Resolving Conflicts Through Mediation In Kenya

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Dedication

Dedicated to the Peacemakers,
Those who strive to
Resolve conflicts
To those who hold
A vision of a peaceful world
And a bright warm tomorrow
Where human beings live in harmony
And to the Dreamers
Who have faith, dream big
And never give up on their dreams
Till the dreams become a reality
You make the world a worthwhile place to live on
You inspire
And keep hope alive
In the face of hardship, pain, sorrow and calamity.

Acknowledgements

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I am profoundly grateful to all the people I had the honour to work with in the course of my research.

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To you all, I extend my deepest appreciation.

Author's Note

Mediation has the ability to deal with conflicts that occur within society. It has the capacity to resolve them. Mediation has its own limitations: it is without prejudice, non-binding and informal. However, where it has worked, lasting solutions have been reached by the parties themselves. It is also possible to come to agreements within and after a mediation and have these enforced either as contracts or in court.

The Constitution of Kenya 2010 has been in place for a while now. Article 159 recognises mediation and other forms of Alternative Dispute Resolution (ADR) as useful tools to aid in Access to Justice and expeditious resolution of disputes.

On the ground, there has been growing awareness and acceptance of the use of ADR mechanisms. Mediation has been embraced by the Court in the Court Annexed Mediation Scheme.

In the conception of the Court Annexed Mediation, however, informal mediation at the local level does not seem to have been given a chance.

The rules governing the same are adopted from the Ontario Mandatory Mediation Program, Canada. They are quite formal. There is a real risk of formalising mediation and making it accessible only to those who are literate and affiliated to professional bodies.

Mediation as practised in Africa has for long been informal but effective. Even as the Judiciary seeks to address the issue of backlog of cases, it is imperative to bear in mind that any mechanism that is adopted should not only respond to the needs of the target group, but should also be accessible, cost-effective and one that the parties can easily identify with especially when compared to litigation. There is a real risk of having a mediation program that is riddled with technicalities just like arbitration.

This edition takes stock of these developments and examines the place of mediation in the Kenyan context. The edition contains additional materials on how best to conceive and implement a mediation program that not only responds to the needs of the people but also achieves the desired goal of addressing case backlog in courts. It is hoped if these recommendations are considered, it is

possible to adopt mediation as part of the access to justice framework in Kenya, while retaining most or all of its perceived merits.

There is also a chapter on the use of negotiation and mediation in the resolution of environmental conflicts in Kenya. The chapter also contains a section on family mediation. While the use of mediation is not only restricted to these two areas, the chapter is intended to highlight some of the ways in which mediation can be used to enhance access to justice for majority of Kenyans.

The edition examines the current legal and institutional structures surrounding mediation and contains reflections on the place of mediation in the future.

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October 2017

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List of Abbreviations

ADR	Alternative Dispute Resolution
BATNA	Best Alternative to a Negotiated Agreement
CAMP	Court Annexed Mediation Project
Cap.	Chapter
CIArb	Chartered Institute of Arbitrators
CPD	Continuous Professional Development
DIHR	Danish Institute for Human Rights
FAMEC	Family Mediation Centre
FIDA	International Federation of Women Lawyers
FIDIC	International Federation of Consulting Engineers
Fig.	Figure
IEBC	Independent Electoral and Boundaries Commission
IELRC	International Environmental Law Research Center
KLR	Kenya Law Reports
Med-Arb	Mediation – Arbitration
NCIC	National Cohesion and Integration Commission
NGO	Non-Governmental Organisation
No.	Number
UN	United Nations
UNEP	United Nations Environment Programme
TJS	Traditional Justice Systems
PRI	Penal Reform International

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Chapter One

Introduction to Mediation

1.1 Introduction

This chapter is an introduction to mediation and other Alternative Dispute Resolution (ADR) mechanisms that are in common use, together with their advantages and disadvantages. It further discusses mediation as a continuation of the negotiation process in the presence of a third party and its attributes such as party autonomy, flexibility, confidentiality, informality, fostering of relationships, speed and cost-effectiveness. It also explores the advantages and disadvantages of mediation viewed against the other ADR mechanisms in use today in settling disputes.

1.2 Mediation

Mediation is one of the alternative dispute resolution mechanisms which has been practised since antiquity and is thus a restatement of customary jurisprudence.[1] 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.[2]

By Alternative Dispute Resolution is used in this book to refer to all those decision-making processes other than litigation, including but not limited to negotiation, enquiry, mediation, conciliation, expert determination and arbitration. 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.[3]

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[1] See generally, Kane, M., et al, "Reassessing customary law systems as a vehicle for providing equitable access to justice for the poor," In Arusha Conference, "New Frontiers of Social Policy"–December, 2005, pp. 12-15.

[2] Idornigie, P.O., "Overview of ADR in Nigeria," *Arbitration: the Journal of the Chartered Institute of Arbitrators*, Vol. 73, No. 1, February 2007, pp. 73–76, p 73; See also generally, Pendzich, C., et al, 'The Role of Alternative Conflict Management in Community Forestry,' *Working Paper 1*, (Food And Agriculture Organization of the United Nations, Rome, 1994). Available at http://www.fao.org/docrep/005/X2102E/X2102E00.HTM [Accessed on 2/08/2017].

[3] Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), pp. 50-52; See also generally,

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).[4]

Article 33 is thus the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties, be they States or individuals. Mediation is also recognized as one of the mechanisms for managing conflicts in Kenya. For instance, Article 159 of the Constitution 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 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.[5] 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.[6] It is the intervention in 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.[7] Others have described it as 'a triadic mode of dispute settlement which entails

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Frey, M.A., "Does ADR Offer Second Class Justice," *Tulsa Law Review*, Vol.36, No. 4, 2001, pp.727-766.

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

[5] Article 159 (2) (c) of the Constitution of Kenya, (*Government Printer,* Nairobi, 2010).

[6] Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, op. cit, p.10.

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

the intervention by a neutral third party at the invitation of the disputants and whose outcome is a bilateral agreement between the disputants'.[8]

These definitions are not entirely correct as they connote that the mediator must be neutral and impartial. A mediator may not necessarily be a neutral and impartial third party, but must be acceptable to the parties. This proposition is supported by Mwagiru who asserts that the fact that the mediator possesses certain resources valued by the parties makes the parties less concerned with the impartiality of the mediator. He also proffers that psychological factors are alternative reasons for a mediator's lack of impartiality.[9]

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 is, in essence, a form of "assisted negotiation" it does not have any direct legal basis.[10] 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.[11] Mediation is thus 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, as a third party.[12]

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

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[8] Greenhouse, C.J., "Mediation; A Comparative Approach", *Man*, New Series, Vol. 20, No. 1, *Royal Anthropological Institute of Great Britain and Ireland*, (Mar., 1985), pp. 90-114, p. 90.
[9]Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp.53-54.
[10]Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, Vol.7, p.289, at p.290.
[11]Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, op.cit, pp. 115-116.
[12] Ibid., p.115.

acceptable to both parties and should have no interest in the dispute other than achievement of a peaceful settlement.[13] Ott[14] observes that the presumed effectiveness of the mediator derives from the diverse functions he or she can serve in a conflict situation. For instance, they can change for the better the behaviour of the disputants just by being present. A mediator has been said to be a catalytic agent whose mere presence, besides anything they may do or say, will bring about positive changes in the behaviour of the disputing parties. Progress achieved through the mediator's presence brings about nothing more than temperate speech.[15]

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 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 mediation, *fora* for mediation, over the process and over the outcome.

1.2.1 Attributes of Mediation

Mediation has many attributes which can be well fathomed by first understanding that mediation is a process that has two facades. It has a political and a legal facet.

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. Mediation in the legal process focuses on the interests of the parties or issues of the conflict. Conflicts arising out of the interests of the

[13]Barkun, M., "Conflict Resolution through Implicit Mediation," *Journal of Conflict Resolution*, VIII (June, 1964), p. 126.

[14] Ott, M.C., "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.

[15]Meyer, A., "Function of the Mediator in Collective Bargaining," *Industrial and Labour Relations Review*, XIII, No. 2 (January, 1960), p. 161.

parties are as a result of the power-capacities between the parties.[16] Since mediation in the legal process is a settlement mechanism, the root causes of the conflict are not addressed as it relies on the power relations which keep changing. A settlement is superficial as it addresses the issues of the conflict only and does not address the underlying causes of the conflict.

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 judicial settlement) and does not address the root causes of the conflict. Apart from mediation in the legal process, litigation and arbitration also lead to a settlement. These dispute settlement mechanisms are coercive in that the parties in the dispute have little or no autonomy over the process and the outcome. The coerciveness of a settlement is achieved through legal tools such as courts, police, and the army among others. For example, in judicial settlement when a matter is taken to court, neither of the parties have a choice about either the judges or the court. The court gives a judgment which is binding on both parties but a dissatisfied party can appeal the decision when it becomes final. While this is the case, the losing party may still be aggrieved, but has to live with that decision or face sanctions or be found to be in contempt of court.[17]

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.[18] As such 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. Consequently, mediation in the political process has more attributes of mediation and it is arguable then that, that is why it will lead to resolution of conflicts as opposed to a settlement. These attributes are: voluntariness, cost effectiveness, informality, focus on interests and not rights, allowing for creative solutions, allowing for personal empowerment, enhancing party control, addressing the root causes of the conflict, non-coerciveness and

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[16]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.

[17] Mwagiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Centre for Conflict Research) 2006, pp.36-38.

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

enduring outcomes. It is as a result of these attributes of mediation in the political process (that is voluntariness, informality, autonomy over the choice of the mediator, over the process and outcome) that the political process of mediation will lead to a resolution as opposed to a settlement.

In the mediation discourse, therefore, 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.[19] The outcome of a resolution is thus mutually acceptable, enduring, and satisfies both parties concerns. A resolution brings about peaceful-coexistence.

Mechanisms that bring about conflict resolution are *negotiation*, *mediation* and *problem solving facilitation*. These mechanisms are non-coercive in that the parties have autonomy about the forum, the process, the third parties involved and the outcome. Non-coercive methods allow parties to work through their conflict, address its underlying causes, and reach a resolution to that conflict. Resolution means that the conflict has been dealt with and cannot re-emerge later.[20]

1.2.2 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. 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.[21]

Regarding its expeditious and time saving nature the American Bar Association[22], notes that it is often possible to schedule mediation around work

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

[20]Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, op. cit.

[21] Sourced from http://resources.lawinfo.com/en/Articles/mediation/Federal /the-pros-and-cons-of-mediation.html, [Accessed on 3/06/2012].

[22] "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 7/05/2012].

schedules or on the weekend. Mediations are 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.[23]

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.[24] 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.[25] 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.[26] 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.[27]

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

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[23]Sourced from http://resources.lawinfo.com/en/Articles/mediation/Federal /the-pros-and-cons-of-mediation.html, op. cit.

[24] See generally Owen M. F., "Against Settlement," *Yale Law Journal*, Vol.93, no. 1073 (1984).

[25]Baylis, C. & Carroll, R., "Power Issues in Mediation", *ADR Bulletin,*Vol.7, No.8 [2005],Art.1, p.135.

[26]Manning, C., *Power Imbalance in Mediation*, an unpublished paper sourced from www.dialmformediation.com.au, *[*Accessed on 2/06/2011*].*

[27]Power Imbalances in Mediation, SCMC Briefing Papers, *Scottish Community Mediation Centres*, Edinburg, sourced from www.scmc.sacro.org.uk, [Accessed on 03/06/2011].

sense, the parties remain always in control of the mediation process. The continuation of the process depends on their continuing acceptance of it.[28] 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.[29]

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.

1.3 Other Alternative Dispute Resolution (ADR) Mechanisms: An Overview

1.3.1 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.[30] 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. 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.[31] Accordingly the aim in negotiations is to arrive at "win-win" solutions to the dispute at hand.

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[28]Sourced from http://resources.lawinfo.com/en /Articles/mediation/ Federal/the-pros-and-cons-of-mediation .html, [Accessed on 03/06/2011].

[29] Ibid.

[30] See generally, "Negotiations in Debt and Financial Management", *United Nations Institute of Training and Research*, (UNITAR), (December 1994).

[31]Fischer, R. & Ury, W., *Getting to Yes: Negotiating Agreement Without Giving In,* (Penguin Books, New York, 1981), p.4.

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.[32] 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.[33] The *pros* and *cons* of this process are similar to those discussed under mediation in the political process.

1.3.2 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. The Arbitration Act, 1995 defines arbitration to mean "any arbitration whether or not administered by a permanent arbitral institution."[34] This is not very elaborate and regard has to be had to other sources. 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.[35]

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 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 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

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

[33] Ibid.

[34] *Arbitration Act*, Act, No. 4 of 1995 as Amended in 2009 by *Arbitration (Amendment) Act*, No. 11 of 2009, Laws of Kenya, (*Government Printer*, Nairobi, 2009).

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

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.

1.3.3 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 techniques may be applied. Conciliation is also used when parties are unwilling, unable, or unprepared to come to the bargaining table.

1.3.4 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.

1.3.5 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.

1.3.6 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.[36]

[36] The CIArb (K) Adjudication Rules, Rule 2.1.

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)[37], 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.[38] 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.

1.3.7 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.

1.3.8 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.

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[37] Ibid, Rule 23.1. The period of adjudication is not fixed and can go up to 84 days: See generally, FIDIC, *Conditions of Contract for Construction: For General Building and Engineering Works Designed by the Employer*, (International Federation of Consulting Engineers (FIDIC), Geneva, 1st Ed., 1999); See also FIDIC, *Conditions of Contract for Plant and Design Build: For Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor*, (International Federation of Consulting Engineers (FIDIC), Geneva, 1st Ed., 1999)

[38] CIArb (K) Adjudication Rules, Rule 29.

1.3.9 Mediation-Arbitration (Med-Arb)

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.[39] 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.

With the third party using both mediation and arbitration, albeit each at a time, the Med-Arb process is intended to allow the parties to profit from the advantages of both dispute settlement procedures.[40] Through incorporating mediation and arbitration, Med-Arb is meant to strike a balance between party autonomy and finality in dispute resolution.[41]

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.[42]

Some scholars and practitioners have argued that it is best to have different persons mediate and arbitrate. However, at times the same person acting as mediator "switches hat" to act as the arbitrator.[43] The risk in such a scenario is that the person mediating becomes privy to confidential information

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[39] 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; Chartered Institute of Arbitrator, *ADR, Arbitration, and Mediation*, (Author House, 2014), p. 247.

[40] 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.

[41] 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.

[42] For more of the Common criticisms of med-arb, both behavioural and procedural in nature, see generally, Limbury, A.L., "Making med-arb work," *ADR Bulletin*, Vol. 9, No. 7, Article, 2007.

[43] 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 01/12/2015].

during the mediation process and may be biased if he transforms himself 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.[44] 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.[45] There is also the risk of delay where should the mediation fail, it will take some time to get the arbitration back on track, especially if a party decides a different neutral is needed to serve as the arbitrator.[46]

The other question that has been raised is whether procedural fairness requirements may tie the mediator-arbitrator's hands in the mediation and impede (or preclude) private caucusing.[47] This may be attributed to the fact that the person mediating becomes privy to confidential information during the mediation process especially during such caucusing. The information so obtained is likely to affect their objectivity in arbitration. It may also raise confidentiality breach issues, thus affecting acceptability of the outcome.[48] This regards the question whether the Med-Arbitrator will remain unaffected as an arbitrator after engaging in caucuses and becoming privy to confidential, perhaps intimate, emotional, personal, or other "legally" irrelevant information.[49] However, it has been suggested that in reaching an ultimate arbitration decision, the med-arbiter has to be sensitive as to how to use, or if to use at all, the knowledge that he or she may have gained in confidence during the mediation phase of the process.[50] Despite the concerns for confidentiality, it is asserted that unlike normal

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[44] Lieberman, A., 'MED-ARB: Is There Such a Thing?' *Attorney At Law Magazine*, op. cit.
[45] Ibid.
[46] Ibid.
[47] 'Agreements to engage in 'med-arb' now enforceable in Ontario,' *ADR Bulletin of Bond University DRC*, op cit.
[48] Baril, M.B. & Dickey, D, 'MED-ARB: The Best of Both Worlds or Just A Limited ADR Option? (Part Two),' August 2014. Available at http://www.mediate.com/pdf/V2%20MED-ARB%20The%20Best%20of%20Both%20Worlds%20or%20Just%20a%20Limited%20ADR%20Option.pdf [Accessed on 2/12/2015].
[49] 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*, op cit, p. 158.
[50] Kagel J, 'Why Don't We Take Five Minutes ? Med-Arb After 40 : More Viable than Ever' 241, 2013, p.246. Available at http://naarb.org/proceedings/pdfs/2013-241.PDF [Accessed on 2/12/2015].

arbitration, parties have to know, and to release, the med-arbiter from the normal restraints of an arbitrator's prohibitions of *ex parte* contacts.[51] This is important considering that mediation views such contacts as essential to come up with an award that addresses the parties' interests.[52]

Certainly, not all matters are suitable for med-arb mechanism.[53] For instance, it has been argued that cases with any of the following issues are likely not appropriate for med-arb: domestic violence or power imbalance that cannot be remedied by the presence of counsel; difficulty in obtaining financial disclosure; a need to bind third parties; party(ies) can't afford the cost of a third professional; party(ies) will not respect court orders or arbitral awards; one party is represented by competent counsel and the other is not; an unhappy party is likely to abandon the process or use the arbitrator's fees as leverage; and a case that requires the arbitrator to determine a novel point of law.[54] It is, therefore, imperative that the mediator-arbitrator identify the most appropriate matters before taking up any matter recommended for med-arb.

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 be ignored in arbitration.[55] That way, parties may gain confidence in the process and chances of the parties readily accepting the outcome are enhanced. Yet, some authors argue that to find an adequate resolution in the arbitration phase of the process, the Med-Arbitrator will need to use his understanding of the relationship between the parties during the mediation phase, or use his prior knowledge of their respective underlying interests.[56] This presents conflicting views on what the med-arbiter should do. However, what is more important for the third party who is retained to conduct both phases of the process is to ensure that

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[51] Ibid.

[52] Ibid.

[53] Baril, M.B. & Dickey, D, 'MED-ARB: The Best of Both Worlds or Just A Limited ADR Option? (Part Two),' op cit.

[54] Wolfson, L., 'When Med-Arb Goes Bad,' p.1, available at http://www.riverdalemediation.com/pdfs/articles/When_Med-Arb_Goes_Bad.pdf [Accessed on 1/12/2015]; cf. Lavi, D, *Divorce Involving Domestic Violence: Is Med-Arb Likely to be the Solution? Pepperdine Dispute Resolution Law Journal*, Vol. 14, Iss. 1, 2014, pp. 91-151.

[55] Ibid.

[56] 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*, op cit, pp. 156-157.

information gathered in either phase is used sparingly and only for purposes of balancing the interests of the party. They must scrupulously guard their reputation of impartiality and independence as either the mediator or an arbitrator in the process. The debate out there is whether this is really possible and therefore, med-arb practitioners must always be aware of these misgivings about the process. 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.[57]

In other jurisdictions, such as Ontario, med-arb has been used to resolve family matters.[58] In *Marchese v Marchese*[59], the Court held that an agreement to submit to med-arb was enforceable in Ontario despite a provision in the domestic arbitration statute that prohibits arbitrators from conducting any part of an arbitration as a mediation.[60] Med-Arb is also said to be on the rise in Asian region where it is incorporated in business contracts.[61] There is also evidence of the process being used in labour disputes, where it is believed that the med-arb process was developed in response to the demand that major labor disputes be resolved through "compulsory arbitration."[62]

In Kenya, the process has not yet been the subject of court discussion although it is not expressly endorsed or prohibited, in its hybrid form. However,

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[57] 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].

[58] 'Agreements to engage in 'med-arb' now enforceable in Ontario,' *ADR Bulletin of Bond University DRC*, vol. 10, No. 6, August/September 2008.

[59] *Marchese v Marchese*, [2007] OJ No 191.

[60] Ibid.

[61] Volling, S., 'Mediation-Arbitration Is There a Method or Is It Madness,' (Corrs Chambers West Garth, September, 2012). Available at http://www.corrs.com.au/thinking/insights/mediation-arbitration-is-there-a-method-or-is-it-madness/ [Accessed on 3/12/2015].

[62] See Telford, ME, 'Med-Arb d-Arbed-Arbethod Resolution Alternative,' (Industrial Relations Centre Press, Canada, 2000), available at http://irc.queensu.ca/sites/default/files/articles/med-arb-a-viable-dispute-resolution-alternative.pdf [Accessed on 3/12/2015]; See also Haight, R., 'Two Hats Are Better Than One: How Utilizing Med-Arb For Termination Provision Disputes Can Result In A Win-Win Situation,' *Resolved: Journal of Alternative Dispute Resolution*, Vol. 4, Iss. 1, Spring 2014, p. 12.

it is possible to argue that med-arb should be encouraged, in light of the current constitutional dispensation that allows parties to explore as many ADR and TDR mechanisms as possible. The requirements for procedural fairness and confidentiality must also be observed by the med-arbiter in this jurisdiction since they are jealously guarded by the Arbitration Act, 1995(2009). 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.

1.3.10 Arbitration-Mediation (Arb-Med)

Arbitration-Mediation (Arb-Med)[63] 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.[64] 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.[65] 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 or she transforms himself/ herself into a mediator. The same issues of 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.[66] The arbitrator-mediator should, thus, be knowledgeable in both processes so as to effective handle the foregoing ethical issues as well as delivering satisfactory outcomes.

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[63] See *Dispute Resolution Guidance,* available http://www.ogc.gov.uk/documents/dispute resolution.pdf, [Accessed on 05/01/2012].

[64] Weisman, MC, 'Med/Arb-A Time And Cost Effective Hybrid For Dispute Resolution,' *Michigan Lawyer's Weekly*, October 10, 2011, op cit, p. 2.

[65] Ibid.

[66] Ibid.

1.3.11 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 even the cost of presenting summary evidence to senior executives is high. Therefore, this process is generally reserved for significant cases involving potential expenditure of substantial time and resources in litigation.

1.3.12 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.

1.3.13 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.

1.3.14 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.

1.3.15 Hybrid ADR

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.

1.3.16 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.[67] 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.

1.4 Conclusion

Since traditional conflict resolution mechanisms are now enshrined in the constitution their positive attributes should now be harnessed to foster peaceful

[67] Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, op. cit, p.16.

co-existence and enhance access to justice in Kenya. It is thus hoped that the policy framework on resolution of conflicts in Kenya is bound to shift to encourage ADR and other traditional means of conflict management.

This chapter was an introduction into mediation and the other alternative dispute resolution mechanisms in common use and their cons and pros. The two perspectives of mediation: mediation in the legal and political process, and their attributes, have also been examined briefly. The next chapter discusses traditional conflict resolution mechanisms and institutions among traditional African societies and their relevance today.

Chapter Two

Traditional Conflict Resolution Mechanisms and Institutions

2.1 Introduction

This chapter discusses traditional conflict resolution mechanisms and institutions among traditional African societies, and their relevance in Kenya today. It is argued that traditional African communities had institutions and mechanisms for conflict resolution. The institutions and mechanisms 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 are 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 chapter 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.

2.2 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]

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[4] See generally, 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, 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

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 conflict resolution 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]

2.3 Principles fostering Peaceful Coexistence and Conflict Resolution

2.3.1 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

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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.

[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].

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]

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]

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[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.

[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.

2.3.2 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 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

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[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, 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.

broken or damaged relationships to restore justice, restore conflicting parties into the community and continue with the spirit of togetherness.[21]

2.3.3 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 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.

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[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.

[24] Kenyatta, J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, op. cit, pp.38-41.

2.4 Institutions of Conflict Management

2.4.1 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]

2.4.2 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. The Turkana people, for instance, 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]

2.4.3 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 by certain rules and regulations that are key in

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[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 Formuation* (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.

avoiding conflicts, for instance, that member of the same clan cannot inter-marry but can marry from other clans.[30]

2.4.4 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].

2.4.5 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]

2.4.6 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.

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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] See Chapter Five of this book.

[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.

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 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. 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.[37]

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

[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] Interview with William Ole Munyere, op.cit.

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.[38]

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.[39]

2.5 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 ADR, only that they had not been tagged as such. They used negotiation, mediation, Med-Arb 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. Mediation is thus not a new concept.

2.5.1 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

[38] 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.
[39] Interview with William Ole Munyere, op.cit.

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.[40]

2.5.2 Joking Relations

Joking relations is a typical African social phenomenon employed to avoid conflicts between neighbouring ethnic groups through verbal exchanges, attitudes, behaviours, sometimes with "violence" and "aggressiveness", but always with a joking tone.[41] 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.[42] 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.[43]

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[40]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.

[41] 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.

[42] Available at, www.library.thinkquest.org [Accessed on 02/07/2012].

[43] 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.

2.5.3 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.[44]

2.5.4 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.[45] 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.[46]

2.5.5 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*.[47] 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

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[44] 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.

[45] 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;

[46] 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].

[47] 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.

offence.[48] 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.[49]

2.5.6 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.[50]

Women elders also played a key role in resolving conflicts.[51] For instance, it is said that among the traditional Igbo society in Eastern Nigeria, women are the sustainers and healers of human relationships.[52] 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".*[53]

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.[54]

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

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[48] 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.
[49] 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).
[50] See generally, Boege, V., Potential and limits of traditional approaches in peacebuilding. *Berghof Handbook II: Advancing Conflict Transformation*, 2011, pp.431-457.
[51] Ibid.
[52] Brock-Utne, B., "Indigenous conflict resolution in Africa," op cit., p.13.
[53] 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).
[54]Brock-Utne, B., *Indigenous Conflict Resolution in Africa*, op cit.

activities was and is still negligible.[55] 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.[56]

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.[57] Their participation in conflict resolution should thus be enhanced.

Peace building generally goes beyond conflict management measures, as it involves developing institutional capacities that alter the situations that lead to violent conflicts.[58] As already pointed out, in traditional African society, people

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[55] 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].

[56] 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.

[57] 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 20/10/2017].

[58] See Maiese, M., 'Peacebuilding,' September 2003. Available at http://www.beyondintractability.org/essay/peacebuilding [Accessed on 20/10/2017].

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.[59]

2.5.7 Traditions, customs and norms

The *traditions, customs and norms* of a particular community played a pivotal role in conflict resolution.[60] Traditions, customs and norms were highly valued and adhered to by the members of the community.[61] 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.[62]

2.6 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

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[59] 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).

[60] 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.

[61] 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.

[62] Idang, G.E., 'African culture and values,' op cit. p.103.

the nation.[63] The constitution recognizes this in Article 11 by stating that 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 conflict 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*[64] 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 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 that 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 traditional African society. Mediation should thus not be used in managing conflicts in the context of the legal environment as it will not resolve conflicts but will rather settle the same.[65]

It is the informal aspects of the process that makes it effective in achieving resolution of conflicts. It is therefore important to ensure that even as mediation is adopted as part of the conflict management mechanisms in Kenya, its positive

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[63] See National Cohesion and Integration Commission (NCIC), *Kenya Ethnic and Race Relations Policy*, available atwww.cohesion.or.ke, [Accessed on 15/04/2012].

[64] *Harambee* literally means "all pull together" in Swahili or 'Community getting together to collectively solve problems'.

[65] See discussion in latter chapters on the distinction between Settlement and Resolution and their differing outcomes in conflict resolution.

aspects are preserved by ensuring that it does not end up as a highly formalised process.

Chapter Three

Attributes of Mediation

3.1 Introduction

This chapter examines the attributes of mediation. Attributes of mediation such as voluntariness, confidentiality, informality, flexibility, speed, cost-effectiveness, efficiency, autonomy and fostering of relationships are explored in this chapter. Most of these attributes existed in the traditional conflict resolution mechanisms, such as the council of elders, among Kenyan communities. In fact, these communities used mediation in resolving their conflicts for centuries only that it was not known as mediation, as it is known today. Conflict resolution, especially the use of negotiation and mediation, was customary and an everyday affair. It was thus common to see people sitting down informally and agreeing on certain issues. These practices fostered broken relationships and enhanced peaceful coexistence among the people ensuring conflicts were managed.

In this chapter, the author discusses the attributes of traditional conflict resolution mechanisms and institutions, highlighting the fact that negotiation and mediation are not alien concepts in the conflict resolution discourse in Kenya.

3.2 Attributes of Mediation

As seen in Chapter 1, mediation as a conflict management mechanism can be used as a legal and political process. In the legal process, mediation is a settlement mechanism and hence does not have all the attributes of mediation. However, in the political process, it possesses all the attributes of mediation and leads to resolution of conflicts. 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.[1]

That is why it is only mediation in the political process that leads to resolution. Consequently, mediation in the political process is 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. It is from these attributes, that is, the voluntariness to engage in the mediation process, fairness, and the autonomy exhibited by the parties over the choice of the mediator, the process

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

and the outcome that mediation in the political process derives its legitimacy.[2] These attributes of mediation are peculiar to mediation in the political process. Conflict resolution in the traditional African society was informal, efficient, fostered relationships and flexible. In view of the discussion in chapter 2, it is apt to aver that mediation in the African social setting was conducted as a political process leading to resolution and not a settlement.

However, there are certain attributes of mediation that are common to both the legal process and the political processes of mediation. The attributes of mediation that run across the board are: the presence of a third party (imposed or chosen), flexibility, confidentiality, 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. The summary of the commonalities and differences between the two processes of mediation is captured in the table here under:

Fig: 1.0 Processes of Mediation

Attributes	**Political Process**	**Legal Process**
1. Flexibility	Yes	Yes
2. Cost effectiveness	Yes	No
3. Party autonomy	Yes	No
4. Speedy	Yes	Yes
5. Confidentiality	Yes	Yes
6. Informality	Yes	No
7. Focus on interests and not rights	Yes	No
8. Voluntariness	Yes	No
9. Fosters relationships	Yes	Yes
10. Allows for creative solutions	Yes	No
11. Allows for personal empowerment	Yes	No

[2] Baylis, C. & Carroll, R., "Power Issues in Mediation", *ADR Bulletin,* Vol.7, No.8 [2005], Art.1, p.135.

12. Enhances party control	Yes	No
13. Addresses root cause of conflicts	Yes	No
14. Non-coercive	Yes	No
15. Leads to a zero-sum situation	No	Yes
16. Outcome is enduring	Yes	No

***Source: The author.**

It is evident from Figure 1.0 that mediation in the political process has more attributes of mediation and it is arguable then that, that is why it will lead to resolution of conflicts. The attributes of mediation in the political process such as voluntariness, informality, autonomy over the choice of the mediator, over the process and outcome are evident and as such the political process of mediation will lead to resolution as opposed to a settlement. These attributes are discussed hereunder:-

3.2.1 Voluntariness

Voluntariness exists if both parties are making real and free choices based on effective participation in the mediation. In situations involving significant power differences, a mediator must ensure that the participation of all parties is genuine and active and that the outcome is not based on coercion or pressure. This, they argue is one of the key elements that lends legitimacy to mediation.[3] It has been argued further that the guiding principle in making informal agreements using negotiation and mediation is that the agreement must be real and one that has been voluntarily entered into. Knowledge of the options, open willingness and the desire to accept a compromise are the main factors contributing to a real and voluntary agreement.[4]

3.2.2 Autonomy

Mediation is generally an informal, strictly confidential mechanism of conflict resolution where the parties to the conflict play the lead role in reaching

[3] Ibid.
[4] Galligan, D.J, *Due Process and Fair Procedures: A Study of Administrative Procedures* [1996] p.383.

a solution to their conflict. Similarly, 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. In essence, mediation is a consensual conflict resolution mechanism in which a third party with no decision-making authority attempts to bring the conflicting parties to end their dispute by agreement.[5] Invariably, a mediator's job is to facilitate the parties into reaching a solution to their conflict by creating the right environment for negotiation, opening communication channels between the parties, keeping the parties focused on the pertinent issues and utilizing information communicated to him to the best effect.[6]

Autonomy is thus a major selling point of mediation in that parties get to choose the mediator to their dispute, the venue of the mediation, who is to attend and when the mediation is to be conducted.[7] It is autonomy that informs the legitimacy of the political process of mediation. It refers to autonomy over the choice of the mediator, the process and the outcome of the mediation process. Autonomy in reference to mediation involves the parties' ability to choose the mediation process and the arrival at an agreement which is agreeable or consensual to both parties. Autonomy thus exists if both parties are able to make real and free choices based on effective participation in the mediation process and where the resulting outcome is not based on coercion or pressure.[8] Where there is party satisfaction with the process and the outcome, then that outcome is more likely to be stable, enduring, long-lasting, and, thus, more successful. [9]

The third party, the mediator, cannot coerce the parties into reaching a decision. Rather, the mediator is engaged by the parties to assist them in negotiating a settlement to the conflict.[10] Thus, mediation is distinguishable from

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[5] Mironi, M., "From Mediation to Settlement and from Settlement to Final Offer Arbitration: an Analysis of Transnational Business Dispute Mediation", Arbitration Vol. 73, No.1, 2007, p.53.

[6] Ibid.

[7]Bauer**, C.P., "**NH Employment Mediation Best Practices: Choice, Control and Conclusion," February 2011. Available at http: / / www. gcglaw. Com / resources / adr, [Accessed on 3/06/2011].

[8] Baylis, C. &Carroll, R., "Power Issues in Mediation", op. cit., p.135.

[9] Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit., p.291-294.

[10] See generally, Fisher, R. J., *Methods of third parties intervention,* In Ropers, N., et al (Eds.), *The Berghof handbook of conflict transformation,* 2001, pp. 1–27.

the other mechanisms of conflict resolution in that the resolution framework is owned by the parties who drive the process of reaching a negotiated settlement.[11]

3.2.3 Party Satisfaction

Mediation in the political process proffers party satisfaction. Parties are more committed to the mediation process if they are satisfied with the process and the outcome. There are a number of measureable indicators of party satisfaction with the mediation process, both with regard to process [privacy and level of involvement] and the outcome [benefits and commitment]. Firstly, an outcome that satisfies both parties is more likely to be stable, long-lasting, enduring and thus more successful.[12] Mediation offers win-win outcomes. Such win-win outcomes are not feasible in litigation and arbitration, as one party will always be dissatisfied with the decision of the judge or arbitrator but are only realizable in negotiation and mediation. It is as a result of these outcomes that are mutually acceptable that both parties feel that the solutions arrived at are legitimate. Secondly, since parties get to choose the mediator, the venue of the mediation, who is to attend and when the mediation is to be conducted, they will be satisfied with the process.

3.2.4 Speed/Expeditiousness

Time Saving is another attribute of mediation. Due to delays and lack of flexibility courts are unable to resolve so many cases causing backlogs. They cannot hear cases at the convenience of the parties. The same applies to arbitration, where with the entry of lawyers into the arbitration practice, the process is becoming more formal and less expeditious.

On the contrary, mediation can be scheduled at the convenience of the parties and the mediator. This coupled with the informality and flexibility of mediation makes it a more expeditious process. Thus, in certain situations such as divorce or employment disputes, many parties favour mediation over litigation.

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[11] Tarrazon, M., "The Pursuit of Harmony: the Art of Mediating, the Art of Singing", *Arbitration*, Vol. 73, No. 1, 2007, p. 49.

[12] Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit., p.293-294.

According to the American Bar Association,[13] 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. 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.[14]

3.2.5 Confidentiality

Mediation is a confidential procedure. Confidentiality serves to encourage frankness and openness in the process by assuring the parties 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.[15] Confidentiality is particularly an important attribute in commercial disputes where parties wish to protect commercial secrets. While confidentiality is seen as a benefit to mediation, there may be other situations where one of the parties wants the information to be public as it would be in a court case. For example, an employee who was treated unfairly might want that information to come out in court and be accessible to the media in the hope that it will help dissuade the company from acting that way again in the future. In *Vacluse Holdings Ltd v Lindsay*,[16] the New Zealand Court of Appeal said:

> "*Mediation agreements such as this one are confidential; any matters arising in the course of mediation are not usually to be put in issue in any subsequent litigation or arbitration. In this spirit, we do not think that statements in the documents prepared for the assistance of the mediator should be relied on in*

[13] "Beyond the Myths: Get the Facts about Dispute Resolution", *American Bar Association*, Washington DC, 2007, p. 8, available at, www.abanet.org/dispute, [Accessed on 8/08/2012].

[14] "The Pros and Cons of Mediation," Sourced from http://resources.lawinfo.com/en / Articles / mediation /Federal/the -pros-and-cons - of - mediation. html, [Accessed on 8/08/2012].

[15] Ibid.

[16] *Vacluse Holdings Ltd v Lindsay* (1997) 10 PRNZ 557 at 559.

subsequent litigation. The whole point of mediation is to remove the process from litigation or arbitration and to ensure that anything said or done in a mediation does not later rebound to the detriment of any party, should the mediation fail to achieve a settlement."

Confidentiality founded on the 'without prejudice' privilege at common law is subject to a number of exceptions.[17] According to Laddie J, in *Unilever Plc v The Procter & Gamble*[18], the first exception is where the entitlement to rely on the privilege has been waived. Secondly, a Court may come to the conclusion that the claim to without prejudice status is not bona fide.[19] Thirdly, Laddie J stated that there are occasions where, even though the parties treated the negotiations as being without prejudice, there are public policy considerations favouring disclosure which override those encouraging the settlement of disputes. It would seem therefore that confidentiality in mediation is guaranteed only to some extent and is not absolute as it has been said to be.

It may be important for counsel to take into account the extent of the protection that is available for communications whose purpose is to resolve the dispute before trial, especially important to preserve the confidentiality of such communications, and lawyers might consider mediation, as opposed to party-to-party settlement negotiations or even a judicially hosted settlement conference, because of the greater protection that some state laws seem to offer to mediation proceedings.[20] This may especially be more important in family mediation cases.

3.2.6 Focus on Interests and not Rights

In mediation, the emphasis is on the parties' interests as opposed to parties' rights and as such, does not impact negatively on prior relationships between parties. Mediation, thus, empowers and fosters parties' relationships

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[17] Carden, D.M., *Confidentiality in Mediation*, a Presentation to the Arbitrators' and Mediators' Institute of New Zealand Inc., 2005 Annual Conference, Queenstown, 30 July 2005, pp. 10 -11.

[18] [1999] 2 All ER 691.

[19] Hoffmann LJ in *Forster v Friedland* [1992], Court of Appeal of England and Wales, (unreported).

[20] Brazil, W.D., "Protecting the Confidentiality of Settlement Negotiations," *Hastings Lj*, No. 39, 1987, pp. 955-1029 at 956; See also generally, Kendrick, N.K., "Confidentiality in Mediation: A Privilege "Work in Process"," (Kendrick Conflict Resolution, LLC, Henning Mediation and Arbitration Service, Inc.). Available at http://www.henningmediation.com/n/KK/cle_seminar.pdf [Accessed on 16/08/2017].

because the values of each party are addressed and their needs, interests, values and points of view recognized. It further fosters relationships in that parties try to attain an understanding of the underlying interests and concerns.[21]

3.2.7 Non-Binding Nature of Mediation

Mediation is first and foremost a non-binding procedure. 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 mediation. The continuation of the process depends on their continuing acceptance of it.[22] The non-binding nature of mediation means also that a decision cannot be imposed on the parties. In order for any settlement to be concluded, the parties must voluntarily agree to accept it. Further, for a mediation agreement to be enforceable parties, have to sign and approve it.[23] It is however important to point out that this may only be applicable to formal mediation processes as against informal types of mediation.

3.2.8 Non-Coerciveness

Mediation and negotiation are non-coercive mechanisms. This means that unlike litigation and arbitration, they are not enforceable legally. In them parties to the conflict voluntarily agree to enter into a process where they can create their own solutions that do not require enforcement by State agencies like the police or the army. It is the parties themselves who enforce the solutions freely.[24] As a consequence, the outcomes reached are generally acceptable, durable and long-standing. When such an outcome is reached, it is hard for the issues in the conflict to flare up again as all underlying issues will often have been addressed.

When a matter is taken to court for judicial settlement, neither of the parties have a choice about either the judges or the court. The court gives a judgment which is binding on both parties but a dissatisfied party can appeal the decision when it becomes final. The losing party may still be aggrieved, but has

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[21] Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation,* (CIArb, London, 2002), p.10.

[22]Sourced from available at http:// resources. Law info .com /en / Articles / mediation /Federal/ the-pros-and-cons-of-mediation.html, op. cit.

[23] Ibid.

[24] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 109-110; 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].

to live with that decision, face sanctions or be in contempt of court.[25] Courts are therefore not best placed to address the causes of a conflict and neither do they reach solutions that are enduring to both parties as they are merely settlement mechanisms.

In arbitration, the parties have some autonomy in choosing the forum and the judges but when an award is given one party will be aggrieved notwithstanding the fact that the parties agree at the outset to be bound by the decision of the arbitrator. The arbitral process thus ends up being coercive because the parties must obey its decisions hence reducing its effectiveness as a conflict management method.[26] The coercive methods such as litigation and arbitration are however useful where the question in dispute relates to rights rather than interests.[27]

3.2.9 Flexibility

Mediation is a very flexible process. It is an informal process that does not follow any procedure or structure. Since it is consensual and voluntary, the parties agree on virtually everything pertaining to the resolution of their conflicts. Flexibility is further enhanced by the autonomy exhibited by the parties over the process, the mediator and the outcome. This being the case, the parties can define and design the course that the process will take such that all arrangements as to when, how and where the process is to take place can be changed, if necessary. This is unlike in litigation where the parties must comply with strict and rigid rules of procedure before a judge whom they have no control over.

3.2.10 Cost-effectiveness

Compared to arbitration and litigation, mediation prides itself as an inexpensive process. This is due to the informality and speed of the process. In most cases, there are no filing fees to be paid upon lodging of documents in mediation.

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

[26] Ibid.

[27]See generally Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op cit.; Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, cit., pp. 109-114.

3.2.11 Informality

As already stated, mediation is a non-coercive and voluntary process undertaken by the parties out of their own free will. It is not guided by rules of procedure as happens in courts of law. It is an informal and *ad hoc* process. It does not have any direct legal basis or institutionalized authority as it relies on personal features and resources mediators have which include personal respect, wisdom, friendships, knowledge and skills in negotiating. It derives its flexibility and expeditiousness from this informal and *ad hoc* nature because the parties can agree on how they want their dispute resolved within convenient time schedules.

In the traditional African social set up, it was customary for disputants to just sit down informally and agree over certain issues such as access to water resources and allocation of other resources. There were no courts to refer disputes to. This is best illustrated by the *Kiama* or Council of Elders among the Kikuyu community which used to act both as an arbitral forum and as a mediator. The council of elders did not have formal forums and were thus accessible to the populace and their decisions were respected.[28] It is however important to point out that as already stated elsewhere, mediation in the political process is the one that is informal in nature and does not suffer from legal procedures.

3.3 Other Abstract Concepts that Inform Mediation in the Political Process

There are other concepts that inform mediation in the political process enabling it to achieve better results than the legal process. These include but are not limited to fairness, power, participant satisfaction, effectiveness and efficiency of the process. The success of mediation is thus gauged by reference to such abstract concepts.

3.3.1 Fairness

Fairness suggests an even-handed procedure and equitable outcome that is indicative of some conception of 'success.'[29] There are a number of concrete indicators of fairness in the political process of mediation that serve to assuage concerns regarding the threat of abstraction including: levels of process neutrality, parties control, equitability, consistency of results and consistency with accepted norms. Fairness is evidenced by the fact that parties have

[28]Interview with Ndungu Mwaura, an 82 year old Kikuyu elder on 16th August 2008, at Kahuhia, Murang'a District.

[29] Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit., p.291-294.

autonomy over the process and are thus convinced that the process will lead to equitable solutions that are acceptable to both of them.[30]

Neutrality is a concept central to the theory and practice of mediation as it functions to preserve a communication context in which grievances can be voiced, claims to justice made, and agreements mutually constructed.[31] Neutrality is often taken to include fairness and even-handedness by the mediator, although these characteristics are sometimes categorised as impartiality, where neutrality is used to describe a mediator's disinterest in the outcome of the conflict.

The argument is that there is a difficulty both in the theory and practice of mediation as there is a contradiction between even-handedness and fairness. This is because if the parties are treated in the same way, the power differences are not addressed, leading to a lack of fairness in the process and the outcome. What is needed is a redefinition of neutrality to ensure that what the mediator does is to ensure the parties control the process, the outcome of the process and that they act out of no coercion or pressure.[32]

3.3.2 Power

Closely connected to fairness is the question of power. Power has been defined as 'the capacity to influence the behaviour of others, their emotions, or the course of events.'[33] It may also be defined as the ability to get one's needs met and to further one's goals,' where in mediation, the concern is with the parties' ability to meet their needs and further their interests during the process and in any agreements reached as a result of the mediation.[34]

Power can broadly be categorised as either structural power or personal power, where structural power is seen in regard to the objective resources people bring to a conflict, the legal and political realities within which the conflict occurs, the formal authority they have, and the real choices that exist. Personal power is demonstrated in the individual characteristics, such as determination, knowledge, wits, courage and communication skills.[35]

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[30] Sheppard, B., *Third Party Conflict Intervention: A Procedural Framework*, *Research in organizational behaviour*,, Vol.6, 1984, pp.226-275, p.226

[31]Cobb, S. & Rifkin, J., "Practice and Paradox: Deconstructing Neutrality in Mediation," *Law & Social Inquiry*, Vol. 16, No. 1, (Blackwell Publishing, Winter, 1991), pp. 35-62.

[32] Baylis, C. Carroll, R., "Power Issues in Mediation," op.cit, p.135.

[33] Baylis, C. & Carroll, R., "Power issues in mediation," op cit., p. 1.

[34] Ibid, p.1.

[35] Ibid,p.1.

As already stated elsewhere, mediation is a continuation of negotiations and in order to reach an outcome, parties must negotiate with each other. As a result, the fairness of the outcome will be affected by the ability of the parties to negotiate effectively. If there is a significant power difference, the concern is that one party may dominate the mediation process and the outcome to the extent that the agreement reflects the needs and interests of one party only. This is the essence of a settlement which is power based.

Power can be used by either the parties or the mediator. One of the valid concerns in mediation is whether the mediator should impose pressure to settle on the participants, where mediators are likely to apply pressure on the weaker party, or push settlements that are not in the best interests of the participants in order to register a success in their record.[36]

It has been suggested that 'for mediators to be effective in any case where one party seeks to use power to determine the outcome, they must know how to manage the means of influence and power that the parties exercise and how to exert pressure themselves'.[37] Managing power relations and its exercise is important for the general the fairness of the outcome considering that the process generally relies on negotiation by the parties with the assistance of the mediator.

Studies conducted elsewhere have documented that in respect of procedural justice, used to refer to concepts of fairness in decision-making processes, the degree to which parties experience fairness in decision-making depends upon several factors: (a) whether they had an opportunity to express their feelings and explain their view of the situation; (b) whether they believe they were treated respectfully; (c) whether they believe that they were treated even-handedly; and (d) whether the decision-maker acted fairly.[38]

Furthermore, it has been observed that if parties believe that they have been treated fairly both in third party decision-making processes as well as in negotiation and mediation, they view the outcome of those processes as fair even if the outcome is not in their favour.[39]

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[36] Boulle, L. & Kelly, K.J., *Mediation: Principles, Process, Practice* (Canadian Edition), (Toronto, Butterworths, 1998, 356 pp.), 'Reviewed by Roxanne Porter,' *Dalhousie Journal of Legal Studies*, 2000, pp.360-364, p. 361.

[37] Baylis, C. & Carroll, R., "Power issues in mediation," op cit., p.1.

[38] Haley, J.N., 'Mediation and Access to Justice in Africa: Perspectives from Ghana,' op cit., p. 96.

[39] Haley, J.N., 'Mediation and Access to Justice in Africa: Perspectives from Ghana,' op cit., p. 97.

Since power can affect the legitimacy of the mediation process, the process must be able to deal with such a conflict. This problem is well addressed by the political process of mediation which allows the parties' to choose the process and hence arrive at an outcome that is acceptable to both and not based on coercion or pressure. [40]

3.3.3 Participant Satisfaction

Mediation in the political process proffers party satisfaction. Parties are more committed to the mediation process if they are satisfied with the process and the outcome. As indicated earlier, there are a number of measureable indicators of party satisfaction with the mediation process, both with regard to process [privacy and level of involvement] and the outcome [benefits and commitment]. An outcome that satisfies both parties is more likely to be stable, long-lasting, enduring and thus more successful.[41] Such an outcome is offered by mediation in the political process.

3.3.4 Effectiveness

Effectiveness is a measure of results achieved, change brought about, or behavioural transformation through mediation since mediation is a process of change. It changes the behaviour and attitudes of the parties, even in a violent situation. Therefore for mediation to be deemed successful, it must have some positive impact or effect on the conflict and the disputants. Positive impact means changes such as moving from violent to non-violent behaviour or even an agreement being entered into by the conflicting parties. Since mediation in the political process delves into the underlying causes of the conflict, it follows that a change must occur as a result of that process. The change observed in the political process is due to the effectiveness of that process, which arises when the negotiations transform from a dyadic to triadic structure. The mediator brings with him additional resources and expands relations through communication hence making the process more effective in resolving the conflict.[42]

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[40] Baylis, C. Carroll, R., "Power Issues in Mediation," op.cit, p.135.
[41] Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit., p.293-294.
[42] Ibid.

3.3.5 Efficiency

Efficiency is the other concept that informs the political process of mediation. Efficiency is primarily focused on the procedural and temporal or informal dimension of mediation in the political process. It addresses issues such as cost effectiveness, time, flexibility of the process and disruptiveness of the undertaking. Efficiency has been given the most weight. Fairness is not enough since a fair agreement may not be acceptable if it takes an inordinately long time to achieve or if it is too expensive.[43] Mediation in the political process is timely, speedy and cost effective and thus will impress the parties to the conflict. The above concepts provide the threshold for determining whether a mediation process is successful. True mediation is the one that has all the above attributes. Mediation in the political process is such a process. Since the above 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.[44] Since mediation in the political process depicts the true character of mediation, it is the one that should be adopted in Kenya to deal with a wide range of problems including resolving environmental conflicts.

3.4 Conclusion

This chapter has examined mediation and its attributes both as a settlement and a resolution mechanism. It has been observed that mediation in the political process leads to resolution since it has all the attributes of a true mediation. In the legal process, mediation leads to a settlement since all the attributes of mediation are not present. As already noted, settlement is superficial; addressing the issues of the conflict only, which may later flare up again when power balances change.

From the above discussion, it can be aptly said that in traditional African society the mechanisms were effective because they were socially responsive. Where mediation was practised, it was in the political perspective leading to a resolution. Such mediations had all the attributes as discussed above and were informed by concepts such as fairness, participant satisfaction, effectiveness, efficiency and power. What can be inferred from the foregoing is that negotiation, mediation and reconciliation have deep roots in traditional African

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[43] Susskind, L. & Cruikshank, J., "*Breaking the Impasse: Consensual Approaches to Resolving Public Disputes,*" [Basic Books, 1987].

[44] Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit., p.293-294.

communities' conflict resolution mechanisms as seen in chapter 2. They are not alien concepts. With particular reference to mediation in the African context, it was and has always remained to be an informal process. However, this is when it is practised in the political perspective. Informality of mediation makes it flexible, expeditious, speedier, able to foster relationships, ensure peaceful coexistence and 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.

In the next chapter the discussion centres around conflicts and disputes and the mechanisms that settle disputes on one side, and those that resolve conflicts on the other.

Chapter Four

Conflicts and Disputes

4.1 Introduction

This chapter discusses two major concepts in conflict management: conflicts and disputes. It also examines the difference between a conflict and dispute. It will show that a conflict is about needs and values shared by the parties whereas a dispute is about interests or issues. The discussion in this chapter will also show that disputes are merely settled hence the phrase dispute settlement whereas conflicts are resolved hence the phrase conflict resolution. It also contains a discussion on the mechanisms that bring about dispute settlement on one side and those that bring about conflict resolution on the other.

The writer contends that among Kenyan communities there were effective mechanisms that resolved conflicts and others that settled disputes. In particular reference to 'mediation' which has been practised by traditional African communities since time immemorial in the political perspective as discussed in Chapter Three, disputants could just sit informally and agree over certain issues affecting them such as resource allocation or voluntarily take the conflict to the council of elders which could then act as a 'mediator'. Where conflict resolution mechanisms such as negotiation and mediation could not effectively manage the conflict, resort could be had to settlement mechanisms which included the use of force, violence or threats, traditions, customs and beliefs as discussed in Chapter 2.

4.2 Conflicts

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.[1] They are infinite. Conflicts, therefore, arise out of the non-fulfillment of these non-negotiable needs or values of the conflicting parties in the society. Accordingly, if all needs are met, the result is

[1] 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-zero-sum which produces integrative and creative solutions and not a zero-sum solution.[2]

More often than not, 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.[3] 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.[4]

Since a conflict is about certain underlying values conflicts are normally resolved hence the phrase "*conflict resolution*". Resolution is the mutual construction of a relationship which is legitimate because the needs of each party are satisfied. It is the mutual construction of a conflict since conflict is dynamic, interactive and constantly 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 processes such as negotiation and mediation in the political process. It is for this reason that it has been said that conflict resolution delves into the roots or the underlying causes of the conflict and relationships, and is thus concerned with removing them altogether.[5] Due to their peculiar nature, conflicts are well addressed through resolution by the non-coercive, non-legal or non-adjudicatory mechanisms such as negotiation, mediation or problem-solving workshops. 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.[6]

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[2] 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.

[3] 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].

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

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

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

4.3 Disputes

Disputes develop when conflicts are not or cannot be effectively managed.[7] They are about interests or issues. Interests are negotiable, divisible and finite whereas needs are not. Because they are ontological they are not negotiable. They cannot be given away or divided. Needs are also infinite, that is, the more security I have the less you have. 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.[8]

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. It is needful to understand the origins or sources of a dispute since if it is not addressed properly, the chance for escalatory responses increases which 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. In such cases the responses employed must take into consideration the interests, rights and power imbalances in the wider context of the dispute. 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, this can be done through negotiations or mediation in the political process involving the whole community

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

[8] 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.

or even a number of communities and which aim at airing grievances and inequalities which are perceived by different groups in the area. Other intervention processes could aim at fostering the broken or damaged relationships in the community caused by the disputes or conflicts.[9]

Interests or issues are superficial and do not go to the core or root causes of the conflict. As such disputes can be settled hence the phraseology "*dispute settlement.*" Seminal scholars of conflict management have argued that a settlement is an agreement over the issue(s) of the conflict which often involves a compromise.[10] A settlement seeks to mollify the opposition without discovering or rectifying the underlying causes of a dispute[11]. Disputes are thus amenable using the adjudicatory or legal or coercive mechanisms such as courts and arbitration.

4.4 Methods of Conflict Management

There is a wide range of mechanisms for the avoidance of conflicts, resolution of conflicts, dispute settlement and conflict transformation. Since a dispute may arise when a conflict is not or cannot be managed, 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.[12] 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 involves complex underlying issues and relationships have been totally destroyed, dispute settlement processes may not be the appropriate mechanisms to resolve the conflict.

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,

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

[10] Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit., p. 152.

[11] Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, op.cit.

[12] Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation,* op.cit.

therefore lessening the possibility of appeal, future conflict or dishonoring of the agreement.[13]

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. [14]

As stated above, disputes are amenable to adjudicatory, coercive or legal methods for settlement while conflicts are amenable to non-legal, non-adjudicatory or non-coercive means. Article 33 of the Charter of the United Nations outlines the conflict management mechanisms in no unclear terms. It states 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."*[15]

Litigation or judicial settlement and arbitration are the main power- and rights-based processes. They are dispute settlement mechanisms. Dispute settlement mechanisms are coercive and the parties in the dispute have little or no autonomy. The coerciveness of a settlement is achieved through legal tools such as courts, police, and the army among others. For example in judicial settlement when a matter is taken to court neither of the parties have a choice

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[13] 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 04/06/2012].

[14] 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.

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

about either the judges or the court. The court gives a judgment which is binding on both parties but a dissatisfied party can appeal the decision when it becomes final. It has been argued that while this is the case the losing party may still be aggrieved, but has to live with that decision or face sanctions and be in contempt of court.[16] Courts are therefore not best placed to address the causes of a conflict and neither do they reach solutions that are enduring to both parties as they are merely settlement mechanisms.

In arbitration the parties have some autonomy in choosing the forum and the arbitrator but when an award is given one party will be aggrieved notwithstanding the fact that the parties agree at the outset to be bound by the decision of the arbitrator. It thus ends up being coercive because the parties must obey the decision hence reducing its effectiveness as a conflict management method.[17]

The coercive methods such as litigation and arbitration are however useful where the question is one about disputes which are about interests rather than values.[18] Where it is a conflict which is about values, these methods are unsatisfactory as they do not address its root causes and leaves one party dissatisfied and the conflict may re-emerge in future.[19]

Conflict resolution mechanisms are negotiation, mediation and problem solving facilitation. These mechanisms are non-coercive in that the parties have autonomy about the forum, the process, the third parties involved and the outcome. These non-coercive methods allow parties to work through their conflict, address its underlying causes, and reach a resolution to that conflict. Resolution means that the conflict has been dealt with and cannot re-emerge later.[20]

The most effective method for conflict management is mediation in the political process which is non-directive, does not affect the autonomy of the parties and leads to enduring outcomes. Most traditional conflict management mechanisms as discussed in chapter 2 are resolution mechanisms. They involved

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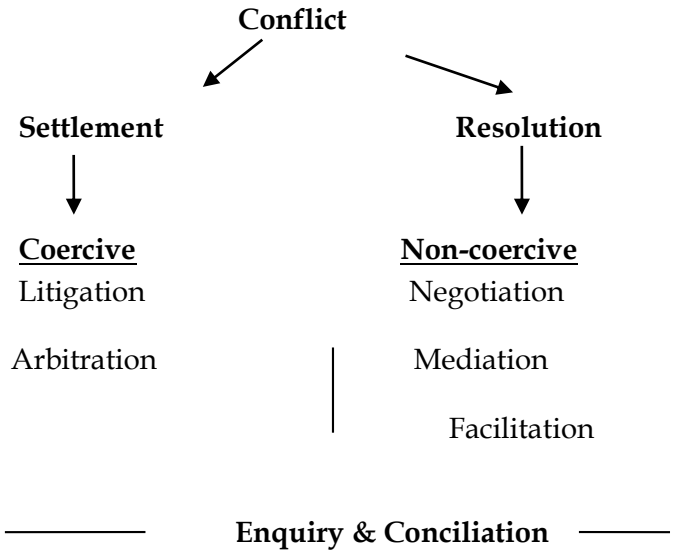
[16] Mwagiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, op.cit, pp.36-38.
[17] Ibid.
[18] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, op. cit. pp. 109-114.
[19] Cloke, K., "The Culture of Mediation: Settlement vs. Resolution,"*The Conflict Resolution Information Source*, Version IV, December 2005.
[20] Ibid.

lots of negotiations and other peace-bringing practices that, to a larger extent, led to prevention or avoidance of conflicts, brought peaceful co-existence and where there were conflicts fostered the damaged relations.

Fig.2.0 Methods of Conflict Management



***Source: The author.**

Figure 2.0 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.

4.5 Conclusion

Effective conflict resolution and dispute settlement requires a profound understanding of the two concepts: conflict and dispute. This is because, at different levels of the conflict, there are particular processes that are the most amenable. So far, the discussion has revealed that traditional conflict resolution

mechanisms were alive to conflict transformation. This is so because they were effective in resolving conflicts. Negotiation, mediation and reconciliation were the most effective conflict resolution mechanism in traditional African communities, even though not referred to as such. In particular reference to mediation, it was practised in the political perspective as discussed in chapter Three, where the disputants could just sit informally and agree over certain issues affecting them such as resource allocation. They could also voluntarily resort to a 'mediator' such as the *kiama* or council of elders among the kikuyu for resolution of their conflicts.[21] Where the conflict could not be effectively managed there were mechanisms that settled the resulting disputes. Settlement mechanisms included the use of force, violence or threats could be used through traditions, customs and beliefs as seen in chapter 2.

[21] Interview with Ndungu Mwaura, an 82 year old Kikuyu elder on 16th August 2008, at Kahuhia, Murang'a District.

Chapter Five

Mediation in the Legal and Political Process

5.1 Introduction

It has already been mentioned in the previous chapters that mediation has both a legal and political façade. The discussion in Chapter Two has put the discussion in the proper context by firmly positing that mediation has and continues to be used by Kenyan communities in resolving conflicts. In this chapter, it is reiterated that 'mediation' was a common mechanism used by Kenyan communities in resolving their conflicts for centuries only that it was not known as mediation as it is known today. Negotiation and mediation were customary and an everyday affair in traditional African societies, such as, when people could just sit down informally during marriage negotiations or resource allocation and agree on certain issues. All this forms a vital background to this chapter as it reaffirms the view that the 'mediation' that was practised by Kenyan communities and which should be adopted today, is mediation in the political process.

This chapter thus begins with a short background to give the reader a general overview and understanding of the key elements that must be present in a mediation situation, which reveals that mediation is generally an informal process. An in-depth examination of the two perspectives is then undertaken, the preponderant argument being that in the political façade mediation depicts all the attributes of mediation, thus being the most amenable mechanism in conflict resolution. In the legal perspective, mediation depicts only a few attributes of mediation thus being amenable only as a dispute settlement mechanism.

5.2 Understanding Mediation

Mediation is essentially an informal process. However, 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.[1]

In the mediation paradigm, the mediation system consists of the mediator, the two negotiators, and the relationships among them. In this paradigm, the mediation environment is wider and includes other actors such as

[1] Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, Vol.7, pp.290-29, at p. 289.

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. 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.[2] This means that no party, whether as a mediator or any third party, engages in a conflict management process for purely altruistic reasons but that they expect certain gains from acting as third parties whether as an individual, an institution, official or non-official although the motives may vary from one actor to another.[3]

In essence, mediation is generally an informal, strictly confidential and consensual conflict resolution mechanism in which, a third party with no decision-making authority, attempts to bring the conflicting parties to end their conflict by agreement.[4] 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. The mediator, thus, takes care of the details of the mediation process, brings the parties together and irons out elements that stand in the way of resolution through such methods as joint meetings, private plenary meetings and/or sub-group meetings.[5] 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 help them reach an outcome that addresses the aggregate of their interests in the conflict.[6]

While contrasts between mediation and adjudication generally stress the relative informality of the mediation process, comparisons with dyadic modes

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[2] Wall, Jr, J.A., "An Analysis, Review, and Proposed Research," *The Journal of Conflict Resolution,* Vol. 25, No.25 [March., 1981], pp.157-160.

[3]Mwagiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, Nairobi, 2008), pp.43-44.

[4] Mironi, M., "From Mediation to Settlement and from Settlement to Final Offer Arbitration: an Analysis of Transnational Business Dispute Mediation", *Arbitration*, Vol. 73, No.1, 2007, p. 52, at p. 53.

[5] Pollack, C., "The Role of the Mediation Advocate: a User's Guide to Mediation", *Arbitration*, Vol. 73, No.1, 2007, p. 20, at pp. 20-23.

[6] Ibid.

stress the potential retention of control by the mediator.[7] Mediation attempts to remove the parties' adversarial posturing replacing it with a harmonious relationship.[8] This transformation may take place by an explicit agreement, a reciprocal acceptance of the "social norms" relevant to the parties' relationship, or by a mutual recognition of a new or more perceptive understanding of one another's problems.[9] It may be conducted by one or more persons and may be nonpartisan, bipartite, or tripartite. In discussing the mediation paradigm, Wall, Stark and Standifer[10] say that:

> *"The origin of mediation is the interaction between two or more parties who may be disputants, negotiators, or interacting parties whose relationship could be improved by the mediator's intervention under various circumstances (determinants of mediation), the parties/disputants decide to seek the assistance of the third party, and this party decides whether to mediate. As the mediation gets under way, the third party selects from a number of available approaches and is influenced by various factors (labelled determinants of approaches), such as environment, mediator's training, disputants' characteristics and nature of their conflict."*[11]

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.[12] The voluntary nature of mediation refers to the fact that parties to the mediation cooperate in the process voluntarily. This distinction is important given that participation in mediation is not universally a matter of choice. 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. However,

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[7] Pollack, C., "The Role of the Mediation Advocate: a User's Guide to Mediation", op.cit. , at pp. 20-23.

[8]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.

[9] Fuller, L., "Mediation-Its Forms and Functions", *Southern California Law Review*, Vol.44, (1971), p. 305, at p. 308.

[10]Wall, Jr., J.A., et al, "Mediation: A Current Review and Theory Development," *Journal of Conflict Resolution*, Vol. 45, No. 3, June 2001, pp. 370-391.

[11] Ibid, p. 371.

[12] Murray, J.S., et al, *Processes of Dispute Resolution: The Role of Lawyers,* op. cit., p. 47.

as it has been pointed out, 'there is a difference between coercion into mediation and coercion in mediation.'[13] 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.[14]

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.[15] Success in mediation can therefore be attributed to both the process and the outcome of the mediation.[16]

There is an argument that mediation is merely a stage in the conclusion of an agreement between the parties to resolve their conflict. As such, the argument goes, mediation is 'solely governed by the law of contract'; [17] the relationship between the parties and the third party and the result of the mediation is contractual. Contractual freedom is seen as the basis of all mediation and mediation is not 'an alternative adjudication, but an alternative to adjudication.'[18] Mediation applies to different fields, with some common peculiar elements and some differences for each of its specialties.

5.3 Perspectives of Mediation

Mediation depicts a political and legal facade: the legal and the political perspectives. This dichotomy is based on various variables. It is a typology founded on the differentiation between a dispute and a conflict. [19] 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

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[13]Sanders, F., "The Future of ADR", *Journal of Dispute Resolution,* Vol.1, 2000, p.3, at p. 7-8.

[14]Tarrazon, M., "The Pursuit of Harmony: the Art of Mediating, the Art of Singing", op cit., at pp. 50-51.

[15]Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit, pp.291-292.

[16] Sheppard, B., "Third party conflict intervention: A procedural framework," *Research in organizational behaviour,* Vol. 6, 1984, pp.226-275, at p. 226.

[17] Timsit, J., "Mediation: an Alternative to Judgment, not an Alternative Judgment," *Arbitration: the Journal of the Chartered Institute of Arbitrators* Vol.69, No. 3, 2003, pp.159-171, at p. 161.

[18] Ibid.

[19] Burton, J., *Conflict: Resolution and Prevention*, (London: Macmillan, 1990), pp. 2-12.

dispute settlement. On their part, conflicts refer to issues about values which are non-negotiable and hence the phrase conflict resolution.[20]

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.[21] 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.[22]

5.4 Mediation in the Political Process

Mediation in the political process is informed by resolution.[23] 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 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.[24]

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

[20] See chapter 4 of this book for a further discussion on the difference between a dispute and conflict.

[21]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.

[22] Ibid.

[23] See Chapter 4 on Resolution and Settlement.

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

party only is willing to submit to mediation, then the chances of resolving that conflict are slim.[25]

There is a resolution of a conflict when the root causes of a conflict are addressed, thus negating the threat of further conflict generating behaviour. 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.[26]

The attributes of mediation in the political process[27] are that: there is autonomy in the choice of the mediator, the outcome is enduring, it is flexible, it is speedy, non-coercive, mutually satisfying, it fosters relationships, its cost effective, addresses the root causes of the conflict, parties have autonomy about the forum and rejects power based out-comes.[28] These attributes are the ones that make mediation in the political process to lead to a resolution as opposed to a settlement. (See Figure 1.0 in Chapter 3.)

5.5 Concepts of Mediation in the Political Process

As the above discussion reveals, mediation in the political process leads to resolution because it has more attributes of mediation. Consequently, mediation in the political process may be considered as 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.

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.[29] The other abstract concepts discussed earlier, also inform the political process enabling it to achieve better results than the legal process. These include participant satisfaction, power, effectiveness and efficiency of the process. The success of mediation is thus gauged by reference to such abstract concepts.

These concepts provide the threshold for determining whether a mediation process is successful or not. True mediation is the one that has all the

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[25]Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria," *Cardozo Journal of Conflict Resolution*, op.cit. p.300.
[26] Ibid, pp.295-296.
[27] See Fig. 1.0.
[28] Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit., p. 152-154.
[29] Baylis, C. & Carroll, R., "Power Issues in Mediation", *ADR Bulletin,* Vol.7, No.8 [2005], Art.1, p.135.

above attributes and incorporates the aforesaid concepts in its process. Mediation in the political process is such a process. Since the above 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.[30] Since mediation in the political process depicts the true character of mediation, it is the one that should be adopted in Kenya in resolving a wide range of conflicts including environmental conflicts.

5.6 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.

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.[31] As a legal process, mediation is linked to judicial settlement and arbitration and thus leads to a settlement. Court annexed mediation is arguably not really mediation.

The voluntariness and the autonomy over the process and the outcome are not present in the legal process because it is mediation pursuant to an order of the court, where the settlement has to be returned back to court for ratification.[32] 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.[33]

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

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[30]Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria," *Cardozo Journal of Conflict Resolution*, op.cit.p.293-294.

[31]Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland," op. cit., p. 152.

[32] See Figure 2.0 in Chapter Ten.

[33] North, J., Court Annexed Mediation in Australia – An Overview, Law Council of Australia, 17th November, 2005, available at, www.lawcouncil.asn.au, [Accessed on 7/7/2012].

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.[34]

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 as it lacks the attributes of mediation which are: voluntariness, autonomy over the forum, choice of the mediator, over the process and the outcome. It only leads to a settlement as opposed to a resolution. It is not true mediation but a legal process. (See Figure 1.0 in Chapter 3.)

5.7 Commonalities between the Political and Legal Processes of Mediation

Certain attributes of mediation are common to both the legal process and the political process of mediation. The attributes of mediation that ran across the board are: the presence of a third party (imposed or chosen), flexibility, confidentiality, 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.

There are certain attributes of mediation that are peculiar to the political process. These are, cost effectiveness, informality, focus on interests and not rights, allowing for creative solutions, allowing for personal empowerment, enhancing party control, addressing the root cause of the conflict, non-coerciveness and the fact that the outcome is enduring. The summary of the commonalities and differences between the two processes of mediation are captured in Figure 1.0 in Chapter 3.

It is evident from Figure 1.0 that mediation in the political process has more attributes of mediation and it is arguable then that, that is why it will lead to resolution of conflicts. The attributes of mediation in the political process such as voluntariness, informality, autonomy over the choice of the mediator, over the process and outcome are evident and as such the political process of mediation will lead to resolution as opposed to a settlement.

[34] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 119.

5.8 Conclusion

It is not in doubt that mediation in the political process is the true form of mediation that leads to resolution of conflicts. Mediation in this perspective is what has existed in Kenya and Africa in general, since time immemorial. This, as has been earlier stated, is possible because in the political process, there are more attributes of mediation. It is also guided by the aforementioned concepts such as fairness, party satisfaction, efficiency, effectiveness and power which ensure that mediation in the political process leads to resolution.

Similarly and as reiterated in Chapter 2 of this book, traditional conflict management mechanisms and institutions thereof were and are mostly engaged with the sole aim of resolving rather than settling. They are flexible, informal, consensual, expeditious and the outcomes are acceptable to the parties and long-lasting. Relationships are fostered through kinship ties which also minimised the likelihood of conflicts arising.

Moreover, and as discussed in chapter 2 traditional conflict management methods and institutions have and continue to be informed by the abstract concepts discussed above since they are effective, efficient, fair, ensure party satisfaction, foster relationships and address the issue of power in conflicts. This being the case there should be a paradigm shift in the legal and policy framework in this country to move towards creating the necessary environment for mediation in the political process and negotiation so as to resolve conflicts.

Chapter Six

Resolution and Settlement

6.1 Introduction

This chapter looks at resolution and settlement as key concepts informing mediation in the political and legal processes respectively. Not all conflict management mechanisms can lead to a resolution. Some are settlement mechanisms. The discussion in this chapter will also show why negotiation, mediation and problem-solving workshops lead to a resolution and not a settlement. An examination of the coercive mechanisms that lead to settlement will also be made.

Both negotiation and mediation have been practised by Kenyan communities since antiquity in managing conflicts albeit informally. Where these mechanisms were employed, they resolved rather than settled conflicts (*See discussion in Chapter Two*). The mediation practised by traditional African communities was an informal, flexible, voluntary and expeditious process that fostered relationships and peaceful coexistence. (*See discussion in Chapter Five*).

Conflict resolution and peacemaking was an everyday affair, which saw, for example, conflicting parties sitting down together and agreeing over the issues affecting them. Inter-community conflicts were also addressed through mediation and negotiation in these informal discussions which would be facilitated by the council of elders as 'mediators' or 'arbitrators'.[1]

6.2 Dispute Settlement

It has been argued that the intellectual and philosophical underpinning of settlement is power which is possessed by the parties to the conflict. In a conflict, then 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. Since a settlement is power-based and power relations keep changing, the process becomes a contest of whose power will be dominant. Power therefore defines both the process and the outcome in a settlement.[2]

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[1] Interview with Ndungu Mwaura, an 82 year old Kikuyu elder on 16th August 2008, at Kahuhia, Murang'a District.

[2]Baylis, C. &Carroll, R., "Power Issues in Mediation", *ADR Bulletin,* Vol.7, No.8 [2005], Art.1, p.135.

A settlement is an agreement over the issue(s) of the conflict which often involves a compromise.[3] A settlement process, "seeks to mollify the opposition without discovering or rectifying the underlying causes of the dispute". A settlement is power based and it is power that informs the results of mediation in the legal context and as such a settlement overlooks the causes of the dispute leading to a "sullen acceptance"[4]. Due to its superficial nature, settlement is only reached over the issues of the conflict. As such a settlement may be an effective immediate solution to a violent situation and it will therefore not address the factors that instigated conflict in the first place.

A settlement is temporal and does not eliminate the underlying causes of the inter-disputant relationship, which can later flare up when new issues or renewed dissatisfaction over old issues or the third party's guarantee runs out.[5] 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.[6]

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.[7] Mediation in the legal process is such a mechanism.

6.3 Dispute Settlement Mechanisms

The main dispute settlement mechanisms are Litigation or judicial settlement and arbitration. Dispute settlement mechanisms are coercive in that

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[3]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.

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

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

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

[7] 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. 6-8.

the parties in the dispute have little or no autonomy. The coerciveness of a settlement is achieved through legal tools such as courts, police and the army.[8]

i. Litigation

The judicial authority in Kenya is exercised by the courts and tribunals.[9] 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.[10]

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. For example, in judicial settlement, when a matter is taken to court neither of the parties have a choice about either the judges or the court. The court gives a judgment which is binding on both parties but a dissatisfied party can appeal the decision when it becomes final.

It has been argued that while this is the case, the losing party may still be aggrieved, but has to live with that decision, face sanctions or be in contempt of court.[11] Courts are, therefore, not best placed to address the causes of a conflict and neither do they reach solutions that are enduring to both parties as they are merely settlement mechanisms.

ii. Arbitration

This is the other settlement mechanism. In Kenya, it 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

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[8] Mwagiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, Nairobi, 2008), pp.36-38.
[9] See Article 159 of the Constitution of Kenya, (*Government Printer,* Nairobi, 2010).
[10]See generally, Dispute Resolution Guidance at http://www.ogc.gov.uk/documents/dispute resolution.pdf, [Accessed on 05/01/2012].
[11]Mwagiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, op. cit, pp.36-38.

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[12], 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-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 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.

In arbitration, the parties have some autonomy in choosing the forum and the judges but when an award is given one party will be aggrieved notwithstanding the fact that the parties agree at the outset to be bound by the decision of the arbitrator. It thus ends up being coercive because the parties must obey it hence reducing its effectiveness as a conflict management method.[13]

The coercive methods such as litigation and arbitration are however useful where the question is one about disputes which are about interests rather than interests.[14] Where it is a conflict which is about values, these methods are

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

[13] Ibid.

[14]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]; Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 109-114.

unsatisfactory as they do not address their root causes and leaves one party dissatisfied and the conflict may re-emerge in future.[15]

6.4 Conflict Resolution

Resolution of conflicts informs mediation in the political process. 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.[16]

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.[17] The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based out-comes.[18] The outcome of conflict resolution is enduring because a resolution is not zero-sum. The gain by one party does not entail a corresponding loss for the other party because each party's needs are fulfilled. These needs cannot be bargained or fulfilled through coercion and power. 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.[19]

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.[20] Cloke observes that a resolution of conflicts brings about a deeper level of understanding and empowerment through honest communication about the causes of the dispute and allows the parties to decide how and whether to end the conflict between them.[21] It has been hypothesized that whereas dispute

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

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

[17] Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", op. cit.

[18] Ibid.

[19] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, op. cit., p. 42; See generally, Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit., p. 153.

[20] Cloke, K., "The Culture of Mediation: Settlement vs. Resolution" in, Guy Burgess and Heidi Burgess *(eds.), "Beyond Intractability", Conflict Research Consortium*, (University of Colorado, Boulder, 2005), p. 1; Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, op. cit., p. 42.

[21] Ibid.

settlement is enforced, for example by courts, and does not delve into the underlying causes of the conflict, conflict resolution delves into the underlying causes of the conflict and removes them altogether.[22]

Within conflict management literature, resolution is often presented as being inherently superior to settlement as it deals with the root causes of the conflict and negates the need for future conflict or conflict management. Resolution has thus been contrasted with settlement in that the latter is a potentially damaging half-measure which leaves the causes of the conflict unaddressed and hence the possibility of the conflict later flaring up while a resolution addresses the root causes of the conflict.[23] The mechanisms that resolve conflicts are negotiation, mediation and problem solving workshops.

6.5 Conflict Resolution Mechanisms

The foregoing discussion shows that in resolution the conflict is dealt with altogether and it cannot re-emerge in future, for instance if the power balance changes. The mechanisms that resolve conflicts as indicated are negotiation, mediation and problem solving facilitation.

6.5.1 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. Negotiation is thus voluntary. It allows party autonomy in the process and over the outcome. It is non-coercive thus allowing parties room to come up with creative solutions. 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.[24]

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

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[22]Burton, J. & Dukes, F., *Conflict: Practices in Management, Settlement and Resolution* (London: Macmillan, 1990), pp.3-4.

[23]Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit., p.296.

[24] 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.

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.

6.5.2 Mediation in the Political Process

In Chapter One, it was seen that mediation arises where efforts by the parties themselves to negotiate are not taking off or where they have started but the parties have reached a deadlock. It has also been emphasized in the previous chapters that mediation depicts a legal and a political façade. It is in the political perspective that mediation can be used as a resolution mechanism.

This is so because mediation in the political process depicts more attributes of mediation as seen in chapter 3 such as being a voluntary process, allowing the parties autonomy over the process and outcome, being expeditious, flexible, cost-effective, fostering relationships and allowing for creative solutions. Due to these attributes of mediation in the political process the causes of the conflict are delved into and they are addressed such that it cannot arise in future. The perceptions, relationships, emotions and attitudes of the parties are effectively addressed. In this way the outcome is both acceptable to the parties and also enduring. It is for these reasons therefore that mediation and more so mediation in the political process is said to lead to resolution as opposed to a settlement.

6.5.3 Problem-solving workshop

In problem-solving, the focus is to create and maintain an environment where the parties can analyze their situations and create solutions for themselves. It tries to understand the root causes of the conflict. When the parties have understood the causes of the conflict they can then ultimately resolve the conflict. It is a more analytical mode of managing conflicts and that is why it resolves because the nature and sources of particular conflicts will have been known.[25]

Conflict resolution mechanisms are non-coercive in that the parties have autonomy about the forum, the process, the third parties involved and the outcome. They allow parties to work through their conflict, address its

[25]Light, M., "Problem-Solving Workshops: The Role of Scholarship in Conflict Resolution," in Banks, M. (ed), *Conflict in World Society*: A New Perspective on International Relations (Brighton: Wheatsheaf Books, 1984), pp. 146-160; See also 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. 4-8.

underlying causes, and reach a resolution to that conflict. This is because resolution means that the conflict has been dealt with and cannot re-emerge later.[26]

Negotiation, mediation and problem-solving workshops are the most effective mechanisms in resolving conflicts. Some of these mechanisms such as negotiation and mediation have been practiced by Kenyan communities since antiquity in managing conflicts albeit informally. Their inclusion in the constitution is thus a restatement of traditional African community's conflict management mechanisms and hence timely.[27] Article 159 of the constitution provides that traditional conflict resolution mechanisms as discussed in chapter 2 shall be promoted by the courts and tribunals albeit subject to clause 3 thereof. Clause 3 states that traditional conflict 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 repugnant to justice or morality; or is inconsistent with the constitution or any written law.

Effective application of traditional conflict resolution mechanisms in Kenya, especially mediation in the political process, will enhance access to justice, ensure peaceful coexistence and foster relationships among people rather than destroy them as does the courts.

6.5.4 Conclusion

It is 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 mutually exclusively but instead there should be synergetic application of the above approaches. Conflict management processes are not mutually exclusive and one can lead to another.[28] Each of the approaches has their success story where they have been effectively applied to achieve the desired outcome.

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[26] Ibid.

[27] See generally Articles 159 and 189 (4) of the Constitution of Kenya, op. cit.

[28] 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).

Chapter Seven

The Mediation Process

7.1 Introduction

This chapter 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 chapter the writer discusses the mediation process as a three phase process.

This chapter 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 chapter 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 becomes one of the parties to the conflict pursuing his own interests just as the other parties to the conflict.[2]

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[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).

[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.

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 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 book, mediation will 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 or political perspective.[4]

7.2 The Negotiation Process

7.2.1 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 thus 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?[5]

The preparation/preliminary stage/ the 'pre-negotiation phase' begins when the parties in conflict consider that their dispute can be resolved by negotiation and as such communicates 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."

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[3] See generally Chapter Two on '*Traditional Conflict Resolution Mechanisms and Institutions*'.
[4]See Amendments to the Civil Procedure Act (Cap. 21) Laws of Kenya, which applies mediation as a court or legal process; 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]Craver, C.B., "The Negotiation Process", available at www.negotiatormagazine.com, [Accessed on 20/06/2012]; See also Fischer, R., & Ury, W., *Getting to Yes: Negotiating Agreement Without Giving In,* (Penguin Books, New York, 1981), pp. 13-20.

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.[6]

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.[7]

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 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.[8] 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

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[6] 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.

[7] Sourced fromwww.negotiations.com, [Accessed on 18/06/2012]; See also Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, op.cit, pp.113-115.

[8] 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.

temporarily. Pre-negotiation can take place even if there is no intention to move on to full negotiations.[9]

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.[10]

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.[11]

7.2.2. 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 advance proposals and counter-proposals, back and forth, until some manner of tentative agreement is reached.[12]

7.2.3 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

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[9]Available at www.cibera.de, [Accessed on 18/06/2012].

[10] Ibid.

[11] Kenyatta, J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, A Division of Random House, New York), pp. 179-221.

[12] 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 20/06/2012]; See also www.negotiations.com, [Accessed on 18/06/2012].

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.[13]

7.3 The Mediation Process

In this section, the process of mediation is examined. 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 will look at what tasks are done in the various stages that is in the pre-negotiation, negotiation and post-negotiation stages in mediation.

7.3.1 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.[14]

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.[15] It has also been suggested that since in mediation the dispute resolution practitioner determines the phases of the process to be conducted, the process

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[13] 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.

[14] 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 18/06/2012]; See also www.negotiations.com, [Accessed on 18/06/2012].

[15] 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 19/09/2017].

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.[16]

Apart from court annexed/mandated mediation, 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.[17]

7.3.2 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 in the political process.[18]

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[19], reflecting, summarizing

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[16] 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.

[17] ICC Commission on Arbitration and ADR, *Mediation Guidance Notes,* ICC Publication 870-1 ENG, (International Chamber of Commerce, France, 2015), p.6.

[18]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.

[19] 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.

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[20].

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'.[21]

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.[22]
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.[23]

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[20] 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.
[21] 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 20/09/2017].
[22] Carbone, M.P., 'Mediation Strategies: A Lawyer's Guide to Successful Negotiation.' Available at
http://www.mediate.com/articles/carbone7.cfm#comments [Accessed on 20/09/2017]; 'Module 4: Issues In Mediation,' available at
http://www.ama.asn.au/wp-content/uploads/2012/07/MODULE-4.pdf [Accessed on 20/09/2017].
[23] 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 21/09/2017]; See also generally, Macmillan, R., *A Practical Guide for Mediators*, (Macmillan Keck Attorneys & Solicitors, Geneva). Available at

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.

7.3.3. 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 as reiterated in the previous chapters, mediation is a mechanism geared towards fostering relationships rather than creating tensions.[24]

7.3.4 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 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.[25]

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http://www.macmillankeck.pro/media/pdf/A%20Practical%20Guide%20for%20Mediators.pdf [Accessed on 19/09/2017].

[24] 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 20/06/2012].

[25] 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

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.[26]

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:[27]

a. First, there needs to be 'an impartial third party facilitator' who helps the parties explore the alternatives and find a satisfactory resolution;
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.

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[26] 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.

[27] 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.

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.'[28]

7.4 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.[29]

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.[30]

The lawyer may also participate in selecting a mediator or providing clients with a list of reputable mediators.[31] 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.[32]

It has also rightly been pointed out that the wise lawyer takes care to understand the scope of the protection the law affords to statements made and acts done in connection with settlement negotiations.[33]

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[28] 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.

[29] 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.

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Brazil, W.D., "Protecting the Confidentiality of Settlement Negotiations," *Hastings Lj*, No. 39, 1987, pp. 955-1029 at 955.

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.

7.5 Conclusion

This chapter has discussed the mediation process as a continuation of the negotiation process. It should be noted that this chapter has examined mediation in the political process, where it is an informal, flexible, voluntary and expeditious process unlike in the legal process where it is bedeviled by the problems associated with the coercive mechanisms. This is the sense in which mediation was practiced by Kenyan communities before the advent of formal legal mechanisms. All the attributes of mediation in the political process are exhibited in mediation in the political process.

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 as seen in chapter 2 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. [34] The next chapter examines the mediation paradigm which connotes a wider environment in conflict management.

[34] Wall, Jr, J.A., "An Analysis, Review, and Proposed Research", *The Journal of Conflict Resolution,* Vol. 25, No.25 [March., 1981], pp.157-160.

Chapter Eight

The Mediation Paradigm

8.1 Introduction

In this chapter, the author discusses elements that must be present in a mediation situation: the parties in conflict, a mediator, process of mediation and the wider context of the mediation process and its outcomes. The negotiator's constituents, mediator's constituents, third parties who affect or are affected by the process and outcome of the mediation will also be examined. Societal norms, economic pressures and other institutional constraints affecting the mediation process and its outcomes directly or indirectly will be discussed. The author also explores the role of a mediator and the parties in the mediation process.

8.2 Background

The purpose of this chapter is to elucidate on the conflict management phenomenon, that is, the conflict and the actors involved in its management. 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 is referred to as the mediation paradigm.[1] [See Fig. 3.0 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.[2]

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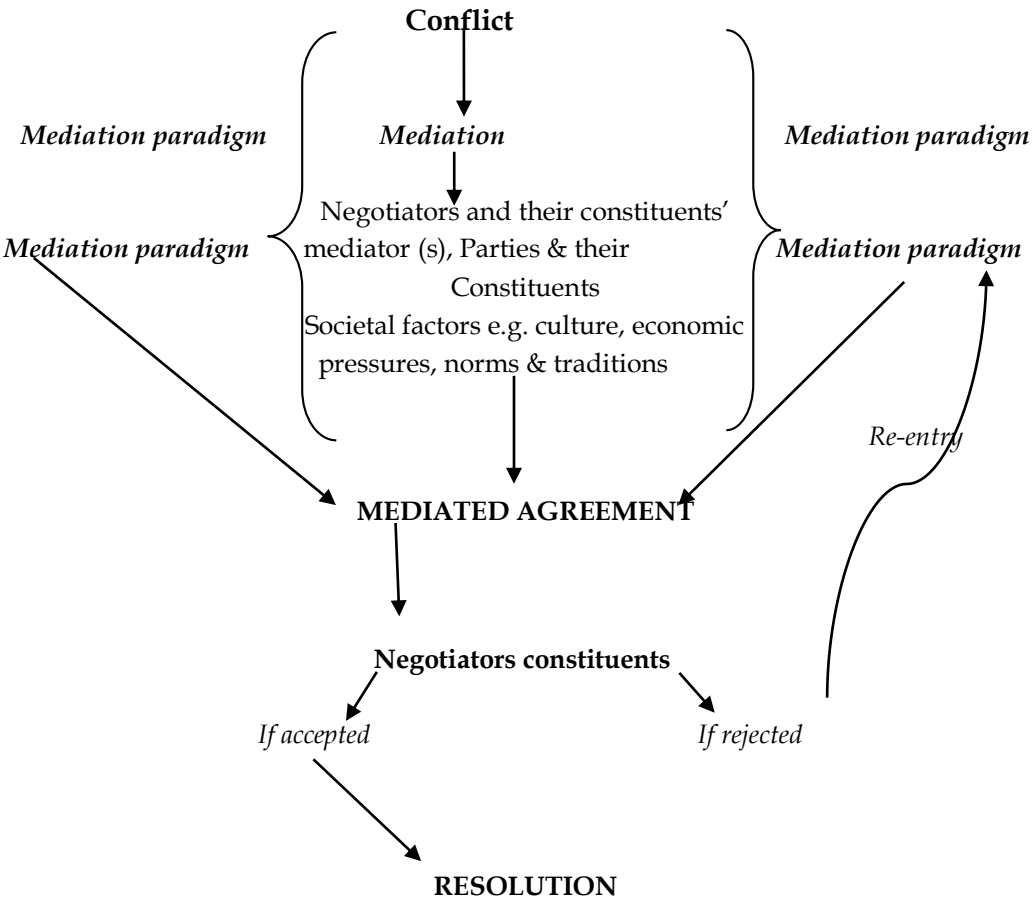
[1] Wall, Jr, J.A., "An Analysis, Review, and Proposed Research", *The Journal of Conflict Resolution,* Vol. 25, No.25 [March., 1981], pp.157-180.

[2] 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.

Fig.3.0 Mediation Paradigm



***Source: The author.**

Fig. 3.0 illustrates the mediation paradigm with some of the main actors, that is, the conflict, negotiators and their constituents, the mediators, third parties and their 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.

As the discussion in chapter 2 reveals, mediation largely depends on the societal context within which a conflict occurs. That is the nature of the disagreement, the parties' perceptions of it, and the level and type of their conflict behavior. 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. Conflict management was thus heavily embedded in the way of life of most Kenyan communities.

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. 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.

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.[3]

8.3 Role of Mediators and their Constituents

A mediator is a third party with no decision-making authority attempts to bring the conflicting parties to end their conflict by agreement.[4] 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. The mediator, thus, takes care of the details of the mediation process, brings the parties together and irons out elements that stand in the way of

[3]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 02/06/2012]; See generally Report by Mohamud, A, et al (eds), *Conflict Management in Kenya: Towards Policy and Strategy Formulation* (Practical Action, Nairobi, 2006).

[4] Mironi, M., "From Mediation to Settlement and from Settlement to Final Offer Arbitration: an Analysis of Transnational Business Dispute Mediation", *Arbitration*, Vol. 73, No.1, 2007, p.52, at p. 53.

resolution through such methods as joint meetings, private plenary meetings and/or sub-group meetings.[5]

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]

There are also arguments that have been put forth suggesting that even mediators do have some interests in the conflict management set up. It is argued that one cannot act as a mediator for altruistic reasons but that they expect some benefits from so acting.[7] This issue is particularly vital in international mediations where great powers that typically are involved in more mediation attempts than smaller states usually have more numerous vested interests, relating to a wider range of issues, over wider geographical areas, than smaller and weaker states; hence their intervention in mediating many conflicts.[8]

8.4 Societal Norms, Traditions and Customs

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. The explanation for this, as seen in Chapter 2 of this book is that conflict resolution was an everyday affair and since disputants repeatedly observed disagreements being handled by third parties (such as the council of elders),they knew that their society had sanctioned the use of the third party approaches in managing conflicts.

In discussing the role of societal factors on the mediation process, it has been argued that it is due to the Easterners desire for harmony enhancement that

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[5] Pollack, C., "The Role of the Mediation Advocate: a User's Guide to Mediation", *Arbitration,* Vol. 73, No.1, 2007, p.20, at p 20-23.

[6] Ibid.

[7] See Mwagiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, op.cit, pp.43-54; Vayrynen, R., "To settle or to transform? Perspectives on the Resolution of National and International Conflicts," in Vayrynen, R. (ed), *New Directions in Conflict Theory: Conflict Resolution and Conflict Transformation* (London: Sage Publications, 1991) pp.1-25; Druckman, D., & Christopher, M., (eds.), 'Flexibility in International Negotiation and Mediation', *The Annals of the American Academy of Political and Social Science*, (1995), p. 542.

[8] Touval, S., "Mediation and Foreign Policy," *International Studies Review*, Vol. 5, No. 4, Dissolving Boundaries (Dec., 2003), pp. 91-95.

they have a higher preference for mediation and how they mediate. They (the Eastern mediators) make heavy use of harmony and peace building techniques that set the pace for mediation.[9] The Easterners desire for harmony is akin to the traditional African society's preference for peaceful coexistence through principles such as communal living, respect and reciprocity. They (the Easterners) also employ pressure tactics (e.g., threats) quite frequently because their society grants them the power and status to do so.[10]

Societal norms not only prompt disputants to seek or allow third-party assistance to their conflict but also because they know that the process will yield various benefits particularly where they realize that the third party possess some expertise on the problem which could be helpful in overcoming the deadlock and foster relationships between the parties which could enable them take control of their own conflict or keep the resolution confidential.[11]

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. 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. For instance, when a member of a *riika* among the Agikuyu injured another it was considered a serious magico-religious offence and as such belonging to an age-group demanded observance of the rules, duties and rights of that age-group. 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 was considered taboo.[12]

8.5 Negotiators and their Constituents

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

[9] Wall, Jr., J.A., et al, "Mediation: A Current Review and Theory Development", *Journal of Conflict Resolution*, Vol. 45, No. 3, June 2001, pp. 370-391; See also discussion in Chapter 2.
[10] Ibid.
[11] Ibid. See Chapter 2 where both female and male elders role in conflict resolution was as a result of the wide powers, knowledge, wisdom and the respect they were accorded in the society.
[12] Kenyatta. J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965), pp. 95-124; Interview on 13th January 2012 with Nelson Nyamu at Kagio, Kirinyaga District.

continuing a relationship in the future.[13] Where the parties to mediation have a higher degree of commonality they have similar socio-political organization structures and will have fewer negative perceptions about each other. In such instances mediation may be more effective than in situations where the parties have great disparities in their socio-political organization.[14]

Great disparities between disputants can be effectively addressed if the mediator can develop communication channels, educate parties on negotiation skills and help in clarifying the situation.[15] Consequently, where there is heterogeneity among the parties due to power imbalances as a result of political, cultural and economic factors may widen the mediation paradigm, where a party may link those power imbalances to the original conflict.[16] In the event of power imbalances, the mediator is called upon to ensure that there is a level playing field for negotiations so as to get a mutually satisfying outcome.[17]

Due to the kinship ties that connected people in traditional societies, and the semblance of the socio-political orientation of most Kenyan communities and Africa in general, mediation and negotiation were very effective and hence their common usage. Moreover, the desire to maintain relationships meant that conflicting parties could result only to mechanisms that resolved rather than settled conflicts.[18]

The process and effectiveness of mediation is also reliant on the level of concern that the parties have to the conflict, their interests and the outcome they expect.[19] The voluntary nature of mediation refers to the fact that parties to the mediation cooperate in the process voluntarily. This distinction is important given that participation in mediation is not universally a matter of choice. In some

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[13] See generally, Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict*, (2nd ed., San Francisco: Jossey-Bass Publishers, 1996).

[14] Davidheiser, M., "Joking for peace: Social organization, tradition, and change in Gambian conflict management," *Cahiers d'études africaines,* Vol. 4, 2006, pp.835-859.

[15] See Adejimola, A.S., "Language and communication in conflict resolution," *Journal of Law and Conflict Resolution* Vol.1, No. 1, 2009, pp.001-009.

[16] Baylis, C. & Carroll, R., "Power issues in mediation," *ADR Bulletin*, Vol.7, No. 8, 2005, p. 1.

[17] Bercovitch, J. & Houston, A., "Why Do They Do It like This? An Analysis of the Factors Influencing Mediation Behaviour in International Conflicts", op.cit; Brecher, M., *Crises in world politics: Theory and reality* (Oxford, Perganion, 1993).

[18] See Mabogunje, A.L., "Institutional radicalization, the state, and the development process in Africa," *Proceedings of the National Academy of Sciences*, Vol.97, No. 25, 2000, pp.14007-14014.

[19] See generally, Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict*, (3rd, San Francisco: Jossey-Bass Publishers, 2004).

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. However, as it has been pointed out, 'there is a difference between coercion into mediation and coercion in mediation.'[20]

As pointed out earlier, apart from the parties themselves, their constituents also have some interest in the conflict management process. This can also be inferred from international mediation where it has been found that there is a wide range of interests by parties that determine the various agencies through which mediation is to be conducted; whether and when to pursue mediation through an international organization and, if so, which; whether to convene an international conference; when to call for the assistance of an international judicial commission; how to organize the use of force among other factors.

Finally, and as espoused elsewhere the interests of the constituents must be taken into consideration in the negotiation process and in relation to the decision reached, the outcome must be acceptable to the parties and all the other actors in managing that conflict.[21] Constituents are crucial in the mediation process and especially during the implementation of the mediation agreement because if they were not sufficiently consulted (See Fig. 3.0) they may refuse to accept the agreement reached citing illegitimacy.[22]

8.6 Conclusion

As the above discussion shows conflict management through mediation is a wide ranging process with many actors visible and non-visible. These actors include but are not limited to the parties (and their negotiators), the mediators, and their constituents, societal factors and the conflict itself. In the traditional African set up, the paradigm was even wider including the norms, traditions, customs, religious and other cultural practices. The widening of the conflict context was essential in that it ensured harmony and peaceful coexistence, as the

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[20] Murray, J.S., et al, *Processes of Dispute Resolution: The Role of Lawyers,* op. cit., p. 47; Bercovitch, J. & Houston, A., "Why Do They Do It like This? An Analysis of the Factors Influencing Mediation Behaviour in International Conflicts", op. cit; Sanders, F., "The Future of ADR", *Journal of Dispute Resolution* Vol. 1, 2000, p.3, at p. 7-8.

[21] Touval, S., "Mediation and Foreign Policy", op.cit.

[22] Ibid.; See also Mwagiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, op.cit, pp.43-54, who discusses the problem of re-entry where the constituents have rejected the agreements reached by the negotiators and hence denying the later a re-entry into the environment for which the agreement was being negotiated.

conflict was not necessarily a concern of the negotiators only, but a communal thing hence the need to avoid conflicts. It is thus right to contend that the mediation paradigm in traditional conflict resolution was wider than the Western conceptualization of the same.

Chapter Nine

Psychological Issues in Mediation

9.1 Introduction

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.[1] 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.[2] 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.

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.[3] Each person's attitudes, intentions, intuitions, awareness context and capacity for empathetic and honest emotional

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[1] Strasser, F. & Randolf, P., "*Mediation: A Psychological Insight into Conflict Resolution*", (Continuum International Publishing Group London, New York, 2004), at pp. 2-30.

[2] Gelfand, M.J., et al, "The Psychology of Negotiation and Mediation", (Chapter 14), available at www.umd.academia.edu/AshleyFulmer/papers/247456/psychologyofnegotiationand mediation, [Accessed on 30/07/2012]; 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 02/08/2012].

[3] 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 29/07/2012].

communication have a significant impact on their experience of conflict and capacity for resolution.[4]

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.[5]

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.

The clinical skills and experience used in assessment, diagnosis and treatment by psychologists are relevant in the mediation context.[6] 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.

9.2 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 communication and of a facilitator of the negotiation.[7] Their powers are summarised as persuasion and communication skills.[8] They are also seen as negotiators who clarify issues, identify alternatives, and help

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[4] Ibid.

[5] Strasser, F. & Randolf, P., "*Mediation: A Psychological Insight into Conflict Resolution*", op. cit.

[6] Diamond, I., "The Value of a Psychologist Mediator", available at www.mediate.com., [Accessed on 29/07/12].

[7] 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.

[8] Noone, M.A., 'ADR, Public Interest Law and Access to Justice: The Need for Vigilance,' op cit., p. 41.

disputants come to a mutual agreement, without making a decision for them.[9] Thus, mediation is based on communication principles, negotiation, providing information and problem solving.[10]

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.[11] 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.[12]

The mediator should understand that the parties are governed by their own outlook and their own 'self-concept' and 'self-esteem'.[13] 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.[14] 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.[15]

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[9] Ibid, p. 41.

[10] 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

[11] Smith, C.R., 'Mediation: The Process and the Issues,' p.6.

[12] 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.

[13] Diamond, I., "The Value of a Psychologist Mediator", op cit.

[14] Ibid.

[15] 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 02/08/2012].

9.3 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.[16]

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.[17]

The "IDR Cycle," 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.[18] The mediator uses interventions such as 'looping' and reframing.[19] 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.[20]

9.4 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.[21] 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.

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

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[16] Ibid; Strasser, F. & Randolf, P., "*Mediation: A Psychological Insight into Conflict Resolution*", op. cit, pp.43-44.

[17] 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.

[18] Ibid., pp. 189-200.

[19] Friedman, G.J. & Himmelstein, J., "Resolving Conflict Together: The Understanding Based Model of Mediation, 2006, *Journal of Dispute Resolution*, pp. 523-529.

[20] Ibid.

[21] Bader, E., "The Psychology of Mediation: Issues of Self and Identity and the ADR Cycle", op. cit, p. 207.

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 from one side and forgiveness on the other can play an important role in resolving the conflict.[22]

9.5 Creative Solutions

It has already been noted elsewhere in this book 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. 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.[23]

As already stated in the introduction to this chapter, in every conflict there are certain emotions, feelings and other psychological issues at play. If these psychological issues can be harnessed by mediators in the course of conflict management, then mediation can become a more effective mechanism in resolving conflicts.[24] 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.[25]

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[22] See generally, The Psychology of Mediation, Pretice Mediation LLC, available at http//www.mediator.seatle.com, [Accessed on 29/07/12]; Jacobs-May**, J., "**The Psychology of Mediation: *An atmosphere that instills fairness and understanding is more likely to lead to resolution",* op.cit.

[23] Jacobs-May**, J., "**The Psychology of Mediation: *An atmosphere that instills fairness and understanding is more likely to lead to resolution",* op.cit.

[24] 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 29/07/2012].

[25] Ibid. See also Diamond, I., "The Value of a Psychologist Mediator", available at www.mediate.com., [Accessed on 29/07/1)02]; 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

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.[26]

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.[27]

9.6 Fairness in Mediation

Chapter Three discussed fairness as one of the abstract concepts influencing mediation in the political process. 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.[28] 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.[29] 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

satisfied with both the process and the outcome of the process because of the creative options generated by parties.

[26] Strasser, F. & Randolf, P., *"Mediation: A Psychological Insight into Conflict Resolution"*, op. cit.

[27] Diamond, I., "The Value of a Psychologist Mediator", op.cit.

[28] Jacobs-May, J., **"**The Psychology of Mediation: *An atmosphere that instills fairness and understanding is more likely to lead to resolution",* op.cit.

[29] Ibid.

centers of the brain to be activated as he punishes the opponent.[30] 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 issues at play.[31] 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 does not come back. It is resolved. Resolution comes about as a result of a process that addresses all the aspects of the conflict including its psychological dimensions.

9.7 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[32]. In all these disputes the psychological processes at play are fairly similar. Integration of the use of mediation in conflict resolution in Kenya can go a long way to ensure parties access justice as envisaged in Article 159 of the constitution.

[30] Ibid.

[31] Ibid. Approaches that can be employed to address psychological issues 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.

[32] See discussion in chapter 11 of this book.

Chapter Ten

Mediation in the Kenyan Legal Framework

10.1 Introduction

This chapter examines the practice of mediation in Kenya. It looks at the formalization of mediation in the context of the Kenyan legal framework. An assessment of the Kenyan law entrenching court mandated mediation is undertaken, its efficacy and expected challenges are also examined. The chapter examines the legal, institutional and other supportive frameworks that facilitate mediation in Kenya and the use of mediation in resolving conflicts.

It also examines how traditional forms of conflict resolution such as the council of elders or *wazees* have been used in resolving environmental conflicts in Kenya. Rules relating to court annexed mediation, an analysis of whether court annexed mediation is really mediation properly so called, and the key areas in dire need of reform are also examined in this chapter.

10.2 Mediation in the Kenyan Legal Framework

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 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 mediation framework in existence has largely been derived from international law and practice and reduced into guidelines by different institutions undertaking mediation in Kenya such as the Dispute Resolution Centre-Nairobi and the Chartered Institute of Arbitrators.[3] Even the latest amendments to the Civil Procedure Act via the Statute Law (Miscellaneous Amendments) Act[4], do not by any standard embody a comprehensive and

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[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] Dispute Resolution Centre, *A lawyer's role in Alternative Dispute Resolution*, a one-day workshop, held on 16th September 2004, at Nairobi, Kenya.
[4] Statute Law (Miscellaneous Amendments) Act, No. 17 of 2012, Laws of Kenya.

integrated legal framework to govern the practice of mediation in Kenya. As seen in the previous chapters mediation depicts both a legal and political façade.

The mediation framework in place provides for court annexed mediation which in the long run leads to a settlement as opposed to resolution. This is largely due to the fact that the legal framework did not (until recently) appreciate the fact that mediation has been practiced by Kenyan communities since time immemorial.[5]

In the past, the justice system has always promoted litigation at the expense of non-litigious conflict resolution. Litigation is not necessarily improper, but the procedure required and the costs of civil suits are usually prohibitive to a majority of the Kenyan population. The practice has been that, as a matter of right, there has been guaranteed direct access to the High Court through a constitutional reference, for any Kenyan who feels that their fundamental rights have been or will be infringed even in mediation and arbitration.[6]

However, 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 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.[7]

Sometimes, parties in litigation can engage in mediation outside the court process and then move the court to record a consent judgment.[8] 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.[9]

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[5]Article 159 (2) (c) of the Constitution of Kenya 2010, now recognizes alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism subject to clause (3) thereof.

[6] Sections 67, 75 and 84 of the repealed Constitution of Kenya; see also the case of *Epco Builders Limited-v-Adam S. Marjan-Arbitrator & Another, Civil Appeal No. 248 of 2005* (unreported).

[7] Constitution of Kenya 2010.

[8] 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.

[9] Law of Contract Act, Cap 14, Laws of Kenya (Revised Edition, 2007), *Government Printer*, Nairobi.

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 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. It is a safe method as it preserves the relationship of the parties as it was before the conflict.[10]

Previously, there were efforts by the legal fraternity in Kenya and other stakeholders to enhance the legal and institutional frameworks governing mediation in general. This covered the whole range of what is known as alternative dispute resolution mechanisms (ADR), which include arbitration and negotiation. Arbitration is already provided for under the Arbitration Act. The proposal for court-annexed mediation has already been implemented into law and is now provided for under section 81 (2) (ff) of the Civil Procedure Act, as amended by the Statute Law (Miscellaneous Amendment) Act[11]. Thus, parties who have presented their cases to court may have their matter referred to mediation by the court for resolution.

The problem being addressed here is the issue of a massive backlog of cases in the courts and recurrence of conflicts even after a court has decided the matter. Mediation, with its flexibility and expeditious nature may be able to bring down the level of backlog in the courts. The Rules Committee, which is a creation of Section 81 of the Civil Procedure Act,[12] conducted a national exercise aimed at soliciting views from the members of the public and various professional bodies on the steps required to bring about changes to the Civil Procedure Act and Rules incorporating mediation among other modes of ADR.[13] The Chartered Institute of Arbitrators was approached to spearhead the task of creating the draft Court Alternative Dispute Resolution Rules due to its experience in mediation.[14] With collaboration of other stakeholders in various professional organizations a draft of Court Mandated Mediation Rules was formulated. The rules provided for

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[10] See generally discussion in Chapter Two.
[11] Statute Law (Miscellaneous Amendment) Act, No. 6 of 2009, Laws of Kenya.
[12] Civil Procedure Act, Chapter 21 of the Laws of Kenya (Revised edition, 2008), *Government Printer*, Nairobi.
[13] Gichuhi, A.V., "Court Mandated Mediation: The final solution to expeditious disposal of cases," *The Law Society of Kenya Journal,* Vol. 1, No.2, 2005, p.106.
[14] Ibid.

establishment of Mediation Accreditation Committee, reference of cases to mediation by the court on its own motion or at the request of the parties and the nature of matters that could be referred for mediation. This rules later found their way into the Statute Law (Miscellaneous Amendment) Act.

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, the International Federation of Women Lawyers (FIDA), and the Family Mediation Centre (FAMEC). In drafting the mediation rules, the task force took into account the experiences of other jurisdictions within the Commonwealth like Canada, Zambia and the United States of America.[15]

10.3 The Law Providing for Mediation: It's Evolution

In July 2009, Parliament passed part of the proposals for amendment to introduce ADR and abandoned others. In essence, the amendments proposed to sections 1 and 81 of the Civil Procedure Act were enacted into law.[16] The upshot of the laws passed by the Parliament was that, on issue of necessary practice notes and/or directions, the practice of court-annexed mediation may take off in Kenya.

Section 1A (1) of the Civil Procedure Act had the effect of introducing the overriding objective to civil procedure in Kenya as being 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.[17]

In effect, this implies that the court in its interpretation and orders will ensure that the civil procedure, as far as possible, is not used to inflict injustice or delay the proceedings and minimizes the litigation costs. This provision can also serve as a basis for the court to employ the rules of procedure that provide for use of Alternative Dispute Resolution mechanisms to ensure that they serve the ends of the overriding objective.

Further, the Civil Procedure Act was amended to foist new duties on the parties to civil disputes and their advocates. Thus, it is the duty of every party to

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[15] Florida Statutes Chapter 44 on Mediation Alternatives to Judicial Action: *The Florida Rules of Civil Procedure*; Administrative Order 3.110 (C) of the County Mediation in Alachva County Rule 24.1 on Mandatory Mediation under Regulation 194 of the Revised Regulations of Ontario of 1990 made under the courts of Justice Act.

[16] Section 1A (1) and section 81 (2) (ff) of Civil Procedure Act, *Government Printer*, Nairobi.

[17] Section 1A (2) of Civil Procedure Act, op. cit.

a civil dispute and the advocate acting for that party to assist the court in furthering the overriding objective of the Act. In particular, the parties and their advocates are bound to participate in the processes of the court and to comply with the directions of the court in ways that promote just, expeditious, proportionate and affordable resolution of civil disputes.[18]

The amendments are especially specific on the duty of the court to further the overriding objective of the civil procedure and lay out in detail the aims which courts shall pursue in handling civil disputes. Courts are bound in the adjudication and application of the civil procedure to ensure just determination of proceedings and efficient disposal of the business of the court. The courts are also required to ensure the efficient use of available judicial and administrative resources and promote the use of suitable technology in civil litigation. Further, it is the duty of the courts to ensure timely disposal of the proceedings before them at a cost affordable by the parties.[19]

The law was also amended in section 81 of the Civil Procedure Act to lay the framework for reference to mediation of cases lodged under the Act. This can be inferred from the amendment to section 81(2) (ff) introducing a clause providing for the promulgation of rules for facilitating selection of mediators and the hearing of matters referred to mediation under the Act. This new clause gives the Rules Committee powers to promulgate rules of procedure for matters referred to mediation and the selection of mediators.[20] A new subsection (3) was also introduced to section 81 giving the Chief Justice power to issue practice notes or directions to resolve procedural difficulties arising under the Act in attaining the overriding objectives of the Act.

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."*

This demonstrates that mediation is practised in Kenya in the legal process and as part of the court process. It envisages a situation where litigants

[18] Civil Procedure Act, Section 1A (3), op. cit.
[19] Civil Procedure Act, Section 1B (1), op. cit; See also Art. 48, Constitution of Kenya 2010.
[20] Civil Procedure Act, Section 81(2) (ff), op. cit.

are ordered by court to continue negotiating or mediating and then to record a consent in court. This way, the mediation process becomes plagued by the shortcomings of the court process discussed earlier with the end result being a settlement. It has been argued that the court system takes several years before the dispute is settled. Court annexed mediation still needs the court for enforcement of the settlement. The end result is litigation and the attendant problems associated with it. The amendments to the law are not the ideal for mediation, if mediation is to be used to resolve conflicts as opposed to settling.[21]

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 have been examined in detail in Chapter Two. 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.[22] 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.[23] 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, fosters relationships, cost effective, addresses the root causes of the conflict, the parties have autonomy about the forum and reject power-based outcomes.[24]

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. As stated in chapter Two these traditional mechanisms use mediation in the political perspective. Such a mediation, which does not require writing and other formalities, should be provided for as parties have autonomy over the process and the outcome and are not subjected to court formalities. It has been suggested in this context that conflicts that were voluntarily taken to the council of elders

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[21] See discussion in Chapter Six.

[22] Article 159 (2) (c) of the Constitution of Kenya, op.cit.

[23] Mbote, P.K., "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 12/08/2011].

[24] See discussion in Chapter Two.

could be resolved expeditiously and the outcome could be agreeable to both parties compared to those taken to the courts.[25]

10.3 Amendments on the Law in Kenya

In addition to the proposals which were enacted into law, there were other proposed constitutional and statutory amendments in relation to ADR and case management that were overlooked by parliament. These as a whole embody radical proposals meant to fully entrench mediation and the other ADR methods into the Kenyan legal system.

An amendment had been proposed enjoining the courts and other adjudicating fora to promote and encourage reconciliation, mediation, arbitration and other alternative dispute resolution mechanisms in resolution of disputes.[26] However, the courts' duty to promote and encourage ADR did not extend to constitutional matters, judicial review, matters exempted by any written law, matters of public policy and matters exempted by the court for any reason.[27] This has partly been actualized through Article 159 (2) (c) of the Constitution of Kenya 2010, which encourages the use of alternative means of dispute resolution such as reconciliation, mediation, arbitration and traditional conflict resolution mechanisms. The rationale of this proposed amendment to the Constitution was said to be 'to introduce ADR as an alternative to civil litigation'.[28]

While this was well intentioned, it offered ample fodder for parties seeking to resist the application of ADR in their matters. For instance, the amendments proposed provided for exception of application of ADR in 'constitutional matters', 'judicial review matters', and 'matters of public policy'. Matters of public policy cover virtually all matters that are administrative and touch on actions of the government agencies. These include matters touching on government procurement, environmental matters and decisions, immigration decisions and taxation disputes, among others.[29]

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[25] Ibid.

[26] See The Rules Committee, "The Proposed Amendments to Civil Procedure and Court of Appeal Rules", (2008), op. cit.

[27] Ibid.; See also the proposed amendment to the Constitution, section 77(9) (b).

[28] The Rules Committee, "The Proposed Amendments to Civil Procedure and Court of Appeal Rules" (2008), op. cit., p. 6.

[29] Knotzl, B. & Zach, E., "Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act", 23(4) *Arbitration International* 666 (2007), p. 681.

Natural resource based conflicts with a constitutional dimension, for instance, the right to property in land, which were protected under section 75 of the Repealed Constitution of Kenya, were also excluded from court ordered mediation. In addition, the proposed amendment excluded any matter exempted by any written law from application of court mandated mediation.[30] What amounts to an exemption and whether a provision of an alternative remedy amounts to an exemption is not clear. This ambiguity made the proposed constitutional amendments susceptible to several interpretations which could result in a very limited application of court mandated mediation. The courts were also given wide discretion to exempt any matter from application of court-mandated mediation.[31] There was no equivalent provision giving the court the positive power to determine what is amenable to court mandated mediation or ADR especially where it is not expressly limited by the law.

These shortcomings were cured by the promulgation of the Constitution of Kenya on 27th August 2010. Article 159(2) provides that in exercising judicial authority, the courts and tribunals shall be guided by certain principles. Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional conflict resolution mechanisms shall be promoted subject to the proviso that traditional conflict 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 and morality or is inconsistent with the constitution or any written law.[32] Similarly, so as to realize sustainable, equitable, efficient and productive management of land, the constitution provides for the encouragement of communities to settle land disputes through recognized local community initiatives consistent with the constitution.[33] 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.[34] Moreover, Article 189 (4) of the constitution 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

[30] The Rules Committee, "The Proposed Amendments to Civil Procedure and Court of Appeal Rules", (2008), op. cit.
[31]Ibid.
[32] Ibid., Article 159 (3).
[33] Ibid., Article 60 (1) (g).
[34] Ibid., Article 67 (2) (f).

been clothed with the necessary powers for reconciliation, negotiation and mediation.[35]

It is thus evident that the new Constitution has enhanced the proposals on ADR contained in the proposed amendments to the previous constitution, by removing the proviso on the matters to which ADR would not apply. This broadens the applicability of ADR and is a clear display of the acceptance of ADR means of conflict resolution in all fields, including the environment.

The Statute Law (Miscellaneous Amendments) Act has amended sections 2 and 59 of the Civil Procedure Act to provide for mediation of disputes.[36] The object of the Act is to amend the Civil Procedure Act 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 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.[37] The Act amends Section 2 of the Civil Procedure Act so as to define as an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute 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. [38]

Under these amendments mediation is to be conducted in accordance with the Mediation Rules.[39] Sub clause (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 clause (1), and 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).[40]

The law now requires reference of all suits, which in the courts opinion are not among those exempted by law and are suitable for mediation.[41] Such

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[35] Ibid., Article 252.
[36] Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, *Government Printer,* Nairobi, 2012, at pp.1092-1097.
[37] Ibid., Section 59A of the Civil Procedure Act.
[38] Ibid, Section 2 of the Civil Procedure Act.
[39] Ibid., Section 59B subclause 3.
[40] Ibid., Section 59B subclause 4.
[41] Ibid., Section 59B (1) of the Civil Procedure Act.

reference is, however, subject to the availability of mediation services and is to be conducted in accordance with the proposed mediation rules.[42] 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.[43]

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 too 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 Westerners perspective and not in the traditional and informal perspective.

10.4 Other Legal Provisions on the use of Mediation

Since the promulgation of the constitution of Kenya 2010, new laws have been enacted. 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 conflict resolution mechanisms have been incorporated in the legal framework.

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.[44]

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[42] Ibid., Section 59B (3).

[43] Ibid., Section 59D of the Civil Procedure Act.

[44] 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.**

The Industrial Court Act, 2011 also contains provisions allowing the court to stay proceedings and refer the matter to conciliation, mediation or arbitration.[45] The court may adopt alternative dispute resolution and traditional conflict resolution mechanisms as envisaged in Article 159 of the constitution.[46] Similar provisions can be found in the Intergovernmental Relations Act in section 34 thereof. On its part the Land Act 2012 encourages communities to settle land disputes through recognized local community initiatives and using alternative dispute resolution mechanisms.[47]

The Elections Act 2011 envisages Independent Electoral and Boundaries Commission (IEBC) peace committees using mediation to manage disputes between political parties.[48] The Supreme Court Rules 2011 allows the Supreme Court to refer any matter for hearing and determination by alternative dispute resolution mechanisms.[49]

It has been argued 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 and the effect of court annexed mediation is that mediation is sacrificed at the altar of legalism, despite the fact that the courts are encouraging parties to choose mediation rather than litigation.[50]

As seen in Chapter Two, mediation in the political process is what can lead to acceptable outcomes as it has more attributes of mediation and it is also arguable that that is why it will lead to resolution of conflicts. The Kenyan legal framework currently advocates for mediation as a legal process in which case it leads to a settlement rather than resolution.

It has been said that resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.[51] Court mandated mediation is in fact not mediation but an adjunct to litigation that can only lead to settlement of the dispute and not a resolution of the conflict. Mediation is able to bring on board the views of the parties who would otherwise not be heard in an arbitral tribunal. The court process therefore

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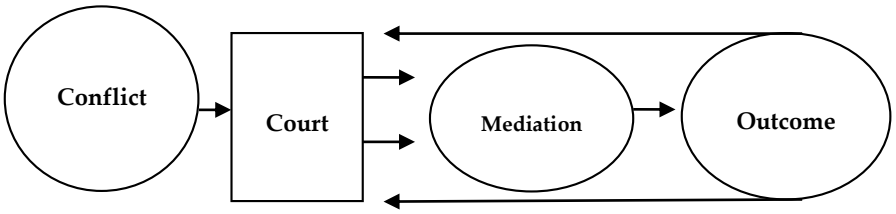
[45] Section 15 (4) of the Industrial Court Act, 2011.
[46] Ibid, Section 15 (3).
[47] Section 4 of the Land Act 2012.
[48] Section 17 (3) of the Elections Act 2011.
[49] Rule 11 of the Supreme Court Rules 2011.
[50] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management,* (Centre for Conflict Research, Nairobi, 2006), pp. 115-118.
[51] Ibid.

can best handle disputes and not conflicts. Disputes are about interests or issues and do not go to the root of the conflict whereas conflicts are about needs and values shared by the parties and go to the underlying causes of the conflict.[52] The settlement by the court will thus be based on power structures and as soon as the power balance changes it gets upset.[53] As Figure 2.0 illustrates, mediation that is made subject to the court process is a settlement and can never resolve conflicts.

Fig. 4.0 Mediation in the Court Process



***Source: The author.**

Fig. 4.0 illustrates that a 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. Consequently, since the parties will have to go back to court, the negotiations become part of the court process, and subject to the bureaucracy and all the undesirable aspects of the court process.

10.5 Assessment of the Amendments – Critique

Kenyan courts are still inefficient, bureaucratic and in some instances corrupt. A majority of the people interviewed during the Public Perception and Proposals on the Judiciary-III, took the view that the conflict resolution institutions lack the essential physical and financial resources to improve efficiency and effectiveness of the courts.[54] A party has to engage all manner of

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[52] Burton, J., *Conflict: Resolution and Prevention*, (London: Macmillan, 1990), pp. 2-12. See also 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.

[53] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management,* op. cit., p. 42.

[54] "Public Perceptions and Proposals on the Judiciary in the new constitution", vol.III, *ICJ Kenya*, May 2002. pp. 1-25.

technicalities to delay and frustrate the other. The adversarial procedure adopted by the courts is thus not the most suitable if the aim is to resolve conflicts in Kenya including environmental conflicts. Court mandated mediation as seen above is so much linked to the court process and is bound to be met with challenges.

The court process leads to a settlement which has been defined by Bloomfield as an agreement over the issue(s) of the conflict and often involves a compromise.[55] In a settlement, parties lack autonomy in the process, the decision is not mutually satisfying, the outcome is not enduring, parties cannot choose a judge and does not address the root causes of the conflict. A resolution on the other hand is informed by the political process of mediation and its outcome is enduring, non-coercive, mutually satisfying, addressing the root cause of the conflict and rejecting power based out-comes.[56]

As stated elsewhere, mediation can be seen both as a legal and political process. In the legal process mediation leads to a settlement whereas in the political process it leads to the resolution of conflicts. The law on mediation is thus totally skewed towards the legal process. Any other form of mediation whereby mediation would be conducted under its own law and rules of procedure, akin to those of arbitration, was never envisaged. The end result is that mediations conducted under the law in Kenya are in the legal process and would only settle and not resolve the conflict. While moving the motion in the house for the second reading of the Statute Law (Miscellaneous Amendments) Bill on 26th May 2009, the then Attorney General Amos Wako had this to say:

> "...What will happen is that this Committee will accredit mediators who will then be registered, so that *when we have a civil case, it would be referred to a particular mediator, who will try to mediate. If he fails in the mediation, only then does the case proceed.…*"[57] (emphasis mine).

The then Minister for Justice, National Cohesion and Constitutional Affairs Mutula Kilonzo supported the motion by stating that the government was

[55]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, at p.152.

[56] Ibid.

[57]Kenya National Assembly Official Report (Hansard) pg. 753 – 754, 26th May 2009; sourced from www.parliament.go.ke, [Accessed on 11/08/2011].

introducing the concept of mediation in our civil cases to deal with the backlog in courts.[58]

These sentiments were expressed by top government legal advisers who are very clear in their minds that mediation is intended to aid the courts deal with the backlog of the cases and that mediation is a secondary mechanism compared to litigation. Thus government policy still encourages litigation and the capabilities of ADR mechanisms in resolving conflicts are still are not fully appreciated. This supposition is buttressed by the sentiments of one Member of Parliament during the debate of the amendments bill when he said that:

> "…Mr. Deputy Speaker, Sir, the other power that the Chief Justice has been given is to make rules. Recently, we passed the Arbitration Bill. We have now given him rules for mediation, so that even before a case is taken to court, there can be evidence of mediation efforts that have been made to resolve it. *Currently, we refer some very petty and useless cases to court, because there has been no provision for mediation…*"[59] (emphasis added).

There is a need for sensitisation among citizens and the leaders so that the opinions they voice about mediation change. The public is led by what leaders say and since parliamentary debates are now in the public domain, the public will embrace what the leaders say and shun mediation and ADR generally as conflict resolution mechanisms. If any form of mediation is to take root in the Kenyan conflict resolution systems, there is a need to embrace and accept it. The following sections assess the expected challenges of the proposed amendments to entrench mediation in Kenya.

10.5.1 Voluntariness of the Mediation Process

Negotiation is the fundamental basis of mediation. This is reflected in the definition of mediation as a continuation of negotiation in the presence of a third party. Since mediation is a continuation of negotiation, it is a voluntary process, and thus when a court orders parties to mediate, it asks them in essence to continue negotiating.[60] As such a court should have no role in mediation, it

[58] Ibid, p. 764.
[59] Ibid., p. 775.
[60] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management,*op. cit.,pp.115-118.

should keep off totally or in the alternative the matter be withdrawn from the court.

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.[61] 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 proposed amendments, compulsory mediation offers the advantage that it can be implemented immediately and does not depend on unpredictable factors such as parties' interests.[62]

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. [63]

On the debate as to whether courts should apply a cost sanction against a party who simply refuses to participate in a mediation, it is argued that there has been a perceived inconsistency between the imposition of the sanctions for failing to take part in a mediation and the essentially voluntary nature of the whole exercise.[64] The imposition of costs sanctions would be derogation from the

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[61] Knotzl, B. & Zach, E., "Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act", op. cit., p. 665.
[62] Ibid.
[63] Cornes, D., "Commercial Mediation: the Impact of the Courts," *Arbitration* Vol. 73, No.1, 2007, p.12.
[64] Colman, A., "Mediation and ADR: A judicial Perspective," *Arbitration,* Vol. 73, No.4, 2007, p. 403, at pp. 403-406.

availability of the courts for the correct resolution of civil litigation. The current practice in England and Wales is that courts cannot compel parties into mediation. This was not always the case until the Court of Appeal decision in *Halsey v Milton Keynes NHS Trust*[65] where Dyson L.J. observed that courts should encourage the use of mediation in appropriate cases.

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.[66] 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. Mediation then becomes a court process leading to settlement of the dispute rather than a resolution of the conflict.[67] A resolution is a more permanent process which gets to the root of the conflict addressing the underlying psychological issues.[68]

Since the aim is to resolve conflicts, mediation in the Kenyan context should have all the attributes of the political process as outlined in Chapter Three. 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.[69] This is because the order by the court calling for mediation interferes with a fundamental quality of mediation - its voluntary nature. With the legal framework in place and even with the amendments discussed earlier, Kenya is not going to achieve resolution of conflicts using the legal process of mediation.

10.5.2 Scope of Application of the Law

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

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[65] [2004] EWCA Civ 576.

[66] Section 59B of the Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, op.cit.

[67] See Chapter Two.

[68] Ibid.

[69] James Mangerere, a practising advocate of the High Court of Kenya and a director at Mediation Training Institute (Kenya), op. cit.

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, however, 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.[70]

The Civil Procedure Act also defines impartiality to mean being or being seen to be unbiased towards parties to a dispute, their interest and options they present in mediation.[71] The procedural rules under the proposed Order 45A included protection of confidentiality in subsequent court proceedings, immunity of the mediator and procedure for expeditious referral of cases to mediation. The proposed mediation procedure rules provided that mediation must be held within three months of reference to mediation subject to a two months extension by the court for a good reason.[72]

10.5.3 Extent of Confidentiality in Mediation

Confidentiality entails the aspect of scope of admissibility and the adducing of evidence on matters dealt with in mediation. Essentially, two options are available when it comes to confidentiality of the deliberations and of the information exchanged in mediation; one is to impose absolute confidentiality and the other provides that only specific aspects enjoy confidentiality.[73] There were proposals to amend the Civil Procedure Rules and the Court of Appeal Rules so that all communications at mediation, mediator's notes and records are declared confidential and 'without prejudice.' This effectively implies that the 'absolute confidentiality approach' was to be taken.

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[70] Section 59D of the Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, op.cit.

[71] Ibid., Section 2.

[72] See Order 45A in The Rules Committee, "The Proposed Amendments to Civil Procedure and Court of Appeal Rules", op.cit.

[73] Knotzl, B. & Zach, E., "Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act", op. cit., p. 666.

As regards admissibility of proceedings in mediation in a court of law, the rules declare them to be inadmissible and bar the mediator from testifying. The recording and transcribing of mediation proceedings was also prohibited under the proposed changes.[74]

Admissibility of the record of what transpired in mediation as evidence in court of law is only permissible on written agreement of the parties. However, the law excludes application of the rules of admissibility with regard to mediated agreements. In addition, the inadmissibility of mediation proceedings does not exclude admission of factual evidence relating to the cause of action that would otherwise be admissible.[75] This last exemption is susceptible to wide interpretation leading to loosening of the provisions securing confidentiality in mediation. Such an eventuality would be devastating as the guarantee of confidentiality frees parties to participate uninhibited and to volunteer prejudicial information for the benefit of resolution of the conflict, without stopping to consider the effect of such confidence if the mediator is called as a witness.

10.5.4 Enforcement of Mediated Agreements

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.[76] The Civil Procedure Act provides for registration and enforcement of mediated agreements resulting from mediations presided over by qualified mediators.[77] 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.

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[74] See, The Proposed Amendments to Civil Procedure and Court of Appeal Rules, op. cit., proposed Order 45A r. 10 and 15.
[75] Ibid., Order 45A r. 15.
[76] Knotzl, B. & Zach, E., "Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act", op. cit., p. 683.
[77] Section 59D of the Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, op.cit.

10.5.5 Maintenance of Quality Standards in Mediation

The need for quality in any proposed mediation exercise cannot be gainsaid. Ann Brandy has expressed concern 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.[78] 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.[79]

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.[80] 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.[81] Listing registered mediators promises to ensure the implementation of the quality standards by the accreditation committee. The proposed Code of Ethics for Mediators addresses substantively matters of quality of mediation practice.[82] There is, however, a need to introduce elements of self-regulatory processes for mediators and to further promote the proliferation of mediation centers and institutions in Kenya.

It is noteworthy that there exists freelance practice of mediation, court annexed mediation, as well as private sector mediation institutions with procedural rules, which offer guidelines on how the practitioners affiliated to

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[78] Brandy, A., *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).

[79] Kirkham, F., "Judicial Support for Arbitration and ADR in the Courts in England and Wales", *Arbitration* Vol. 72, No.1, 2006, p.53.

[80] Ibid., p. 56.

[81] Section 59A of the Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act, No. 17 of 2012, op.cit.

[82] Ibid., Appendix 1: proposed Code of Ethics for Mediators.

them conduct their mediation processes. There are also different models of mediation based on different schools.

While there is expected to be a different professional code of ethics of the different groups involved, the practice standards of the mediator are of utmost concern in the process as they might affect the acceptance and legitimacy of the final outcome. For instance, the parties expect the mediator to demonstrate impartiality[83], respect party's self-determination[84], declaration of self-interest, if any, demonstrated competency, and confidentiality[85], amongst others.[86]

It is, however, noteworthy that in the court annexed mediation, the Mediation Accreditation Committee (MAC) has since developed a Code of Ethics that was apply to all mediators taking part in the pilot program, and the same is expected to remain in force even after the program is rolled out to the rest of the country.

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[83] However, there are those who argue that impartiality is not necessarily universal: See 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. 78:

> "….in the modern mediation process, where neutrality is assumed to be an overarching value. The western-inspired Model Standards of Conduct for Mediators are typical in this regard: "A mediator shall conduct mediation in an impartial manner and avoid conduct that gives the appearance of partiality." However, this understanding of the role of the mediator is not universally shared among different cultures. It lies in contrast to the more directive role for African mediators for whom peace is the ultimate goal, and is somewhat different from Zartman's description of the traditional African mediator as a wise and moral person who searches for a common understanding of the problem and a shared solution, a moral mediator rather than a mediator with muscle. Other studies of African mediators show more pronounced differences on the value of neutrality. One study of Gambian mediators showed that neutrality is not a favored virtue in mediators. Instead, mediators actively direct the mediation discussions and express their opinions. Ahorso and Ame talk about qualified neutrality in traditional Ghanaian mediation, which is practiced in order to establish a new relationship among the parties when there is power asymmetry among them. Crampton describes Ghanaian forms of mediation where the mediator's authority comes from the community rather than the state and where the role of the mediator is both to "facilitate and counsel."

[84] Cf. Haley, J.N., 'Mediation and Access to Justice in Africa: Perspectives from Ghana,' op. cit., p. 79.
[85] Cf. Haley, J.N., 'Mediation and Access to Justice in Africa: Perspectives from Ghana,' op. cit., p. 80.
[86] Ibid.

10.5.6 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.[87] There was a proposed framework for mediation which anticipated referral to mediation only after close of pleadings after parties have incurred legal fees in drawing the pleadings and court fees in filling their pleadings.[88] The lack of a reimbursement system for legal fees and other expenses was likely to make litigants resistant to mediation as it implies extra costs to the parties and there was no provision for taxation of costs even where a mediated agreement was reached. The best starting point would have been to allow parties to reclaim court fees or part of it. The mediation rules also provide for legal aid in mediation by exempting a person who has instituted a suit as a pauper not to pay mediation fees. However, it is not stipulated who is responsible to pay such fees.[89]

This is the best shot made towards case management using ADR methods and more so mediation, in the history of the Kenya legal system. However, the proposals that were contained in the Rules Committee Report and in the amendments did not adequately cater for mediation as a conflict resolution mechanism as seen in the discussion above. Much more needs to be done to seal the loopholes identified so that all the positive attributes of mediation can be enjoyed.

The overall impact of the mediation law is mainly underpinned by its scope as defined under the Constitution. The Constitution enjoins Courts to promote, *inter alia*, mediation and other alternative dispute resolution methods in settlement of disputes.[90]

10.6 Court-annexed Mediation in Kenya: Challenges and prospects

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

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[87] Knotzl, B. & Zach, E., "Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act", op. cit, p. 683.

[88] The Proposed Amendments to Civil Procedure and Court of Appeal Rules, Order 45A r. 1, op. cit.

[89] Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, op.cit.

[90] Article 159 of the Constitution of Kenya, op.cit.

Operationalization Committee (AOC)[91]; and the Secretariat (Technical Working Group (TWG)[92]). The pilot project was mainly introduced as a mechanism to help address the backlog of cases in Kenyan court. The Kenyan legal framework on mediation generally envisages the Facilitative Model of mediation.

The Mediation Accreditation Committee (MAC) is a committee established under section 59A of the Civil Procedure Act[93]. The first appointment of the Committee members was made by the Hon Chief Justice through Gazette Notice No 1088 of 2015[94], chaired by the Chairman of the Rules Committee, Hon Justice Alnashir Visram (JA). 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.[95]

According to reports on the review of the success of the program, the following statistics were recorded:

Fig. 5.0 Mediation Case Monitoring Report

Item No.	Description	Division		Total
		Family	Commercial	
1.	Total number of files screened	511	1067*	1578
2.	Total number of matters referred to mediation	265 out of 511	241 out of 1067	506
3.	Total Number of concluded matters	137 out of 267	71 out of 241	204

[91] 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.

[92] 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.

[93] Chapter 21, Laws of Kenya.

[94] *The Kenya Gazette,* Vol CXVII-No.17 (20 February, 2015).

[95] Sec. 59A (4), Civil Procedure Act, Cap 21, Laws of Kenya.

4.	Total number of matters with settlement agreements	86 out of 137		42 out of 71		125
	Breakdown	Full Settlements	76 out of 86	Full Settlements	28 out of 42	104
		Partial Settlements	6 out of 86	Partial settlements	3 out of 42	9
		Consent	4 out of 137	Consents	11 out of 42	15
5.	Total number of matters where parties have failed to reach an agreement	61 out of 137		29 out of 71		90
6.	Terminated	3 out of 265		6 out of 241		9
7.	Total number of mediations where settlement agreements have been adopted	51 out of 76		26		77
8.	Total value of matters in mediation	2,168,400,000		11,366,500,486		13,534,900,486
9.	Total value of matters in mediation with settlement agreements	340,192,000		713,489,071		1,053,681,071
10.	Average duration of matters in mediation	69days		63days		66days

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Fig. 6.0 Statistics on Case Settlement Rate As At April 2017

Table: Case Settlement Rate As At April 2017[96]

Family Division	Case Numbers	Commercial Division	Case Numbers	Family And Commercial Divisions	Total
Number referred	221	Number Referred	200	Number Referred	421
Number Settled (Full and Partial)	41 (2 partial settlements; 39 full settlements)	Number Settled (Full, Partial and Consents)	20 (12 full; 3 partial; 5 consents)	Number Settled (Full, Partial and Consents)	61
Settlement Rate (%)	18.5%	Settlement Rate (%)	10%	Settlement Rate (%)	28.5%
No Settlement	28	No Settlement	13	No Settlement	41
No Settlement Rate (%)	12.6%	No Settlement Rate (%)	6.5%	No Settlement Rate (%)	19.1%
Ongoing	152	Ongoing	166	Ongoing	318
Ongoing Rate (%)	68.7%	Ongoing Rate (%)	83%	Ongoing Rate (%)	151.7 %

10.6.1 External Assessment of the Court Annexed Mediation Pilot Project

While the foregoing statistics paint a relatively hopeful future for the Court Annexed Mediation Pilot Project, the Report on the *External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts* also highlights some of the challenges that emerged from the implementation of the Project and offers some recommendations as follows:[97]

[96] Adopted from *External Evaluation of the Court Annexed Mediation Pilot Project Within The Family And Commercial Divisions Of The Milimani Law Courts, May 2017*, submitted to Judiciary of Kenya, Milimani Law Courts, Nairobi, Kenya by Achere Ibifuro Cole Consultant, External Evaluator Lagos, Nigeria (Supported by: International Development Law Organization (IDLO) Nairobi, Kenya; International Commission of Jurists, Kenya Nairobi, Kenya; Kenya Human Rights Commission Nairobi, Kenya).

[97] *External Evaluation of the Court Annexed Mediation Pilot Project Within The Family And Commercial Divisions Of The Milimani Law Courts, May 2017*, submitted to Judiciary of Kenya, Milimani Law Courts, Nairobi, Kenya by Achere Ibifuro Cole Consultant, External Evaluator Lagos, Nigeria (Supported by: International Development Law Organization (IDLO) Nairobi, Kenya; International Commission of Jurists, Kenya Nairobi, Kenya; Kenya Human Rights Commission Nairobi, Kenya).

a. Funding and Remuneration of Mediators/Staff

In order to secure a stable source of funds for the program, the report recommends funding either directly from the executive (exchequer) or from the Judiciary. Regarding remuneration of mediators, it is suggested that mediators should be paid a fixed fee per case from the Project's fund/budget, where a percentage of the fees should be paid upfront to encourage the practice of mediation. It is also recommended that the Advocates Remuneration Order should be amended to include billing for mediation. There is however a recommendation for development of pro-bono mediation scheme for indigent Parties.[98]

b. Development of Infrastructure and Organisational Structure

It has been suggested there should be development of permanent infrastructure for the Project, including but not limited to: office space, mediation rooms, mediators' room, wash room and office equipment, amongst others. There should also be a central Registry for mediation which co-ordinates all mediation activities – including use of space, preferably located at the available space for the CAMP in the Milimani High Court.[99]

The Judiciary should consider creating a Mediation Division headed by a designated Mediation Registrar or Deputy Registrar(s), and the Judiciary should take ownership of the project staffing. The division should have ADR Judges who should be officially appointed and trained in accordance with the relevant rules/laws. Furthermore, ADR Judges could be appointed on a rotational basis to ensure that all Judges eventually have the benefit of exposure to mediation practice.[100]

The Mediation Division should also have Screening Officers whose sole responsibility is to screen cases as suitable for mediation should be designated.[101]

c. Laws, Rules and Manuals

The Report also recommends that a Law establishing the Court Annexed Mediation Project (consider changing 'project' to 'program') should be created.[102]

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[98] *External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts, May 2017*, pp.28-29.

[99] Ibid, p.29.

[100] Ibid, p.30.

[101] Ibid, p.30.

[102] This should aim at defining the organisation; set the objectives, functions and extent of its powers; create a governing structure recognised by law; state the role of the Principal

It is also suggested that the Mediation Pilot Project Rules, 2015 should be amended to expunge and modify impediments to an efficient mediation process inclusive of procedural technicalities (such as filing of case summaries, appointment of mediators etc.). The amendments should be dynamic and innovative to suit the challenges identified with the project. Restorative Justice provisions should be considered in making amendments to the Rules.[103]

d. Mediation Process and Mediators

It has been suggested that the Judiciary should consider development of a Case Management System, separate from the one created for the Judiciary, that can track mediation cases (mediators and mediation law clerks should access and update this system), generate progress reports and deal with the appointment of mediators. It is also recommended that there should be inclusion of the 'mention process' in the rules. Cases should be brought before the Mediation Deputy Registrar for mention at different stages. It is suggested that **s**anctions for non-compliance in the Rules should be maintained but sparingly used at this initial stage to gain acceptability. It is also suggested that settlement agreements should not be reviewed in court by parties or Advocates.[104]

It is also suggested that for clarity of agreements (Mediation Law Clerks should also be trained in drafting settlement agreements), Judges should be trained on the Mediation process which will include the finality of the mediation agreements, mediators should be trained not to coerce parties to sign as they may renege at the courts, mediators should at no time be required to be in the courts to attest to the veracity of the settlement agreement etc.[105]

There is also a recommendation that the same format for settlement agreements should be used in each division. Furthermore, standard mediation

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Judge, Judges, ADR Judges, Mediation Deputy Registrar and other officers of the CAMP; give power to the governing council to make staff regulations concerning conditions of service of the CAMP employees; State the role of the Court, Counsel and Disputing Parties, define the relationship between the Mediation Accreditation Committee with the Project ; establish a fund for the project and state how this fund will be realized and the limits to receiving funding; define the accounting and auditing process of the project; and other provisions which are necessary for inclusion in the law.

[103] External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts, May 2017, pp.31-32.

[104] External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts, May 2017, pp.32-34.

[105] Ibid.

settlement clauses should be added. It is also suggested that settlement agreements should also be reviewed by the Technical Working Group.[106]

With regard to Mediators' Appointment, it is suggested that the Judiciary – Mediation Deputy Registrar and Program Manager, should have the prerogative/primary responsibility for the appointment of mediators from the MAC register. Parties/Advocates should also be given the opportunity but only based on their request. It is also suggested that MAC should consider modifications to the mediation accreditation standards requirements in S.4 (b) and S. 5 – specifically certificate of membership of a recognized professional body as this may be exclusive. It is also suggested that MAC should maintain other requirements in s.4 of mediation accreditation standards requirements to ensure (amongst others) that a university degree is a prerequisite for being enlisted in the register of mediators.[107]

However, it has been pointed out in the Report that MAC should note that mediation in the CAMP and in the communities or alternative justice systems have different parameters.

e. Training and Sensitisation/Advocacy

It has been recommended that there should be training and exchange programs with other jurisdictions for the following groups: ADR Judges: Case Management in Court Annexed Mediation; Judges: Mediation Process in Court Annexed Mediation; Mediators: Drafting settlement agreements, mediator's ethics, the process of mediation at the CAMP, mediation principles, practice sessions on mediation, co-mediation, mentorship (this can accommodate the need for new mediators to complete at least 3 mediations), development of Kenyan based mediation case studies, case management etc.; and Technical Working Group: Case Management in Court Annexed Mediation; the mediation process, ethics; customer care; drafting settlement agreements, etc.[108]

It is also suggested that a curriculum should be designed for each group and the Judicial Training Institute co-opted to aid in the training as well as a curriculum for mediator's 'follow up' training. There is also a recommendation that collaborative and continuous sensitisation of stakeholders with deployment of feedback towards improvement of the Project should be continued monthly.[109]

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[106] Ibid.

[107] Ibid, p.34.

[108] *External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts, May 2017*, p.34.

[109] Ibid, p.35.

f. Monitoring/Management and Replication

It has been suggested that a small taskforce should be created to ensure appropriate planning and implementation of these recommendations. Brainstorming sessions should be held first to gain clarity of approach and make necessary modifications to the recommendations before the planning commences. It is however suggested that overall responsibility for compliance with the recommendations should be given to a designated Mediation Deputy Registrar and project leader of the CAMP.[110]

A phased replication of the Court Annexed Dispute Resolution Pilot Project is recommended after implementation of these recommendations. A general replication model should be created indicating clear milestones and timelines for funding, human resource structures (mediators, staff, Judges, Mediation Deputy Registrar's etc.), infrastructure, training, etc. This replication model should be modified based on the circumstances of each division and county.[111]

g. Political Will

To achieve success on this project, there has to be sufficient political will from the Office of the Chief Justice, Presiding Judges' and all relevant stakeholders especially for funding, infrastructure, training, human resource and creation of enabling laws.[112]

10.7 Beyond the Court Annexed Mediation Project: Making Mediation Work for all

It is laudable that the state justice system has continually embraced and supported ADR, and mediation, in particular. Despite its relative success during the Pilot Project, sustainable implementation of mediation, particularly in court-connected programs, the implementers and policy makers ought to be aware of a number of issues.[113]

From the foregoing recommendations by the external evaluator, it is clear that mediation as conceived by the Judiciary is fully formalised and it is to follow certain rules and technical procedures. While this is understandable in some

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[110] Ibid, p.36.

[111] Ibid, p.36.

[112] *External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts, May 2017*, p.37.

[113] Notably, the Evaluation Report has highlighted some of the challenges and even offered some recommendations.

circumstances, the approach adopted is likely to lock out some key players in mediation in the country.

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 *actors*, *their communication*, *expectations*, *experience*, *resources*, *interests*, and *the situation in which they all find themselves* (emphasis added).[114] It is thus not a linear cause-and-effect interaction but a reciprocal give-and-take process.[115]

Legislation should thus not kill mediation by annexing it to the court system and making it a judicial process inaccessible to all, 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. It has been pointed out that with courts, legal organizations, and practitioners using these more directive, coercive mediation models, it is understandable that mediation in all dispute sectors might be viewed as the practice of law.[116]

There are those who argue that traditional systems of justice with their inquisitorial and restorative methods of dispute resolution are often more appropriate for parties in local communities than methods that employ the adversarial approach of litigation, and legal system reform efforts should therefore build on the success of traditional systems.[117] In this regard, it is suggested that as a way to establish mediation as a legitimate process of resolving disputes in and out of court, policymakers must honour the longstanding values (such as consent and respect for elders) that underlie customary African dispute resolution. This, it is argued, avoids the danger of coercion creep that can occur when mediation is first promoted as a voluntary process and then made

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[114] 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).

[115] 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 10/09/2017].

[116] Kelly, J.B., 'Issues Facing Family Mediation Field,' *Pepperdine Dispute Resolution Law Journal*, Vol. 1, 2000, pp. 37-44, at p.39.

[117] Haley, J.N., 'Mediation and Access to Justice in Africa: Perspectives from Ghana,' op cit., p. 103.

compulsory under the banner of access to justice.[118] Studies report that mediation systems that build upon pre-existing dispute resolution systems and connect to local customs and values, offer the most promise in providing access to justice.[119]

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.'[120] For instance, it has been observed that in African informal family mediation, the practice is picking a mediator who is a wise man or woman, preferably an elder from within the community, known and respected by all parties, with a formal or informal position of leadership.[121] This is meant to ensure that the mediator would have extensive background information and experience with the parties, their families, and associates because he or she is one of them'.[122] This is against the Western notion of picking a third party who is unknown and unaffiliated with either of the parties.[123]

Furthermore, 'the mediator is expected to reflect and uphold the morals and structure of society. This expectation is often so subtle that both the mediator and the parties may respond to it unconsciously. For example, the mediator (or interpreter) may support one party's higher social position by privileging them through with a level of politeness or respect reserved especially for people of their

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[118] Haley, J.N., 'Mediation and Access to Justice in Africa: Perspectives from Ghana,' op cit., p. 103. Haley, while writing in the context of Ghana, argues that '*whereas consent will not necessarily result in just outcomes, it is to acknowledge the primacy of consent at two levels – first, as a highly honoured value in many traditional African dispute resolution systems and equally important, as the support mechanism for self-determination, which is the controlling principle of mediation. He also affirms that consent of the parties is an important source of legitimization, not just in Ghana, but in other parts of Africa as well*.' (emphasis added)[p.104]. His argument is thus, "mediation as implemented in African legal systems should take into account local traditions and customs in order to be a vehicle for access to justice." [p.105].

[119] Haley, J.N., 'Mediation and Access to Justice in Africa: Perspectives from Ghana,' op cit., p. 103.

[120]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

[121] 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

[122] Ibid, p. 30.

[123] Ibid.

position. This is contrary to the western model's expectation that each party will be treated equally and no party given special privileges.'[124]

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.[125]

They may therefore consider coming up with a more accommodative criteria or framework for accreditation of more mediators, from across board, that is, formal and informal mediators, especially in light of the constitutional provisions providing for land and environmental disputes through ADR and TDR mechanisms. 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. Communities are more likely to accept 'insiders' to resolve their conflict compared to Judiciary appointed third parties. As already pointed out, 'acceptance' of the third party is important for the legitimacy of the outcome.

When the program is finally rolled out to the rest of the country, it is important to ensure that the costs of mediation do not become prohibitive, as it is the case with courts. Uncontrolled costs are likely to defeat the purpose of the program, which is, enhancing access to justice for all.

Finally, in order to ensure the long term sustainability and improving the quality and geographical scope of the program, it is imperative for the state to allocate the financial infrastructure to facilitate remuneration of mediators as well as enhancing the necessary staffing requirements.

10.8 Conclusion

What has been passed into law is court mandated mediation and suffers the challenges discussed above and may not assist Kenya in the resolution of

[124] Ibid, op cit., p. 31.

[125] FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

conflicts. It is a mixture of the court process and the arbitral process hence not true mediation. The political process of mediation is what can lead to acceptable outcomes for the Kenyan context since the main aim is to resolve conflicts and not merely to settle them. Mediation should be delinked as much as possible from the court process such that once parties decide to mediate the matter it should be withdrawn from the courts. Moreover, and as the discussion in chapter two reveals, mediation in Kenya is not a new concept. When it was practiced in resolving conflicts by traditional African communities, it was in the political process where it was a very informal, flexible and voluntary process.

Mediation in the political process is the true mediation. However, mediation in the legal process is not to be entirely shunned as it comes in handy in settling disputes where interests or issues are involved and where the conflict is violent in nature. All the same, Kenya should aim for political mediation since there is autonomy in the choice of the mediator, the outcome is enduring, it is flexible, speedy, non-coercive, mutually satisfying, it fosters relationships, it's cost effective, addresses the root causes of the conflict, parties have autonomy about the forum and rejects power based out-comes. Moreover, the constitution now recognizes traditional conflict resolution mechanisms including mediation.

Chapter Eleven

Mediation and Access to Justice

11.1 Mediation and Access to Justice

The right to access to justice has been codified in a number of international treaties.[1] It has rightly been asserted that "access to justice can and should be enhanced by both access to the courts as well as access to the mechanisms for reaching consensual outcomes outside the courts."[2] It is also generally accepted that popular notions of access to justice are focused on empowering individuals to exercise their legal rights in the civil justice system.[3]

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.[4] This is attributed to the fact that frequently, the parties involved in conflicts are convinced that their own view is the solely valid one.[5] It is, thus, suggested that since there is no access to an objective truth about justice, conflicts may be reconciled by the judgment 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.[6]

There is differing literature on the place of Alternative Dispute Resolution (ADR) mechanisms in the access to justice debate. There are however those who argue that while mediation and arbitration neither lower court costs (though they increase court capacity), nor substantially expand access to justice, by some measures, mediation still provides fairer outcomes and, in civil cases, higher rates of compliance than does adjudication.[7] They are seen as offering modestly

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[1] International Convention on Civil and Political Rights (Article 14).

[2] Aina, K., "Court Annexed Mediation: Successes, Challenges And Possibilities, Lessons From Africa Session (Nigeria)," Available at http://www.conflictdynamics.co.za/Files/217/Mediation--lessons-form-Nigeria--MANDELA-INSTITUTE-PRESENTATION.pdf

[3] 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. 66.

[4] Montada, L., 'Justice, Conflicts, and the Justice of Conflict Resolution,' International *Encyclopedia of the Social & Behavioral Sciences* (Second Edition, 2015), pp. 937–942.

[5] Ibid.

[6] Ibid.

[7] McEwen, C.A. & Maimon, R.J., "Arbitration and mediation as alternatives to court," *Policy Studies Journal*, Vol.10, No. 4, 1982, pp.712-726.

effective alternatives to court in administration of justice.[8] Those who advocate for mediation base their argument on promises of greater efficiency in resolving disputes through cost and time savings, greater satisfaction through party self-determination, opportunities for preserving relationships, the potential for creative solutions, process flexibility, informality and conservation of court resources.[9] Mediators are also believed to enhance parties' understanding of their disputes, improve communications between them, and strengthen parties' problem-solving abilities, benefits that offer possibilities for providing access to justice.[10]

Negotiation and mediation 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 encourage "win-win" situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal, flexible and attempt to bring all parties on board.[11]

As such ADR mechanisms such as negotiation and mediation 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 does the court process. They are effective to the extent that they will be expeditious and cost-effective compared to litigation.[12] The use of mediation in natural resource based conflicts management is especially common in Canada.[13]

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[8] Ibid.

[9] Haley, J.N., 'Mediation and Access to Justice in Africa: Perspectives from Ghana,' op cit., p. 67.

[10] Ibid, p.67.

[11] Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.10; See also generally, Warner, K., 'Participatory Processes and Conflict Management in Community Forestry,' available at http://www.mekonginfo.org/assets/midocs/0003351-environment-participatory-processes-and-conflict-management-in-community-forestry.pdf [Accessed on 10/09/2017]; See also Skutsch, M. M., "Conflict management and participation in community forestry," *Agroforestry systems*, Vol.48, No. 2, 2000, pp. 189-206.

[12] Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.

[13] 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*

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 local people's priorities in natural resource management.[14]

While mediation can be used in dealing with different types of conflicts, this chapter limits the discussion to only family disputes and environmental matters as some of the most critical issues that affect the society.

11.2 Use of Mediation in Resolving Environmental Conflicts

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 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.[15]

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.[16] 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.[17]

Presented at the Second Annual Meeting of IASCP University of Manitoba, Winnipeg, Canada, Sept. 26-29, 1991.

[14] 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.

[15] CDCA, 'Why environmental conflicts?' Available at http://cdca.it/en/perche-i-conflitti-ambientali [Accessed on 18/10/2017].

[16] Ibid.

[17] 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.,

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.[18]

While environmental conflicts may involve many factors and issues[19], as seen above, the scope of this section is restricted to natural resource based conflicts as characterised by competition for environmental resources. Natural resource based 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.[20] 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 based 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.[21]

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).[22] As a result, it is

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"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/].

[18] 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 18/10/2017]; 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 18/10/2017].

[19] See also Dukes, E.F., "What we know about environmental conflict resolution: An analysis based on research," *Conflict resolution quarterly,* Vol. 22, No. 1-2, 2004, pp. 191-220.

[20] 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].

[21] 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

[22] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' *Annex C - Summary of Discussion Papers*, (FAO), available at

contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.[23] Despite this, there are key principles such as, inter alia, participatory approaches[24], equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.[25]

Natural resource based conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.[26] To them, justice would mean affording them an opportunity to get what they feel entitled to and anything less, means that they resort to other means of possessing the same. This way, conflicts become inevitable. 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.[27] This is particularly important in ensuring that there will be no future flare-up of conflict due to unaddressed underlying issues.[28]

Natural resource based 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 explosive."[29]

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-

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http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage [Accessed on 2/01/2016].

[23] Ibid.

[24] 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.

[25] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

[26] 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].

[27] 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.

[28] See generally Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management, op. cit.

[29] Government of Kenya, et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.

party politics were thus influenced by tribal considerations with their roots in economic and considerations making it easier to incite politically based tribal violence.[30]

Land clashes that occurred in Kenya in 1992 and 1997 have been attributed to inequitable allocation of land resources and poor government policies and programmes perceived as favouring some factions at the expense of others. The issues of the use of environmental resources underlie the 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.[31]

It has rightly been argued that 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.[32] 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 based conflicts in Kenya.

11.2.1 Nature of Natural Resource Based Conflicts

The process of mediating environmental conflicts can take a number of different approaches depending on the nature of environmental issue(s) at stake.[33] There are three broad categories of natural resource issues which tend to degenerate into an environmental conflict, namely, technical and practical problems; value-laden problems in which people agree on the basic nature of the problem, but not on how to resolve it; and value-laden problems in which people disagree on both the nature of the problem and how to resolve it.[34]

The technical and practical environmental problems are essentially 'how to' questions that can be answered by reasoning and the application of existing

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[30] Ibid.

[31] See Machel, G. & Mkapa, B., *Back from the Brink: the 2008 mediation process and reforms in Kenya*, (African Union Commission, 2014).

[32] CDCA, 'Why environmental conflicts?' op cit.

[33] Stone-Molloy, M.S., "Mediating Environmental Conflicts: A Practical Manual", available at http://www. law. ufl.edu/conservation/pdf/ mediating .pdf [Accessed on 20/07/2012].

[34] McKinney, M. & Harmon, W., "Governing Nature, Governing Ourselves: Engaging Citizens in Natural Resource Decisions," available at http://www.cnrep.org/documents/Governing/Nature.pdf [Accessed on 18/5/2010].

knowledge. People are likely to agree on the nature of such problems and on a short list of potential solutions. These problems are susceptible to expert solutions without much consideration of values, and they may not require high levels of involvement by those the problems affect.[35] An example of a technical and practical environmental problem could be infestation of noxious weeds on different parts of the country.

As regards value-laden environmental problems, the people generally agree on the nature of a problem, but they disagree over the basic direction to take in responding to it. In this type of problem, values and interests begin to pull people in different directions.[36]

The third category of natural resource issues consists of conflicts that are often described as 'intractable'(some researchers and practitioners refer to them as 'wicked' problems)[37] because they are so difficult to resolve, warrant a deeper analysis and require more-robust tools for responding to them. In contrast to issues that are more readily resolved, issues arising from intractable problems tend to involve many stakeholders with different—often divergent—interests; revolve around complex, sometimes confounding information; and occur in a broad patch of governmental jurisdictions with overlapping and conflicting mandates, laws, policies, and decision-making protocols. In such issues, the power to address the problem is scattered among a host of players.

If the issue involved is value-laden and there are other underlying issues besides the environmental and continuing relationship which will survive the resolution, the mediator must be sensitive and focus on uncovering whatever underlying interests and values the parties have hidden within them, and uncovering whatever interests the parties share between them. In so doing, the mediator would best engage strategies of mediation that aid the parties to gradually reach a solution to the problem at hand as well as facilitate the transformation of their relationship in the mediation process.[38]

Where the environmental conflict is 'intractable' as described above, the skills and intuition of the mediator are required in deciding the working combination of all the four methods of mediation namely, facilitative, evaluative

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[35] Ibid.

[36] Ibid.

[37] See Susskind, L. & Field, P., *Dealing with an Angry Public: The Mutual Gains Approach to Resolving Disputes*, (The Free Press, 1996), pp. 152-197.

[38] Susskind, L. & Field, P., *Dealing with an Angry Public: The Mutual Gains Approach to Resolving Disputes*, op cit.

, settlement and transformative mediation[39]. This is because it is impossible to know beforehand which method among the four will best resolve the pronounced variance of needs, interests, values and points of view that usually characterize intractable environmental conflicts.

In addition, the mediator should use the various mediation tools at his disposal.[40] These are: mediator's introduction, facilitating inter-party communication in helping the parties design and shape the process of resolution, summarize the parties' positions from time to time, reality-checking and active listening, encourage joint meetings, calling a caucus, using open and closed questions, reframing issues and answers by the parties and assessment of the parties' *Best Alternative to a Negotiated Agreement* (BATNA).[41]

11.2.2 International Use of Environmental Mediation

Lately, focus has shifted towards the utility of mediation as a means of peaceful management of conflicts resulting from the interpretation or implementation of international law. On 23rd September 2008, the United Nations Security Council convened a meeting on mediation and settlement of disputes and reaffirmed the United Nations' role in mediation efforts. During this meeting, Council members stressed the importance of mediation for the peaceful settlement of disputes and also focused on the role of the United Nations (UN), the Security Council and the Secretary-General in working in cohesion to promote the mediation of problem situations and thematic areas such as the environment.[42] The Security Council requested for a report from the Secretary-General in six months on the role of UN in mediation of conflicts and the possible ways to improve it and on 8th April 2009, the Secretary-General submitted his report on enhancing mediation and its support activities to the Security Council.[43]

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[39] See Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), for a discussion on the various methods of mediation.

[40] Mironi, M., "From Mediation to Settlement and from Settlement to Final Offer Arbitration: an Analysis of Transnational Business Dispute Mediation", *Arbitration,* Vol. 73, No.1, 2007, p. 52, at p. 54; See also the discussion in chapter 2 of this book.

[41] Ibid.

[42] United Nations Security Council, September 2008, Presidential Statement reaffirming the UN's role in mediation efforts, S/PRST/2008/36.

[43] Report of the Secretary General on Enhancing Mediation and its Support Activities; S/2009/189:8), sourced from http://www.un.org/Docs/sc/sgrep09.htm, [Accessed on 05/12/2009]; See also United Nations, *Guidance for Effective Mediation*, (United Nations, New York, September 2012); See also Myint-U, T., "The UN as Conflict Mediator: First

The Secretary General's report was in consonance with a UNEP Report which recommended that priority in international environmental law be given to "capacity building for dispute resolution, environmental governance and land administration in states that are vulnerable to conflicts over natural resources and the environment."[44] The report of the Secretary-General sums the emerging international approach towards mediation of conflicts:

> *Since one of the most promising approaches to peaceful settlement of disputes is skillful third-party mediation, we, the United Nations, have a responsibility to "we the peoples" to professionalize our efforts to resolve conflicts constructively rather than destructively and to save succeeding generations from the scourge of war.*[45]

Mediation has been used in one form or another as an active part of peaceful conflict resolution for thousands of years in a variety of societies around the world.[46] Research has confirmed the effectiveness of environmental mediation in reaching high quality agreement and building cooperative working relationships among parties at the international level.[47] Mediation has been used successfully, though infrequently, in negotiating and implementing international environmental conventions and treaties[48] and its attributes should be exploited to aid the local framework.

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amongst Equals or the Last Resort?" In *Oslo Forum Briefing Pack*, vol. 10, pp. 90-95. 2006; United Nations General Assembly, *United Nations activities in support of mediation - Report of the Secretary-General* (A/72/115) [EN/AR] (United Nations, 27 June 2017).

[44] United Nations Environment Programme, "From Conflict to Peace Building: The Role of Natural Resources and the Environment", *UNEP*, February 2009; available at http http://postconflict.unep.ch/ publications/pcdmb _policy_01.pdf, [Accessed on 05/12/2009]; See more recent works by the UN at "Natural Resources and Peacebuilding," available at http://www.unep.org/disastersandconflicts/what-we-do/recovery/environmental-cooperation-peacebuilding/what-we-do/natural-resources-and [Accessed on 20/10/2017].

[45] United Nations Security Council, September 2008, Presidential Statement, op. cit.

[46] Mediators without Borders, "Supporting Statement on the Importance of Mediation to Climate Change", 19th August 2009, Available at: http://www.worldpulse.com/files/upload/581/supporting _statement_on_mediation.pdf [Accessed on 05/12/2009].

[47]Institute for Environmental Conflict Resolution (2009), *Environmental Conflict Resolution: Performance Evidence from the Field;* Available at: www.ecr.gov [Accessed on 05/12/2009].

[48] Schueli, D. & Vranesky, A., "Environmental Mediation in International Relations", In Bercovitch, J. (ed.), *Resolving International Conflicts: The Theory and Practice of Mediation,* (Boulder, Colorado: Lynne Rienner Publishers, 1996), pp. 33-59.

Despite the foregoing, very little has been done to inculcate the practice of environmental mediation within the framework of the Kenya legal system. Even though the current resolution mechanisms have helped in tackling 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 many procedural requirements to be met before justice is seen to be done. It is thus recommendable to adopt simpler mechanisms that were traditionally used in the African setting such as conciliation and mediation by the elders.

The Kenyan legal system has always preferred litigation as a mechanism for conflict resolution yet courts of law are often inaccessible to the poor, marginalized groups and communities living in remote areas. This is due to the cost of litigation, distance to the courts, language barriers, political obstacles, among other factors. Cases could run for years without a possible solution in sight. Mediation as a conflict resolution and management mechanism can be utilised to address most of the conflicts occurring in Kenya including environmental conflicts.

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 - will be the core foreign-policy challenge [in the twenty-first century].[49] There is thus an urgent need to deal with environmental conflicts if peace and stability is to be maintained nationally and internationally. That is why mediation as was practised for many years by Kenyan communities, in the political perspective, may be the mechanism that is best suited to resolve and manage conflicts including intractable environmental conflicts.

It is thus reassuring and a welcome thing to see that mediation and other traditional conflict resolution mechanisms being recognized and mainstreamed. As stated in Chapter Two, Kenyan communities have used it for centuries. It was the familiar way of sitting down informally and agreeing on certain issues, such as the allocation of resources and therefore they are more familiar with it than they are with the courts. 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

[49] Kaplan, R., "The Coming Anarchy," *Atlantic Monthly*, 1994.

elders and institutions were accessible to the populace and their decisions were respected.[50]

11.2.3 Resolving Land Related Conflicts

It has been suggested that there were few conflicts especially 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. However, in times of drought, communal resources, such as water and grass, would become depleted and this was a major source of conflict. Watering livestock was a challenge and, thus, a few hardworking families would come together and build a dam to harvest water which they would use when the community dam and rivers ran dry. Often, those who did not prepare for the dry season would encroach on the 'private dams' and disagreements would emerge.[51]

The Maasai community had a unique system of community mediation which they used to deal with conflicts. It was unique because 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. 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.[52]

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 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. This form of

[50] Interview with Ndungu Mwaura, an 82 year old Kikuyu elder on 16th August 2008, at Kahuhia, Murang'a District.
[51] Interview with William Ole Munyere, a 97 year old Maasai elder on 6th June, 2009, at Oloirien Inkarusa village, Ngong Division, Kajiado District.
[52] Ibid.

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.[53]

These assertions on customary conflict resolution are rendered credible by writers who opine that the institution of *Wazee* still exists in almost all communities in Kenya.[54] The *Wazee* institution is normally the first point of call whenever a dispute arises in the 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.[55]

Mediation also allows more members of the community to take part in environmental conflict resolution and, by extension, environmental resources management. Mediation, with its many advantages, may just address some of the challenges facing the current conflict management mechanisms. There is hence an urgent need to promulgate the mediation rules if there is to be any semblance of utilising mediation to resolve conflicts over natural resources in Kenya.

With the promulgation of the 2010 Constitution of Kenya, the law makers created an opportunity for exploring the use of ADR mechanisms and Traditional Dispute Resolution Mechanisms (TDRMs) in managing natural resource based conflicts.[56] 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.[57] 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 conflict resolution mechanisms in land conflicts.[58] This is a significant provision considering that land conflicts form

[53] Ibid.
[54] Mbote, P.K., "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," op. cit. p. 8.
[55] Ibid.
[56] Art. 159(2) (c), Constitution of Kenya 2010, Government Printer, Nairobi.
[57] Art. 60 (1) (g).
[58] Art. 67(2) (f).

the bulk of natural resource based conflicts reported in the country, and the land issue is an emotive one.[59]

There have been frequent and well documented reports of violent conflicts over access to and use of land in Kenya.[60] For example, recently, Narok and Kwale Counties suffered natural resource conflict albeit in varying degrees. In Narok, Kenya, clashes between Maasai and Kipsigis in Olposimoru, Narok County in December 2015 over what is believed to be natural resource based conflict resulted in human casualties and displacement.[61] In Kwale County, there

[59] 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.

[60] 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."

[61] 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]; Recent conflicts have also been reported as follows: Macharia, M., 'Kenya: Resources Conflict Uproots Hundreds of Kenyan Families,'(CAJ News Agency, 6/10/2017), available at http://allafrica.com/stories/201710060488.html [Accessed on 17/10/2017]; Clifton, M., 'The untold story of the conflict in Laikipia, Kenya,' (Animals 24-7, 17/03/2017]. Available at http://www.animals24-7.org/2017/03/17/the-untold-story-of-the-conflict-in-laikipia-kenya/ [Accessed on 17/10/2017]; Kenya Red Cross Society, 'Baringo residents struggle with drought and conflict over resources,' (ReliefWeb, 22/02/2017), available at https://reliefweb.int/report/kenya/baringo-residents-struggle-drought-and-conflict-over-resources [Accessed on 17/10/2017]; Abuya, W.O., "Resource conflict in Kenya's titanium mining industry: Ethno-ecology and the redefinition of ownership, control, and compensation," *Development Southern Africa,* Vol. 34, Iss. 5, 2017.

have also been cases of violence related to natural resource exploitation.[62] In such instances, one may find that a few herdsmen may have been accused of 'trespassing' to graze 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 address all of their concerns.

Although the existence of legal and institutional framework in the country is meant to deal with natural resource based conflicts, it has not offered much in stemming the natural resource based conflicts due to inadequacies within the structure.

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.[63] 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.[64]

Access to justice through litigation is, however, also 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.[65]

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62 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].

63 Buckles, D. (ed), *Cultivating Peace Conflict and Collaboration in Natural Resource Management*, (International Development Research Centre 1999), p.5.

64 Ibid, p. 110.

65 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 09/01/2016]; *The Fair Administrative Action Act*, 20l5 (No. 4 of 2015) which is an Act of Parliament to give effect to Article 47 of

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.[66] 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.[67]

Natural resource based conflicts are unique as they involve people's lives. Left to escalate, suffering and death may be the undesirable result. The ADR conflict management mechanisms have certain advantages that make them

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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, the proposed law, *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.

[66] Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' op cit.

[67] FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

suitable for use in resolution of natural resource based 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 based conflicts.

Arguably, 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 based 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.[68]

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.[69]

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.[70] This is in recognition of the fact that Kenya is a diverse society with different communities who hold different values, attitudes and beliefs towards the land and its resources.

Further, it is 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.[71]

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[68] Daniels, S.E. & Walker, G.B., 'Collaborative Learning And Ecosystem-Based Management,' *Environ Impact Asses Rev*, Vol. 16, 1996, pp. 71-102, p. 82.
[69] Ibid.
[70] Constitution of Kenya 2010, Art. 60(1).
[71] Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' *Biological Conservation*, Vol. 195, March 2016, pp. 196–202.

Consequently, approaches to reducing conflicts are increasingly focusing on engaging stakeholders in processes that are perceived as fair, i.e. independent and where stakeholders have influence, and which in turn can generate trust between stakeholders. [72] It is thus believed that increased trust through fair participatory processes makes conflict resolution more likely.[73] Arguably, central governments who are genuinely concerned about the sustainable use of their country's natural resources must, at a minimum, involve local communities in their management.[74] 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.[75] 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.[76]

The Constitution of Kenya requires 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; 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.[77] 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.[78]

It is, therefore, arguable that one of the ways of stemming natural resource based 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 the 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

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[72] Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' *Biological Conservation*, op cit., pp. 196–202.
[73] Ibid.
[74] Buckles, D. (ed), *Cultivating Peace: Conflict and Collaboration in Natural Resource Management*, (International Development Research Centre 1999), pp. vii-viii.
[75] Ibid.
[76] Ibid.
[77] Constitution of Kenya 2010, Art. 69(1).
[78] Ibid, Art. 69(2).

management to be successful there is a need to conduct a historical analysis (with the participation of local people) so that the major issues can be identified, analysed and discussed.[79]

Managing natural resource based 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.

11.3 Family Mediation and the Law in Kenya

Under the Constitution of Kenya 2010, the 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.[80] 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.[81]

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.[82]

Family mediation is seen as a family-oriented, problem-solving, task completion model that empowers family members to negotiate mutually agreed-on decisions.[83] Indeed, family mediation has emerged as a major dispute resolution process in many states within the U.S., Australia, Canada, and Scotland. With increasing acceptance, family mediation has broadened to include

[79] 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). Available at http://www.fao.org/3/a-y4503e/y4503e09.pdf

[80] Art. 45(1), Constitution of Kenya 2010.

[81] Art. 45(3), Constitution of Kenya 2010.

[82] 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

[83] 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.

adoption, child protection, guardianship, juvenile, parent-teen, and probate matters, although divorce mediation remains the predominant practice.[84]

It has 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.[85] One of the factors contributing to its growth was the anticipation was that the divorce mediation 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.[86]

Compulsory mediation pilot scheme introduced in Kenya in April 2016 was to run on a pilot program for one year was to run initially in the Commercial and Family Division 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.[87]

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.

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[84] Kelly, J.B., 'Issues Facing Family Mediation Field,' *Pepperdine Dispute Resolution Law Journal*, Vol. 1, 2000, pp. 37-44, at p.37.

[85] Ibid, p. 37.

[86] Ibid, p.38.

[87] 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

a. 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.[88]

b. 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.[89]

c. 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.[90] 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.[91]

11.4 Development and Future of Family Mediation in Kenya

a. The Scope of Family Mediation

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 book, 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.[92] This is especially true in light of the fact that the

[88] Marriage Act, 2014, sec. 64.
[89] Marriage Act, 2014, sec. 68(1).
[90] Marriage Act, 2014, sec. 68(2).
[91] Marriage Act, 2014, sec. 68(3).
[92] 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.

conventionally, divorce process as currently conducted continues to be structured as a contest between two opponents.[93]

In other jurisdictions, 'marital reconciliation is encouraged if feasible, but an equally important objective is to help the couple negotiate a workable divorce settlement'.[94] 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.[95] It is therefore important to employ mediation in such matters in Kenya on a larger scale than it may currently be the case.

b. Standards of Practice and Skills in Family Mediation

In order to boost effectiveness of family and divorce mediation, it is also 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 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.[96] 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.[97] There are multiple paths to competence as a family mediator. The individual's life skills, knowledge, professional experience working with

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[93] Bahr, S.J., 'An Evaluation of Court Mediation: A Comparison in Divorce Cases with Children,' *Journal of Family Issues*, op.cit., p. 41.

[94] Ibid., p.42.

[95] Ibid., 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].

[96] 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.

[97] 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.

families, specific training in family mediation, peer consultation, and continuing education all contribute to mediator competence.[98]

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.[99]

Some scholars have argued that family mediators should be trained because (1) this mediation involves new and generally unfamiliar conflict management procedures, (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.[100] 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 learning about family dispute resolution.[101] Such training, it is argued, should include substantive information, negotiation and mediation procedures and skills, conciliation procedures and skills, and ethics.[102]

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

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[98] Kelly, J.B., 'Issues Facing Family Mediation Field,' *Pepperdine Dispute Resolution Law Journal*, Vol. 1, 2000, pp. 37-44, at p.39.

[99] Kelly, J.B., 'Issues Facing Family Mediation Field,' op cit., at p.39.

[100] Moore, C. W., 'Training mediators for family dispute resolution,' *Mediation Quarterly,* No.2, 1983, pp.79-89.

[101] 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.

[102] Moore, C. W., 'Training mediators for family dispute resolution,' op cit.

mediation models and their underlying assumptions, and what practices stem from these rationales.[103] 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.[104]

11.5 Conclusion

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 conflicts such as the natural resource based ones, 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.

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.[105] This is especially so in the management of natural resources conflicts.

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 based conflicts has been recognized in the constitution.[106] 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.[107] This is especially so where natural resource based 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

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[103] 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.
[104] Ibid, p.40.
[105] 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.
[106] See Art. 60(1) (g); Art. 159.
[107] Constitution of Kenya, Art. 159(2).

linked up well with courts and tribunals to promote access to justice and public participation.

This chapter has also 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.

Chapter Twelve

Reflections

12.1 Introduction

This Chapter contains the author's 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.

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. 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.

The revised version of the book also 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. Some of the challenges and recommendations as highlighted by the report have also been captured in this book.

12.2 Reflections on the Theme

In this book the writer contends that most communities in Kenya have used mediation in resolving their conflicts for centuries. It was customary and an everyday affair to see people sitting down informally and agreeing on certain issues, such as the allocation of resources in traditional African societies. 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.[1]

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

[1] For a detailed discussion on these mechanisms, principles and institutions see Chapter Two of this book.

have been innovatively incorporated into formal justice systems in the resolution of conflicts.[2]

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.

Mediation in the political perspective 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 negotiations. He does not dictate the outcomes of the negotiations. Parties must have the autonomy of the process and of the outcome.[3]

Mediation is a voluntary process. However, Kenya has introduced court mandated mediation (See discussion in Chapter 10). Court mandated mediation cannot be true mediation. Once the voluntariness to go for mediation is lost then the process of mediation is negatively affected. It may not lead to outcomes that are enduring, since the parties will always feel they were coerced into a negotiation. In any event and as has been argued elsewhere in this book court mandated mediation is a legal process that can only lead to a settlement rather than a resolution of the conflict (see discussion in Chapter 10 and illustration in Fig. 2.0). The parties will be expected to report back the outcome of their negotiations to court. The court will have to endorse it. As such the process then becomes exposed to the vagaries that bedevil the court system including delays, bureaucracy and inefficiency.

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[2] 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].

[3] See discussion in Chapter 1 and 3.

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. Formal legal systems have failed to recognize that mediation is not a new concept in Kenya and have 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 institutional capacity already existing, 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 (See discussion in Chapter 9). As Martin Luther King Junior said:

> "*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*".[4]

Resolving conflicts in Kenya through mediation, as has been demonstrated herein is possible. It is indeed an imperative.

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[4] Martin Luther King: Excerpt from acceptance Speech by the 1993 Nobel Peace Laureate, Inaugural Celebration address 1994, sourced from, http.www.goote.htm, (accessed on 5/08/2012).

12.3 Opportunities for Mediation

12.3.1 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.[5]

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).[6]

Marginalised individuals and groups often possess limited influence in shaping decision-making processes that affect their well-being.[7] 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.[8]

It is often difficult for Kenyans to seek redress from the formal court system especially due to the challenges highlighted above. The end result is that the 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 cited as some of the causes of ethnic or clan animosity in Kenya.[9]

In litigation, the dispute settlement coupled with power struggles will usually leave broken relationships and the problem might recur in future or even

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[5] Global Alliance against Traffic in Women (GAATW), Available at *http://www.gaatw.org/atj/*(Accessed on 13/10/ 2017).

[6] 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).

[7] 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.

[8] 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].

[9] *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*', (the 'Akiwumi Commission') (Government Printer, Nairobi, 1999).

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.[10]

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.[11] 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.[12]

12.3.2 Mediation, Environmental Democracy, Public Participation and Community 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.[13]

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.[14]

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[10] 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.

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

[12] 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.

[13] FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

[14] 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

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.[15] 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.[16]

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.[17]

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.[18] 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.[19]

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

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to the environment is to encourage public participation in the management, protection and conservation of the environment.

[15] 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].

[16] 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.

[17] 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).

[18] Constitution of Kenya 2010, Art. 10(2).

[19] Constitution of Kenya 2010, Art. 10(3).

citizens, at the relevant level.… Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[20] Participatory approaches have been increasingly advocated as effective decision-making processes to address complex environment and sustainable development issues.[21]

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.[22]

It has been suggested that government policies can create opportunities for use of mediation during disputes.[23] 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.[24]

Alternative Dispute Resolution mechanisms (ADR) and particularly negotiation and mediation, have intrinsic advantages that can facilitate effective management of natural resource based conflicts. They are 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

[20] United Nations Conference on Environment and development, *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992.
[21] 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.
[22] Ibid, p.16.
[23] Castro, A.P. & Nielsen, E. (eds), 'Natural resource conflict management case studies: an analysis of power, participation and protected areas,' op cit, p. 272.
[24] Ibid.

> 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.[25]

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.[26]

Political empowerment requires inclusion in democratic decision-making processes which is equated to mainly gaining a voice within the local and/or central state.[27]

As discussed in Chapter 2, 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 in the political perspective.

Arguably, mediation in the political perspective 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 attributes of the political perspective 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

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[25] Oladipo, S.E., 'Psychological Empowerment and Development', *African Journals Online, Vol. 2, No 1, 2009,* p.121.

[26] 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].

[27] 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, pp. 393–406.

as time and money, fostered relationships and mutually satisfying outcomes.[28] 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.[29] In fact, it is against this fact that the Constitution retains the test of non-repugnancy while applying traditional justice systems.[30] This is where the Courts come in as the legal guardians of the Bill of Human rights as envisaged in the Constitution.[31]

12.3.4 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

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[28] Muigua, K., 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,' op cit. p. 84.

[29] 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].

[30] Constitution of Kenya 2010, Art. 159(3).

[31] 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;
> (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.

because control over the benefits from local natural resources is often a chief motivator of ethnic or identity-based conflicts.[32] 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.[33]

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.

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.[34] 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.[35] 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.[36]

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.[37] 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 to

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[32] Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' op cit, p. 5.

[33] 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).

[34] FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

[35] Ibid.

[36] See generally Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management, op. cit.

[37] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

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.[38]

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.[39] 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'.[40] It is also noteworthy that SDGs seek to promote participation of local communities in natural resource management.[41]

Indigenous knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment.[42] 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.

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[38] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, op.cit.
[39] Ibid.
[40] 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.
[41] Ibid, Goal 6b.
[42] 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.

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.[43]

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[44] 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 many challenges. However, ADR is worth working with in the environmental arena. The benefits accruing from ADR

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[43] 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].

[44] 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).

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.

12.4 Recommendations

a. Facilitative 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.

As discussed in chapter 2 before the advent of contemporary conflict resolution 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 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.[45]

Development, in order to be authentic, must respond to the traditions, attitudes, organisations and goals of the people whose society is under consideration.[46] Elders are traditionally regarded as experienced, expert custodians of knowledge, diplomacy and the judicial system of their specific society grouping.[47] 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.[48]

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[45] 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.

[46] Brainch, B., *ADR/Customary Law*, a paper presented at the World Bank Institute for Distance Learning for Anglophone Africa, November 6, 2003.

[47] Ibid.

[48] 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].

The current land mediation system in East Timor for example, creates a bridge between traditional dispute-resolution mechanisms and the courts.[49] 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.[50] 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 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. As already elaborated elsewhere in this book, the policy, legal and institutional mechanisms in Kenya are merely 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.[51]

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[49] 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].

[50] Ibid.

[51] Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", op cit.

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 in the political perspective 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.

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 and thus the author does not advocate for court annexed mediation as is suggested in the Civil Procedure Act. Mediation that is annexed to the process of the court losses the very essence of voluntariness, which is the hallmark of mediation and ADR in general (See discussion in Chapter 10).

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.[52] 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.[53] 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.[54]

The role of women in mediation of conflicts as discussed in chapter 2 should be institutionalized. The place of women in our society puts them in the most proximate contact. As stated in chapter 2, 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.[55] The constitution now requires gender parity in almost all commissions or organs of government.

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 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

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[52] Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", op. cit., p. 196.
[53] See generally, The European Code of Conduct for Mediators and Directive 2008/52 [2008] *OJL* 136/3.
[54] See Brainch, B., *ADR/Customary Law,* op. cit.
[55] Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", op. cit., p. 196.

example, pledge use of mediation clauses in all government contracts and to resort to mediation in the first instance.[56] 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 Koffi 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, *albeit* in a different manner, that is in the political perspective. 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.[57]

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.[58]

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[56] Brainch, B., *ADR/Customary Law,* op. cit.

[57] 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).

[58] 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.

b. 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.[59] 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 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

[59] Constitution of Kenya, Article 60 (1) (g); 67(2) (f).

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. 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[60] 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.

c. 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.[61] 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

[60] One of the principles of land management in Kenya is encouragement of communities to settle disputes through ADR.

[61] 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).

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.[62]

12.5 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.

As discussed in chapter 2 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. These positive attributes of mediation can only be realized if mediation is conceptualized as an informal process as it was in the traditional African society and not as a legal process. Mediation should thus not be used in managing conflicts in the context

[62] See *Republic v Mohamed Abdow Mohamed, [2013] eKLR, Criminal Case 86 of 2011.*

of the legal environment as it will not resolve conflicts but will settle the same.[63] 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.

[63] See discussion in the previous chapters on the distinction between Settlement and Resolution and their differing outcomes in conflict resolution.

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e) Interviews

Interview with Ndungu Mwaura, an 82 year old Kikuyu elder on 16th August 2008, at Kahuhia, Murang'a District.

Interview with William Ole Munyere, a 97 year old Maasai elder on 6th June, 2009, at Oloirien Inkarusa village, Ngong Division, Kajiado District.

Interview with Nelson Nyamu at Kagio, Kirinyaga District on 13th January 2012.

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