, Cap 22 such that matters that are the subject of traditional dispute resolution proceedings can still be taken to court if no agreement is reached at the conclusion of the TDR process.

(v)Kadhis' Courts Act, Cap 11 should be reviewed to make provision for the appointment of women Kadhis.

(vi) The Appellate Jurisdiction Act should be amended to provide for application of TDRs in the appellate process where the matter in dispute involves customary law.

(vii)Land Act, 2012, should be reviewed to ensure clear and substantive provisions that ensure: elimination of gender discrimination in law, customs and practices related to land and property in land especially in conflict management; encouragement of communities to settle land disputes through recognized local community initiatives; participation, accountability and democratic decision making within communities, the public and the Government; affording equal opportunities to members of all ethnic groups; non-discrimination and protection of the marginalized; democracy, inclusiveness and participation of the people; and the active utilisation of alternative dispute resolution mechanisms, especially TDRMs, in land dispute handling and management.

(viii)Marriage Act, 2014, should be reviewed to ensure that mediation of disputes in customary marriages and the customary dispute resolution

mechanisms provided for in the Act conform to the principles of the Constitution.

(ix)Matrimonial Property Act, should be reviewed to ensure that Section 11 of the Act which stipulates that during the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including (a) the customary law relating to divorce or dissolution of marriage; (b) the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife/wives is expanded to provide guidelines/rules that ensure that the same is smoothly implemented.

(x)Section 17 of the National Land Commission Act should be amended with a view to incorporating a requirement on the part of the Commission to consult or seek assistance from community leaders on matters pertaining to land. Section 18 which provides for the establishment of County Land Management Boards needs to be amended in terms of the composition of the Boards so as to include community leaders.

(xi)Rule 54 of the Supreme Court Rules 2012 which provides for the attendance of Amicus curiae, experts or advocates assisting the court in determining technical matters should be accorded a wide interpretation and application to provide an opportunity for community leaders to assist the court in matters pertaining to customary law.

3.There is need to formulate an enabling legal framework for ADR and TDRMs.

4.It is proposed to have a law to be known as ADR and TDR Mechanisms Act enacted to provide for the operationalization of Article 159 (2)(c) and (3)(a)-(c) of the constitution and to provide for the regulatory and institutional framework to govern the practice of ADR and TDRMs. The formulation of the said legislation should be informed by the following guidelines:

a. The need to ensure that TDRMs meet the Constitutional threshold under Article 159(3) of the Constitution and the Bill of Rights;
b. The need to establish an efficient referral system for matters from courts of law to TDRs and vice versa depending on the nature of the dispute and steps taken by the disputants;

c. Provide for a clear review and appeal system in TDR and ADR;
d. Legal mechanisms for the formal recognition and enforcement of decisions made in TDR and ADR processes ought to be set up to make TDRMs more efficient;
e. The legislation should maintain informality of TDRMs;
f. Defining the jurisdiction of TDRMs;
g. Establishment of an efficient institutional framework for implementation and enforcement framework of TDRM Policies ;
h. Provide for enforcement mechanisms of TDRMs outcomes;
i. Abolish unconstitutional and/or unlawful TDRs and their outcomes; and
j. Establish collaboration between the National Government and the Devolved Governments to ensure that TDRMs are promoted and accessible to every person.
k. Collaboration between the National Government and the devolved units of governance to ensure that TDRMs are promoted in the counties and that every person has access to the mechanisms.

5. Kenya needs to adopt tested best practices in comparable jurisdictions with regard to TDRMs.

6. Conclusion

The Constitution of Kenya 2010 specifies the fundamental rights and freedoms to which every Kenyan is entitled. It empowers courts to enforce human rights and interpret the law in a way that gives effect to a right of a fundamental freedom. To ensure full enjoyment of rights, the Constitution guarantees the right of access to justice under Article 48. Further, the Constitution widens the doors of access to justice by promoting the access through formal and informal processes. To this end, Article 159 (2) (c) and (3) brings on board other justice mechanisms such as ADR and TDR to ensure wide access to justice. For TDRs to be applicable, they must not be inconsistent with the Constitution, justice or morality or any other written law.

Although the Constitution guarantees the right of access to justice and goes further to recognize ADR and TDRs, there is no elaborate legal or policy framework for their effective application. This is the situation, despite the fact that a great percentage of disputes in Kenya are resolved through mediation, conciliation, negotiation and traditional processes. Currently, the legal framework does not provide for linkage of TDRs with the formal court process. In most instances, courts have undermined the awards reached through TDRs terming them as informal and not founded on any law. This has further frustrated the utilization of TDRs in Kenya.

From the findings of the research and study conducted, there is a need for enactment of a sound legal and policy framework for effective utilization of TDRMs and ADR to ensure

full access to justice for Kenyans. The study revealed that TDRMs are widely used by communities to resolve a myriad of disputes and therefore cannot be wished away. Therefore, it is imperative that the TDRs be anchored in the legal and policy framework. The framework should harness the recommendations made in this paper for effective incorporation of TDRs and other community based process into the justice system. Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems is an idea that calls for attention, and effective implementation.

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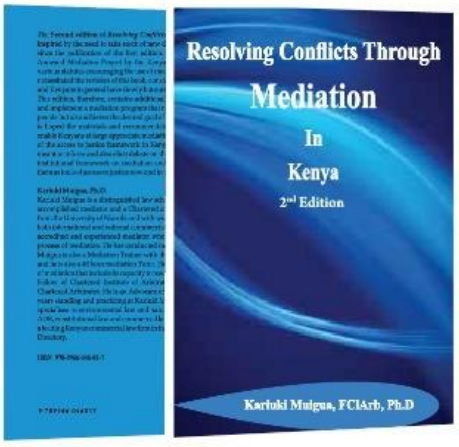

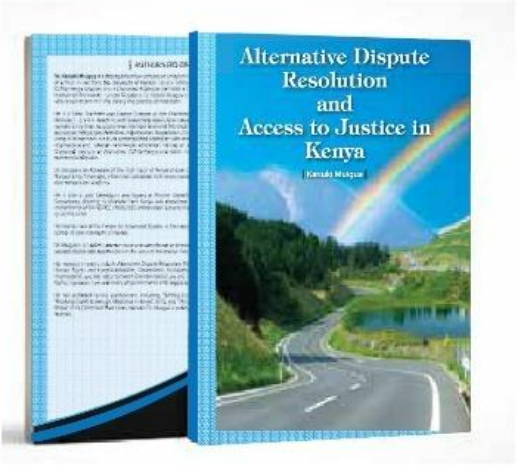

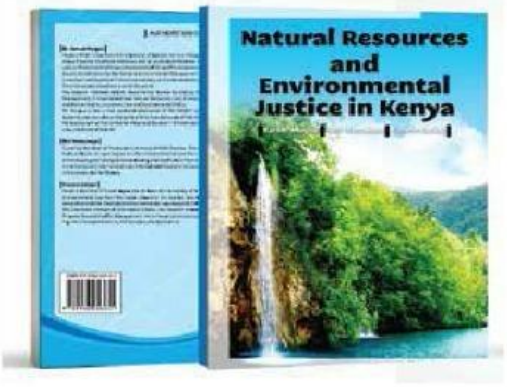

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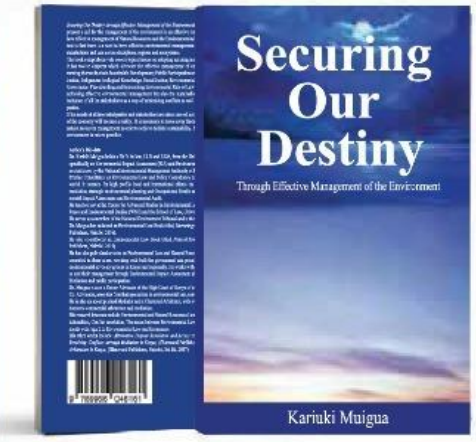

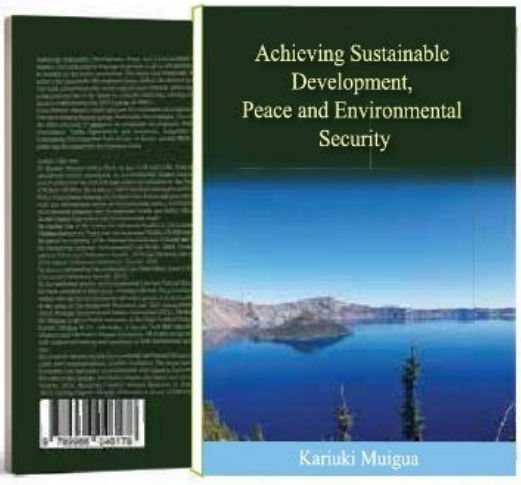

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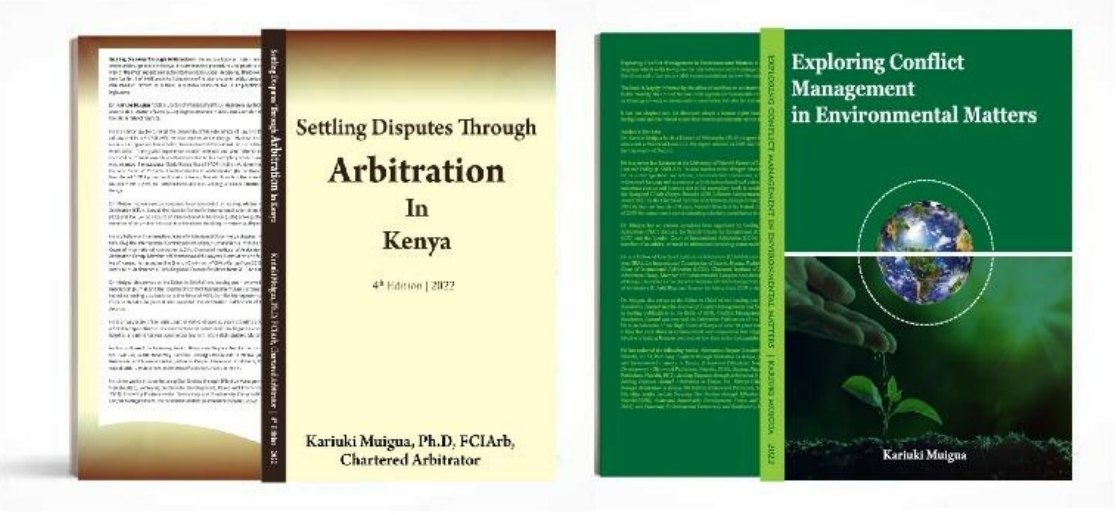

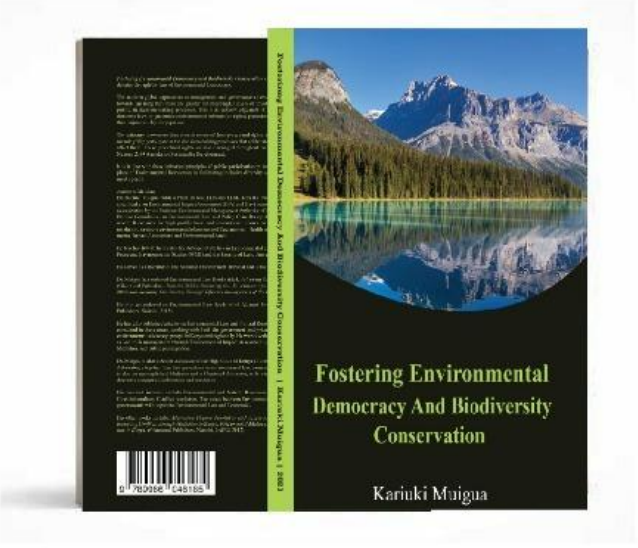

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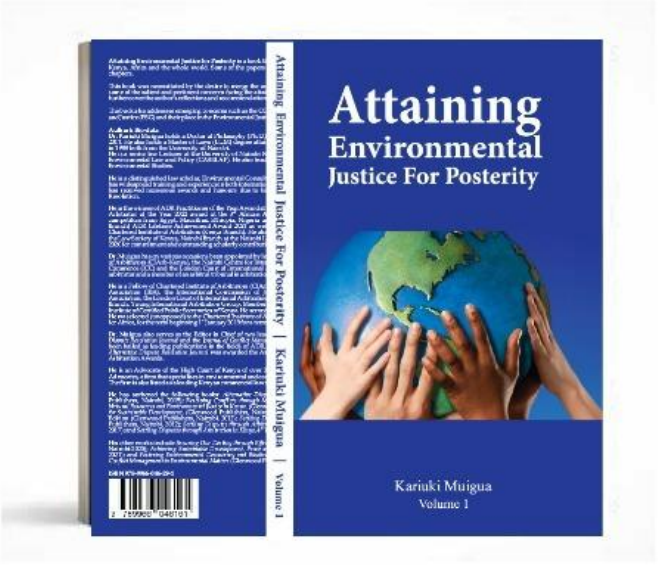

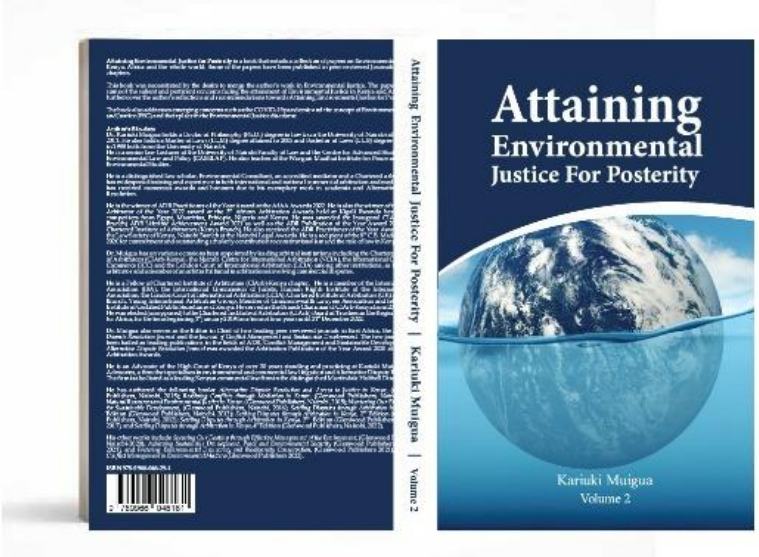

Accessing Justice through ADR is a book that contains a collection of independent articles on Alternative Dispute Resolution (ADR) written over time. Some have been published in Journals and book chapters.

The publication was necessitated by the need to consolidate the author's work in ADR and make it easy for the general readers, scholars, judges and academics to access.

The various articles seek to link ADR Mechanisms with the quest for justice. Access to Justice is possible through various mechanisms which include Litigation, Arbitration, Conciliation, Mediation.

Author's Bio-data

Dr. Kariuki Muigua holds a Doctor of Philosophy (Ph.D.) degree in law from the University of Nairobi attained in 2011. He also holds a Master of Laws (LL.M) degree attained in 2005 and Bachelor of Laws (LL.B) degree attained in 1988 both from the University of Nairobi. He is a senior law Lecturer at the University of Nairobi Faculty of Law and the Centre for Advanced Studies in Environmental Law and Policy (CASELAP). He also teaches at the Wangari Maathai Institute for Peace and Environmental Studies.

He is a distinguished law scholar, Environmental Consultant, an accredited mediator and a Chartered arbitrator. He has widespread training and experience in both international and national commercial arbitration and mediation. He has received numerous awards and honours due to his exemplary work in academia and Alternative Dispute Resolution.

He was recognized and awarded for his role as the Chartered Institute of Arbitrators (CIArb) Africa Trustee from 2019 to 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022. His book, *Settling Disputes through Arbitration in Kenya,4th Edition,* Glenwood publishers 2022, was awarded the Publication of the Year Award 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022. He is the winner of ADR Practitioner of the Year Award at the AIAA Awards 2022. He is also the winner of the African Arbitrator of the Year 2022 award at the 3rd African Arbitration Awards held at Kigali Rwanda beating other competitors from Egypt, Mauritius, Ethiopia, Nigeria and Kenya. He was awarded the Inaugural CIArb (Kenya Branch) ADR Lifetime Achievement Award 2021 as well as the ADR Publication of the Year Award 2021 by the Chartered Institute of Arbitrators (Kenya Branch). He also received the ADR Practitioner of the Year Award 2021 by the Law Society of Kenya, Nairobi Branch at the Nairobi Legal Awards. He is a recipient of the 8th C.B. Madan Prize of 2020 for commitment and outstanding scholarly contribution to constitutionalism and the rule of law in Kenya.

Dr. Muigua has on various occasions been appointed by leading arbitral institutions including the Chartered Institute of Arbitrators (CIArb-Kenya), the Nairobi Centre for International Arbitration (NCIA), the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) among other institutions, as both a sole arbitrator and a member of an arbitral tribunal in arbitrations involving commercial disputes.

He is a Fellow of Chartered Institute of Arbitrators (CIArb)-Kenya chapter. He is a member of the International Bar Association (IBA), the International Commission of Jurists, Human Rights Institute of the International Bar Association, the London Court of International Arbitration (LCIA), Chartered Institute of Arbitrators (UK) and Kenya Branch, Young International Arbitration Group, Member of Commonwealth Lawyers Association and fellow of the Institute of Certified Public Secretaries of Kenya. He served as the Branch Chairman of CIArb-Kenya from 2012 to 2015. He was elected (unopposed) to the Chartered Institute of Arbitrators (CIArb) Board of Trustees as the Regional Trustee for Africa, for the term beginning 1st January 2019 for a term of four years until 31st December 2022.

Dr. Muigua also serves as the Editor in Chief of two leading peer reviewed journals in East Africa, the *Alternative Dispute Resolution Journal and the Journal of Conflict Management and Sustainable Development*. The two journals have been hailed as leading publications in the fields of ADR, Conflict Management and Sustainable Development. The *Alternative Dispute Resolution Journal* was awarded the Arbitration Publication of the Year Award 2020 at the Africa Arbitration Awards.

He is an Advocate of the High Court of Kenya of over 30 years standing and practicing at Kariuki Muigua & Co. Advocates, a firm that specialises in environmental and commercial law litigation and Alternative Dispute Resolution. The firm is also listed as a leading Kenyan commercial law firm in the distinguished Martindale Hubbell Directory.

He has authored the following books: *Alternative Dispute Resolution and Access to Justice in Kenya,* (Glenwood Publishers, Nairobi, 2015); *Resolving Conflicts through Mediation in Kenya,* (Glenwood Publishers, Nairobi, 2013); *Natural Resources and Environmental Justice in Kenya,* (Glenwood Publishers, Nairobi, 2015); *Nurturing Our Environment for Sustainable Development,* (Glenwood Publishers, Nairobi, 2016); *Settling Disputes through Arbitration in Kenya, 1st Edition* (Glenwood Publishers, Nairobi, 2012); *Settling Disputes through Arbitration in Kenya, 2nd Edition* (Glenwood Publishers, Nairobi, 2012); *Settling Disputes through Arbitration in Kenya, 3rd Edition* (Glenwood Publishers, Nairobi, 2017); and *Settling Disputes through Arbitration in Kenya, 4th Edition* (Glenwood Publishers, Nairobi, 2022).

His other works include *Securing Our Destiny through Effective Management of the Environment,* (Glenwood Publishers, Nairobi-2020); *Achieving Sustainable Development, Peace and Environmental Security* (Glenwood Publishers, Nairobi, 2021); *Fostering Environmental Democracy and Biodiversity Conservation,* (Glenwood Publishers 2021); *Exploring Conflict Management in Environmental Matters* (Glenwood Publishers 2022); and *Attaining Environmental Justice for Posterity, Volume 1 and 2,* (Glenwood Publishers 2022).