Alternative Dispute Resolution And Access to Justice in Kenya

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Table of Contents

Dedication viii

Acknowledgements ix

Table of Figures x

List of Cases xi

List of Statutes and International Legal Instruments..xii

List of Conventions and Treaties..xv

List of Abbreviations..xvi

Chapter One..1

Conflict Management and Alternative Dispute Resolution..1

1.1 Conflict……………………………………………………………………..1

1.2 Conflicts and Disputes..5

1.3 Conflict Management..7

1.4 Conflict Management Mechanisms..8

1.5 Settlement and Resolution Mechanisms..10

1.6 Addressing Root Causes of Conflict 12

1.7 Resolving Conflicts 16

Chapter Two 19

Alternative Dispute Resolution Mechanisms and Traditional Dispute Resolution: an Appraisal …………..…………………………………………....19

2.1 Introduction 19

2.2 Negotiation 23

2.3 Mediation 24

  2.3.1 Merits and Demerits of Mediation 31

2.4 Conciliation 32

2.5 Arbitration 34

  2.5.1 Types of Arbitration 35

  2.5.2 Advantages and Disadvantages of Arbitration 39

2.6 Med-Arb 44
2.7 Arb-Med 48
2.8 Dispute Review Boards 49
2.9 Early Neutral Evaluation 50
2.10 Expert Determination 50
2.11 Mini Trial (Executive Tribunal) 51
2.12 Adjudication 51
2.13 Traditional Justice Systems/ Traditional Dispute Resolution Mechanisms 52
2.14 Demerits/Criticism of ADR Mechanisms 54
2.15 Conclusion 56
Chapter Three 58
Understanding the foundations of ADR 58
3.1 Introduction 58
3.2 Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution 58
Mechanisms (TDRM) In Pre-Colonial Era 58
3.3 Emergence of Formal Justice System in Kenya 61
3.4 Place of Traditional Justice Systems in Current Kenyan Legal System 63
3.5 Are ADR Mechanisms Alternative? 66
3.6 Conclusion 72
Chapter Four 74
Legal and Policy framework of ADR in Kenya 74
4.1 Introduction 74
4.2 Legal and Institutional Framework on Arbitration in Kenya 75
4.3 Legal and Policy Framework on TDR in Kenya 79
4.3.1 The Constitution, 2010 79
4.3.2 Civil Procedure Act and Rules 2010 80
4.3.3 Land Act, 2012 81
4.3.4 Commission on Administrative Justice Act, 2011 82

4.3.5 The National Land Commission Act, 2012 83
4.3.6 Environment and Land Court Act, 2011 84
4.4 Towards a Policy and Legal Framework 85
4.4.1 Policy Framework on ADR in Kenya 85
4.4.2 Legal and Administrative /Institutional Framework 87
4.5 Conclusion 90
Chapter Five 91
ADR under the Court Process: A Paradox? 91
5.1 Introduction 91
5.2 Court annexed arbitration 92
5.2.1 Role of Courts in Arbitration 94
5.3 Court Sanctioned Mediation 100
5.3.1 The Mediation (Pilot Project) Rules, 2015 102
5.4 Challenges and Opportunities for Court-Annexed ADR 104
5.4.1 Challenges in Court Sanctioned Mediation in Kenya 105
5.4.2 Reforming the Role of Court in ADR and TDR in Kenya 116
5.5 Conclusion 117
Chapter Six 121
ADR and Access to Justice 121
6.1 Introduction 121
6.2 Access to Justice in Kenya 125
6.3 Challenges facing Actualization of Access to Justice 126
6.4 Towards Actualization of the Right of Access to Justice 128
6.4.1 Access to Justice through TDR and ADR Mechanisms in Kenya 130
(i) Access to Justice through Negotiation 135
(ii) Mediation and Justice 140
(iii) Justice via Conciliation 140
(iv) Seeking Justice through Arbitration 140

(v) Justice through Med-Arb 141
(vi) The Arb-Med Justice Option 141
(vii) Adjudication and Justice 142
(viii) Traditional Justice Systems 142
6.5 Conclusion 144
Chapter Seven 146
Regulating ADR Practice in Kenya 146
7.1 Introduction 146
7.2 To Regulate or Not To Regulate? 146
7.3 A Case for a Multi-Layered Approach 151
7.4 Processes or type of ADR 152
7.5 Referral of disputes to ADR 155
7.6 Obligations of parties to participate in ADR 156
7.7 Standards and Accreditation of ADR practitioners 157
7.8 Confidentiality of communications made during ADR and Inadmissibility ... 159
of Evidence 159
7.9 Confidentiality Issues 160
7.10 Conclusion 160
Chapter Eight 162
The Lawyer as a Negotiator, Mediator and Peacemaker 162
8.1 Introduction 162
8.2 Lawyers and Society 163
8.3 Lawyers in the Negotiation Process 164
8.3.1 Methods of Negotiation 166
8.3.2 Negotiation Skills for Lawyers 167
8.4 Lawyers and the Mediation Process 170
8.4.1 Making Positive impact to the mediation Process 174
8.4.2 Mediation Skills for Lawyers 177

8.5 Role of the Lawyer as a Peacemaker in Society 178
8.6 Remoulding the Lawyer 181
8.6.1 Guaranteed Remuneration 181
8.6.2 Training in ADR 182
8.6.3 Holistic Law Curriculum 183
8.7 Conclusion 185
Chapter Nine 187
The Future of ADR in Kenya 187
9.1 Introduction 187
9.2 Scope of ADR and TDR 187
9.3 Professionalization of ADR: ADR and Public Trust 189
9.4 Streamlining TDR mechanisms 190
9.5 Statute on ADR and TDR Mechanisms 191
9.6 Acceptance by the society 192
9.7 Accountability/Public Participation and ADR 195
9.8 Court Practice 197
9.9 Conclusion 200
Chapter Ten 201
Conclusion 201
Bibliography 206

Dedication

Dedicated to the idea
Of equal Access to Justice
For all
And to the ideal
That human beings can
Live together in peace
And harmony
And to those who believe
That if your dream is big enough,
No one can take it
Away from you.

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Table of Figures

Figure 1 Methods of Conflict Management……………………………………….17
Figure 2 Degree of Party Autonomy…………………………………………….56
Figure 3 Mediation in the Court Process……………………………………….104

List of Cases

African Commission on Human and Peoples Rights V Republic of Kenya, Application 006/2012.

Anne Mumbi Hinga V Victoria Njoki Gathara, Court of Appeal at Nairobi, Civil Appeal 8 of 2009 [2009] eKLR

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List of Abbreviations

ADR-Alternative Dispute Resolution

Arb-Med-Arbitration-Mediation

BATNA-Best Alternative to a Negotiated Agreement

CADR-Centre for Alternative Dispute Resolution

CCMA-Commission for Conciliation, Mediation and Arbitration

CIArb (K)-Chartered Institute of Arbitrators-Kenya Branch

CON-ARB-Conciliation – Arbitration

DRC-Dispute Resolution Centre

ICPAK-Institute of Certified Public Accountants of Kenya

MAC-Mediation Accreditation Committee

Med-Arb-Mediation-Arbitration

NADRAC-National Alternative Dispute Resolution Advisory Council

NGO-Non Governmental Organisation

PRI-Penal Reform International

SDRC-Strathmore Dispute Resolution Centre

TDRM-Traditional Dispute Resolution Mechanisms

TDR-Traditional Dispute Resolution

TJS-Traditional Justice Systems

UK-United Kingdom

UNCITRAL-United Nations Commission on International Trade Law

UNCTAD-United Nations Conference on Trade and Development

Chapter One

Conflict Management and Alternative Dispute Resolution

1.1 Conflict

Conflict as a concept has no universally agreed definition.[1] While some scholars have defined the term narrowly, others have conceptualised it broadly, in a way that envisages the wide range of issues that are relevant or give rise to conflict. There are those who have explained conflict as any situation in which two or more "parties" (however defined or structured) perceive that they possess mutually incompatible goals.[2] In the foregoing definition, any conflict is believed to consist of three component parts: goal incompatibility, attitudes and behaviour. With regard to incompatibility, it is argued that actors or parties think that the realisation of one or more of their objectives is blocked by the other party's attempt to reach its own respective goal. Indeed, goal incompatibility is believed to be the starting point from which a conflict becomes manifest and each of the three elements begins to interact.[3]

Goals are believed to be consciously desired future outcomes, conditions or end states, which often have intrinsic (but different) values for members of particular parties.[4] It has been argued that conflicts [in Africa] arise from problems basic to all populations: the tugs and pulls of different identities, the distribution of resources and access to power, and competing definitions of what is right, fair and just.[5] Conflict has also been described as a process of social interaction involving a struggle over claims to resources, power and status, beliefs, and other preferences and desires. The aims of

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[1] See Rahim MA, *Managing Conflict in Organizations*, (Transaction Publishers, 4th ed., 2015), p. 15.

[2] Demmers J., *Theories of Violent Conflict: An Introduction*, (Routledge, New York, 2012), p.5.

[3] *Ibid*; See also Kriesberg, L., *Constructive Conflicts: From Escalation to Resolution*, (Lanham, Maryland: Rowman & Littlefield, 1998). *<http://www.colorado.edu/conflict/peace/example/kries7527.htm>* Accessed 20 November 2015.

[4] *Ibid.*

[5] Stephen Stedman as quoted in Kieh, G.K. & Mukenye, I.R. (eds), *Zones of Conflict in Africa: Theories and Cases*, (Greenwood Publishing Group, 2002), p.3.

the parties in conflict may extend from simply attempting to gain acceptance of a preference, or securing a resource advantage, to the extremes of injuring or eliminating opponents.[6]

Kenya can readily identify with the foregoing conception of conflict in relation to some of the ethnic and clan conflicts. Research shows that most of them are instigated by competition for scarce resources.[7] The scarcity may be due to climate change or resource capture and control by a few individuals either for personal benefit or for the benefit of a small group at the expense of the majority.[8]

The other component of conflict is conflict attitudes, which are defined as those psychological states (common attitudes, emotions and evaluations, as well as patterns of perception and misperception) that accompany and arise from involvement in a situation of conflict.[9] The third component is conflict behavior, which consists of actions undertaken by one party in any situation of conflict aimed at the opposing party with the intention of making that opponent abandon or modify its goals.[10] In Kenya, and Africa in general, this may explain the tendency by some communities or militia driving out others from an area that is rich in certain basic resources or minerals.[11]

While conflict may exist in many forms, the discussion in this book is restricted to social conflict, which has been defined as the opposition between individuals and groups on the basis of competing interests, different identities and/or differing

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[6] Rahim, M.A., *Managing Conflict in Organizations*, (Quorum books, 3rd Ed., 2001), p. 1.

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

[8] Evans, A, 'Resource Scarcity, Climate Change and the Risk of Violent Conflict,' *World Development Report 2011: Background Paper*, (Center on International Cooperation, New York University, September 9, 2010), p. 8-9. Available at *https://ipcc-wg2.gov/njlite_download2.php?id=10351* [Accessed on 5/12/2015].

[9] Demmers J., *Theories of Violent Conflict: An Introduction*; See also Folger, J.P., et al, "Conflict and Interaction," in *Bridges Not Walls*, ed. John Stewart, 6th edition, (New York: McGraw-Hill, 1995), pp. 402-410.

[10] *Ibid*.

[11] See generally, Mutisi, M., *et al*, *Integrating Traditional and Modern Conflict Resolution Experiences from selected cases in Eastern and the Horn of Africa*, (ACCORD, 2012).

attitudes.[12] In this context, social conflict does not focus on conflict within individual minds, or on purely individual reactions to conflict.[13] Rather, its focus is on social conflict: conflict between or among individuals, or between or among groups.[14] Social conflicts involve an antagonism between different groups of people based on basic values, social status, political influence, or scarce resources.[15] These are the main forms of conflict that are to be dealt with in this book, particularly those originating from political influence or scarce resources. However, this will not include a discussion on personal conflict and dispute.

It has been argued that causes of conflicts are variously attributed to factors inside one or more of the adversaries, to the relations between different groups, and to features of the social system.[16]It has rightly been observed that conflicts are intimately linked to the question of power—that is, to the capacity of individuals or groups to realize their goals, satisfy their needs, and promote their interests.[17] As such, any attempt to address the root causes of the conflict must address these factors, which may not be very obvious to an outsider.[18] Perhaps in the understanding of the foregoing, it

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[12] Schellenberg, J.A., *Conflict Resolution: Theory, Research and Practice*, (Suny Press, 1996), p. 8.

[13] *Ibid.*

[14] *Ibid.*

[15] Clark DS, service) S e Reference (Online and Sage Publications inc, 'Encyclopedia of Law & Society : American and Global Perspectives' 1387, p.3.

[16] Kriesberg, L., 'Social Conflict Theories and Conflict Resolution,' *Peace and Change* Volume: 8 Issue: 2/3 Dated: special issue (Summer 1982) pp. 3-17.

[17] Clark DS, service) S e Reference (Online and Sage Publications inc, 'Encyclopedia of Law & Society : American and Global Perspectives' op cit., p.3.

[18] See Gallo G, 'Conflict Theory, Complexity and Systems Approach' (2013) 30 *Systems Research and Behavioral Science,* 156. Gallo argues that a conflict is a special kind of system whose complexity stems from many different and sometimes unrelated elements. He goes on to state that on the one side, there are the parties involved in the conflict. There are cases in which the parties are just two (or even one, in the case of a dilemma), but most often the parties are many, with intricate relations between them. He observes that more importantly, there are often multiple and diverse objectives. Some may even be hidden, not defined once and for all, and may evolve over time.

is posited that conflict must be understood as potentially endemic in all political systems. It is believed that there is clearly a direct connection between the escalation of civil conflict, the retardation of socio-economic development, and the exacerbation of human misery.[19]

There are still those who argue that conflict is fully a part of all forms of society and that people should appreciate its importance-for stimulating new thoughts, for promoting social change, for defining group relationships, for helping people form their own senses of personal identity, and for many other things that people take for granted in everyday lives.[20] It is even asserted that most of the modern national states were forged through bitter conflict.[21] It is also argued that conflict can be an important force for social change, because it alerts people to: grievances in the wider socio-economic or political system; competitive or contradictory laws or policies regulating access to or control over natural resources; weaknesses in the ways in which natural resource management policies or laws are implemented; people's need or desire to assert their rights, interests and priorities; and undesirable environmental conditions, such as overharvesting of renewable resources.[22] There exist studies as evidence that these factors are rife across many African States, especially those that are well endowed with natural resources.

Indeed, Plato asserted that tension within society is natural, and therefore some conflict is inevitable. However, he argued that if a proper balance of the parts could be obtained, social conflict would be kept to a minimum.[23] This book seeks to adopt a definition that is broad enough to incorporate all the relevant issues surrounding the meaning, scope and elements of conflict.

Conflict is viewed as a process of adjustment, which itself can be subject to procedures to contain and regularize conflict behaviour and assure a fair

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[19] Kieh, G.K. & Mukenye, I.R. (eds), *Zones of Conflict in Africa: Theories and Cases*, (Greenwood Publishing Group, 2002), p.3.

[20] *Ibid*, p.9.

[21] *Ibid*.

[22] FAO, 'Negotiation and Mediation Techniques for Natural Resource Management' <*http://www.fao.org/docrep/008/a0032e/a0032e05.htm*> Accessed 20 November 2015.

[23] Schellenberg, J.A., *Conflict Resolution: Theory, Research and Practice*, op cit, p.89.

outcome.[24]Around Africa, social conflict has affected national and social development in unprecedented ways that have resulted in mass exodus of people to other areas, as refugees.[25] It is for this reason that conflicts need to be managed for the sake of balancing interests, power and adjusting parties' expectations, in order to avoid the potentially negative effects of conflict in a society. There is a need to strike a balance among the three component parts of a conflict, namely, goal incompatibility, attitudes and behaviour, in order to ensure a peaceful society where groups do not unduly use their power to suppress the perceivably weak groups or individuals. It is for this reason that the next part looks at conflict management and why it is important to manage social conflict in a society.

1.2 Conflicts and Disputes

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.[26] Conflicts arise due to issues about values which are non-negotiable.[27] They arise due to non-fulfillment of needs and values that are shared by the parties and are inherent in all human beings.[28] It is arguable that most of the conflicts arise out of feelings of injustice being perpetrated. It has been posited that the desire for justice is one that people tend to be unwilling to compromise. Assertions of injustice often lead to intractable conflicts as well, with an individual's sense of justice

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[24] Rummel, R.J., *Principles of Conflict Resolution*, Chapter 10, 'Understanding Conflict and war: Vol. 5: The Just Peace.

[25] See Nmoma, V., 'The Civil War and the Refugee Crisis in Liberia,' *The Journal of Conflict Studies,* Vol. 17, No 1, Spring 1997; Office of the High Commissioner for Human Rights,'FactSheet20en.pdf'*<http://www.ohchr.org/Documents/Publications/FactSheet20en.pdf> [* Accessed on 27/11/2015].

[26] 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.

[27] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 42.

[28] *Ibid*; See also Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit.pp.56-65.

being connected to the norms, rights, and entitlements that are thought to underlie decent human treatment.[29]If not well addressed, such feelings of dissatisfaction may result in conflicts.

On the other hand, a dispute refers to issues or interests that are finite and divisible, and can therefore be negotiated. As such, disputes are merely settled hence the phrase dispute settlement[30].

A dispute can be interest- based, rights-based or power-based. Interest-based disputes are best addressed through negotiation and mediation, rights-based disputes through litigation while power-based disputes are addressed through *inter alia,* use of force, threats and violence.[31] It has been observed that disputes involve the recognition by the parties involved that they are entitled to some kind of resolution or solution to the dispute.[32] A disagreement as to the existence or validity of a claim by a party gives rise to the dispute.[33]

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[29] Michelle, M., "Causes of Disputes and Conflicts," in Burgess, G. & Burgess, H., (eds), *Beyond Intractability*, (Conflict Research Consortium, University of Colorado, October, 2003), available at <*http://www.beyondintractability.org/essay/underlying-causes*>.[Accessed on 06/08/2015]; See also generally, Okidi, C.O. *et al*, (eds), *Environmental Governance in Kenya,* (East African Educational Publishers Ltd., Nairobi, 2008).

[30] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), *op cit,* pp. 109-110; See also generally, Mwagiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, Nairobi, 2008), chapter Four.

[31] *Ibid*

[32] Marshall P, 'Would ADR Have Saved Romeo and Juliet?' (1998) vol. 36 Osgood Hall Law Journal pp. 771, p. 775.

[33] *Ibid*.

1.3 Conflict Management

There are two main approaches to conflict management.[34] Traditional theory considers people involved in conflict situations as trouble makers while the modern theory considers conflict as a natural and inevitable outcome of human interaction.[35]

Conflict management refers to the various processes required for stopping or preventing overt conflicts, and aiding the parties involved to reach durable peaceful settlement of their differences.[36] This definition conceives 'conflict management' as an 'umbrella term' that refers to all the stages of conflict as well as all the mechanisms that are used to deal with conflict.[37] "Management" in this context is used in a wider meaning than the strict sense of "to manage" or "to cope with" to include the meaning of "to administer".[38]The discussion herein adopts the term in this context and as such, this section highlights all the approaches employed in dealing with conflict. This is against the narrow view by some scholars that conflict management, as a concept, refers to conflict containment, a view that is based on the belief that violent conflicts are an ineradicable consequence of differences of values and interests within and between communities.[39] According to this school of thought, resolving such conflicts is unrealistic: the best that can be done is to manage and contain them, and occasionally to reach a historic compromise in which violence may be laid aside and normal politics resume.[40]It has been argued that if the basic human needs are unfulfilled because the state fails to properly address them, or if a group feels that

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[34] Della, V.E. & Cerizza, LD, Management *of agricultural research: A training manual*, ('Session 5' FAO), available at *http://www.fao.org/docrep/w7504e/w7504e07.htm#reading%20note:%20conflict%20management* [Accessed 21/11/2015.

[35] *Ibid*.

[36] Leeds, C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners,' *International Journal of Peace Studies*, Vol. 2, No. 2, 1997.

[37] Hamad, AA, 'The Reconceptualisation of Conflict Management' (2005) 7 *Peace, Conflict and Development: An Interdisciplinary Journal* 1, pp. 6-7.

[38] *Ibid*, p. 11.

[39] *Ibid*.

[40] *Ibid,* p. 4.

these needs are unmet, or perceives a threat to these needs, violence can emerge.[41]It is against the foregoing background that the author explores the various mechanisms that can be employed in conflict situations especially social conflicts in Kenya.

1.4 Conflict Management Mechanisms

Generally, conflict management mechanisms include any process which can bring about the conclusion of a dispute or conflict, ranging from the most informal negotiations between the parties themselves, through increasing formality and more directive interventions from external sources, to a full court hearing with strict rules of procedure.[42]There is a range of conflict management mechanisms available to parties in conflict or dispute. For instance, Article 33 of the *Charter of the United Nations*[43]outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to.[44] It provides that *the parties to any dispute should, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice* [Emphasis added].[45]

Litigation or judicial settlement is a coercive dispute settlement mechanism that is adversarial in nature, where parties in the dispute take their claims to a court of law to be adjudicated upon by a judge or a magistrate. The judge or magistrate gives a judgment which is binding on the parties, subject only to statutory right of appeal. In

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[41] Doucey M, 'Understanding the Root Causes of Conflicts: Why It Matters for International Crisis Management,' *International Affairs Review, Vol. 20, No. 2, Fall2011,* p. 4.

[42] Sourced from, <*http://www.buildingdisputestribunal.co.nz/.html*> [Accessed on 05/08/2015].

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

[44] See generally Eunice R. Oddiri, *Alternative Dispute Resolution*, paper presented by author at the Annual Delegates Conference of the Nigerian Bar Association, 22nd - 27th August 2004, Abuja, Nigeria. Available at *http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.htm* Accessed on 17 April, 2013; See 'The Role of Private International Law and Alternative Dispute Resolution', Available at *http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap4.html* [Accessed on 19/08/2015].

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

litigation, the parties to the dispute have minimum or no control at all over the forum, the process and outcome of the process and as such, the outcome may not satisfy both parties.

The judicial authority in Kenya is exercised by the courts and tribunals.[46]Litigation has its advantages in that precedent is created and issues of law are interpreted.[47] It is also useful where the contract between the parties does not stipulate for a consensual process and the parties cannot agree on one; the only alternative is litigation. Through litigation, it is possible to bring an unwilling party into the process and the result of the process be enforceable without further agreement.[48] Litigation should therefore, not be entirely condemned as it comes in handy, for instance, where an expeditious remedy in the form of an injunction is necessary.

The Constitution provides that the national courts and tribunals should do justice to all irrespective of status; justice should not be delayed; alternative forms of dispute resolution should be promoted; and justice should be administered without undue regard to procedural technicalities.[49]Courts in Kenya, however, have encountered many problems related to access to justice, for instance, high court fees, geographical location, complexity of rules and procedure and the use of legalese.[50] The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves.'[51] Dispute settlement through litigation can take years

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[46] See Art. 159 of the Constitution of Kenya, [*Government Printer,* Nairobi, 2010].

[47] See the argument by Calkins, R.M., 'Mediation: A Revolutionary Process That Is Replacing the American Judicial System,' *Cardoza Journal of Conflict Resolution*, Vol. 13, No. 1, 2011; cf. Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases,' *Utah Law Review*, No. 3, 2009, pp. 797-843, p. 799.

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

[49] See Art. 48 &159 (2) of the Constitution of Kenya.

[50] *Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution,* ICJ Kenya*,* Vol. III, May, 2002.

[51] Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," *Kenya Law Review Journal*, Vol. 1, No. 19, 2007, pp. 19-29 at p.29.

before the parties get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. Litigation is so slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world. It is against this backdrop that this book explores how litigation can be complemented with the effective use of ADR mechanisms in facilitating access to justice. This section offers a general introduction to conflict management, clarifying issues and concepts that inform various conflict management mechanisms.

1.5 Settlement and Resolution Mechanisms

Settlement is an agreement over the issues(s) of the conflict which often involves a compromise.[52]A settlement process "seeks to mollify the opposition without discovering or rectifying the underlying causes of the dispute". Settlement is considered to be power-based in that the outcome majorly relies on the power that is possessed by the parties to the conflict. Due to the changing nature of power, the process becomes a contest of whose power will be dominant. Parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in the relationship. Basically, power is the defining factor for both the process and the outcome.[53]

Settlement may be an effective immediate solution to a violent situation, but will not thereof address the factors that instigated the conflict. Settlement practices fail to address needs that are inherent in all human beings, parties' relationships, emotions, perceptions and attitudes. Thus, the real causes of conflict remain unaddressed with possibilities of erupting in future.[54]Dispute settlement mechanisms remain highly coercive allowing parties limited or no autonomy. To this end, settlement mechanisms may not therefore, be very effective in facilitating satisfactory management of natural

[52] Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research, op cit*, p.152.

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

[54] Fetherston, A.B., "From Conflict Resolution to Transformative Peace building: Reflections from Croatia", *Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4* (April, 2000), pp. 6-8; See also generally Muigua, K., "Resolving Environmental Conflicts Through Mediation in Kenya" Ph.D. Thesis, 2011, *Unpublished,* University of Nairobi

resource based conflicts. The main dispute settlement mechanisms are litigation or judicial settlement and arbitration.[55]

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.[56] Conflict resolution on the other hand, refers to a process where the outcome is based on mutual problem-sharing with the conflicting parties cooperating in order to redefine their conflict and their relationship.[57] Resolution is non-power based and non-coercive thus enabling it to achieve mutual satisfaction of needs without relying on the parties' power.[58] 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.[59]

This outcome is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and it is also not zero-sum, since gain by one party does not mean loss by the other; each party's needs are fulfilled.[60] Such needs cannot be bargained or fulfilled through coercion and power. These advantages make resolution potentially superior to settlement. Conflict resolution mechanisms include, *inter alia,* negotiation, mediation in the political process, and problem solving facilitation.

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

[56] *Ibid;* See also generally Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, *op cit.*

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

[58] Cloke, K., "The Culture of Mediation: Settlement vs. Resolution," *The Conflict Resolution Information Source*, Version IV, December 2005, available at *http://www.beyondintractability.org/bi-essay/culture-of-mediation* [Accessed on 08th March, 2014].

[59] See also Sandole, D. J. D., et al, (eds) *Handbook of Conflict Analysis and Resolution*. (International Relations, 2008); Nanthikesan, S. & Uitto, 'Evaluating post-conflict assistance,' In *Assessing and Restoring Natural Resources in Post--Conflict Peace building,* ed. D. Jensen and S. Lonergan. London: Earthscan, 2012.

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

It is, therefore, arguable that resolution mechanisms have better chances of achieving parties' satisfaction when compared to settlement mechanisms. However, each of the two approaches has their own distinct advantages, thus making them complementary to each other. For realisation of effective justice, there is need to ensure that the two are engaged effectively where applicable.

1.6 Addressing Root Causes of Conflict

Conflict resolution is used to mean terminating conflict with an outcome that, in the view of the parties involved, is a permanent solution to the problem. Conflict resolution, as opposed to conflict "management" or "settlement," requires methods that get to the root of problems and, therefore, are highly analytical.[61] Indeed, it has been argued that conflict resolution has the capability of dealing with all forms of conflict at all social levels from the impersonal to the international. This capability extends to conflicts which are complex, intense, and violent – it is here that conflict resolution demonstrates its unique usefulness.[62] Conflict resolution mechanisms such as negotiation and mediation seek to address the root cause of conflicts unlike litigation, which concerns itself with reaching a settlement.

Since a settlement is power-based and power relations keep changing, the process becomes a contest of whose power will be dominant.[63] Rights-based and power-based approaches are used at times when parties cannot or are not willing to resolve their issues through interest-based negotiation.[64]

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.[65] Examples of such mechanisms are litigation and arbitration. In litigation the dispute settlement coupled

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[61] Burton, J.W., 'Conflict Resolution as a Political System - PEACE in Action' <*http://promotingpeace.org/2007/4/burton.html*> Accessed 18 November 2015.

[62] *Ibid*.

[63] *Ibid*, p.80.

[64] See generally Chapter-V, 'Non Adjudicatory Methods of Alternative Disputes Resolution' *op cit*, p. 165.

[65] Muigua, K., *Resolving Conflicts through Mediation in Kenya, op cit*., p. 81.

with power struggles will usually leave broken relationships and the problem might recur in future or even worse still, the dissatisfied party may seek to personally administer 'justice' in ways they think best. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed. ADR mechanisms are thus better suited to resolve conflicts where relationships matter.

If the parties are to express real satisfaction in their quest for true justice needs in the conflict management mechanism used, then there must be a paradigm shift from focusing on the artificial issues of the dispute, to seeking to deal with the real problem so as to avoid future problems, depending on the nature of the dispute and the nature of the parties' relationship. Further, some conflicts would require resolution as against settlement, especially if relationships are at stake. Any approach settled for should be chosen on the basis of the actual needs of the parties, in regard to access to justice. This way, the particular method would achieve its chief objective of promoting a just society, where access to justice does not rely on economic or political factors, but the real needs of the persons concerned.

Conflict resolution processes such as negotiation and mediation delve into the roots or the underlying causes of the conflict and relationships and are thus concerned with removing them altogether.[66] Due to their peculiar nature, conflicts are well addressed through resolution by the non-coercive, non-legal or non-adjudicatory mechanisms.[67] Resolution is the mutual construction of a relationship which is legitimate because the needs of each party are satisfied. It is only through these mechanisms that the mutual needs of the parties and removal of the underlying causes of the conflict can be satisfied.[68] It has been argued that the practice of conflict resolution via an analytical, problem-solving procedure is deduced from the theory that conflict is a universal response to frustrated needs and the practice involves providing opportunities for the parties to: analyze relationships so as to generate an accurate

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

[67] Swatuk, L. A., 'Conflict Resolution and Negotiation Skills for Integrated Water Resources Management,' *Cap-Net Training Manual*, (International Network for Capacity Building in Integrated Water Resources Management, 2015), available at *http://www.academia.edu/216405/Conflict_Resolution_and_Negotiation_Skills_for_Integrated_Water_Resources_Management* [Accessed on 1/08/2015].

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

definition of the problem in terms of basic/fundamental motivations and human needs; cost their goals and policies once they are fully informed of all aspects of the dispute, including the fundamental motivations and values of the opposing side; and discover possible options that may be available once there has been a full analysis of the conflict in all its aspects.[69]

On the other hand, Disputes develop when conflicts are not or cannot be effectively managed.[70] They are about interests or issues. Interests are negotiable, divisible and finite whereas needs are not. Conflicts and disputes arise where two or more people or groups who perceive their rights, interests or goals to be incompatible, communicate their view to the other person or group. Similarly, disputes can be based on the interests, rights or the power imbalances in the society. These interests or issues can be negotiated and even bargained about.[71]

As mentioned earlier, the best approach in resolving dispute depends on whether it is interest-based, rights-based or power-based, with negotiation and mediation, litigation, and use of force being the best responses respectively.[72]

It is necessary to understand the origins or sources of a dispute since, if it is not addressed properly, the chance for escalatory responses increases.[73] This can ultimately lead to violence and long-term fission of society. In certain types of disputes, such as those involving the use and access to natural resources, it should be noted that tensions keep recurring. Recurrence of a dispute over years could be a symptom of a much deeper conflict in which individuals or groups are embroiled.[74] In

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[69] Burton, J.W., 'Conflict Resolution as a Political System - PEACE in Action' op cit.

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

[71] 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.

[72] *Ibid*.

[73] Loode, S., *et al*, 'Conflict Management Processes for Land-related conflict,' *op cit*, p.14.

[74] See generally, Owen, L., *et al*, "Conflicts over Farming Practices in Canada: The Role of Interactive Conflict Resolution Approaches," *Journal of Rural Studies*, Vol.16, No.4, 2000, pp. 475-483; Osaghae, E.E., 'The persistence of conflict in Africa: Management failure or endemic catastrophe?' *South African Journal of International Affairs*, Vol. 2, Iss. 1, 1994, pp. 85-103.

such cases, the responses employed must take into consideration the interests, rights and power imbalances in the wider context of the dispute.[75] This would mean that the responses must target the dispute at various levels. Some responses could aim at settling the particular dispute, for example, through adjudication mechanisms such as the courts and arbitration. Other intervention processes could aim at addressing the often much larger underlying causes of the dispute, for example through negotiations or mediation in the political process, involving the whole community or even a number of communities, which aim at airing grievances and inequalities which are perceived by different groups in the area.[76]

Litigation or judicial settlement and arbitration are the main power and rights-based processes. They are dispute settlement mechanisms. Disputes are thus manageable using the adjudicatory or legal or coercive mechanisms such as courts and arbitration.[77] Both the power- and rights-based processes lead to results in which one side loses and the other side wins. These processes can lead to the issues in disagreement flaring up again. They can lead to resistance, violence and revolt as they are merely settlement mechanisms not addressing the underlying causes of the conflict.[78] Although rights-based dispute settlement feels fairer and less arbitrary than power-based processes, the outcome is zero-sum, since one side must win and the other lose.[79] It is argued that lawyers and other practitioners dealing with conflicts within economic institutions are usually concerned with settlements and halfway solutions, instead of understanding the dimensions of the conflict.[80] However, this approach

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[75] Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' (Food and Agriculture Organization of the United Nations, Rome, 2005), available at *http://www.fao.org/docrep/008/a0032e/a0032e00.htm#Contents* [Accessed on 31/07/2015].

[76] *Ibid*.

[77] See T.F. Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society,* (Berkeley: University of California Press, 2002).

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

[79] *Ibid*.

[80] Hamad, AA, 'The Reconceptualisation of Conflict Management' (2005) 7 *Peace, Conflict and Development: An Interdisciplinary Journal* 1, p. 24.

could function in some areas, but not in others, such as in ethnic, political and international relations.[81]

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. [82]

1.7 Resolving Conflicts

Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.[83] 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.[84] Resolution is usually preferred to settlement for its effectiveness in addressing the root causes of the conflict and negates the need for future conflict or conflict management.[85]

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

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[81] *Ibid*.

[82] See Serge, L., *et al,* "Conflict Management Processes for Land-related conflict," *A Consultancy Report by the Pacific Islands Forum Secretariat, op cit*; K. Cloke, "The Culture of Mediation: Settlement vs. Resolution," *The Conflict Resolution Information Source*, *op cit*; See also Law Reform Commission, 'Alternative Dispute Resolution: Mediation and Conciliation' (2010) 1393-3132 1393-3132, p.2.

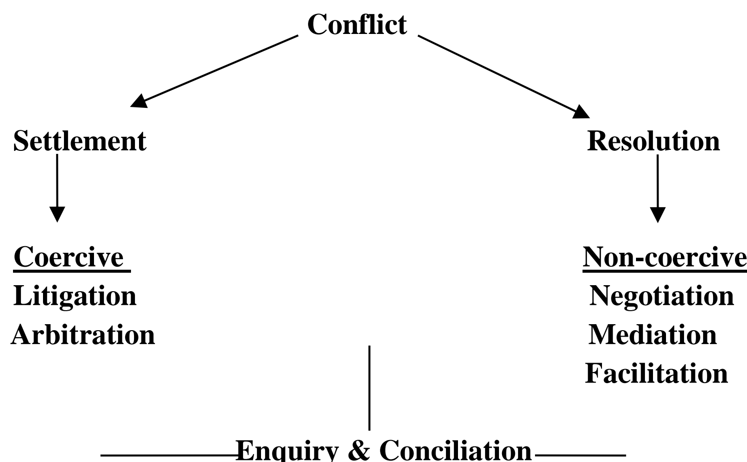
[83] Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, *op. cit*; See also K. Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, *op cit*. p. 7.

[84] Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, Vol.7, p.289 at p.296.

[85] *Ibid*.

mechanisms that are directed at conflict resolution should therefore be encouraged. The major selling point of the ADR approaches of conflict management is their attributes of flexibility, low cost, lack of complex procedures, mutual problem solving, salvaging relationships and their familiarity to the common people. ADR is also arguably more 'appropriate' rather than 'alternative' in the management of some of the everyday disputes among the people of Kenya.

Figure 1 Methods of Conflict Management



***Source:** The author

Figure 1 shows that there are certain methods of conflict management that can only lead to a settlement. Those that lead to a settlement fall into the category of coercive methods 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.

With adequate legal and policy framework on the application of ADR in Kenya, it is possible to create awareness on ADR mechanisms for everyone, including the poor, who may well be aware of their right of access to justice but lacking means of

realizing the same. There is need for consolidating and harmonizing the various statutes relating to ADR with the Constitution, to ensure that access to justice by all becomes a reality. Continued sensitization of the key players in the Government, the judiciary, legal practitioners, business community and the public at large will also boost support for ADR mechanisms in all possible aspects as contemplated under the Constitution and various statutes. A full appreciation of the workings of ADR mechanisms is key in achieving widespread yet effective use of ADR and TDR mechanisms for access to justice.

Chapter Two

Alternative Dispute Resolution Mechanisms and Traditional Dispute Resolution: an Appraisal

2.1 Introduction

Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms that are utilized to manage disputes without resort to the often costly adversarial litigation. Most of the African communities had their own unique conflict management mechanisms.[1] Each African community had a council of elders that oversaw the affairs of the community, including ensuring that there is social order and justice in the community. These were known by various names in different communities and their membership had specific characteristics/qualifications. The most commonly used ADR mechanisms by traditional Kenyan communities include mediation, arbitration, negotiation, reconciliation and adjudication, amongst others.[2]

The main disputes that may be resolved by way of ADR and TDR mechanisms in the communities include land disputes, marriage, gender violence, family cases including inheritance, clan disputes, cattle rustling, debt recovery, overall community conflicts and resolution of political disputes in the community, and welfare issues such as nuisance, child welfare and neglect of elderly in a community amongst others.[3]

This section critically examines the merits and demerits of Alternative Dispute Resolution (ADR) mechanisms and Traditional Dispute Resolution Mechanisms (TDR). It also discusses the challenges facing the effective use of these mechanisms. The author also explores the attributes of informal conflict resolution mechanisms, highlighting the fact that most of these mechanisms are not alien concepts in the

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[1] Laurence, B., "A History of Alternative Dispute Resolution," *ADR Bulletin*: Vol. 7: No. 7, Article 3, 2005. p. 1. Available at: *http://epublications.bond.edu.au/adr/vol7/iss7/3* [Accessed on 26/06/2015].

[2] *Ibid.*

[3] Kenyatta, J., *Facing Mount Kenya: The Tribal life of the Gikuyu, op cit*; See also Lenkinski, E.L. & Mehra, M., Are 'We Counsel or Counsellors? Alternative Dispute Resolution & the Evolving Role of Family Law Lawyers in Canada,' available at *https://www.iaml.org/cms_media/files/are_we_counsel_or_counsellors.pdf*[Accessed on 24/10/2015].

conflict resolution discourse in Kenya.[4]The Constitution of Kenya, 2010 recognizes the application of TDR and ADR mechanisms in conflict management for efficient dispensation of justice, since, as it will be discussed elsewhere in this book, their merits outweigh the disadvantages thereof.[5] It is noteworthy that a high percentage of disputes in Kenya are resolved outside courts or even before they reach courts by use of TDR or ADR mechanisms. TDR and other community justice mechanisms are widely used by communities to resolve conflicts owing to their legitimacy and accessibility.

Generally, many cases are resolvable through TDR, except for serious criminal offences that require the intervention of the courts. Where attempts have been made to subject the matters that were previously believed to fall within the exclusive ambit of criminal law, it has led to heated deliberations as to whether the same should be allowed.[6] The role of elders in a TDR hearing include, urging parties to consider available options for resolution of the dispute, making recommendations, making assessments, conveying suggestions on behalf of the parties, emphasizing relevant norms and rules and assisting the parties to reach an agreement.[7]

The main aspects of TDR and other ADR mechanisms, which make them unique and community oriented, is that they focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by formal common law and

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[4] The Constitution of Kenya advocates for the use of Alternative Dispute Resolution Mechanisms (ADR) and Traditional Dispute resolution Mechanisms (TDRMS) for the management of disputes and conflicts in Kenya; See Art. 60(1) (g); 67(1); 159(2); and 189.

[5] See Art. 159 (2) (c) of the Constitution of Kenya 2010.

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

[7] Muigua, K., *Resolving Conflicts through Mediation in Kenya*, *op cit* pp. 27-28.

statutory regimes.[8] The main objective of TDR in African societies is to resolve emerging disputes and foster harmony and cohesion among the people.[9]

At the international level, the United Nations encourages a peaceful approach to management of conflicts amongst States. Article 33 of the Charter of the United Nations states that "*the parties....should, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice"* (emphasis added).[10] The special place of ADR mechanisms in achieving a peaceful society is also reflected in Kenya's constitutional provisions which encourage the use of ADR in dealing with community conflicts.[11] The Constitution of Kenya 2010 generally recognises the use of Alternative Dispute Resolution Mechanisms (ADR) in conflict management by Kenyan courts.[12] It provides that in exercising judicial authority, the Kenyan courts are to be guided by key principles which include, *inter alia,* promotion of alternative forms of conflict management including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.[13]

Unlike litigation which results in dispute settlement, TDR and majority of ADR mechanisms (perhaps except arbitration) focus on conflict resolution. TDR utilizes resolution mechanisms such as negotiation, mediation and conciliation to ensure that the root causes of the dispute are addressed and that they assist the parties to explore mutually satisfying and durable solutions.[14] These mechanisms can be effective in

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[8] Muigua, K., 'Effective Justice for Kenyans: Is ADR Really Alternative?' pp. 12-13. Available at *http://www.kmco.co.ke/attachments/article/125/Alternative%20Dispute%20Resolution%20or%20Appropriate%20Dispute%20Resolution.pdf*

[9] Hwedie, K. O. & Rankopo, M. J., Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, *op cit*, available at *http://home.hiroshima-u.ac.jp/heiwa/Pub/E29/e29-3.pdf* [Accessed on 27/08/1015], p. 33.

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

[11] Art. 60(1) (g), 67(2) (f), 159(2) (c).

[12] Art. 159(2).

[13] Art. 159(2) (c).

[14] *Ibid*.

managing conflicts as their outcomes are recognized by the formal institutions especially under the current constitutional dispensation.[15]

TDR mechanisms have some disadvantages such as: potential disregard for basic human rights; application of abstract rules and procedure/lack of a legal framework; lack of documentation/record-keeping; evolution of communities and mixing up of different cultures thereby eroding traditions; negative attitudes towards the systems and bias at times; the jurisdiction is vague/undefined and wide; and lack of consistency in the decisions made. Other challenges include lack of recognition and empowerment of elders both legally and by the government, inadequate security and protection and negative attitudes towards elders by the community, illiteracy and lack of modern technology, gender imbalance in the composition of the committees and lack of awareness by the public on the TDR and general rights, among others. However, these disadvantages can effectively be addressed through putting in place an efficacious policy and legal framework in order to foster the use of these mechanisms since the advantages thereof outweigh the demerits.

As Fig. 1 illustrates, there are certain conflict management mechanisms that can lead to a settlement[16] only, while others have been effective in bringing about a resolution. A *settlement* comes about when the parties are forced to come to an agreement which they are compelled to adhere to because of power differences in relationships. On the other hand a *resolution* prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship.[17] The conflict management methods that lead to a settlement fall into the category of *coercive methods* where parties have little or no autonomy over the forum, choice of the judges and the outcome. The coercive methods are litigation or judicial settlement and arbitration. The *non-coercive methods* (negotiation, mediation and facilitation) lead to resolution. In the non-coercive conflict management methods the parties enjoy autonomy over the choice of the mediator or

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[15] Art. 159(2); See also S. 20, *Environment and Land Court Act*, 2011, Laws of Kenya.

[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. 153. Bloomfield argues that a settlement is temporal and does not eliminate the underlying causes of the inter-disputant relationship whereas a resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based out-comes.

[17] *Ibid.*

third party, the process and the outcome. These conflict management mechanisms are discussed in detail hereunder.

2.2 Negotiation

Negotiation is an informal process that involves the parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It has been hailed as one of the most fundamental methods of conflict resolution, offering parties maximum control over the process.[18]

Negotiation aims at harmonizing the interests of the parties concerned amicably. This mechanism involves the parties themselves exploring options for resolution of the dispute without involving a third party. In this process, there is a lot of back and forth communication between the parties, in which offers for settlement are made by either party.[19] Conflict resolution among the traditional African societies was anchored on the ability of the people to negotiate.[20]

If negotiation fails, parties resort to mediation where they attempt to resolve the conflict with the help of a third party. Negotiation is by far the most efficient conflict management mechanism in terms of management of time, costs and preservation of relationships and has been seen as the preferred route in most disputes.[21] In negotiation, the parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation.[22]

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[18] Muigua, K., *Resolving Conflicts through Mediation in Kenya, op. cit.*, p.11; Pan, J, *Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes*, (Martinus Nijhoff Publishers, 2009), p. 53; Goh, G.M., *Dispute Settlement in International Space Law: A Multi-door Courthouse for Outer Space*, (Martinus Nijhoff Publishers, 2007), P. 96; Lewicki, R.J., et al, *Negotiation*, (3rd ed., Boston: Irwin McGraw-Hill, 1999).

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

[20] See United Nations, 'Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities.' *Study by the Expert Mechanism on the Rights of Indigenous Peoples*. August 2014. A/HRC/27/65.

[21] See *Dispute Resolution Guidance, op. cit*.

[22] Peter Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), at p. 12.

During the negotiation phase, 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.[23] It has been said that negotiation leads to mediation, because the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.[24]

Its advantages are that it can be fast; informal, cost saving; flexible; confidential; preserves relationships; provides a range of possible solutions; and there is autonomy over the process and the outcome, among others. Negotiation is also a non-coercive process in that the parties have autonomy about the forum, the process, and the outcome [See Fig. 1]. Its disadvantages are inter alia that, it requires the goodwill of the parties; may lead to endless proceedings; can create power imbalances; it is non-binding unless parties reduce the agreement into writing; creates no precedents and it is not suitable when one party needs urgent protection like an injunction.

If the parties do not reach an agreement through negotiation, they will need to consider what other method or methods of conflict management would be suitable. However, it will still be possible or may be necessary to continue with negotiations as part of or alongside other forms of conflict management.[25] Where parties in a negotiation hit a deadlock in their talks, a third party can be called in to help them continue negotiating. This process now changes to what is called mediation.

2.3 Mediation

Mediation is a voluntary, informal, consensual, strictly confidential and non-binding conflict management process, in which a neutral third party helps the parties to reach a negotiated solution.[26] The Kenyan *Civil Procedure Act*[27] defines mediation

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

[24] *Ibid*.

[25] *Ibid*.

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

[27] Cap 21, Laws of Kenya; *Mediation (Pilot Project) Rules, 2015,* Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170,* 9th October, 2015, pp. 1283-1291 (Government Printer, Nairobi, 2015).

as an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings. This definition depicts mediation as taking part in the context that makes the whole process legal.[28] Mediation has also been defined as a continuation of the negotiation process by other means where instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the negotiations between the parties.[29]

The mediator's role in such a process is to assist the parties in the negotiations and they cannot dictate the outcomes of the negotiation.[30] As such, mediators may play a number of different roles, and may enter conflicts at different levels of development or intensity.[31]A mediator is one "who comes between the conflicting parties with the aim of offering a solution to their dispute and/or facilitating mutual concessions." However, such a person must be acceptable to both parties and should have no interest in the dispute other than achievement of a peaceful settlement.[32] They have also been described as a third party who is independent, impartial, and has no stake in the outcome of the process; helps parties in dispute to clarify issues, explore solutions and

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[28] *Ibid*, S. 2 of the Civil Procedure Act.

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

[30] K. Muigua, *Resolving Environmental Conflicts through Mediation in Kenya* Ph.D Thesis, 2011, *Unpublished,* University of Nairobi. P.43; See also C. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, (Jossey-Bass Publishers, San Francisco, 1996), p. 14.

[31] Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd, (San Francisco: Jossey-Bass Publishers, 2004). Summary written by Tanya Glaser, Conflict Research Consortium, Available at
<http://books.google.com/books/about/The_Mediation_Process.html?id=8hKfQgAACAAJ>
[Accessed on 08th March, 2014]

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

negotiate their own agreement and does not advise those in dispute, but helps people to communicate with one another.[33]

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.[34] 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.[35] Indeed, it has been observed that mediation is more of a private affair in which the mediator is neither applying nor interpreting the law, but just facilitating the parties to arrive at their mutual agreement.[36] Mediation, with its confidentiality safeguards, offers a much more private, low-key approach to conflict resolution. It attempts to remove the parties' adversarial posturing replacing it with a harmonious relationship.[37]

Mediation can be classified into two forms namely: Mediation in the political process and mediation in the legal process. This dichotomy (legal and political process) is based on various variables. It is a typology founded on the differentiation between a dispute and a conflict.[38]

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[33] Gichuhi, A.W., "Court Mandated Mediation-The Final Solution to Expeditious Disposal of Cases," Chartered Institute of Arbitrators, *Alternative Dispute Resolution*, Vol. 2, No. 1, 2014, pp. 135-180 at p. 137.

[34] Mironi, M., "From Mediation to Settlement and from Settlement to Final Offer Arbitration: an Analysis of Transnational Business Dispute Mediation", 73(1) *Arbitration* 52 (2007), p. 53.

[35] Pollack, C., "The Role of the Mediation Advocate: a User's Guide to Mediation", 73(1) *Arbitration* 20, (2007), p 20-23.

[36] *Senator Johnstone Muthama v Tanathi Water Services Board & 2 others* [2014] eKLR, para. 10. [Per GV Odunga, J].

[37] 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.

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

Mediation in the political process is informed by resolution as against settlement. It allows parties to have autonomy over the choice of the mediator, the process and the outcome. The process is also associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control, addressing root causes of the conflict, non-coerciveness and enduring outcomes. Consequently mediation in the political process is held out to be the true mediation. It has the true character of mediation: voluntariness, party autonomy in the choice of the mediator, over the process and the outcome.[39]

Mediation in the legal process is a process where the conflicting parties come into arrangements which they have been coerced to live or work with while exercising little or no autonomy over the choice of the mediator, the process and the outcome of the process. This makes it more of a settlement mechanism that is attached to the court as opposed to a resolution process, and defeats the advantages that are associated with mediation in the political process.[40]

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.[41] That is why it is arguable that only mediation in the political process leads to *resolution* (emphasis added).

The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship.[42] In conflict resolution processes like mediation, the goal, then, is not to get parties to accept formal rules to govern their

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[39] Muigua, K., *Resolving Environmental Conflicts through Mediation in Kenya* Ph.D Thesis, 2011, *op cit* P.48.

[40] *Ibid*, Chapter 4; See also sec.59A, B, C & D of the Civil Procedure Act on Court annexed mediation in Kenya.

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

[42] Fuller, L.L., *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., 'Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms In Socio-economic Rights Cases' *Utah Law Review,* (2009) [NO. 3] *op cit*, pp. 802-803.

relationship, but to help them to free themselves from the encumbrance of rules and to accept a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.[43]

The salient features of mediation (in the political process) are that it emphasizes on interests rather than (legal) rights and it can be cost - effective, informal, private, flexible and easily accessible to parties to conflicts. These features are useful in upholding the acceptable principles of justice: *expedition*; *proportionality*; *equality of opportunity*; *fairness of process*; *party autonomy*; *cost-effectiveness*; *party satisfaction* and *effectiveness of remedies (*emphasis ours), thus making mediation a viable process for the empowerment of the parties to a conflict.[44]

Mediation as practised by traditional African communities was informal, flexible, voluntary and expeditious and it aimed at fostering relationships and peaceful coexistence. Inter-tribal conflicts were mediated and negotiated in informal settings, where they were presided over by the Council of Elders who acted as 'mediators' or 'arbitrators'.[45] It was customary and an everyday affair where people sat down informally and agreed on certain issues, such as allocation of resources.[46]

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.[47] 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.[48] It is party-centred

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[43] *Ibid*.

[44] See generally Muigua, K., "Resolving Environmental Conflicts through Mediation in Kenya" Ph.D Thesis, 2011, *Unpublished.*

[45] Muigua, K., *Resolving Conflicts through Mediation in Kenya, op. cit.*, pp. 20-37; See also generally, Kenyatta, J., *Facing Mount Kenya: The Tribal life of the Gikuyu,* (Vintage Books, New York, 1965).

[46] *Ibid*, p. 20.

[47] Murray, J.S., et al, Processes *of Dispute Resolution: The Role of Lawyers,* University casebook series, Foundation Press, 1989, p. 47.

[48] Tarrazon, M., "The Pursuit of Harmony: the Art of Mediating, the Art of Singing", 73(1) *Arbitration* 49, (2007), pp. 50-51.

and this makes its outcome more acceptable to them, as they feel that they can identify with the mediation outcome or that their side of the story influenced such outcome. As noted elsewhere in this book, mediation is a continuation of the negotiations with the assistance of a third party so as to come to a mutually acceptable outcome that is durable and that addresses the root causes of the conflict. The involvement of the neutral third party makes the negotiations more effective. It should be seen as the preferred conflict management route in most disputes when conventional negotiation has failed or is making slow progress.[49]

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.[50] With regard to the mediation paradigm, it has been stated that the mediation system consists of the mediator, the two negotiators, and the relationships among them. In this paradigm, there are those who argue that the mediation environment is wider and includes other actors such as the negotiator's constituents, the mediator's constituents and the third parties who affect or are affected by the process and outcome of the mediation.[51] For instance, in an environmental matter mediation involving a corporation, effects of the company's activities on the environment and the local residents and economic hardships can be said to be the other forces or parties who may form part of the mediation environment as they would be directly or indirectly affected by the 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 outcome, either directly or indirectly.[52] 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.[53]

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[49] See Scottish Procurement Directorate, *Dispute Resolution Guidance*, *Reference No. SPD2*, October 2003, available at *www.gov.scot/resource/doc/1265/0085404.doc*[Accessed on 09/10/2015].

[50] Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, *op cit*, pp.290-291.

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

[52] *Ibid*.

[53] *Ibid*.

Traditionally, the mediators are the respected elders of the communities of the disputants. Elders are trustworthy mediators owing to their accumulated experience and wisdom.

Sometimes, parties in litigation can engage in mediation outside the court process and then move the court to record a consent judgment.[54] This procedure exists as a remote form of court-annexed mediation. Parties who have presented their cases to court or are about to do so get into mediation under the supervision of the court.[55] A successful mediation is then made binding through the recording of a consent in Court.[56] 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*.[57]

Currently, there are efforts by the legal fraternity in Kenya and other parties to enhance legal and institutional frameworks governing mediation in general. The *Civil Procedure Act*[58] provides for mediation of disputes.[59] The Act was amended to introduce the aspect of mediation of cases as an aid to case management for the streamlining of the court process.[60] This amendment of the Act required the setting up of a Mediation Accreditation Committee by the Chief Justice to determine the criteria for the certification of mediators, propose rules for the certification of mediators, maintain a register of qualified mediators, enforce such code of ethics for mediators as

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[54] Civil Procedure Rules 2010 and S. 3A of the Act.

[55] Kathy, "What is court-annexed mediation?" Available at *http://www.janusconflictmanagement.com/2011/10/q-what-is-court-annexed-mediation/* [Accessed on 27/06/2015].

[56] Civil Procedure Act, S. 59B (1).

[57] Cap 23, Laws of Kenya, (Government Printer, Nairobi).

[58] Cap 21, Laws of Kenya.

[59] Ss. 2 and 59 Civil Procedure Act as Amended by the Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, (Government Printer, Nairobi, 2012), at pp.1092-1097.

[60] *Ibid.*

may be prescribed and set up appropriate training programmes mediators.[61] The Chief Justice has since appointed Members to the Committee and had them gazetted.[62] The *Mediation (Pilot Project) Rules, 2015* have also been gazetted.[63] These rules are to apply to all civil actions filed in the Commercial and Family Divisions of the High Court of Kenya at Milimani Law Courts, Nairobi, during the Pilot Project.[64]

Under customary law, mediation is applied in resolution of many conflicts within communities in Kenya. The most prevalent ones are boundary conflicts and family conflicts, where in both cases and particularly boundary conflicts, parties in dispute bring the matter before a panel of elders who are drawn from respected members of the society. The elders listen to the parties and encourage them to come to a consensus. This serves to permit access to justice for the aggrieved parties as the consensus reached is binding, and various communities have internal enforcement mechanisms widely accepted by the given society.[65] It is noteworthy that informal mediation may not require the use of writing, although this may change with the codification of mediation rules.

2.3.1 Merits and Demerits of Mediation

Mediation is preferred over litigation as it offers some advantages over the adversary process namely: it is cheaper, faster, and potentially more hospitable to unique solutions that take more fully into account non-material interests of the disputants; it can also educate the parties about each other's needs and those of their community.[66] Thus, it can help them learn to work together and to see that through

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[61] S. 59 A (1) and (2) of the Civil Procedure Act.

[62] Kenya Gazette, Vol. CXVII-No. 17, Gazette Notice No. 1088, Nairobi, 20th February, 2015, p. 348.

[63] Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170,* 9th October, 2015, pp. 1283-1291 (Government Printer, Nairobi, 2015).

[64] Rule 2. “Pilot project" means the mediation program conducted by the court under these Rules. (R. 3).

[65] Muigua, K., *Resolving Conflicts through Mediation in Kenya*, (Glenwood Publishers, 2012). pp. 21-22.

[66] Riskin, L.L., ‘Mediation and lawyers,’ *Ohio State Law Journal*, Vol.43, 1982, pp.29-60 at p.34.

cooperation both can make positive gains.[67] Law and mediation are inseparable in that most commercial disputes referred to mediation are legal in nature. Besides, parties usually resort to mediation after first engaging the legal remedies available. Additionally, due to the non-binding nature of mediation, parties appeal to legal avenues afterwards to render the decisions thereof binding and enforceable. Indeed, in recent times the trend towards having mediation provided for by law has also emerged.[68]

Mediation is voluntary and seeks to encourage parties to find solutions that are agreeable to all of them and, as such, yields a win for all parties and preserves the relationship between parties.[69]The salient features of mediation are that it emphasises interests rather than (legal) rights and it is cost - effective, informal, private, flexible and easily accessible to parties to conflicts.

Critics of mediation have however argued that it is indefinite, time consuming and does not encourage expediency.[70] This may be a challenge in disputes that are time bound such as projects where a speedy, efficient and cost effective conflict management mechanism would be more admirable. The other risks related to mediation is that it requires the goodwill of the parties; may lead to endless proceedings; can create power imbalances; it is non-binding unless parties reduce the agreement into writing; creates no precedents and it is not suitable when one party needs urgent protection like an injunction.

2.4 Conciliation

Conciliation[71] 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 Commission for Conciliation,

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[67] *Ibid.*

[68] Civil Procedure Act, Cap 21, Laws of Kenya. Order 46; S. 59B. These provisions envisage court-annexed mediation.

[69] J.G. Merrills, *International Dispute Settlement,* 4th ed. (Cambridge University Press, Cambridge, 2005), p. 28.

[70] Murithi, T. & Ives, P.M, Under the Acacia: Mediation and the dilemma of inclusion, (Centre for Humanitarian Dialogue, April 2007), pg. 77.

[71] Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.14.

Mediation and Arbitration (CCMA) defines a conciliation hearing as a process where a commissioner (or a panellist, in the case of a bargaining council or agency) meets with the parties in a dispute and explores ways to settle the dispute by agreement.[72]

If the dispute is settled, the commissioner will draw-up a settlement agreement which both parties are to sign and issue a certificate recording that the dispute is settled. A conciliation agreement is final and binding on both parties. If either party fails to uphold the agreement, it can be made an award and thereafter certified as an order of court.[73]

If the disputed is not settled, there are two options available: Firstly, if the matter remains unresolved and relates to probation, the matter must continue as on a Conciliation – Arbitration (CON-ARB) basis. If the matter relates to dismissal (conduct/incapacity) or unfair labour practice and the parties don't object to the process, the matter will continue on CON-ARB basis.[74] Secondly, the commissioner might issue a certificate of non-resolution and the applicant can then apply for arbitration.

The advantage of conciliation is that it extends the negotiation process and allows for settlement between the parties: for example, where a procedure requires that conciliation be attempted before industrial action can be undertaken, time is allowed for both parties to "cool off" and to approach each other in a friendlier manner whilst seriously attempting to settle before engaging in industrial action which might eventually destroy the relationship.[75]

It has all the advantages and disadvantages of negotiation except that the conciliator can propose solutions making parties lose some control over the process. Conciliation is different from mediation in that the third party takes a more interventionist role in bringing the two parties together. Conciliation works well in labour disputes.[76] A conciliator who is more knowledgeable than the parties, can help

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[72] The CCMA is a dispute resolution body established in terms of the Labour Relations Act, 66 of 1995 (LRA) of the Republic of South Africa.

[73] *Ibid.*

[74] *Ibid*.

[75] *Ibid*.

[76] International Labour Office, "Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives." *High–Level Tripartite Seminar on the Settlement of Labour Disputes through Mediation, Conciliation, Arbitration and Labour*

parties achieve their interests by proposing solutions based on his technical knowledge that the parties may be lacking in. This may actually make the process cheaper by saving the cost of calling any other experts to guide them.

The Constitution provides for *re*conciliation (emphasis added) which is believed to connote a deeper implication.[77] Under reconciliation in a community setting, once a dispute is heard before the Council of Elders, the parties are bound to undertake certain obligations towards settlement. These are mainly through payment of fines by the party found to be on the wrong. Once this obligation is discharged, there is reconciliation which results in restoration of harmony and mending relationships of the parties.[78]

While conciliation is concerned with finding peace and harmony by putting an end to a conflict, reconciliation seeks to reestablish relations. As such, it can be said to be a restorative process which is desirable in building lasting peace and ensuring that competing interests are balanced.

Conciliation and reconciliation can play a significant role in empowering parties to a dispute by giving them substantial control over the process.

2.5 Arbitration

The Arbitration Act, 1995[79] defines arbitration to mean "any arbitration whether or not administered by a permanent arbitral institution." The Act's description leans more towards typology of arbitration rather than the meaning of 'arbitration' as a term. This is not very elaborate and regard has to be had to other sources to get the meaning. Arbitration is defined as 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. Arbitration is a process subject to statutory controls, whereby formal disputes are determined by a private tribunal of the parties'

Courts. Nicosia, Cyprus October 18th – 19th, 2007; S. 10 of the *Labour Relations Act*, No. 14 of 2007, Laws of Kenya.

[77] Comment by Commissioner Otiende Amollo, during the 1st NCMG East African ADR Summit held at the Windsor Golf Hotel, Nairobi on 25th & 26th September, 2014; Art. 159(2) (c).

[78] J. Kenyatta, *Facing Mount Kenya,* op.cit.

[79] No. 4 of 1995, Laws of Kenya.

choosing. A third party neutral is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award.[80]

In Africa, there existed the customary arbitration which was used in a wide array of disputes. In some States, arbitration was the highest level of conflict management at the village level. The proceedings were formalized and paid public officials used to guide them in settlement of both civil and criminal cases.[81]

Arbitration in Kenya is governed by the Arbitration Act, 1995, the Arbitration Rules, the Civil Procedure Act (Cap. 21) and the Civil Procedure Rules 2010. Section 59 of the Civil Procedure Act provides that all references to arbitration by an order in a suit, and all proceedings there under, shall be governed in such manner as may be prescribed by rules. Order 46 of the Civil Procedure Rules, inter alia, provides that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court for an order of reference wherever there is a difference. Arbitration arises where a third party neutral is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award.

Arbitration can be useful in helping parties take control of their disputes and help in saving costs, time and emotional stress that may come with courts. However, arbitration, as practiced today still requires courts for enforcement of awards.[82]

2.5.1 Types of Arbitration

There are different types of arbitration which include: ad hoc, institutional, statutory, look-sniff, flip-flop, documents–only, domestic and international.[83] In every situation, parties are required to determine which type of arbitration is appropriate or relevant for their case.[84]

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[80] Stephenson, R., *Arbitration Practice in Construction Disputes,* (Butterworths, London, 1998), p.123.

[81] Hwedie, O.K. & Rankopo, M.J., *Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana*, *op cit.*

[82] S. 36, Arbitration Act, No. 4 of 1995 (2009), Laws of Kenya. (Government Printer, Nairobi).

[83] Hasan, Z., 'Law of Arbitration' September 2011, available at *https://zulkiflihasan.files.wordpress.com/2008/06/week-2.pdf* [Accessed on 4/12/2015].

[84] Copi; Irving & Carol Cohe, 'Chapter 3: Forms of Arbitration, p. 31, para. 3-2. Available at *http://faculty.law.lsu.edu/toddbruno/Vis/Chapter%203.pdf* [Accessed on 4/12/2015].

Ad hoc arbitration is one that is not administered by an institution as the arbitration agreement does not specify an institutional arbitration, and it may encompass domestic or international commercial arbitration.[85] The parties then have to determine all aspects of the arbitration, like the selection and manner of appointment of the arbitral tribunal, applicable law, procedure for conducting the arbitration and administrative support without assistance from or recourse to an arbitral institution.[86] It is however, noteworthy that an ad hoc arbitration does not necessarily require the parties to start from scratch and draft their own rules. They can use the rules of an arbitration institution without submitting the dispute to that institution.[87]

Ad hoc arbitration is mostly used where one of the parties is a State or State-entity or parastatal since they are usually reluctant to submit to institutional arbitration for sovereignty reasons.[88] It has also been observed that ad hoc arbitration undoubtedly preceded institutional arbitration since, long before the emergence of permanent organizations providing professional services that facilitate arbitration proceedings, ad hoc arbitration had been in existence for hundreds or even thousands of years.[89] However, institutional arbitration remains more popular especially among business entities, possibly due to the procedural certainty that comes with institutional affiliation.[90]

Institutional arbitration is an arbitration administered by a specialist institution, where parties should incorporate the rules of the selected institution into their

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[85] Rajoo S, 'Institutional and Ad Hoc Arbitrations : Advantages and Disadvantages' *The Law Review*, 2010, pp. 547-558 at p. 548.

[86] *Ibid*, p. 548.

[87] Stanley C, 'Traps for the Unwary: The Pitfalls of Ad Hoc Arbitration,' *Trusts & Trustees*, Vol. 18, No. 4, May 2012, p. 338.

[88] Copi; Irving & Carol Cohe, 'Chapter 3: Forms of Arbitration, op cit, p. 35.

[89] Zangh, T., 'Enforceability of Ad Hoc Arbitration Agreements in China: China's Incomplete Ad Hoc Arbitration System,' *Cornell International Law Journal,* Vol. 26, 2013, pp. 363-399, p. 364.

[90] *Ibid*, p. 364.

arbitration clause by reference.[91] Such rules are expressly formulated for arbitrations conducted under the administration of the relevant institution.

Statutory arbitration is one that originates from a mandatory provision in an Act of Parliament, without necessarily requiring a pre-existing arbitration agreement between the parties. Most of the post-2010 Constitution of Kenya statutes have provisions on the use of ADR mechanisms.[92] The Constitutional provision that one of the guiding principles in exercise of judicial authority is encouraging the use of ADR and TDR, may arguably also give rise to statutory arbitration.[93]

"Look-sniff arbitration" or "quality arbitration" is defined as a combination of the arbitral process and expert opinion, where the parties select the arbitrator on the basis of his or her specialized knowledge, expertise and experience in a particular area of business or trade.[94] The relevant question arising from the dispute is whether the commodity delivered complies with the quality specification or agreed sample, and thus, such questions of pure quality are arguably best resolved by experts in the field by way of an arbitral procedure.[95]

It has been observed that look-sniff arbitrations depend on technical skills in a particular trade.[96] Further, the procedures are governed largely by the customs of the trade and there are usually no lawyers, witnesses or arguments.[97]

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[91] Rubino-Sammartano M, 'International Arbitration,' p. 3, (Ashurst Quick guides, 2011). Available at *https://www.ashurst.com/doc.aspx?id_Resource=4643* [Accessed on 3/12/2015].

[92] See Civil Procedure Rules, Order 46, Rule 20 on court referral of matters to ADR; See also S. 20, *Environment and Land Court Act* 2011; S. 15(4), *Industrial Court Act*, 2011; S. 34, *Intergovernmental Relations Act*; S. 4, *Land Act* 2012; S. 17(3), *Elections Act*, 2011; Rule 11, Supreme Court Rules, 2011.

[93] Art. 159(2) (c).

[94] Rajoo S, 'Trade Disputes Solving Mechanisms,' p. 18, available at *http://sundrarajoo.com/wp-content/uploads/2009/10/Trade-Disputes-Solving-Mechanisms-Poram-Course-July-2009-docx1.pdf* [Accessed on 4/12/2015].

[95] *Ibid*, p. 18.

[96] Tay, C.S.K., *Resolving Disputes by Arbitration: What You Need to Know*, (NUS Press, 1998), P. 67.

[97] *Ibid*.

This type of arbitration can certainly save parties a lot of time and trouble in hiring an independent expert witness, as would be the case if they decided to resort to litigation.

Flip-flop arbitration or pendulum arbitration (also known as baseball arbitration) is a type of arbitration where parties formulate their cases beforehand and then they invite the arbitrator to choose one of the two.[98] The arbitrator then makes an award in favour of one party and the other must clearly lose. The award cannot be somewhere in between.[99] The arbitrator is requested to make an award by adopting, without modification, one of the parties' respective final positions, and this is mostly used when the parties differ only over a monetary amount.[100]

Documents-only arbitration is defined as an arbitration that is based on the Claim Statement and Statement of Defence and a written reply by the claimant, if any.[101] A documents-only procedure is lauded as being most appropriate where all the evidence relevant to the dispute is contained in documents, including expert reports, and there is no need for oral testimony from witnesses.[102] However, it can also be appropriate where the dispute involves simple issues of fact and opinion.

According to the *Arbitration Act,* 1995 (2009), an arbitration is domestic if the arbitration agreement provides expressly or by implication for arbitration in Kenya, and at the time when proceedings are commenced or the arbitration is entered into—where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya; where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are

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[98] Universal Law Series, *Arbitration & ADR*, (Universal Law Publishing, Dec 1, 2009), p. 17.

[99] *Ibid*, p. 17.

[100] Droog, D.D., 'Baseball Arbitration of Commercial & Construction Disputes (Part I)' (Shipley Snell Montgomery Shipley Snell Montgomery, 2015). Available at *http://www.shipleysnell.com/baseball-arbitration-of-commercial-construction-disputes-part-i/* [Accessed on 4/12/2015].

[101] Universal Law Series, *Arbitration & ADR*, op cit, p. 17.

[102] Chartered Institute of Arbitrators, *Practice Guideline 5: Guidelines for Arbitrators regarding Documents-Only Arbitrations*, 06 December 2011, para. 2.1. Available at *https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/international-arbitration-guidelines 2011/2011documentsonlyarbitration.pdf?sfvrsn=10* [Accessed on 5/12/2015].

exercised in Kenya; where the arbitration is between an individual and a body corporate — the party who is an individual is a national of Kenya or is habitually resident in Kenya; and the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected, is Kenya.[103]

On the other hand, an arbitration is international if— the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; one of the following places is situated outside the state in which the parties have their places of business— the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.

While it is acknowledged that all the foregoing types of arbitration have their distinct merits and demerits, this book does not discuss each of them separately but instead it looks at the more general characteristics, advantages and disadvantages of arbitration, as an umbrella term for all the classifications.

2.5.2 Advantages and Disadvantages of Arbitration

(a) Advantages of arbitration

Several benefits have been attributed to arbitration as an alternative dispute resolution mechanism. Firstly, arbitration accords the parties a considerable amount of control over the proceedings. Unless parties agree otherwise in an arbitration agreement or choose later to resort to court, all the aspects of the case are confidential. Secondly, arbitration is a private and consensual process. For instance, they can select one or more neutral arbiters to hear their dispute.[104] Proceedings in Court are open to

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[103] S. 3(2), Act No. 4 of 1995 (2009).

[104] See Muigua K., *Settling Disputes through Arbitration in Kenya*, pp.3-4, (Glenwood Publishers Ltd, Nairobi, 2012); Chartered Institute of Arbitrators, 'Arbitration.' Available at *http://www.ciarb.org/dispute-resolution/resolving-a-dispute/arbitration/* [Accessed on 02/08/2015]; Tribunal Arbitral De Barcelona, 'Advantages of arbitration.' Available at

the public, whereas proceedings in commercial arbitration are private. Accordingly, the parties who wish to preserve their commercial secrets may prefer commercial arbitration.[105]

Arbitration is also considered to be less expensive when compared to litigation due to a number of factors. Firstly, the process is generally regarded as semi-formal in that it does not restrict itself to the strict procedural rules and technicalities associated with courts. Secondly, arbitration, unlike courts, usually operates within specified timeframe including constrained timelines for appeals by discontented parties.[106] It is noteworthy that cost effectiveness of arbitration does not necessarily mean that arbitration is cheap. It only means that unlike courts, where matters can drag on for years thus leaving the litigants with huge bills to settle, arbitration is expedient thus making it less expensive. Arbitration costs largely depend on the number of arbitrators and the other players and their willingness to dispose of the matter expediently.[107]

Arbitration is potentially much faster than litigation. Arbitration, unlike litigation, normally allows for limited grounds of appeal. Usually, there must be express agreement of the parties to appeal.[108] Even then, disgruntled parties can only

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http://www.tab.es/index.php?option=com_content&view=article&id=22&Itemid=65&lang=en [Accessed on 02/08/2015].

[105] Muigua, K., *Settling Disputes Through Arbitration in Kenya.* (Glenwood Publishers Ltd, Nairobi, 2012).

[106] However, appeals only lie where there was pre-existing agreement between the parties that any party who is not satisfied with the outcome will be free to appeal to court

[107] The President of the Australian Centre for International Commercial Arbitration, Mr. Doug Jones, has been quoted as making the following observation: *'domestic arbitration is still…expensive and hugely inefficient, forcing many companies to prefer expert determination – due to a combination of arbitrators failing to insist on processes different to courts, and lawyers continuing to insist on intricate pleadings, excessive discovery and prolonged hearings. We need reform to distinguish arbitration from court processes.'* (Reported in *'Call for much simpler Arbitration',* Australian Financial Review, 7 November 2008, p.51. and reproduced in New South Wales Government, ADR Blueprint, Discussion Paper, April 2009, Framework for the Delivery of Alternative Dispute Resolution (ADR) Services in NSW, p. 18. Available at *http://www.courts.lawlink.nsw.gov.au/agdbasev7wr/_assets/cats/m402652l3/adr_blueprint.pdf)* [Accessed on 2nd March, 2014].

[108] See United Nations Conference on Trade and Development (UNCTAD), 'Dispute Settlement, International Commercial Arbitration: Arbitration Agreement' (2005) UNCTAD/EDM/Misc.232/Add.39; Sec. 39 of the *Arbitration Act* 1995 provides that questions

appeal on grounds of arbitral awards going against public policy or an award in favour of a matter not capable of being settled through arbitration. In the Kenyan case of *Nyutu Agrovet Limited v Airtel Networks Limited,*[109] which was an application to strike out the Record of Appeal in the Court of Appeal of Kenya at Nairobi, one of the issues was whether an appeal lay from the High Court to this Court, following a decision made under section 35 of the Act. The Court of Appeal, in granting the motion to strike out the application, reiterated that by the preponderance of existing material in law and case law to sustain the arbitration principle that intervention by court's participation in arbitral matters be strictly limited, leaving the parties to the proceedings to map their own paths out of their disputes, should be sustained. The Court reaffirmed that where there lies an appeal to the High Court, the decision of the Court becomes final and binding.

Court litigation, however, allows parties to appeal on a wider range of grounds and occasionally, several times to the highest court on land. Huge backlog of cases compel parties to wait a longer time to secure hearings and ultimately get the final decision. Court procedures must strictly be followed unlike in arbitration where there is minimum emphasis on procedural formalities. This arguably makes arbitration much faster as it depends on the goodwill of the parties to push it forward. As pointed out elsewhere, courts in Kenya are not easily accessible owing to complex rules and high costs associated with filing and lawyer's fees.

The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.[110] Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. Litigation is however, associated with the following advantages: the process is open, transparent and public; it is based on the strict, uniform compliance with the law of the land, and determination is final and

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of law arising in domestic arbitration where in the case of a domestic arbitration, *the parties have agreed that*: an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; *or an appeal by any party may be made to a court on any question of law arising out of the award,* such application or appeal, as the case may be, may be made to the High Court. (Emphasis ours).

[109] [2015] eKLR, Civil Appeal (Application) No.61 of 2012.

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

binding (subject possibly to appeal to a higher court).[111] Criminal justice may also be achieved through litigation especially where the cases involved are very serious.

Another advantage of arbitration over litigation is the finality of arbitral awards and their binding nature upon the parties.[112] Due to the limited number of appeals, the arbitrator's decision is usually final and binding on the parties. While it is generally agreed that arbitration does have adversarial aspects, it is normally less adversarial than court litigation. This may help preserve relationships between parties depending on the nature of their dispute. Arbitration is typically a private process as it does not admit the general public into its hearings or proceedings. This is advantageous to the parties who, most of the time, do not desire to wash their dirty linen in public.[113]

Arbitration is also preferred over litigation due to its flexible nature. Parties in arbitration are allowed to agree on the timeframes within which pleadings are to be filed or amended.[114] In court proceedings, the timelines for filing pleadings are usually fixed by the Civil Procedure Rules. This flexibility allows parties to appoint arbitrators that have specific expertise in their area of business or nature of their dispute. Most court systems, on the other hand, do not have expert judges for specific areas of law and so the parties may have a presiding judge with no specific knowledge of their industry. Thus, in cases where specific knowledge in an area of business or law is important, parties in court do not enjoy such freedom of deciding which judge or magistrate gets to listen to what matter. Further, parties can often choose either a complex procedure or a simpler one. With court litigation, the parties must follow the

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[111] See generally Mazirow, A., 'The Advantages and Disadvantages of Arbitration As Compared To Litigation' *Presented to The Counselors of Real Estate*, April 13, 2008, Chicago, Ilinois. Available at *http://www.cre.org/images/MY08/presentations/The_Advantages_And_Disadvantages_of_Arbitration_As_Compared_to_Litigation_2_Mazirow.pdf* [Accessed on 2nd March, 2014]; Chartered Institute of Arbitrators, Litigation: Dispute Resolution. Available at *http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation* [Accessed on 27th February, 2014].

[112] S. 32A (via the 2009 amendments) also provides that unless parties agree otherwise, arbitral awards are final and binding on the parties.

[113] Awards, unlike court judgments, are not published in the official Kenya Law Reports unless with the express consent of the parties.

[114] S. 24(1) and (3) of the *Arbitration Act*, 1995(2009).

legal procedures, as laid down.[115] The fact that arbitration is a private process makes it enjoy confidentiality, an important aspect in private matters. Unlike litigation where there is official law reporting, arbitral awards or proceedings are never published without the parties' approval. The foregoing advantages make arbitration more appealing to disputants as compared to litigation. However, arbitration also carries some disadvantages with it, as discussed herein under.

(b) Disadvantages of arbitration

As already noted elsewhere, although arbitration is generally less expensive than litigation, it can still become too expensive in the long run in case of any delay. The parties must pay for the arbitrator's time, the fee of the arbitration forum, as well as all the normal litigation fees like legal fees and related costs.[116] The cumulative cost may end up being more than litigation, especially where arbitration takes longer to conclude. Since arbitration depends on the goodwill of the parties therein, there is a greater likelihood of non-compliance with the arbitral award unlike the court judgment which is usually backed with sanctions. Therefore, the parties may end up spending more in pursuing judicial enforcement of the arbitral award.

Further, while arbitration is potentially better in preserving the parties' relationship than litigation, if any party is dissatisfied with the award and decides to resort to court, this advantage may be defeated.[117] The Arbitration Act confers the High Court with the power to determine any question of law arising in the course of the arbitration, if a party makes an application in that regard.[118] Further, an appeal by any party may be made to the court on any question of law arising out of the award for determination. However, this section is to the effect that prior to any application being made, parties must have agreed that such applications can be made to the court. Such appeals are likely to sever any business or personal relationships.

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[115] See Mazirow, A., 'The Advantages And Disadvantages of Arbitration As Compared To Litigation' *Presented to The Counselors of Real Estate*, April 13, 2008, Chicago, Ilinois, op. cit. p. 3.

[116] Sec. 32B, *Arbitration Act, 1995*

[117] Under sec. 39, *Arbitration Act* 1995, parties may appeal all the way to Court of Appeal where they feel dissatisfied with the outcome of the arbitral process.

[118] S. 39(1).

The major selling point of the ADR approaches of conflict management is their attributes of flexibility, low cost and lack of complex procedures. These attributes may no longer be tenable in arbitration as it is gradually becoming as expensive as litigation, especially when the arbitral process is challenged in court.[119] When the matter goes to court, it is back to the same old technicalities that are present in civil proceedings.

This challenge also brings in the other factor that is changing the face of arbitration; interference by courts. Ordinarily, courts are not supposed to inquire into the arena of the arbitral proceedings, even where the same are court mandated. Courts are entertaining all manner of applications by parties intent on derailing the arbitral proceedings and thus delaying justice for all concerned. This means then that parties are slowly losing confidence in the arbitral process, as it makes no sense to engage in arbitration for years only for the dispute to end up in courts of law for determination. This comes at a time when the Constitution is trying to do the opposite.

2.6 Med-Arb

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.[120] With the third party umpire 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.[121] It has been asserted that through incorporating mediation and arbitration Med-Arb therefore, strikes a balance between party autonomy and finality in dispute resolution.[122]

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[119] Mazirow A,op cit, p 11.

[120] 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.

[121] 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.

[122] 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.

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.[123] The risk in such a scenario is that the person mediating becomes privy to confidential information 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 competency requirements for mediation and arbitration.[124] 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.[125] 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.[126]

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.[127] 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.[128] This regards the question whether the Med-Arbitrator

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[123] 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].

[124] *Ibid.*

[125] *Ibid*.

[126] *Ibid*.

[127] 'Agreements to engage in 'med-arb' now enforceable in Ontario,' *ADR Bulletin of Bond University DRC*, op cit.

[128] 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].

will remain unaffected as an arbitrator after engaging in caucuses and becoming privy to confidential, perhaps intimate, emotional, personal, or other "legally" irrelevant information.[129] 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.[130] Despite the concerns for confidentiality, it is asserted that unlike normal arbitration, parties have to know, and to release, the med-arbiter from the normal restraints of an arbitrator's prohibitions of *ex parte* contacts.[131] This is important considering that mediation views such contacts as essential to come up with an award that addresses the parties' interests.[132]

Certainly, not all matters are suitable for med-arb mechanism.[133] 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.[134] It is, therefore, imperative that the mediator-arbitrator identify the most appropriate matters before taking up any matter recommended for med-arb.

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[129] 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.

[130] 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].

[131] *Ibid*.

[132] *Ibid*.

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

[134] 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, pp. 91-151, 2014.

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.[135] 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.[136] 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 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.[137]

In other jurisdictions, such as Ontario, med-arb has been used to resolve family matters.[138] In *Marchese v Marchese*[139], the Court held that an agreement to submit to med-arb was enforceable in Ontario despite a provision in the domestic arbitration

[135] *Ibid*.

[136] 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.

[137] 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].

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

[139] [2007] OJ No 191.

statute that prohibits arbitrators from conducting any part of an arbitration as a mediation.[140] Med-Arb is also said to be on the rise in Asian region where it is incorporated in business contracts.[141] 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."[142]

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, 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. Parties should be able to appreciate the challenges that are likely to arise in med-arb before settling for it. To facilitate this, the proposed mediator-arbitrator should be well trained in both mediation and arbitration. They should also be able to advise the parties accordingly on the consequences of taking up med-arb as the conflict management mechanism of choice.

2.7 Arb-Med

Arb-Med[143] 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

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[140] *Ibid.*

[141] 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].

[142] See Telford ME, 'Med-Arb : A Viable Dispute 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.

[143] See *Dispute Resolution Guidance,* op. cit.

then the parties commence a standard mediation facilitated by the same person.[144] 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.[145] 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 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.[146] 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.

2.8 Dispute Review Boards

Dispute Boards are normally set up at the outset of a contract and remain in place throughout its duration to assist the parties, if they so desire, in resolving disagreements arising in the course of the contract and make recommendations or decisions regarding disputes referred to it by any of the parties.[147] It has been observed that since a Dispute Board's decision is not an arbitral award capable of enforcement, nor does it have the status of a court judgment, a decision is only binding as a matter of contract between the parties and the appropriate method of enforcing a Dispute Board's decision is by way of an action for breach of contract.[148] As a result, in enforcement proceedings, there is very little room for the defaulting party to resist

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

[145] *Ibid*.

[146] *Ibid*.

[147] Building Disputes Tribunal, "Dispute Resolution Boards (DRBs)," available at *http://www.buildingdisputestribunal.co.nz/DRBS.html, [Accessed on 13/10/2015]; see also generally, Douajni, G.K., "From Arbitration to Dispute Boards – A Right Step for Dispute Resolution in Africa," available at http://www.drb.org/downloads/Doujani.pdf* [Accessed on 13/10/2015].

[148] *Ibid*.

enforcement unless it can establish that the Dispute Board exceeded its jurisdiction.[149] Dispute Review Boards can effectively be utilised in the construction industry for effective management of disputes.

2.9 Early Neutral Evaluation

Early Neutral Evaluation[150] is a private and non-binding technique where a third party neutral (often legally qualified) gives an opinion on the likely outcome of a - trial as a basis for settlement discussions.[151] Although settlement is not the primary objective, the purpose of early neutral evaluation is to promote settlement discussions at an early stage in the litigation process, or at the very least, to assist parties to avoid the significant time and expense associated with further steps in litigation of the dispute[152]. The opinion can then be used as a basis for settlement or for further negotiation. The aim of a neutral evaluation is to test the strength of the legal points in the case. It can be particularly useful where the dispute turns on a point of law. It is therefore not useful where on the facts of a case, the dispute does not turn to a technical point of law.

2.10 Expert Determination

Expert Determination[153] 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.[154] 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

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[149] *Ibid*.

[150] Fenn, P., "Introduction to Civil and Commercial Mediation", *op. cit*, p. 15.

[151] *Ibid*.

[152] Building Disputes Tribunal, New Zealand <*http://www.buildingdisputestribunal.co.nz/.html*> [Accessed on 13/10/2015].

[153] *Ibid*, p. 16.

[154] *Ibid*.

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.

2.11 Mini Trial (Executive Tribunal)

This is a voluntary non-binding process where the parties involved present their respective cases to a panel comprised of senior members of their organisation assisted by a neutral third party and has decision making powers.[155] After hearing presentations from both sides, the panel asks clarifying questions and then the facilitator assists the senior party representatives in their attempt to negotiate a settlement.[156]

2.12 Adjudication

Adjudication is defined under the CIArb (K) Adjudication Rules as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract.[157] Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision within 28 days or the period stated in the contract),[158] 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.[159] Adjudication is thus effective in simple construction disputes that need to be settled within some very strict time schedules.

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[155] *Ibid*, p.16.

[156] Lowe, D. & Leiringer, R., *Commercial Management of Projects: Defining the Discipline*, (John Wiley & Sons, 2008), p.239.

[157] Chartered Institute of Arbitrators, *The CIArb (K) Adjudication Rules*, Rule 2.1.

[158] *Ibid*, Rule 23.1.

[159] *Ibid*, Rule 29.

The demerits of adjudication are that it is not suitable to non-construction disputes; the choice of the adjudicator is also crucial as his decision is binding and that it does not enhance relationships between the parties.

In adjudication within the community setting, the elders, Kings or Councils of Elders summon the disputing parties to appear before them and orders are made for settlement of the dispute.[160] The end product of adjudication is reconciliation, where after the disputants have been persuaded to end the dispute, peace is restored.[161]

2.13 Traditional Justice Systems/ Traditional Dispute Resolution Mechanisms

It is noteworthy that there is an overlap between the forms of ADR mechanisms and traditional justice systems.[162] The Kenyan communities and Africa in general, have engaged in informal negotiation and mediation since time immemorial in the management of conflicts. For instance, in relation to women, it has been argued that for Kenyan women, custom is particularly important as it defines their identity within society, and mediates their family relationships, entitlements and access to resources.[163] In addition, informal justice systems which constitute the most accessible forms of conflict management, utilize localized norms derived from customary law.[164]

Culture has been identified as an essential component of sustainable development and a critical element of human rights-based approaches as it represents a source of identity, innovation and creativity for the individual and community and is an important factor in building social inclusion and eradicating poverty, providing for economic growth and ownership of development processes.[165] Indigenous knowledge,

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[160] Ajayi, A.T. & Buhari, L.O., "Methods of Conflict Resolution in African Traditional Society," *op cit,* at p. 150.

[161] *Ibid*, p. 150.

[162] *Ibid*, pp.20-21. Art. 159 (2) treats traditional justice systems as part of ADR.

[163] Kamau, W., "Customary Law and Women's Rights in Kenya." p. 1.Available at *http://theequalityeffect.org/wpcontent/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf* [Accessed on 27/08/1015].

[164] *Ibid*.

[165] United Nations Development Group, *Delivering The Post-2015 Development Agenda: Opportunities At The National And Local Levels*, 2014. p. 28 Available at *http://www.undp.org/content/dam/undp/library/MDG/Post2015/UNDP-MDG-Delivering-Post-2015-Report-2014.pdf* [Accessed on 28/08/2015].

cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment.[166] Indeed, this has been recognised in the current Constitution of Kenya and it provides that it recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.[167] It also obligates the state to recognise the role of science and indigenous technologies in the development of the nation and to promote the intellectual property rights of the people of Kenya.[168]

Effective application of traditional conflict resolution mechanisms in Kenya and across Africa can indeed strengthen access to justice for all including those communities who face obstacles to accessing courts of law, and whose conflicts, by their nature, may pose difficulties to the court in addressing them.[169] Restorative justice in the field of criminal justice is lauded especially in relation to young offenders since it is seen as a paradigm shift in criminal justice, away from dominant punitive and therapeutic paradigms, emphasizing instead the reintegration of offenders and potential offenders into their communities.[170]

It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.[171]

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[166] *United Nations Declaration on the Rights of Indigenous Peoples*, Preamble.

[167] Art. 11(1).

[168] Art. 11(2).

[169] See the Kenyan case of *Republic v. Mohamed Abdow Mohamed,* Criminal Case No. 86 of 2011 (May,2013), High Court at Nairobi,

[170] Johnstone, G., *Restorative Justice: Ideas, Values, Debates*, (Willan, 2002). Available at *http://books.google.co.ke/books?id=Fu5GKPqVUnAC&printsec=references&dq=adr+and+political+empowerment&lr=&vq=%22The+Possibility+of+Popular+Justice%22&source=gbs_citations_module_r&cad=5* [Accessed on 25/02/2015].

[171] Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at *www.payson.tulane.edu*. [Accessed on 24/02/2015].

It has been observed that in Tanzania, customary and religious laws are both recognised alongside state law, an indication of the decisive role of state in validating each body of law while attempting to reconcile customary laws with national laws and international laws.[172]

The traditional justice systems can effectively be used alongside the formal systems in giving people a voice in decision-making.

2.14 Demerits/Criticism of ADR Mechanisms

Whereas the ADR mechanisms are lauded as having all the advantages as discussed in this section, there is also a school of thought that is completely against it. The mechanisms and the whole notion of their use have been criticised on the premises that: there is imbalance of power between the parties; there is absence of authority to consent (especially when dealing with aggrieved groups of people); ADR presupposes the lack of a foundation for continuing judicial involvement; and adjudication promotes justice rather than peace, which is a key goal in ADR.[173]

It is argued that a settlement will thereby deprive a court of the occasion and, perhaps, even the ability to render an interpretation. Thus, when parties settle, society gets less than what appears and for a price it does not know; there is also imbalance of power between the parties; there is absence of authority to consent (especially when dealing with aggrieved groups of people); parties might settle while leaving justice undone; and adjudication promotes justice rather than peace, which is a key goal in ADR.[174]

The other demerit is that in mediation, power imbalances in the process may cause one party to have an upper hand in the process, thus causing the outcome to unfavourably address his/her concerns and/or interests at the expense of the other.[175] Regardless of the type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party. However, it may be claimed that inequality in the

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[172] Derman, B., *et. al.* (Eds), *Worlds of Human Rights: The Ambiguities of Rights Claiming in Africa*, (*BRILL*, 2013), p. 198.

[173] Owen, F., 'Against Settlement', *Yale Law Journal*, (1984), No. 93, pp. 1073-1090, p. 1073.

[174] *Ibid*.

[175] Muigua, K., "*Court Annexed ADR in the Kenyan Context*" *op cit*. p. 5.

relationship does not necessarily lead to an exercise of that power to the other party's disadvantage.[176]

The other demerit is that most of the mechanisms under ADR that are voluntary in nature mostly rely on the goodwill of the parties and any withdrawal of such goodwill might result in collapse of such a process. It is thus possible for a party to go into mediation to buy time or to fish for more information.

Contrary to ADR, adjudication through court is usually based on law, rules and regulations provided for, which results in consistent decisions based on law and precedents; Parties are bound by the decision of the court, which can be enforced; Court decisions are appealable and errors can be corrected, reviewed or reversed by the appellate courts.[177]

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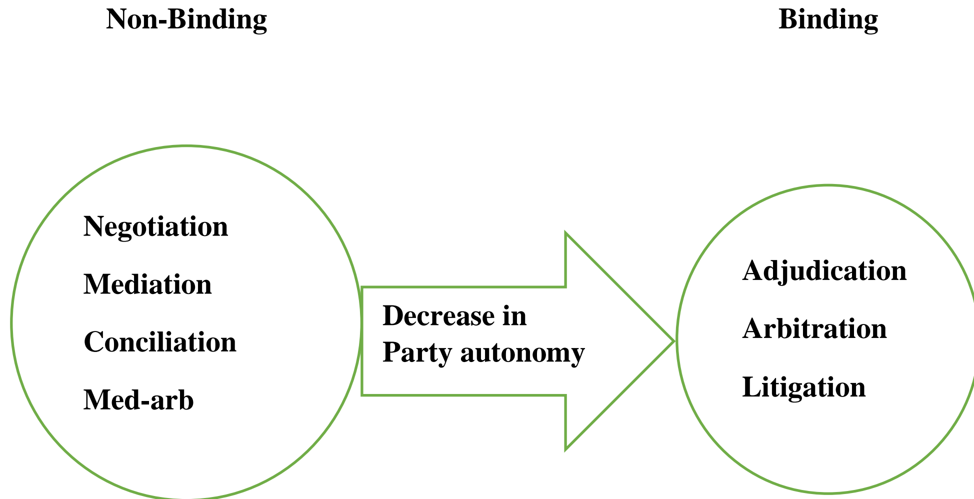
[176] Abadi, S.H., The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration, p. 3, *Effectius Newsletter*, Issue 13, (Effectius: Effective Justice Solutions, 2011). Available at *http://effectius.com/yahoo_site_admin/assets/docs/Effectius_Theroleofdisputeresolutionmechanisms*

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

Figure 2 Degree of Party Autonomy



***Source: Author.**

Fig. 2 illustrates the degree of party control or autonomy over the conflict management process under the various ADR mechanisms. From the figure, it is manifest that it is in a negotiation that the parties enjoy maximum party autonomy. There is minimum or no control as one moves from negotiation to litigation.

2.15 Conclusion

The scope for the application of ADR has been widened broadly by the 2010 Constitution, with Article 189 (4) stating that national laws should provide for the procedures to be followed in settling intergovernmental disputes through alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. These key provisions form the constitutional basis for the application of ADR mechanisms in Kenya; their import is that ADR can apply to a wider scope of disputes and hence broadens the applicability of ADR. It is also a clear manifestation of the formal acceptance of ADR as a means of conflict management in all disputes.[178]

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

These mechanisms can effectively be applied in resolving a wide range of commercial disputes, family disputes and natural resource based conflicts, amongst others, thus easing access to justice.[179]

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

Chapter Three

Understanding the foundations of ADR

3.1 Introduction

This section critically examines whether Alternative Dispute Resolution (ADR) is really an alternative method of managing conflicts in the search for effective justice for Kenyans. Further, it seeks to critically analyse the place of ADR in the management of disputes and conflicts in Kenya. The discussion briefly traces the earliest development or practice of ADR in various regions across the world, including Africa and Kenya in particular. Also examined is whether the now common notion that ADR is alternative to the formal court process is a misconception and how the perception has affected its effective application in conflict management in the country. ADR is a broad term used to refer to the use of negotiation, mediation, conciliation, or arbitration in dispute management.

Successful incorporation of ADR and Traditional Dispute Resolution Methods (TDRM) mechanisms in conflict management calls for a change in attitude towards the same. They ought to be treated as mechanisms that are the most appropriate in the effective resolution of certain kinds of conflicts. As such, ADR and TDRM mechanisms should be viewed as complementary to the court system; working together to ensure that access to justice is achieved for all through employment of the most appropriate mechanism for the particular dispute or conflict. Indeed, it has been argued that these techniques are not necessarily mutually exclusive in any particular conflict, but can be used sequentially or in a customized combination with other adjudicative methods for resolving disputes.[1]

3.2 Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution Mechanisms (TDRM) In Pre-Colonial Era

During the colonial period, the political and legal systems of the colonial masters were superimposed upon the traditional and customary political and legal processes of African peoples. In an attempt to safeguard their own interests, the

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[1] G. Hamilton, 'Rapporteur Report: Alternative Dispute Resolution (ADR) —Definitions, Types and Feasibility', p. 1, Joint Symposium, International Investment and ADR. Available at*http://investmentadr.wlu.edu/deptimages/Symposium%202010/Rapparteur%20Report%20 %20ADR%20DEFINITION%20-%2019%20March.pdf* [Accessed on 16 May 2014].

colonial masters suppressed the African customs and practices, allowing them to be applied 'only if they were not repugnant to justice and morality'.[2] A misconception of the African communal way of life, conflict resolution institutions and prejudice against their traditional way of life saw the Europeans introduce the Western ideals of justice which were not based on political negotiations and reconciliation.[3]Although certain minor disputes could be settled in the customary manner, the English Common Law was the ultimate source of authority.[4] The effect of this was disempowerment of the Kenyan people as far as control of their lives was concerned.

Before the arrival of Colonialists in Africa, African communities had their own ways of dealing with day to day challenges of life. Africans led a communal way of living and this, naturally informed their approach to handling different issues of life.[5] A good example is the land tenure system which was communal, with no single person claiming ownership of the land, apart from user rights and holding the same in trust for future generations.[6] Any group of people living together is bound to have disagreements over various issues, and Africans were no different. Thus, they had mechanisms of resolving conflicts as they arose amongst them. They understood very well what approach was applicable to what kind of dispute or conflict.[7]

For instance, in the Kalahari Desert in Botswana and Namibia the Bushmen have lived traditional lives for many thousands of years, without sophistication in conflict management practices which have evolved without courts and a formal state

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[2] The clause is retained in the *Judicature Act*, Cap 8, Laws of Kenya and Article 159(3), *Constitution of Kenya* 2010.

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

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

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

[6] *Ibid,* pp. 21-51.

[7] See generally L.J. Myers & D. H. Shinn, 'Appreciating Traditional Forms of Healing Conflict in Africa and the World, 2010, available at *scholarworks.iu.edu/journals/index.php/bdr/article/download/.../1220* [Accessed on 20/05/2014].

system and are suited to the needs of a collective hunter-gatherer society.[8] The Bushmen's disputes occur over food, land and mates. Those in conflict bring other members of the tribe together to hear out both sides and where passions rise, senior tribal members hide the disputants' poisoned hunting arrows to prevent resort to violence.[9] If resolution is not reached in the small group, the larger community is brought together where everyone is able to talk through every aspect of the dispute over a number of days until the dispute has been 'talked out'. Economic reality and social dependence preclude the easy resort to violence over individual problems.[10]

As such, these approaches to conflict resolution were aimed at ensuring continued co-existence of the communities and sought to ensure that the conflicts were fully addressed to prevent their re-emergence in future.[11] The traditional approaches therefore effectively addressed the conflicts making them appropriate for the management of the particular problem. This presents a sharp contrast with the formal justice systems, which seeks to settle the disputes without necessarily addressing the real cause of the conflict, thus creating a likelihood of re-emergence of the problem in future with even more severe consequences. The Missionaries and the colonial masters spread western ideas, customs, and religions to people in Africa.[12] Africans were made to believe that unless they resorted to court, there was no other way of achieving justice. Even where they used the traditional conflict resolution mechanisms, their decisions could be appealed to the formal systems. [13]

This fallacy became so well entrenched in the system that Courts were elevated to a position that portrayed the ADR, TDR and any other out of court approach to dispute management as either totally ineffective, or simply undesirable. These

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[8] Boulle, L., "A History of Alternative Dispute Resolution," *ADR Bulletin*: Vol. 7: No. 7, Article 3, 2005. p. 1. Available at: *http://epublications.bond.edu.au/adr/vol7/iss7/3* [Accessed on 16/05/2014].

[9] *Ibid*, p. 2.

[10] *Ibid*.

[11] See Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management,* (Nairobi: Centre for Conflict Research, 2006). pp. 36-45.

[12] Kenyatta, J., *Facing Mount Kenya, op cit* pp. 259-269.

[13] 'Historical Background of the Judiciary in Kenya', available at *http://judiciary.marsgroupkenya.org/index.php?option=com_content&view=article&id=45&Itemid*=37 [Accessed on 20/05/2014].

mechanisms do have a role to play in access to justice. However, this is not to say that all disputes are capable of being addressed through the TDRM and any other out of court approach, especially in the wake of the human rights movement, but it is also not true to say that all disputes are capable of being adequately and satisfactorily addressed through the formal court system.

The introduction of foreign legal systems in Kenya and Africa in general thus saw the beginning of the end of active application of the informal justice systems due to their perceived inferiority in the face of imperialism, thus eroding the confidence that they had gained from the people over the years. However, as much as there was emergence of new kinds of disputes, mostly commercial in nature, the day to day types of conflicts amongst people never went away. The formal legal system could not address most of these and the more Informal Justice Systems (IJS) remained the most applicable, applying hand in hand in areas where the formal system failed or could not reach. They were, therefore, part of everyday life of the people. This, arguably make them the most appropriate disputes mechanisms as compared to the foreign and often complicated formal justice system.

3.3 Emergence of Formal Justice System in Kenya

With the Colonial incursion in Africa came the introduction of the formal justice systems that before then were non-existent and even unknown. The colonial masters came with the mindset of amassing as much wealth as they could, not only for themselves, but also for their countries of origin.

With the private ownership of property by the colonialists especially the settlers, there arose the need for protection of their rights to the property and also enforcing the same against others. The colonialists frowned upon the African communal way of life, and especially with regard to ownership of property including land. This was not favourable to their policy of sourcing raw materials for their countries and settling their people in Africa. Indeed, it has been correctly argued that even if it weakly described actual systems of property-holding, the rhetoric of absolute private property was politically important.[14] The idea that absolute private property was the best way to

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[14] Brewer, J. & Staves, S., "Introduction," in, Brewer & Staves, (eds), *Early Modern Conceptions of Property*, p. 18. [As quoted in Ince, O.U., 'John Locke and Colonial Capitalism', PhD Candidate, Department of Government, Cornell University, p. 16, Available at *http://government.arts.cornell.edu/assets/psac/fa12/Ince_PSAC_Sep28.pdf [Accessed on 17/05/2014]. See also Ogendo, H.W.O.O., Tenants of the crown: The Evolution of Agrarian Law and Institutions in Kenya*, (Acts Press, 1995); Hardin, G., 'The Tragedy of the Commons,' *Science*, New Series, Vol. 162, No. 3859, Dec. 13, 1968, pp. 1243-1248.

incentivize owners and maximize productivity was used not only to legitimate the enclosing of commons, but also, to legitimate the taking of land from foreign peoples with different systems of property.[15]

It has also been rightly pointed out that the Classical-Christian legalistic tradition in which disputes over colonial property were embedded, dictated that land appropriations be legitimated by appeal to some pre-existing law, which was complicated by the fact that the lands in question were patently inhabited by peoples thought to be outside the civic history of the Old World.[16]

The foreigners sought to inculcate their way of life into Africans either openly or through subtle ways such as using Christianity to condemn the African cultural practices without due regard to the positive aspects of the same. The Africans, together with their ways of life, were considered barbaric, and the colonialists embarked on importing not only their notion of civilisation, but also all other aspects of their system including dispute management mechanisms namely formal courts of law. Civilisation was equated to the rule of law.[17] They were bent on engendering and protecting the perceived exclusive right to property acquired in Africa by the colonialists. Capitalism and imperialism took root at the expense of the African way of doing things. It is arguable that the most damaging impact of imperial rule in Africa was not only economic and political, but was also psychological.[18]

In order to subdue the purportedly inferior African way of life, including their approaches to conflicts and disputes management mechanisms, there was put in place qualifications for the African customary law in the name of a 'repugnancy clause'. Every customary law practice had to be subjected to this subjective test of repugnancy to morality or justice.[19] It is important to note that the concepts of morality and justice

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[15] *Ibid.*

[16] Pagden, A., "The Struggle for Legitimacy and the Image of Empire in the Atlantic to *c*. 1700," in *OHBE* Vol. 1, ed. Canny, pp. 37-8 [As quoted in Ince, O.U., *op cit* p. 15].

[17] See Mamdan, M., *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, (Princeton University Press, 1st ed., April 1, 1996).

[18] 'Imperialism in Africa', p. 1, available at *http://www.ocs.cnyric.org/webpages/phyland/files/imperialism%20in%20africa.*pdf [Accessed on 17/05/2014]. ; See also Mamdan, M., op.cit.

[19] See S. 3(2), Judicature Act, Cap 8, laws of Kenya and S. 2, Magistrate's Act, Cap 10, Laws of Kenya.

were defined, not according to the African conception of the same, but according to the colonial masters' perception of what was moral or just. Africans had little if anything to say on what they considered morally right or just. African values and ways of doing things were so severely undermined that the Africans began to see themselves as inferior and conditioned to see Westerners and their culture as superior. Africans were expected, as a matter of law, to submit all their disputes to the newly introduced formal legal systems, without any recourse to use of their more familiar ways of addressing any disputes or conflicts. For as long as the Africans viewed everything through the prism of Western concepts, ideals, values and policies, anything African was regarded as either second class or an inferior alternative to the Western ways of doing things.

It is not therefore difficult to see why traditional justice systems were regarded as capable of being only alternative to Court system even in the independent Africa, including Kenya. Unfortunately, this has continued to the present African countries' legal systems and particularly Kenya. It is only recently that there have been spirited efforts by a section of Kenyans to ensure legal recognition of what are now known as ADR and TDRM mechanisms. However, much still needs to be done to change people's perceptions instead of waiting for the courts to mandatorily refer people for ADR.

3.4 Place of Traditional Justice Systems in Current Kenyan Legal System

The Kenyan *Judicature Act*[20] under Section 3(2) outlines the formal sources of law in the country. These are listed as follows: the Constitution; Statutory law or Acts of Parliament, including foreign laws named in the First Schedule of the *Judicature Act*; Subsidiary legislation; the substance of the common law, doctrines of equity, English Statutes of general application, and procedure and practice observed in courts in England until 12 August 1897; and African customary laws, including certain religious laws (Islamic and Hindu). However, section 3(2) of the *Judicature Act* provides that customary law will apply to the extent that it is not repugnant to justice and morality.

Customary law is applicable in a numerous areas, including: land held under customary tenure, marriage, divorce, maintenance of children, dowry, matters affecting the status of women, widows, guardianship, custody, adoption, legitimacy of

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[20] Cap 8, Laws of Kenya.

children, and succession.[21] The *Magistrates' Act*[22] provides under section 17 thereof that a magistrate's court may call for and hear evidence of the African customary law applicable to any case before it.[23] Section 2 thereof also specifies the areas and matters upon which the court shall be guided by customary law. The Act provides that "claim under customary law" means a claim concerning any of the following matters under African customary law: land held under customary tenure; marriage, divorce, maintenance or dowry; seduction or pregnancy of an unmarried woman or girl; enticement of or adultery with a married woman; matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy; and intestate succession and administration of intestate estates, so far as not governed by any written law. This for a long time relegated customary law affecting its appreciation across other areas. For instance, in the case of *Kimani v Gikanga*[24] the Court of Appeal for Eastern Africa was dealing with an action involving questions as to title of land and other rights in Kenya. The Respondents became the registered proprietors of land which under land consolidation replaced the land left by Gikanga, their father and the registration was originally done under the *Native Land Tenure Rules*, 1956. The Plaintiff claimed that he had lived and assisted Gikanga in his life, something that made him acquire 30 acres from the estate as well as becoming the *Muramati* (head of family in charge of land) upon the death of Gikanga. The issue was how the Court would establish customary laws as facts before it. The Court held that any person seeking to rely on customary law must prove the same in court. In other words, the Court will not take judicial notice of customary law and agreements as the one portrayed in the foregoing case would not just be recognised.

It is noteworthy that the current Constitution of Kenya, 2010[25] does not expressly refer to customary law as one of the sources of law in Kenya. This notwithstanding, it is apparent that the Constitution recognises customary law as a

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[21] Gitonga, F.K, "Provisions of the General Laws," *The International Journal of Not-for-Profit Law*, Vol. 12, Issue 2, February 2010, International Center for Not-for-Profit Law.

[22] Cap 10, Laws of Kenya [Revised Edition 2012 [2010].

[23] S. 17, Cap 10.

[24] Court of Appeal for Eastern Africa, [1965] E.A. 735.

[25] Government Printer, 2010, Nairobi.

source of law in Kenya. It states under Article 2(4) that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. This is in line with the statutes that have made express reference to customary law.[26] Under Article 11, the Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and the nation. The state is mandated with promoting all forms of national and cultural expression through literature and other media. To this extent, customary law is applicable as a source of law in Kenya.

The Constitution also provides under Article 44 that every person has a right to enjoy their language and culture, though no one should be compelled to perform, observe or undergo any cultural practice or right. It is also noteworthy that Article 45(4) provides that the Parliament shall enact legislation that recognises: marriages concluded under any tradition, or system of religious, personal or family law; and any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with the Constitution.

Regarding management of disputes and conflicts, the Constitution of Kenya has several provisions seeking to promote ADR as well as TDRM mechanisms in the resolution of conflicts and settlement of disputes. One of the principles of land policy as provided for under the Constitution, is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.[27] Further, the National Land Commission is tasked with *inter alia* encouraging the application of traditional dispute resolution mechanisms in land conflicts.[28] One of the guiding principles in the exercise of judicial authority by the courts and tribunals is the promotion of alternative forms of conflict management including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms* [emphasis added], subject to repugnancy to morality or justice.[29]

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[26] See Magistrates Act, Cap 10 and Judicature Act, Cap 8.

[27] Article 60(1) (g).

[28] Article 67(2) (f); See also sec. 5(1) (f), *National Land Commission Act*, No. 5 of 2012.

[29] Article 159(2) (c).

It is important to note that even under the current Constitution of Kenya, the repugnancy test for ADR and TDRM has been retained.[30] In relation to governance related disputes, Article 189(3) state that in any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation. Clause (4) therefore is to the effect that national legislation shall provide procedures for settling inter-governmental disputes by alternative conflict management mechanisms, including negotiation, mediation and arbitration. Where the two Houses of National Assembly fail to agree on a single version of a Bill, the Constitution allows the Speakers of both Houses to appoint a mediation committee consisting of equal numbers of members of each House to attempt to develop a version of the Bill that both Houses will pass.[31]

These are the major provisions that directly vouch for application of ADR as well as TDRM mechanisms in the resolution of conflicts and settlement of disputes. These provisions demonstrate the paradigm shift in the way ADR is perceived in the mainstream legal system.

3.5 Are ADR Mechanisms Alternative?

ADR and TDRM mechanisms have been associated with a number of advantages over litigation. Generally, ADR mechanisms are hailed as expeditious, cost effective and lenient on procedural rules. Specifically, ADR mechanisms, perhaps with the exception of arbitration, seek to address the root causes of the dispute or the conflict. Justice is a highly subjective notion and the justice needs of one person in a certain situation are totally different from those of another. Justice must demonstrate fairness, affordability and flexibility. Fairness includes both substantive and procedural fairness. Procedural fairness, also known as rules or principles of natural justice, is said to consist of two elements namely: the right to be heard which includes- the right to know the case against them; the right to know the way in which the issues will be determined; the right to know the allegations in the matter and any other information that will be taken into account; the right of the person against whom the allegations have been made to respond to the allegations; the right to an appeal, and

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[30] Article 159(3). This provision is to the effect that Traditional dispute resolution mechanisms shall not be used in a way that— contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law.

[31] See Article 112 and 113.

the right to an impartial decision which includes-the right to impartiality in the investigation and the decision making phases; the right to an absence of bias in the decision maker.[32] Lord Hewart, in the English case of *Rex v Sussex Justices; Ex parte McCarthy* rightly held that "… it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[33]

Article 159 (1) of the Constitution provides that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and that it is administered without undue regard to procedural technicalities.[34] It emphasises the right of all persons to have access to justice as guaranteed by Article 48 of the constitution. It also reflects the spirit of Article 27 (1), which provides that "*every person is equal before the law and has the right to equal protection and equal benefit of the law*" [Emphasis ours].[35]

Article 159 can be construed as generally encouraging application of both formal court systems and ADR and TDRM in the pursuit of justice.[36] As already noted, ADR comprises several mechanisms which vary in their application and the advantages that go with each of them. Litigation is classified under dispute settlement mechanisms while ADR mechanisms are classified under the conflict resolution ones. Settlement is an agreement over the issue(s) of the conflict which often involves a compromise.[37] As a result, litigation does not preserve the relationship of the parties, and there is likelihood of the problem recurring and even a distressed party taking

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[32] *Rex v Sussex Justices; Ex parte McCarthy,* ([1924] 1 KB 256, [1923] All ER Rep 233); See also Articles 47 and 50, Constitution of Kenya, 2010.

[33] ([1924] 1 KB 256, [1923] All ER Rep 233).

[34] *Ibid*, Article 159(2) (d).

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

[36] Article 159(2).

[37] Bloomfield, D., Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, *Journal of Peace Research,* vol. 32 no. 2 May 1995 151-164. Available at *http://jpr.sagepub.com/content/32/2/151.short* [Accessed on 18/05/2014]; See also generally M. Mwagiru, *Conflict in Africa; Theory, Processes and Institutions of Management*, *op cit,* pp.36-41.

matters into their own hands. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed. However, it is noteworthy that in matters of protection of human rights, litigation offers the best channel to ensure protection and enforcement of the same.[38] Further, where there is need for an injunction, litigation offers best solution. To this extent, litigation would be useful especially if there is no incentive for preserving relationships.

Resolution of conflicts gives rise to an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.[39] 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.[40]

The ADR mechanisms are mainly intended for conflict resolution and have, as their major selling point, their attributes of flexibility, low cost, lack of complex procedures, mutual problem solving, salvaging relationships and their familiarity to the common people. For instance, negotiation allows parties to fully control both the process and the outcome through a mechanism which will not impose any outcome which is not mutually acceptable.[41]

Conflict resolution mechanisms are usually preferred to settlement for their effectiveness in addressing the root causes of the conflict and negate the need for future conflict or conflict management.[42] They are suitable for certain types of conflicts

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[38] Art. 22(1) of the Constitution of Kenya 2010 provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

[39] Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, *op cit*; See also Muigua, K., 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010', p. 7, available at Available at
http://www.chuitech.com/kmco/attachments/article/111/Paper%FINAL.pdf

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

[41] K. Muigua, Resolving Conflicts through Mediation in Kenya, p. 11, (Nairobi: Glenwood Publishers, 2012).

[42] *Ibid.*

especially those that involve intense emotions but at the same time require preservation of relationships. In such situations, settlement mechanisms such as litigation are inappropriate. It is only resolution mechanisms such as ADR that are capable of addressing such instances of conflicts. This therefore begs the question whether ADR would be an alternative to litigation in such a scenario or the more appropriate means of resolving the conflict. ADR is arguably more 'appropriate' than alternative in the management of some of the everyday disputes among the people of Kenya. Courts and the law makers in general seem to have recognised this fact. For instance, Statutes and courts have required disputants to employ ADR mechanisms in handling their disputes before going to courts. This is evident in provisions of various statutes.[43] Indeed, in some instances, the Courts may send the parties away if it emerges that they did not make any attempts to resolve their disputes or conflicts through ADR mechanisms before approaching the Courts. This court practice takes us back to the question whether ADR mechanisms are really alternative to the Court process or complementary.

While it is to be acknowledged that in some jurisdictions such as the United Kingdom, ADR is purely alternative to litigation, ADR mechanisms form an important part of conflict management mechanisms in Kenya and Africa in general. The actualization of Article 48 of the Constitution on the right of access to justice by all in Kenya requires various instruments and institutions. These include both formal and informal mechanisms of conflict management and access to justice. Article 48 is to the effect that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Despite these provisions, access to justice especially through litigation is usually hampered by some challenges as highlighted in the previous section.

To the ordinary *mwananchi,*[44] negotiation is usually the first port of call when there is a dispute. Negotiation, as an informal process of conflict resolution, offers parties maximum control over the process to identify and discuss their issues enabling them to reach a mutually acceptable solution without the help of a third party. Its focus is on common interests of the parties rather than their relative power or position. It is associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control,

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[43] Such as *Environment and Land Court Act*, 2011, *National Land Commission Act*, 2012 and *Labour Relations Act*, 2007.

[44] Mwananchi is the Swahili word for "Citizen" used to connote the people of Kenya.

addressing root causes of the conflict, non-coerciveness and enduring outcomes. This makes it very applicable to everyday life disputes which would otherwise be aggravated by any attempts to litigate them. If parties in a negotiation hit a deadlock, then they invite a third party of choice to help them resolve their matter and this becomes mediation.[45] Mediation is associated with same advantages as negotiation. However, it suffers from its non-binding nature so that where compliance is required, one would have to resort to courts to obtain the same since mediation does not have enforcement mechanism but relies on parties' goodwill. Conciliation on the other hand involves a third party , called a conciliator, who restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions.

Conciliation is useful in reducing tension, opening channels of communication and facilitating continued negotiations. It therefore follows that where there are already severed relationships which need restoration, conciliation would work best instead of litigation or any other mechanism such as arbitration which would exacerbate the situation. For instance, transitional justice is defined as 'that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'.[46] It entails two aspects of justice namely *retribution* (punishment and corrective action for wrongdoings) and *restoration* (emphasising the construction of relationships between the individuals and communities).[47] While formal justice system may effectively achieve retributive justice, restorative justice may arguably only be effectively achieved through ADR/TDRM mechanisms. Access to justice arguably includes 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.[48]

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[45] Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management,* op *cit* p. 115.

[46] Kenya Human Rights Commission, Transitional Justice in Kenya: A Toolkit for Training and Engagement, p. 14, 2010. Available at www.khrc.or.ke/.../7-transitional-justic... [Accessed on 19/05/2014].

[47] *Ibid*

[48] 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.

Traditional conflict resolution processes are part of a well-structured, time-proven social system geared towards reconciliation, maintenance and improvement of social relationships since they are deeply rooted in the customs and traditions of peoples of Africa; they strive to restore a balance, to settle conflict and eliminate disputes.[49] Indeed, it is contended that conflicts must be understood in their social context, involving values and beliefs, fears and suspicions, interests and needs, attitudes and actions, relationships and networks in order to ensure that their root causes are addressed.[50] This is not always possible or necessary in all scenarios. However, it should be appreciated that where this is the case, then the most appropriate dispute management mechanisms should be used. In this case, it would be ADR as opposed to the formal justice system.[51] For example, it has been documented that, in a study of non-formal conflict management processes in a slum area in Nairobi, these processes operate in a wider socio-economic context and are integrated into the social and economic fabric of life. Thus, for instance, the mandate of the village committees extend beyond hearing disputes to other important aspects of community life such as security, environmental management, health and civic education.[52] This is a clear indication that the formal and informal justice systems are not antagonistic but are indeed capable of complimenting each other in promoting access to justice for all not only in Kenya but also across Africa.[53]

ADR mechanisms can rightly be referred to as Appropriate Dispute resolution mechanisms instead of alternative as the use of the word 'alternative' makes them appear inferior to litigation while this is not the case. The reality is that these mechanisms should at least be treated as equal if not better mechanisms when compared to litigation. These have the potential for being made applicable in all walks

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[49] Hwedie, K.O. & Morena, J.R., *Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana*, p. 33, (University of Botswana).

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

[51] ADR mechanisms are also at times referred to as Alternative Justice Systems (AJS).

[52] Kamau, W.W., *Law, Family and Dispute Resolution: Negotiating Justice in a Plural Legal Context*, PhD Dissertation, (York University, 2007), p. 5.

[53] Informal justice systems are also referred to as Alternative Justice Systems by some scholars.

of life wherever there exist possibilities of any dispute, a potential only waiting to be tapped.

From the foregoing, it is apparent that it is hard to dismiss ADR/TDRM mechanisms as merely alternative to litigation. They cannot be dispensed with as yet due to their utmost appropriateness in handling certain kinds of conflicts in the society. The debate that remains thus is whether ADR mechanisms are really alternative to formal justice systems. This is the time to recognize that alternative conflict management mechanisms stand independently and not as an alternative to any adjudicatory process.[54]

3.6 Conclusion

The Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.[55] The traditions, customs and norms of a particular community have always played a pivotal role in conflict resolution and they were highly valued and adhered to by the members of the community.[56]

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).[57]

Recognition of ADR and traditional dispute resolution mechanisms is thus, predicated on these cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system.[58] It is also borne out of the recognition of the diverse cultures of the various

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[54] Gaur, L.K., Why *I Hate 'Alternative' in "Alternative Dispute Resolution*", p.4. Available at *http://delhicourts.nic.in/Why_I_Hat1.pdf* [Accessed on 22/09/2015].

[55] Art. 11(1).

[56] Muigua, K., *Resolving Conflicts through Mediation in Kenya, op. cit.*, p. 35.

[57] See Maiese, M., "*Principles of Justice and Fairness,"* in Burgess, G. & Heidi Burgess, H. (Eds.) "Conflict Information Consortium", *Beyond Intractability,* University of Colorado, Boulder (July 2003).

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

communities in Kenya as the foundation of the nation and cumulative civilization of the Kenyan people and nation. Most of these mechanisms are entwined within the cultures of most Kenyan communities which are also protected by the Constitution.[59] ADR mechanisms are flexible, cost-effective, expeditious, foster relationships, are non-coercive and result in mutually satisfying outcomes. They are thus more appropriate in enhancing access to justice by the poor in society as they are closer to them. They may also help in reducing backlog of cases in courts.[60] stamina

As such, these mechanisms provide an opportunity for empowering the Kenyan people through saving resources such as time and money, fostered relationships and mutually satisfying outcomes.

With adequate legal and policy framework on the application of ADR in Kenya, it is possible to create awareness on ADR mechanisms for everyone, including the poor who may be aware of their right of access to justice but with no means of realizing the same, as well as consolidating and harmonizing the various statutes relating to ADR including the Arbitration Act with the constitution to ensure access to justice by all becomes a reality. There is also a need for continued sensitization of the key players in the Government, the judiciary, legal practitioners, business community and the public at large so as to support ADR mechanisms in all possible aspects.

It is apparent that ADR has not lost its relevance in the society and what it requires is mainstreaming without necessarily formalizing it in a way that takes away all the benefits that come with its application to a dispute. The answer to the question whether ADR is really alternative is not a straightforward one. However, it is clear that ADR can play a key role in the realisation of the right to access justice in society, which is a human right. If justice can be effectively realised through ADR, it can no longer be viewed solely as alternative. The time to debate the question whether ADR is really alternative is now ripe.

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http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf

[59] Art. 11.

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

Chapter Four

Legal and Policy framework of ADR in Kenya

4.1 Introduction

The Constitution of Kenya guarantees the right of every person to access justice and calls for the State to take appropriate policy, statutory and administrative interventions to ensure the efficacy of justice systems.[1]

In order to guarantee access to justice for Kenyans, the Constitution broadens the available mechanisms in the justice system by encouraging the utilization of formal and informal justice systems.[2] In this regard, Article 159 recognizes the use of Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) mechanisms in addition to the court process.[3]

Despite the formal recognition coupled with a constitutional mandate for their promotion in appropriate conflict management strategies, TDR mechanisms and other community justice systems are yet to be institutionalized by way putting in place adequate supporting legal and policy measures that would ensure effective utilisation of the same in access to justice. There exists no substantive policy or legislative framework to guide the promotion and use of these mechanisms despite their constitutional recognition and limitations set out under Article 159(2) and (3).[4]

It is against this background that this section examines the current legal and policy framework on access to justice, with a view to make recommendations on the appropriate policy, statutory and administrative measures that will ensure that the ADR

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[1] Art.21, 47, 48 & 50.

[2] Art. 159(2) (d).

[3] It stipulates that in exercising judicial authority, the courts and tribunals are to be guided by the following principles: justice is to be done to all, irrespective of status, (b) justice shall not be delayed and (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause 3. Clause 3 thereof provides that TDR mechanisms shall not be used in a way that (a) contravenes the Bill of Rights, (b)is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality, or (c) is inconsistent with the Constitution or any written law.

[4] It is noteworthy that the current Constitution of Kenya calls for promotion of alternative forms of dispute resolution as a guiding principle in the exercise of judicial authority by courts and tribunals but not necessarily as a requirement under any written law.

mechanisms are meaningfully and actively utilized in facilitating access to justice especially for the poor Kenyans.

4.2 Legal and Institutional Framework on Arbitration in Kenya

The first Arbitration law in Kenya came in the form of the Arbitration Ordinance, 1914 which was a reproduction of the English Arbitration Act, 1889. This Ordinance accorded courts in Kenya ultimate control over the arbitration process in Kenya. Kenya acquired its first Arbitration Act in 1968.[5] The 1968 Act was almost a replica of the *Arbitration Act* 1950 of United Kingdom. Similar to the *Arbitration Act* 1950 of UK, this Kenyan Act this provided generally the for court's intervention in arbitrations. Essentially, Courts were afforded too much intrusive powers and this affected the efficiency of arbitration as dispute settlement mechanism. The adoption of UNCITRAL Model Arbitration Law led to legal reforms repealing the 1968 *Arbitration Act* and replacing it with the Arbitration Act, 1995. The Act is based on the Model Arbitration Act of the United Nations Commission on Trade Law.

The Model of the United Nations Commission on International Trade Law (UNCITAL) was adopted in 1985 with a view to encouraging arbitration and processes that would have global recognition.[6] Later, Kenya's Arbitration Act 1995 was amended vide the *Arbitration (Amendment) Act* 2009 which was assented to on 1st January 2010 (hereinafter referred to as the Amending Act).

The Arbitration Act 1995 is applicable to both domestic and international arbitration except as limited by its provisions.[7]

Currently, arbitration in Kenya is governed by various laws which include the Constitution, *The Arbitration* 1995[8] (hereinafter the Arbitration Act), the *Arbitration Rules*, *Civil Procedure Act*[9] and the *Civil Procedure Rules* 2010[10]. Article 159(2) (c)

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[5] The now repealed Arbitration Act (Cap. 49) Laws of Kenya,

[6] The Arbitration Agreement, Kenya Law Resource, Available at *http://kenyalawresourcecenter.blogspot.com/2011/07/arbitration-agreement.*html [Accessed on 24 February, 2014]

[7] S. 2, No. 4 of 1995(2009).

[8] No. 4 of 1995(As amended in 2009)

[9] Cap 21, Laws of Kenya.

[10] Legal Notice No. 151 of 2010, Rules under S. 81, Cap 21. S. 59 of the *Civil Procedure Act* provides that; "All references to arbitration by an order in a suit, and all proceedings thereunder,

of the Constitution provides that in the exercise of judicial authority, the Courts and tribunals must be guided by the principle of *inter alia* promotion of alternative forms of dispute resolution (ADR) including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3). Notable are the provisions of Clause (3) thereof which are to the effect that Traditional dispute resolution mechanisms shall not be used in a way that: contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law. The effect of this is that arbitration must be carried out in a way that is Constitutional, failure to which it would be seen as invalid.

Article 189 of the Constitution provides for cooperation between national and county governments. Article 189(4) thereof provides that National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. Section 59 of the *Civil Procedure Act*[11]provides that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules. Further, Order 46 of the *Civil Procedure Rules* provides *inter alia* that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the Court for an order of reference wherever there is a difference.

The *Arbitration Act* 1995 generally provides for arbitral proceedings and the enforcement of the arbitral awards by national courts. An arbitration agreement or arbitration clause must be concluded in writing. An arbitration agreement is in writing if signed by parties or involves an exchange of letters, telex, telegram, facsimile, electronic mail or other telecommunication means providing a record of the agreement.[12] An arbitration agreement by reference is also possible provided the

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shall be governed in such manner as may be prescribed by rules" ; Order 46 of the *Civil Procedure Rules* provides, inter alia, that; "1. Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference."

[11] Cap 21, Laws of Kenya; S. 59D of the Act provides that *all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court*.[11]

[12] S. 4 of the Act. See also Muigua, K. The Arbitration Acts: A Review of Arbitration Act, 1995 Of Kenya Vis-A-Viz Arbitration Act 1996 Of United Kingdom, Rev. March 2010, available at *www.kmco.co.ke/articles.html*

contract making the reference is in writing and the reference makes the clause referred to part of that contract.[13] Where there is no binding agreement to arbitrate, parties to dispute willing to arbitrate usually enter into an "ad hoc" agreement to arbitrate the same. The Act contains provisions relating to arbitral proceedings, recognition and enforcement of arbitral awards, irrespective of the state in which it was made subject to certain limitations.[14]

Section 3(1) of the Act defines the scope of the Act and defines "arbitration" to mean any arbitration whether or not administered by a permanent arbitral institution. Further, the section defines an "arbitral tribunal" as a sole arbitrator or a panel of arbitrators. The Act thus, applies to a wide range of arbitration matters. Arbitration practice in Kenya has increasingly become formal and cumbersome due to lawyers' entry to the practice of arbitration.[15] This has had the effect of seeing more matters referenced to the national Courts due to the disputants' dissatisfaction. The referrals have been based on matters touching on substantive as well as procedural aspects of the arbitration.

Generally as the Arbitration Act recognizes, arbitration can be conducted by either institutions or independent arbitrators, commonly known as ad hoc arbitration. The Chartered Institute of Arbitrators (Kenya Branch), established in 1984, is the umbrella body that oversees, promotes and facilitates determination of disputes by Arbitration and other forms of Alternative Dispute Resolution (ADR). The Kenya Branch has members from such diverse fields as Architecture, Engineering, Quantity Surveying, Law, Insurance, Accounting and Property Valuation, and maintains a register of knowledgeable and experienced Arbitrators and facilitates their appointment.[16] The institute relies on its membership to conduct the arbitrations whenever parties opt to source for an arbitrator through the institution.

Another institute that provides ADR services in the Dispute Resolution Centre (DRC), a non-profit organization founded in 1997.[17] Dispute Resolution Centre in

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[13] *Ibid*.

[14] S.s 36 and 37.

[15] Muigua K., *Settling Disputes Through Arbitration in Kenya*, p. 10, (Glenwood Publishers Ltd, Nairobi, 2012)

[16] Sourced from the institute's website; www.ciarbkenya.org [Accessed on 25/09/2015].

[17] See Dispute Resolution Centre, available at *http://www.disputeresolutionkenya.org/* [Accessed on 25/09/2015].

2012 entered into a Memorandum of Understanding with Strathmore Law School to form the Strathmore Dispute Resolution Centre.[18] The Strathmore Dispute Resolution Centre (SDRC) is a Mediation Centre at the Strathmore Law School focused on facilitating and promoting Mediation and other forms of Alternative Dispute Resolution as a form of settling disputes and conflicts between individuals, within groups and in organizations.[19]

The *Nairobi Centre for International Arbitration Act*[20] establishes the Nairobi Centre for International Arbitration whose functions include, inter alia, to promote, facilitate and encourage the conduct of international commercial arbitration in accordance with the Act; to administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; to ensure that arbitration is reserved as the dispute resolution process of choice; and, to develop rules encompassing conciliation and mediation processes.[21] The Centre is administered by a Board of Directors as provided for under the Act.[22] There is also an Arbitral Court established under the Act, which court has exclusive original and appellate jurisdiction to hear matters that are referred to it under the Act.[23]

Through its capacity to handle domestic and international arbitration, it can only be hoped that this potential will be exploited to its maximum in the years to come so as to prominently place Kenya on the global map of international arbitration while also encouraging the use of mediation, where appropriate.

The Centre for Alternative Dispute Resolution is another registered institution that is aimed at enhancing settlement of disputes through ADR Mechanisms. With the recognition of ADR in Article 159 of the current Constitution of Kenya, 2010, this Centre is meant to enhance the services of ADR mechanisms in dispute settlement in

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[18] See Strathmore Dispute Resolution Centre (SDRC), available at *http://www.strathmore.edu/sdrc/* [Accessed on 25/09/2015].

[19] *Ibid*.

[20] No. 26 of 2013, Laws of Kenya (Government Printer, Nairobi, 2013).

[21] *Ibid*, S. 5 (a)-(d).

[22] *Ibid*, S.6.

[23] *Ibid*, S.21.

Kenya.[24] Its Membership is drawn from the Chartered Institute of Arbitrators (Kenya branch).[25]

4.3 Legal and Policy Framework on TDR in Kenya

Currently, there is no stand-alone statute on traditional dispute resolution in Kenya. In communities where traditional dispute resolution process is utilized in conflict management, the rules and procedure used are derived from customs and traditions of the community. The preservation of TDR mainly relies on the fact that customs and traditions are handed down from one generation to the next and there is no form of documentation for TDR in most Kenyan communities. Consequently, there is a danger of distortion or neutralization of customs and traditions in the context of modern notions of Western civilization. Some of the Kenyan laws make reference to ADR and TDR mechanisms and advocate for their use in conflicts management in the country.

4.3.1 The Constitution, 2010

The Constitution seeks to promote the cultural practices and traditional knowledge of the Kenyan communities including the use of ADR and TDR mechanisms in conflict management. In this regard, Article 159 (1) provides that judicial authority is derived from the people and vests in and it is to be exercised by courts and tribunals established by or under the Constitution with regard to the principles of *inter alia* promoting the use of ADR mechanisms in conflicts management.[26]

The rationale of the constitutional recognition of TDR is to validate alternative forums and processes that provide justice to Kenyans. However, Article 159 (3) provides that traditional dispute resolution mechanisms are not to be used in a way that (*a*) contravenes the Bill of Rights; (*b*) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or(*c*) is inconsistent with the Constitution or any written law. The policy behind subjection of customary law to the repugnancy test was founded on the contention that there are certain aspects of customary laws that do not augur well with human rights standards. This has resulted

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[24] The Centre was registered under the *Companies Act* Cap 486 of the Laws of Kenya as Company limited by guarantee.

[25] CIArb-K members become automatic members of CADR.

[26] Article 159 (2) (c) and (3).

in continued subjection of customary laws to the repugnancy clause by courts hence undermining the efficacy of traditional justice systems.[27] Besides, the repugnancy clause suffers from a grievous misconception of 'justice and morality' because it imposes the Western moral codes on African societies who have their own conceptions of justice and morality. Redefining the repugnancy clause would call for a change of attitude by the courts and reforms on the formal legal systems to elevate the position of customary laws.

4.3.2 Civil Procedure Act and Rules 2010

The Civil Procedure Act and rules, Cap 21 embodies the procedural law and practice in civil courts in Kenya. These include the High Court and Subordinate Courts. The Act and Rules envisage enabling provisions within which ADR mechanisms are to be supported.[28]
Within this framework, the court has inherent power to explore conflict management options that further the overriding objectives. TDR mechanisms are arguably part of such options.

In most civil matters emanating from customary law such as family disputes (marriage, divorce and matrimonial property), succession and inheritance often turn to customs and traditions of the communities of the parties. Thus, use of traditional processes in such cases facilitates achievement of the overriding objective. Pursuant to the inherent powers of the court under *Section 3A* which empowers courts to make orders that may be necessary for the ends of justice, the court can promote the use of TDR.

Mediation is one of the key conflict management mechanisms in traditional justice systems. *Section 59A* establishes the Mediation Accreditation Committee. The Committee's role is to determine the criteria for certification of mediators and propose rules for the certification of mediators.

Further, the use of TDR in resolution of civil disputes can be promoted under Order 46 rule 20[29] of the Civil Procedure Rules. Order 46 Rule 20 read together with

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[27] S. 3(2), Judicature Act, Cap.8.

[28] S. 1A (1)of the Civil Procedure Act encapsulates the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.

[29] "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

Sections 1A and 1B of the Civil Procedure Act therefore obligates the court to employ ADR and TDR or any other appropriate mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. There is a need therefore to introduce court-annexed TDR and ADR as it will go a long way in tackling the problem relating to backlog of cases, enhance access to justice, encourage expeditious resolution of disputes and lower costs of accessing justice.

Under Order 46 rule 20 (2), a court may adopt any ADR mechanism for the settlement of the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism. Judges will thus need to be thoroughly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the particular mechanism that will lead to the attainment of the overriding objectives under sections 1A and 1B of the Act. Nonetheless, Order 46 Rule 20 needs to be reviewed to put it into conformity with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases.

The application of TDR in dispute resolution can be promoted under the Evidence Act, Cap 80 by introducing amendments to relax the rules of evidence in informal hearings such as rules relating to character evidence, statements by persons who cannot be called as witnesses, competency of witnesses and rules as to examination of witnesses.

To promote TDR in dispute resolution, Parliament should amend the Limitation of Actions Act, Cap 22 such that matters that are the subject of traditional dispute resolution proceedings can still be taken to court if no agreement is reached at the conclusion of the TDR process.

4.3.3 Land Act, 2012

The Land Act is the substantive regime for matters pertaining to land in Kenya. It was enacted with a view to harmonize land regimes which were scattered in different pieces of legislation. The Act lays down the guiding values and principles of land management and administration which include *inter alia*: elimination of gender discrimination in law, customs and practices related to land and property in land; encouragement of communities to settle land disputes through recognized local community initiatives; participation, accountability and democratic decision making

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of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under S.s 1A and 1B of the Act."

within communities, the public and the Government; and alternative dispute resolution mechanisms in land dispute handling and management.[30]

This Act promotes the application of ADR mechanisms which in this case include traditional dispute resolution mechanisms. Thus, TDR can effectively be utilized within the framework of providing access to justice. In particular, disputes involving communal land can be better resolved through application of TDR. It is also important to point out that the use of ADR and TDR mechanisms can also facilitate the implementation of the constitutional principles of public participation, inclusiveness, protection of the marginalised, non-discrimination, equity and social justice amongst others.

Lack of a policy and legal framework on the operation of ADR and TDR mechanisms however gives a wide discretion to the National Land Commission[31] on how to go about ensuring the use of ADR and TDR in land matters and may even create confusion as how and when the same should be used.

4.3.4 Commission on Administrative Justice Act, 2011

Section 3 establishes the Commission and confers it with the mandate under section 8 to perform various functions.[32] Under section 8 (f), the Commission is mandated to work with various public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration. In this regard, the utilization of ADR and TDR mechanisms enables the Commission to explore the root causes of the disputes and the most appropriate options for resolution.[33] The Commission has been instrumental in promoting the use of ADR mechanisms especially in handling disputes between various State and Constitutional organs with a high success rate.[34]

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[30] S. 4.

[31] Established by the Constitution of Kenya under Article 67 and the National Land Commission Act, 2012, No. 5 of 2012.

[32] See also Article 59(4), Constitution of Kenya, 2010.

[33] O, Amollo, "Constitutional and Statutory Regime of Alternative Dispute Resolution in Kenya," in *Chartered Institute of Arbitrators (Kenya) Alternative Dispute Resolution Journal,* Vol. 2, No. 1, 2014, pp. 96-111 at pp. 109-111.

[34] *Ibid*.

4.3.5 The National Land Commission Act, 2012

Under section 3, the object of the Act is to provide for the management and administration of land in accordance with the principles of national land policy and the Constitution of Kenya.

Under section 5 (f) of the Act, the Commission is obligated to encourage the application of traditional dispute resolution mechanisms in land conflicts. Further, under sub-section 2(f), the Commission is mandated to develop and encourage alternative dispute resolution mechanisms in land dispute handling and management. Section 6 provides for the powers of the Commission and subsection 3 thereof provides, *inter alia*, that in the exercise of its powers and the discharge of its functions the Commission is not bound by strict rules of evidence.

There is need to amend section 17 on consultations to the effect that the Commission can consult or seek assistance from community leaders on matters pertaining to land. Having a legal framework on the use of TDR and ADR is arguably the only way that community elders can have a say in deliberations on the use, access and management of natural resources affecting their livelihoods, especially land, without being sidelined by the Commission.[35] Currently, there have been no sign of actual and meaningful engagement of communities in land matters especially in the ongoing supremacy battle between the National Land Commission and the Ministry of Land, Housing & Urban Development on who should spearhead the control of use, access and management of land in the country.[36] There is need to put in place provisions in the Act that obligate the Commission to engage the community experts in handling land disputes and ensuring that the same enable such communities to challenge the Commission's actions where they feel that they were sidelined. It has rightly been observed that meaningful participation of affected communities is one of

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[35] See Yance S & Yance S, 'Blending the Law, the Individual, and Traditional Values to Create an Effective. ADR System : A Study on the ADR Processes in Rwanda and Nicaragua' *Pepperdine Dispute Resolution Law Journal*, Vol. 14 No. 3, (2014) 14.

[36] Standard Digital, F. Ayieko, "Ngilu- National Land Commission wars hit lenders," Thursday, October 23rd 2014.Available at *http://www.standardmedia.co.ke/lifestyle/article/2000139137/ngilu-national-land-commission-wars-hit-lenders.* [Accessed on 06/7/2015]; Daily Nation, "Ministry, judges on the spot over 5,000 land cases," Monday, June 9, 2014. Available at *http://www.nation.co.ke/news/Ministry-judges-on-the-spot-over-5-000-land-cases/-/1056/2342658/-/qjbgvh/-/index.html* [Accessed on 06/7/2015]

the cornerstones of environmental justice and should be used to prevent conflicts before the need for ADR or litigation arises.[37]

4.3.6 Environment and Land Court Act, 2011

Under section 3, the objective of the Act is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act and that the parties and their representatives shall assist the court in furthering the overriding objectives.

Section 20 provides for the application of ADR and empowers the court to adopt and implement on its own motion with the agreement of or request of the parties any appropriate mechanism such as mediation, conciliation and TDR mechanisms in accordance with Article 159(2) (c) of the Constitution. Further, the Act provides that in cases where ADR is a condition precedent to any proceeding before the Court, the court must stay proceedings until such condition is fulfilled. What is ambiguous is what or who determines a matter where the use of ADR and TDR mechanisms is a condition precedent to any proceeding before the Court. The court's discretion and lack of clarity on these provisions may defeat the spirit of Article 159 and the same should therefore be clarified.

ADR has also been incorporated in the Limited Liability Partnership Act, 2011 which incorporates arbitration; the Intergovernmental Relations Act, 2012 which prescribes ADR to be used should dispute occur between national and county government, or amongst county governments; the National Gender and Equality Commission Act, 2011 which Commission shall endeavor to resolve any matter brought before it by conciliation, mediation or negotiation; the Industrial Court act, 2011; the Partnership Act, 2012; the National Government and Coordination Act 2013; the Media Council Act 2013, which establishes a Complaints Commission to mediate and arbitrate any conflict that may arise between government, the media and the public, and lists within it mediation rules to observed ; the Public Private Partnerships Act, 2013; the Sports Act, 2013; the Wildlife Conservation and Management Act 2013; the Victim Protection Act, 2014 which makes provision for restorative justice; the Marriage Act which prescribes conciliation; the Protection against Domestic Violence Act, 2014; the Investment and financial Analysts Act 2015, and the Insolvency Act 2015.

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[37] See 'Chapter 5: Alternative Dispute Resolution and Meaningful' Not *in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, available at *http://www.usccr.gov/pubs/envjust/ch5.htm* [Accessed on 16/11/2015].

4.4 Towards a Policy and Legal Framework

4.4.1 Policy Framework on ADR in Kenya

It is noteworthy that currently there is no policy on TDR and other community based justice systems in Kenya. Thus, dispute resolution through TDR and other community justice systems is communal based. The rules governing the TDR processes differ from one community to another depending on the customs and traditions of the communities. In this regard, there is a gap owing to the absence of a comprehensive policy to guide dispute resolution through TDR Mechanisms. There ought to be put in place a TDR policy framework in order to recognize and affirm the importance of TDR mechanisms in the administration of justice and establish a clear interface between TDR and the formal processes. The policy should be targeted at promoting access to justice while preserving customs and traditions of the people of Kenya. The policy framework should be designed in a way that harmonizes traditional systems with the core principles of the Constitution and international law.

The traditional justice systems policy framework should promote and preserve the African values of justice, which are based on reconciliation and restorative justice. The role of traditional justice systems in access to justice goes beyond dispute resolution. For instance, TDR mechanisms promote social cohesion, coexistence, peace and harmony besides the reactive role of dispute resolution.[38]

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

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

The Policy should provide the minimum qualifications for the recognised TDR practitioners. Mechanisms should also be put in place to ensure that TDR practitioners exercise their role and functions in line with culture and traditions of the community. These safeguards should be designed to prevent deviation from the applicable rules of the community. There should be mechanisms to ensure adherence to due process by the community and observance of the principles of natural justice.

The Policy should also promote continuous training of TDR practitioners. In order to link TDR mechanisms to formal justice systems, there is a need to train TDR practitioners on the minimum requirements of formal law such as constitutional requirements as to the Bill of Rights and best practices regarding TDR. Further, an enactment on TDR is necessary to provide for training programmes designed to promote efficient functioning of TDR mechanisms.

In most Kenyan communities, traditional dispute resolution systems have a wide and undefined jurisdiction comprising of both civil and criminal matters. There is no clear line as to which matters should be subjected to the TDR process and which matters should be taken to court. An enactment with clear guidelines would help clear the ambiguity that may arise.

The sanctions imposed in TDR processes should not contravene the Bill of Rights. As such, TDR and ADR practitioners would greatly benefit from clarification on what amounts to violation of the Bill of rights as spelt out in the Constitution.[39]

The policy framework should also outline minimum procedural requirements in TDR proceedings in order to entrench due process and rules of natural justice. These include requirements as to submitting a dispute, service of processes and whether or not there needs to be representation, the hearing, among others.

Further, the policy framework should clearly provide for recourse of any party who is aggrieved with a decision delivered in TDR processes. This is in line with the Constitution and due process for a fair hearing and access to justice.[40] These mechanisms include review or appeal. The formal courts should be expressly conferred with jurisdiction to review decisions made in TDR proceedings.

There should also be a clear interface between TDR processes and formal courts and tribunals. To this end, there is a need to formulate a clear referral system indicating how disputes from TDR proceedings can be referred to court and vice versa. The framework should be clear on the stage of the dispute process at which a referral may or may not be done.

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[39] Chapter Four (Articles 19-58), Constitution of Kenya 2010.

[40] Articles 48, 50.

In order to overcome the challenge of poor record keeping especially for purposes of appeal, review or referral, it there is need to adopt information technology in TDR processes.

4.4.2 Legal and Administrative /Institutional Framework

Article 159 (2) (c) of the Constitutions obligates courts and tribunals in the exercise of judicial authority promote the application of TDR and ADR mechanisms. In addition, the Civil Procedure Act under sections 1A provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. Within this framework, the court has inherent power to explore dispute resolution options that further the overriding objectives. Courts and tribunals, in consultation with knowledgeable community leaders, can therefore go a long way in encouraging and promoting the use of TDR and ADR mechanisms in conflict management.

In most Kenyan Communities, the institution of Council of Elders remains a strong regulatory institution. Most disputes are submitted to the elders for resolution before parties consider the court process. The Councils of Elders exercise jurisdiction over both interpersonal disputes relating to land, marriage and inheritance and minor crimes.

The foregoing institutions can join hands in a mutual relationship to promote the active uptake of TDR and ADR mechanisms in conflict management in Kenya. An effective working relationship between the formal justice system and TDR mechanisms, would call for an effective court-annexed TDR and ADR framework where the outcomes of such processes would enjoy the approval of the Judiciary for purposes of recognition, enforcement and appeal. It would also call for simplified procedures to ensure that courts and tribunals focus on substantive rather than procedural justice. This would tackle the problem of backlog of cases, enhance access to justice, and encourage expeditious disposal of disputes and lower costs of accessing justice.

Kenya can learn a lot from the case of Rwanda's mandatory mediation framework where carrying the agenda of local ownership of conflict resolution, the Rwandan government passed *Organic Law No. 31/2006* which recognises the role of *abunzi* or local mediators in conflict resolution of disputes and crimes.[41] The

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[41] Mutisi, M., "Local conflict resolution in Rwanda: The case of abunzi mediators", in M. Mutisi and K. Sansculotte-Greenidge (eds), *Integrating Traditional and Modern Conflict Resolution: Experiences from selected cases in Eastern and the Horn of Africa*, pp. 41-74 at

Constitution of Rwanda provides for the establishment in each Sector a "Mediation Committee" responsible for mediating between parties to certain disputes involving matters determined by law prior to the filing of a case with the court of first instance.[42] The Mediation Committee comprises of twelve residents of the Sector who are persons of integrity and are acknowledged for their mediating skills.[43] Such a framework may be useful in dealing with the challenges that are likely to arise in the actualization of Articles 60(1)(g) and 67(2)(f) together with all the relevant land laws which require the use of ADR and TDR mechanisms in managing natural resource based and especially land conflicts. There should be set in place a legal framework within which such an arrangement may operate.

Order 46 Rule 20 of Civil Procedure Act and Rules,[44] does not expressly mention TDR mechanisms. This needs to be amended so as to put it in line with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases. These provisions have has the potential to promote the active use of ADR and TDR through an all-inclusive policy, which takes into account the particular context, cultural distinctions and value systems of particular communities.

The Evidence Act, Cap 80 should also be reviewed so as to simplify the evidential rules to cover situations where informal systems of dispute resolution are being used. Simplified procedures should be introduced to ensure that courts and tribunals focus on substantive rather than procedural justice as contemplated under Article 159(2) (d). This is in appreciation of the fact that most of the practitioners of TDR are usually non-lawyers and mostly even persons with no formal education. If these persons are to take part in the justice system, then there should be created an environment that allows them to participate meaningfully such as one that allows them to utilize their expertise and knowledge based on their cultural backgrounds.

It is also important that the Judicature Act, 1967 be reviewed in view of the recognition that culture and traditional dispute resolution mechanisms are now recognized under

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p.41, African Centre for the Constructive Resolution of Disputes (ACCORD), Africa Dialogue Monograph Series No. 2/2012 Available at *http://accord.org.za/images/downloads/monograph/ACCORD-monograph-2012-2.pdf* [Accessed on 28/03/2015]

[42] Article 159, Constitution of Rwanda, 2003.

[43] *Ibid.*

[44] Cap 21, Laws of Kenya.

the Constitution and should inform the use of ADR and TDR mechanisms in conflict management and access to justice.

There should also be put in place proper procedures and channels through which application of TDR in the appellate process where the matter in dispute involves customary law can take place.

Land Act, 2012, should also be reviewed to ensure clear and substantive provisions that ensure that requirement on encouragement of communities to settle land disputes through recognized local community initiatives and participation is phrased in a more mandatory manner so as to ensure that there is equal and equitable opportunities to members of all ethnic groups; non-discrimination and protection of the marginalized; democracy, inclusiveness and participation of the people; and the active utilisation of alternative dispute resolution mechanisms, especially TDR, in land dispute handling and management. As it is now, the provisions appear to be too general and ambiguous rendering their implementation more discretionary than mandatory. In addition to the foregoing, section 17 of the National Land Commission Act should be amended so as to ensure that the Commission consults or seeks assistance from community leaders on matters pertaining to land on a mandatory basis rather than discretionary one. Section 18 which provides for the establishment of County Land Management Boards needs to be amended in terms of the composition of the Boards so as to include community leaders/elders who would advise such boards on matters of ADR and TDR.

Such elders should also be accorded an opportunity through a legal platform to assist or advise the court in matters pertaining to customary law. There is therefore a need to formulate an enabling policy and legal framework for ADR and TDR mechanisms. As such, one of the ways that this would be actualized is enactment of a statute to be known as ADR and TDR Mechanisms Act in order to provide for the effective implementation of Article 159 of the constitution on the use of ADR and TDR and to provide for the regulatory and institutional framework to govern the practice of ADR and TDR. This would go a long way in ensuring that such mechanisms: are used in a way that is consistent with the Bill of Rights; existence of a clear referral mechanism; formal recognition and enforcement of ADR and TDR outcome and that there is clearly defined jurisdiction of ADR and TDR practitioners. All this should be done while ensuring that there is preserved the informality of these mechanisms.

4.5 Conclusion

Although the Constitution guarantees the right of access to justice and goes further to recognize ADR and TDR, there is no sufficient and elaborate legal or policy framework for their effective application. Currently, the legal framework does not provide comprehensive guidelines on linkage of TDR with the formal court process. This has further frustrated the utilization of TDR in Kenya.

While acknowledging that the adoption and application of Africa's traditional dispute resolution mechanisms, including indigenous principles and methods on conflict management do not apply to all situations, there are relevant aspects of these principles and practices that can be integrated and harmonized with the formal legal and institutional framework to offer an all-round approach on access to justice which caters for all persons despite any social differences.[45] They can be weighed against the constitutional safeguards so as to get rid of the negative aspects therein. Traditional dispute resolution mechanisms can go a long way in facilitating access to justice at the community level, especially for those who feel alienated from the formal processes in terms of the cost for justice and technical procedures.[46] There is therefore a need for enactment of a sound legal and policy framework for effective utilization of TDR and ADR to ensure full access to justice for Kenyans. It is only through putting such legal and policy measures in place that we can fully legitimize the ADR and TDR mechanisms and tap into their advantages. This will facilitate effective justice for Kenyans and ultimately promote the creation of a just and peaceful society for all.

[45] Yance S & Yance S, 'Blending the Law, the Individual, and Traditional Values to Create an Effective ADR System : A Study on the ADR Processes in Rwanda and Nicaragua' *Pepperdine Dispute Resolution Law Journal*, Vol. 14 No. 3, (2014) 14.

[46] Article 60(1) (g) of the Constitution of Kenya provides that one of the principles of land policy in Kenya is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution. This is also reflected under Article 67(2) (f) which provides that one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.

Chapter Five

ADR under the Court Process: A Paradox?

5.1 Introduction

Court annexed ADR arises where after parties have presented their case to court, the same is referred by the court to one of the ADR mechanisms for resolution.
There has been enactment of laws in Kenya recognizing the role of Alternative Dispute Resolution (ADR) mechanisms in enhancing access to justice and peaceful coexistence and such mechanisms consist of mediation amongst others. It is however important to point out that such ADR mechanisms do operate either outside the law or as it has been the case in some countries, they are regulated through legislation.

The constitution of Kenya now provides that in exercising judicial authority, the courts and tribunals must abide by certain principles which include, *inter alia,* promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute management mechanisms.[1]To bring them into conformity with Article 159 of the constitution which introduces the notion of justice being done to all irrespective of status and without delay, alternative forms of dispute including reconciliation, mediation and traditional dispute resolution mechanisms have been incorporated in the legal framework.[2]

The *Civil Procedure Act*[3] provides for mediation of disputes.[4] The Act was amended to introduce the aspect of mediation of cases as an aid to the streamlining of the court process.[5] This amendment of the Act provided for the setting up of a Mediation Accreditation Committee by the Chief Justice to determine the criteria for the certification of mediators, propose rules for the certification of mediators, maintain a register of qualified mediators, enforce such code of ethics for mediators as may be

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

[2] See also S. 20, *Environment and Land Court Act* 2011; S. 15(4), *Industrial Court Act*, 2011; S. 34, *Intergovernmental Relations Act*; S. 4, *Land Act* 2012; S. 17(3), *Elections Act*, 2011; Rule 11, Supreme Court Rules, 2011.

[3] Cap 21, Laws of Kenya.

[4] S.s 2 and 59 *Civil Procedure Act* as Amended by *the Statute Law (Miscellaneous Amendments) Act* No. 17 of 2012, *Government Printer,* Nairobi, 2012, at pp.1092-1097.

[5] *Ibid*

prescribed and set up appropriate training programmes for mediators.[6]The Chief Justice has since appointed Members to the Committee and had them gazetted.[7]

Mediation is to be conducted in accordance with the Mediation Rules.[8] Sub clause (4) provides that an agreement between the parties to a dispute as a result of mediation under this part must be recorded in writing and registered with the court giving direction under sub clause (1), and the same shall be enforceable as if it were a judgment of that court and no appeal shall lie against an agreement referred to in sub clause (4).[9]

Informal mediation which may not require the use of writing is not provided for. The codification of mediation rules in the civil procedure Act seems to reflect the concept of mediation as viewed from a Westerner's perspective and not in the traditional and informal way. In addition to the foregoing Kenya's Judiciary efforts towards promoting the use of ADR have been witnessed in the Judiciary ADR Pilot Scheme.[10] This is expected to assist in dealing with backlog of cases in the courts. This section offers a critical analysis of the merits and demerits of court annexed or court mandated ADR and suggests plausible ways of entrenching the same in the Kenyan justice system.

5.2 Court annexed arbitration

Court-annexed arbitration can arise as a result of the application of the Arbitration Act 1995 and also under supervision of the court under the Civil Procedure

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[6] S. 59 A (1) and (2) of the Civil Procedure Act.

[7] Kenya Gazette, Vol. CXVII-No. 17, *Gazette Notice No. 1088*, Nairobi, 20th February, 2015, p. 348.

[8] *Ibid*, S. 59B (3).

[9] *Ibid*, S. 59B (4).

[10] Mutunga, W., Chief Justice & President Of The Supreme Court Of Kenya, '*Alternative Dispute Resolution And Rule Of Law' For East African –Prosperity*,' remarks By The Chief Justice At The East African Arbitrators Conference September 25, 2014. pp. 3-4. Available at*http://www.judiciary.go.ke/portal/assets/files/CJ%20speeches/Cjs%20Speech%20ADR%20-%20Sept.%2025,%202014,%20Windsor.pdf* [Accessed on 28/03/2015]; "Judiciary to adopt alternative dispute resolution mechanism," People Correspondent, *People Daily Newspaper*, 10 March, 2015. Available at *http://mediamaxnetwork.co.ke/peopledaily/139823/judiciary-adopt-alternative-dispute-resolution-mechanism/* [Accessed on 28/03/2015].

Act. Under the Civil Procedure Act, the court's involvement in the arbitral process is specifically provided for in Section 59 and Order 46[11] of the Civil Procedure Rules, 2010. Section 59 of the Act provides for references of issues to arbitration, which references are to be governed in a manner provided for by the rules.

Under Order 46 Rule 2, the arbitrator is to be appointed in a manner that the parties have agreed upon. However, where no arbitrator or umpire (under rule 4) has been appointed the court under rule 5 may, on application by the party who gave the notice to the other to appoint, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire, or make an order superseding the arbitration and in such case the court shall proceed with the suit.

Where an award has been made pursuant to arbitration under the Rules, rule 10 requires that that the persons who made it should sign it, date it and cause it to be filed in court within 14 days together with any depositions and documents which have been taken and proved before them. A court has the power to modify or correct an award under rule 14 if it is imperfect or contains an obvious error, if a part of the award is upon a matter not referred to arbitration or if it contains a clerical mistake or error from an accidental slip or omission. The court also has power to remit an award for reconsideration by the arbitrator under rule 15. Rule 18 provides that the court shall, upon due notice to the other parties, enter judgment according to the award and upon such that judgment a decree shall follow thereof. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award.

Order 46 Rule 20[12] read together with Sections 1A and 1B of the Civil Procedure Act obligates the court to employ ADR mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. Court-annexed ADR is thus expected to go a long way in tackling the problem relating to backlog of cases, enhance access to justice, and result in the expeditious resolution of disputes and lower costs. Judges thus need to be adeptly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the

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[11] Order 46 rule 1 provides that *"Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference."*

[12] 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 S.s 1A and 1B of the Act.*

particular mechanism and that will lead to the attainment of the overriding objective under sections 1A and 1B of the Act.

No doubt parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending. In addition, recognition and enforcement of arbitral awards in court has often been unduly reduced to a sure wait-and-see game to the detriment of parties in whose favour the awards are made. The object of intervention of the court should be to guarantee fair and impartial settlement of disputes. Even more importantly, it is inferable that parties' autonomy is not to be restricted unnecessarily by courts except in public interest.

In the England case of *Coppee-Lavalin SA/NV-v-Ken-Ren Chemicals and Fertilizers Ltd,* [13] the House of Lords drew a distinction, which is relevant for our purpose, between three groups of measures that involve courts in arbitration. Firstly, there are such measures as involving purely procedural steps and which the arbitral tribunal cannot order and/or cannot enforce. For instance, issuing witness summons to a third party or stay of legal proceedings commenced in breach of the arbitration agreement. Secondly, there are measures that are meant to maintain the status quo, like granting of interim injunction or orders for preservation of the subject matter of the arbitration. Lastly, there are such measures as give the award the intended effect by providing means for enforcement of the award or challenging the same.

There is no doubt that the three measures engender differing degrees of encroachment on the arbitral proceedings and by extension party autonomy. Indeed, sometimes the measures result in court's direct or indirect interference in the arbitral tribunal's task of deciding on merits of the dispute. Hence the need to ensure that such intrusion is kept to the bare minimum and only be exercised when the occasion merit it.[14]

5.2.1 Role of Courts in Arbitration

Section 10 of the Act provides for the extent of court intervention in arbitration proceedings. It provides that *except as provided in this Act, no court shall intervene in matters governed by this Act*. The provision restricts the jurisdiction of the court to only such matters as are provided for by the Act. This section epitomizes the recognition of the policy of parties' autonomy which generally underlie arbitration

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[13] [1994] 2 All ER 465.

[14] See Lord Mustill's dicta in Coppee-Lavalin SA/NV case (supra) p. 469-470 on the ideal court's approach in such intrusion.

process. The provision articulates the need to restrict the court's role in arbitration so as to give effect to that policy.[15] The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair settlement of disputes between parties without unnecessary delay and expense.

On the face of it, section 10 of the Act permits two possibilities where the court can intervene in arbitration. First is where the Act expressly provides for or permits the intervention of the court. Then, in public interest, where substantial injustice is likely to be occasioned, even though a matter is not provided for in the Act, it is trite that the Act cannot reasonably be construed as ousting the inherent power of the court to do justice especially through judicial review and constitutional remedies. This latter instance can only be countenanced in exceptional instances.

In the case of *Epco Builders Limited-v-Adam S. Marjan-Arbitrator & Another,*[16] the appellant had taken out an originating Summons before the High Court (Constitutional Court) under, *inter alia*, sections 70 and 77 of the constitution of Kenya (repealed); section 3 of the Judicature Act and section 3A of the Civil Procedure Act. The appellant's contention in the constitutional application was that its constitutional right to a fair arbitration had been violated by a preliminary ruling of the arbitrator.

In essence, the applicant's main complaint was that it likely would not obtain fair adjudication and resolution of the dispute before the arbitral tribunal. That was, it argued, in view of the arbitrator's "unjustified refusal to issue summons to the Project Architect and Quantity Surveyor" who were crucial witnesses for a fair and complete resolution of the matters before the tribunal. Consequently, the applicant argued that such refusal was a violation of its rights under sections 70 and 77 of the then Constitution of Kenya.

The application was opposed and urged to be stuck out on the basis that it "disclose[d] no reasonable cause of action", was incompetent and did not lie in law, and that the court lacked jurisdiction to entertain the questions raised by it. The counsel for the Chartered Institute of Arbitrators-Kenya Branch, an interested party, submitted during trial that arbitration must have an end. In counsel's view, while she did not refute the application under section 77 (9) of the constitution, she was of the considered view that the procedure laid down under the Arbitration Act should be exhausted first before such application. The majority of the court, while avoiding making a conclusion

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[15] Sutton D.J, *et al*, (2003), *Russell on Arbitration* (Sweet & Maxwell, London, 23rd Ed.) p. 293.

[16] Civil Appeal No. 248 of 2005

as to whether the application disclosed a cause of action were of the view that the same was not frivolous. It was thus ordered that the application of the appellant be heard by the High Court on merits. Justice Deverell, while contributing to the majority decision, impressed the importance of encouraging alternative dispute resolution to reduce the pressure on the court from the ever increasing number of litigants seeking redress in court. He was of the view that every civil dispute dealt with by arbitration should result in a corresponding reduction in the pressure on the courts.[17]

The dissenting judge in the *EPCO Case* (supra), Githinji, JA, who considered the merits of the application was of the view that arbitration disputes are governed by private law and not public law and by invoking section 84(1) of the Constitution, the appellant was seeking a public remedy for a dispute in private law. The judge also impressed that the subject matter of the constitutional application was a matter of discretion of the arbitral tribunal and where the same was exercised erroneously, the error could be corrected within the parameters of the Arbitration Act, which provides effective remedies for such errors as denying the arbitral parties fair hearing and/or yield breach of nature justice. Thirdly, the learned Judge of Appeal emphasized the fact that just because the law is contained in the Constitution does not *ipso facto* mean that the breach of that law has to be redressed through a constitutional application under section 88(1) of the Constitution.

The learned judge reasoned that the right to fair hearing under section 77(9) of the constitution is applied by the courts in ordinary civil proceedings even without constitutional application and is one of the cardinal rules of natural justice. In his learned view, fair hearing was also incorporated by section 19 of the Act which provision the appellant could have invoked in a normal application to get redress for breach of principle of fair hearing, if any.

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[17] Thus, articulating the precarious balance and interest at stake in the application the Hon. Justice added: *"If it were allowed to become common practice for parties dissatisfied with the procedure adopted by the arbitrator(s) to make constitutional applications during the currency of the arbitration hearing, resulting in lengthy delays in the arbitration process, the use of alternative dispute resolution, whether arbitration or mediation would dwindle with adverse effects on the pressure on the courts. This does not mean that recourse to a constitutional court during arbitration will never be appropriate. Equally it does not mean that a party wishing to delay an arbitration (and there is usually one side that is not in a hurry) should be able to achieve this too easily by raising a constitutional issue as to fairness of the "trial" when the Arbitration Act 1995 itself has a specific provision in S. 19 stipulating that "the parties shall be treated with equality and each party shall be given full opportunity of presenting his case," in order to secure substantial delay. If it were to become common, commercial parties would be discouraged from using ADR."*

In conclusion, the learned Judge found that there is clear law and procedure (under Arbitration Act and the rules there under) for redress of the grievances of the appellant raised under the constitutional application and the law should be strictly followed. He thus held that the application to be not disclosing *ex facie* a constitutional issue and further that it was frivolous and gross abuse of the constitution and the process of the court. He was for the dismissing of the appeal but for the fact that the majority of court was of a different view ruling against considering the merits of the application.

Section 6 of the Act confers the High court powers to stay legal proceedings and refer the matter to arbitration where there is pre-existing agreement to refer the matter for arbitration.

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

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

Section 35 confers the High court powers to set aside an arbitral award under the circumstances provided under that provision. Section 35(1) is to the effect that recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3). This implies that the Court will not act in such matters unless a discontented party invites it to do so. Subsection (2) sets out the grounds upon which the High Court will set aside an arbitral award.

The grounds which the applicant must furnish proof for the arbitral award to be set aside are: incapacity of one of the parties; an invalid arbitration agreement; Lack of proper notice on the appointment of arbitrator, or of the arbitral proceedings or where the applicant was unable to present its case; where the award deals with a dispute not contemplated by or one outside the terms of reference to arbitration or matters beyond the scope of reference; where the composition of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties except where such agreement was in conflict with provisions of the Act and the parties cannot derogate from such; or where fraud, undue influence or corruption affected the making of the award. Apart from the above, the High Court may also set aside arbitral awards where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with the public policy of Kenya.[18]

The Act however limits the time frames within which the disgruntled party may lodge their applications with the High Court for setting aside of arbitral awards. Section 35(3) of the Act provides that where three months have lapsed since the award was entered the court will not entertain any applications to set the same aside. This limitation may serve to prevent such applications to be made in bad faith and also to ensure that such decided matters are put to rest. This was also observed in the Kenyan case of *Nancy Nyamira & Another V Archer Dramond Morgan Ltd*[19], where it was observed that '*...Given the objectives of the Arbitration Act stated above, it is important that Courts enforce the time limits articulated in that Act – otherwise Courts would be used by parties to underwrite the undermining of the objectives of the Act*'.

Concerning recognition and enforcement of arbitral awards, section 36(1) of the Act confers the High Court powers to recognize and enforce domestic arbitral awards as binding upon application by parties for the same. Section 36(2) provides for the recognition of international arbitral awards as binding and enforceable in accordance to the provisions of the *New York Convention* or any other convention to which Kenya is signatory and relating to arbitral awards. The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* was adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.[20] The Convention, in principle, applies

[18] S. 35(2) (b), Act No. 4 of 1995

[19] Civil Suit 110 of 2009, [2012]eKLR

[20] S. 36 (5), Act No. 4 of 1995, (Act No. 11 of 2009, s. 27) "*(5) In this section, the expression "New York Convention" means the Convention on the Recognition and Enforcement of Foreign*

to all arbitral awards (Article I, paragraphs (1) and (2)). However, Article I paragraph (3) allows states to make reservations.[21]
The effect of the above are the two reservations commonly referred to as the reciprocity reservation and the commercial reservation.[22]

In the Kenyan case of *Glencore Grain Ltd V TS.S.S Grain Millers Ltd*,[23] an international award that was entered in England and the applicant sought to have it recognised and enforced by Kenyan Courts. However, the courts were not willing to enforce the same on technical grounds of non-compliance. The award took more than ten years before recognition and enforcement could be realized. Section 37 provides for grounds upon which the High Court may decline to recognize and/or enforce an arbitral award at the request of the party against whom it is invoked, if that party furnishes to the High Court proof of: party's incapacity; legally invalid arbitration agreement; party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration; the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made.

The High Court may also decline recognition and/enforcement of an award if its making was affected by fraud, corruption or undue influence. Further, an award arising

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Arbitral Awards adopted by the United Nations General Assembly in 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.

[21] "*When ... acceding to this Convention ... any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration*." [Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Reservations, Available at *http://interarb.com/nyc/reservations* [Accessed on 24/09/2015]

[22] *Ibid*.

[23] Civil Case 388 of 2000 [2012] eKLR

out of matter not capable of settlement by arbitration under the Kenyan law or one whose recognition or enforcement would be against public policy will not be recognised or enforced by the Court.[24]

5.3 Court Sanctioned Mediation

Court Sanctioned Mediation may take the form of Court-Annexed Mediation or Court-Mandated Mediation. Court mandated mediation as envisaged in the Kenyan legal framework arises where after parties have lodged a dispute in court, the court encourages them to have their dispute mediated after which the outcome of that mediation is tabled in court for ratification. Court-annexed mediation may arise where parties in litigation can engage in mediation outside the court process and then move the court to record a consent judgment. It has also been defined as the mediation of matters which a judicial officer has ordered to go to mediation or which are mediated pursuant to a general court direction (e.g. a procedural rule which states that parties to a matter make an attempt to settle the matter by way of mediation before the first case management conference).[25]

It is noteworthy that both court-annexed and court mandated forms of mediation have the court playing a major role either in their take off as in the case of court mandated or in ratification of the outcome as in the case of court annexed mediation. As such, the current formal framework on mediation envisages both Court-Annexed Mediation and Court-Mandated Mediation.

The clamour to introduce court-annexed mediation has borne fruit and is now evident under section 81 (2) (ff) of the Civil Procedure Act.[26] Section 81 (2) (ff) provides for the selection of mediators and the hearing of matters referred to mediation under this Act. Thus, parties who have presented their cases to court may have their matter referred to mediation by the court for resolution. Section 59 of the Civil Procedure Act was amended to introduce the aspect of mediation of cases as an aid to the streamlining of the court process.

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[24] S. 37(1)(vii), No. 4 of 1995

[25] Kathy, "What is court-annexed mediation?" Available at *http://www.janusconflictmanagement.com/2011/10/q-what-is-court-annexed-mediation/* [Accessed on 27/03/2015].

[26] Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 12 of 2012, *Government Printer,* Nairobi, 2012, whose date of commencement was 12th July 2012.

The law now requires the court either at the request of the parties, where it deems appropriate to do so or where the law provides so, to refer a dispute presented before it to mediation.[27] Where a dispute is referred to mediation under subsection (1), the parties thereto are to select for that purpose, a mediator whose name appears in the mediation register maintained by the Mediation Accreditation Committee.[28] Such reference is, however, to be conducted in accordance with the mediation rules.[29] Section 59B (4) provides that an agreement between the parties to a dispute as a result of mediation under this part is to be recorded in writing and registered with the court giving direction under sub section (1), and shall be enforceable as if it were a judgment of that court. No appeal is to lie against an agreement referred to in subsection (4).[30]

Under Section 59C, a suit may be referred to any other method of dispute resolution where the parties agree or where the court considers the case suitable for referral.[31] Under Section 59C (2), any other method of alternative dispute resolution is to be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order. Any settlement arising from a suit referred to any other alternative dispute resolution method by the Court or agreement of the parties is enforceable as a judgment of the Court.[32] No appeal lies in respect of any judgment entered under this section.[33] Further, all agreements entered into with the assistance of qualified mediators are to be in writing and may be registered and enforced by the Court.[34] Pursuant to Order 46 rule 20 (3) it is only after a court-mandated mediation fails that the court should set the matter down for hearing and determination.

The aforesaid amendments to the Civil Procedure Act did not, arguably, really introduce mediation *per se,* but merely set up a legal process where a court can coerce parties to mediate and the outcome of the mediation taken back to court for ratification.

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[27] S. 59B (1) of the Civil Procedure Act.

[28] S. 59B (2).

[29] S. 59B (3).

[30] S. 59B (4).

[31] S. 59C (1).

[32] S. 59C (3).

[33] S. 59C (4).

[34] S. 59D of the Civil Procedure Act.

These amendments introduced a mediation process which is formal and annexed to the procedures governing the conduct of cases in the high court. It is noteworthy that 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 reflects the concept of mediation as viewed from a westerner's perspective and not in the traditional, political and informal perspective**.**

5.3.1 The Mediation (Pilot Project) Rules, 2015

These *Mediation rules*[35] are meant to apply to all civil actions filed in the Commercial and Family Divisions of the High Court of Kenya at Milimani Law Courts, Nairobi, during the Pilot Project.[36] The Rules provide that every civil action instituted in court after commencement of these Rules, should be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable and may be referred to mediation.[37] The Rules provide for the process of the screening of the civil suits before referral to mediation. Civil actions are to be screened as follows- in the Commercial Division, cases are to be screened upon close of pleadings; in the Family Division, cases are to be screened upon filing of Plaint or Petition or other originating process, or at the close of pleadings or at any other appropriate stage as the Court may determine; where filed prior to the commencement of these Rules and pending determination, may be screened and referred to mediation; or before a case is set down for hearing the Court may refer any case for mediation.[38] While awaiting the Mediator's report after the mediation, the time limits applicable to civil actions under the Civil Procedure Rules shall cease to run.[39]

Noteworthy is the requirement that mediation under these Rules must be conducted by a person registered as a mediator by Mediation Accreditation Committee (MAC).[40]For each case referred to mediation, the Mediation Deputy Registrar is to

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[35] Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170,* 9th October, 2015, pp. 1283-1291 (Government Printer, Nairobi, 2015).

[36] Rule 2. "Pilot project" means the mediation program conducted by the court under these Rules. (R. 3).

[37] Rule 4(1).

[38] Rule 4(2).

[39] Rule 4(3).

[40] Rule 6(1).

nominate three qualified mediators from the Register of mediators maintained by MAC, and notify the parties of the names of the nominated mediators.[41] Parties are also not to pay the mediators under this pilot project.[42] It therefore follows that parties are not at liberty to choose any mediator that is not registered with MAC. While this may ensure that only qualified professionals are appointed as mediators, it limits the party autonomy in relation to choice of mediators and may also lock out qualified but unregistered mediators.

Mediation proceedings are also to take place and be concluded within sixty (60) days from the date of referral to mediation provided that time may be extended for a further period not exceeding ten (10) days by the Mediation Deputy Registrar having regard to the number of parties or complexity of issues or with the written consent of the parties, which consent shall be duly filed with the Mediation Deputy Registrar.[43] This is a laudable provision that is essential for ensuring that the disadvantage that is often associated with mediation as not being time saving, is dispensed with.

In what appears to be a move to safeguard against information fishing expedition by parties, the Rules provide that mediator's notes shall be deemed to be confidential and shall not be admissible in evidence in any current or subsequent litigation or proceedings.[44]

Where there is an agreement resolving some or all of the issues in dispute, such agreement shall be in the prescribed Form 8, duly signed by the parties and shall be filed by any of the parties, with the Mediation Deputy Registrar within ten (10) days of conclusion of the mediation.[45] Any agreements filed with the Mediation Deputy Registrar shall be adopted by the Court and shall be enforceable as a Judgment or order of court.[46] No appeal shall lie against a judgment or order of the Court arising from mediation.[47]

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[41] Rule 6(2).

[42] Rule 6(5).

[43] Rule 7.

[44] Rule 12(1).

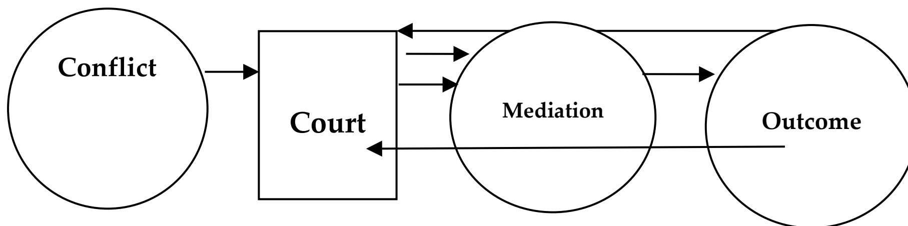
[45] Rule 14(1).

[46] Rule 14 (2).

[47] Rule 16.

These Rules will indeed go a long way in entrenching formal mediation practice in the country. Being a pilot project, it can only be hoped that the outcome will encourage more parties to seek the services of mediators, both within the court-annexed arrangement and outside the court process. However, it is noteworthy that there is yet no place for informal mediators in the formalised process. As such, mediators doing mediation within community setting may have to wait a little longer or register with MAC.

Figure 3 Mediation in the Court Process



Source: The author.

Fig. 3 shows mediation in the Court process. Mediation becomes formalized and may lose certain aspects such as confidentiality and voluntariness.

5.4 Challenges and Opportunities for Court-Annexed ADR

Despite the strides made in coming up with a framework for the use of ADR in Kenya, there still are certain challenges in the effective application of the same to enhance access to justice, reduce backlogs and expedite dispute resolution. These challenges relate to lack of capacity in terms insufficient personnel who can handle disputes using ADR mechanisms, and lack of understanding on the working of some mechanisms such as mediation. Equally, parties may lose their autonomy when ADR is court-mandated. The fundamental quality of mediation, that is, its voluntary nature, is interfered with through the court order calling for mediation; enforcement of mediated agreements entered into with the assistance of unqualified mediators is excluded; the lack of a reimbursement system for legal fees and other expenses is likely to make litigants resistant to mediation as it implies extra costs to the litigants and there is no provision of taxation of costs even where a mediated agreement is reached.

Mediation in the legal process is temporal and may not deal with the negative elements of the underlying inter-disputant-relationship. Mediation also risks being a court process because even after the parties have negotiated and even reached a solution to the conflict, they nevertheless have to go back to court for enforcement of

the mediated agreement. Power imbalances in mediation may cause one party to dominate the process with the result that the outcome largely reflects that party's needs and interest and may also affect the legitimacy of the process itself.

The effective operationalisation of the Arbitration law and court supervised ADR faces challenges as there is an overlap of some provisions. Moreover, the public have not been fully made aware of ADR methods of conflict management and their usefulness, as conceived within the legal framework. Nevertheless, if properly adopted, the adoption of ADR may have the effect of lowering the costs of accessing justice as ADR mechanisms are cheaper compared with the court process. Some ADR methods such as negotiation and mediation address underlying psychological dimensions which cannot be addressed in courts and hence where ADR mechanisms are utilized, the dispute may not flare up again.

5.4.1 Challenges in Court Sanctioned Mediation in Kenya

(i) Voluntariness of the Process

Voluntariness exists if both parties are making real and free choices based on effective participation in the mediation.[48]Mediation laws are generally based on either the voluntary or compulsory approach. Mediation may either be dependent on a party's unfettered will possibly with suggestion by the court or it may be imposed compulsorily by a court.[49] Both approaches have their advantages and reasons why they are attractive to parties. For instance, parties' voluntary submission to mediation impacts on the success of mediation as they are, in such a case, willing to find a win-win solution for all of them. If parties fail to submit to mediation voluntarily and it is imposed on them, the mediator will find it hard to get the parties to contribute to the resolution process and the result may not be a solution generated by the parties themselves.

Parties also tend to highly identify with mediated agreements reached voluntarily and which invariably enjoy unprecedented durability. But when the aim is to decongest the court system, as is the case with the amendments, compulsory

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[48] K. Muigua, *Resolving Environmental Conflicts through Mediation in Kenya* Ph.D Thesis, 2011, *op cit* p.48.

[49] B. Knotzl & E. Zach, "Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act", 23(4) *Arbitration International*, 666, (2007). p. 665.

mediation offers the advantage that it can be implemented immediately and does not depend on unpredictable factors such as parties' interests.[50]

There has been a long debate as to whether mediation should be compulsory. Those against compulsion say that mediation is a voluntary process; that compulsion is anathema and that some cases are unsuitable for mediation. Those in favour of compulsion say that mediation has a good success rate and should be compulsory subject to an opt–out clause. They opine that nothing is lost by attempting and that subjectively mediators feel that the rate of success is no different where cases have been vigorously pushed (but not ordered) by judges into mediation. [51]

When the law provides, that the court may on the request of the parties concerned or where it deems it appropriate to do so, direct any dispute before it be referred to mediation, it shuns voluntariness which is a cardinal principle of mediation in the political process.[52] As such the very essence of the mediation - party autonomy in the process and the outcome - is lost. This is the nature of mediation in the Kenyan context. The fact that voluntariness is lost in court mandated mediation means that the process cannot *resolve* conflicts.

Since the aim is to resolve conflicts, mediation in the Kenyan context should have all the attributes of the political process as outlined above. What is needed in Kenya is a framework that allows parties to make the decision to negotiate, to progress with the process by inviting a third party to continue with the negotiations and the outcome to be their own. The order by the court calling for mediation interferes with a fundamental quality of mediation - its voluntary nature.

(ii) Composition of Mediation Accreditation Committee

The Chief Justice of Kenya appointed twelve members to the Mediation and Accreditation Committee.[53]The Committee is chaired by a serving Judge and it is responsible for determining the criteria for the certification of mediators, proposing rules for the certification of mediators, maintaining a register of qualified mediators,

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[50] *Ibid*.

[51] Cornes, D., "Commercial Mediation: the Impact of the Courts", 73 (1) *Arbitration* 12, (2007), p. 13.

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

[53] As per S. 59 A (1) and (2) of the Civil Procedure Act.

enforcing such code of ethics for mediators as may be prescribed and setting up appropriate training programmes for mediators.[54]

The membership consists of: Representatives from the Office of the Attorney General; Law Society of Kenya; Chartered Institute of Arbitrators (Kenya Branch); Kenya Private Sector Alliance; Institute of Certified Public Accountants of Kenya (ICPAK); Institute of Certified Public Secretaries of Kenya; Kenya Bankers Association; Federation of Kenya Employers; International Commission of Jurists (Kenyan Chapter); and the Central Organizations of Trade Unions.[55] The Chief Justice also appointed a Member of the Judiciary as the Acting Registrar of the Committee.[56]

It is commendable that the foregoing membership consists of experienced ADR practitioners. However, considering that true mediation also incorporates informal mediation, this composition excludes the real informal mediation practitioners who conduct mediation everyday outside court. The list is arguably elitist and it locks out the mediators at the grassroots level. This is especially reinforced by the encouragement for formal qualifications for mediators.

With the pre-determined qualifications of who can act as a mediator, this effectively bars those mediators who may be untrained in formal mediation, but are experts in informal mediation from being recognised as mediators. It is important to remember that some of the conflicts especially those with a cultural aspect to them may benefit from the vast experience and knowledge of these informal mediators. However, they may not be able to participate citing lack of the formally acceptable qualifications as mediators. Formal accreditation becomes a complicated issue 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 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.

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[54] *Ibid*.

[55] Kenya Gazette, Vol. CXVII-No. 17, *Gazette Notice No. 1088*, Nairobi, 20th February, 2015, p. 348.

[56] *Ibid*, *Gazette Notice No. 1087*.

The Constitution of Kenya 2010, requires that communities be encouraged to settle land disputes through recognised local community initiatives consistent with the Constitution.[57]If there is a dispute filed in Court by such affected communities and the Court decides to refer the same for ADR and specifically mediation, it is not clear from the law what criteria would be used to decide whether the Community initiative is well equipped to handle the matter and then file their report back to Court.

It is also noteworthy that the Committee was appointed based on their professional qualifications and this may be out of touch with the relevant expertise that would be necessary to deal with customary or community matters. The criteria to be used in picking out and allocating such matters to the Community initiatives are also not clear.

Arguably, the use of ADR mechanisms as contemplated under Article 159 of the Constitution of Kenya should be interpreted in broader terms that not only involve the Court sanctioned mediation but also informal ADR mechanisms especially mediation, negotiation and reconciliation, amongst others. This assertion is in fact buttressed by the constitutional provisions that call for the utilisation of ADR to deal with natural resource conflicts and particularly community land.[58] It is suggested that the current framework on ADR in Kenya and specifically the court sanctioned mediation is narrow and does not capture the true spirit of the Constitution on the practice of ADR in the country.

These are concerns that might need to be addressed if the Judiciary ADR Pilot Scheme is to succeed. Mediation conducted within the community context as contemplated under Article 60[59] of the Constitution of Kenya may necessitate incorporation of the informal mediators into the Committee as the carry with them invaluable experience and expertise that the formal mediators may not possess or even obtain through formal training.

Kenya can learn and benefit from the case of Rwanda's mandatory mediation framework where carrying the agenda of local ownership of conflict resolution, the Rwandan government passed *Organic Law No. 31/2006* which recognises the role of

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[57] Article 60 (1) (g); 67(2) (f).

[58] Articles 60 and 67, Constitution of Kenya 2010.

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

abunzi or local mediators in conflict resolution of disputes and crimes.[60] The Constitution of Rwanda provides for the establishment in each Sector a "Mediation Committee" responsible for mediating between parties to certain disputes involving matters determined by law prior to the filing of a case with the court of first instance.[61] The Mediation Committee comprises of twelve residents of the Sector who are persons of integrity and are acknowledged for their mediating skills.[62]

They are elected by the Executive Committee and Councils of Sectors from among persons who are not members of decentralized local government or judicial organs for a term of two years which may be extended.[63] The *abunzi*[64] deal with civil and penal cases that occur in present-day Rwanda, hence genocide cases are outside their jurisdiction. Any party to the dispute who is dissatisfied with the settlement may refer the matter to the Courts of law. Such matter is however not be admissible by the court of first instance without prior production of the minutes of the settlement proposal of the mediators.[65] Like *gacaca*[66], the *abunzi* is inspired by Rwandan

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[60] M. Mutisi, "Local conflict resolution in Rwanda: The case of abunzi mediators", in M. Mutisi and K. Sansculotte-Greenidge (eds), *Integrating Traditional and Modern Conflict Resolution: Experiences from selected cases in Eastern and the Horn of Africa*, pp. 41-74at p.41, African Centre for the Constructive Resolution of Disputes (ACCORD), Africa Dialogue Monograph Series No. 2/2012 Available at *http://accord.org.za/images/downloads/monograph/ACCORD-monograph-2012-2*.pdf [Accessed on 28/03/2015]

[61] Article 159, Constitution of Rwanda, 2003.

[62] *Ibid.*

[63] *Ibid.*

[64] Literally translated, *abunzi* means 'those who reconcile'. Mandated by Article 159 of the Constitution of Rwanda, and the Organic Law No. 31/2006 and further by Organic Law No. 02/2010/OL on the Jurisdiction, Functioning and Competence of Abunzi Mediation Committees, the *abunzi* is defined as 'an organ meant for providing a framework of obligatory mediation prior to submission of a case before the first degree courts.'

[65] Article 159, Constitution of Rwanda.

[66] GACACA are traditional community courts in Rwanda set up. Sourced from "Gacaca Courts," *http://www.kigalicity.gov.rw/?article71* [Accessed on 26/03/2015]; In Rwandan context, or local language, Gacaca means, "judgment on the grass". Gacaca's main objective was reconciliation through restoration of harmony, social order by punishing, shaming and requiring reparations from the offenders….. as well as giving everyone in the community an opportunity to participate in the deliberation of justice, for example on how to punish the

traditional conflict management systems which encourage local capacity in the resolution of conflicts.[67] It is observed that in a way, *abunzi* can be seen as a hybrid between state-sponsored justice and traditional methods of conflict resolution, popularised by the Government of Rwanda in the post-2000 era based on the objective to decentralise justice, making it affordable and accessible.

Despite the reduced backlog of cases in Rwandan Courts and other benefits from the *abunzi* system, it has been argued that with excessive state oversight in the *abunzi* processes, there is always the possibility of *abunzi* becoming just another state-mandated mediation where local Rwandans participate not out of will or choice, but out of need.[68] The argument is that the ultimate result could be a dramaturgical representation of reconciliation and community building while deep seated reservations, divisions and frustrations remain latent.[69]Although *abunzi* mediation committees are local just like the gacaca courts, the abunzi function according to codified laws and established procedures although their decisions often remain inspired by custom. They encourage disputing parties to reach a mutually satisfying agreement but if necessary they will issue a binding decision.[70]

Kenya can benefit from the foregoing model in incorporation of informal mediators as well as customs and rules applicable to a particular community or group of people.[71]

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violators as well as having a say in the reintegration of the perpetrators back into the community. Sourced from P. Manyok, "Gacaca Justice System: Rwanda Quest for Justice in the post Genocide Era," *Peace and Collaborative Development Network*, February 28, 2013. Available *http://www.internationalpeaceandconflict.org/profiles/blogs/gacaca-justice-system-rwanda-quest-for-justice-in-the-post#.VRl_XvCP_FQ* [Accessed on 26/03/2015].

[67] M. Mutisi, "Local conflict resolution in Rwanda: The case of abunzi mediators," *op cit* p.41.

[68] *Ibid,* p.42.

[69] *Ibid*, p. 42.

[70] *Ibid*, p. 49.

[71] Multi-Door Courtrooms like those in Lagos, Nigeria, which provides a comprehensive approach to dispute resolution within the administrative structure of the court offering a range of options other than litigation can also be considered for the Kenyan Judiciary.

(iii) Enforcement of Mediation Outcome

While the formal mediation processes requires written mediation agreement or outcome, this may be problematic for informal approaches where these may not take these forms. An informal mediation outcome may take the form of shaking hands, slaughtering a bull or goat, taking solemn oath to keep the promises or just confidential agreements especially between spouses.[72]Arguably, it should be possible under the legal framework to report back to court albeit orally such informal mediation outcome for purposes of terminating the conflicts or even enforcing the outcome where such was the agreement between the parties.

This may create difficulties in recognition, enforcement or even execution of such mediation agreements. The question is therefore how broadly a mediation agreement can be defined in order to accommodate informally brokered mediation agreements. It is important to assess whether it is possible to accommodate the issues as perceived in informal ADR practice especially informal mediation. The Judiciary could also review the framework as it is and decide whether a mere recording that the matter has been settled can suffice.

A case in point is *Republic V Mohamed Abdow Mohamed*[73] where the accused person was charged with murder. However, the deceased's family had written to the Director of Public Prosecutions requesting that the charge be withdrawn on account of a settlement reached between the families of the accused and the deceased respectively. The two families had sat and some form of compensation had taken place wherein camels, goats and other traditional ornaments were paid to the aggrieved family. Actually one of the rituals that were performed was said to have paid for blood of the deceased to his family as provided for under the Islamic Law and customs. These two families performed the said rituals, the family of the deceased was satisfied that the offence committed had been fully compensated to them under the Islamic Laws and Customs applicable in such matters and in the foregoing circumstances, they did not wish to pursue the matter any further be it in court or any other forum. The trial was thus terminated. Evidently, there was no written agreement in this matter and it relied on the good faith and voluntariness of the parties to resolve it.

It has been observed that informal mediation results in a non-binding agreement reached from mutual participation in the designing of the agreement, where through

[72] See generally J. Kenyatta, *Facing Mount Kenya, The Tribal Life of the Kikuyu*, (Vintage Books Edition, October 1965); See also H.O. Ayot, *A History of the Luo-Abasuba of Western Kenya From A.D. 1760-1940,* (Kenya Literature Bureau, 1979, Nairobi).

[73] [2013] eKLR, Criminal Case 86 of 2011.

mutual participation and self-determination, it is anticipated that both parties will adhere to the stipulations of a settlement without the need for a 'binding' agreement.[74] As such, there may be need to relook at the law to accommodate such informal agreements and recognise them under the law for purposes of ensuring matters come to an end where it is the parties' wishes to do so.

There is a need for the guarantee of enforceability of the mediated agreement to ensure that mediation competes meaningfully with formal and binding dispute settlement methods, like litigation and arbitration. It has been argued that enforcement of the mediated agreement should not be left to the goodwill of the parties, but should be conferred on a public authority and be de-linked from requirements of form or process.[75] The Civil Procedure Act provides for registration and enforcement of mediated agreements resulting from mediations presided over by *qualified* mediators.[76] In effect, the law excludes enforcement of mediated agreements entered into without the assistance of 'qualified' mediators. Indeed, this exclusion would also affect enforcement of mediated agreements entered into with assistance of 'unqualified' mediators.[77]

(iv) Addressing the Legal Framework for ADR

There are mainly two options that applicability of mediation can assume. Mediation could be given wide application so that the law provides that it applies to every dispute in commercial and civil law. The other approach is to institute mediation procedures connected to competence of particular courts. The mediation law in Kenya seems to adopt the first approach with some variations.

The amendment to the Civil Procedure Act defined mediation and mediator very precisely and also defined the role of the mediator. The definition of mediation is narrow and has restricted the mediation only to a facilitative approach. The Act is also silent on whether or not mediation carried informally and conducted by 'unqualified' mediators is included in the definition. But nothing seems to exclude such mediation

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[74] J. Rifleman, *Mandatory Mediation: Implications and Challenges*, December 2005. Available at *http://www.mediate.com/articles/riflemanJ1.cfm* [Accessed on 27/03/2015]

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

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

[77] The question of who a 'qualified' mediator is a hotly contested one and has no clear answer.

as the definitions of mediator and mediation are wide and all encompassing. However, even then, registration of mediated agreements and enforcement by the court is restricted to only those entered with assistance of qualified mediators.[78] This leaves uncertainty as to the status of informally entered mediation, which arguably form the basis of mediation use in Kenya.

In the short term, there should be ongoing efforts to identify and use mediation in ways that create a bridge between traditional conflict resolution mechanisms and the more formal mechanisms like the courts as recognized in Article 159 (2) (c) of the constitution.

Development in order to be authentic, must respond to the traditions, attitudes, organisations and goals of the people whose society is under consideration.[79] Elders are traditionally regarded as experienced, expert custodians of knowledge, diplomacy and the judicial system of their specific society grouping. At independence in many African countries (including Kenya), most disputes were resolved using traditional/informal justice. Despite their popularity, these justice systems were regarded as obstacles to development. It was assumed that as the countries became more and more modernized Traditional Justice Systems (TJS) would naturally die but this, according to a study by Penal Reform International (PRI) has not been the case.[80] The current land mediation system in East Timor for example, creates a bridge between traditional dispute management mechanisms and the courts.[81] The need for greater connectivity between the 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.

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

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

[80] See Penal Reform International, "Access to justice in Sub Saharan Africa: The Role of Traditional and Informal Justice Systems", *PRI,* (2000), pp. 1 – 196. Sourced from *http://www.gsdrc.org/docs,* (Accessed on 03/06/2012).

[81] Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", in Aus AID's *Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific*, (2008),Case Study No. 9, p. 175. Sourced from *http://www.ausaid.gov.au/publications/pdf,* (Accessed on 24/03/2015).

The author recommends the drafting of a policy to inform the contents of a legal and institutional framework for mediation. The framework should not be "top-down". It should be a framework that recognizes traditional norms, laws, customs and institutions that deal with mediation and grants them an equal place in line with the constitution. The way to go is institutionalization of mediation in the political perspective for resolution of all conflicts, to ensure an element of effectiveness in enforcement of the agreed positions/decisions.

An Alternative Dispute Resolution Act would provide for the setting up of an institutional framework within which mediation and the other ADR processes would be carried out.[82] Care has to be taken however to ensure that parties engage in mediation voluntarily, the autonomy of the process is respected and the solutions reached are acceptable and enduring. Reforms to the current system of conflict resolution would effectively address weaknesses such as delays, costs, backlog of cases and bureaucracy.

A balance needs to be struck between using mediators with local expertise and ensuring objectivity in resolution of conflicts. In striking this balance, important issues need to be addressed such as providing appropriate training and building transparency and accountability into the mediation system.[83] Local administration officials involved in peace committees for example, have local knowledge and expertise but they are more susceptible than outsiders to allegations of bias and partisanship, thus the need to have independent members of the public as commissioners in the mediation process. There should also be more resources devoted to capacity building programs for mediators.

(v) Ethics in Mediation

Considering that mediators may come from different backgrounds, it may be important to come up with a code of ethics to regulate the mediation practice. The code should set out principles relating to competence, appointment, independence, neutrality and impartiality, mediation agreements, fairness of the process, the end of the process, fees and confidentiality, which mediators should commit to.[84] The

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[82] All ADR processes need to meet the Constitutional threshold envisaged in Article 159(3). They should not offend the Bill of Rights or be repugnant to justice or morality or be inconsistent with the Constitution.

[83] D. Fitzpatrick, "Dispute Resolution; Mediating Land Conflict in East Timor", op. cit., p. 196.

[84] See generally, The European Code of Conduct for Mediators and Directive 2008/52 [2008] *OJL* 136/3.

Mediation forums 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.[85]

(vi) Maintenance of Quality Standards in Mediation

The need for quality in any proposed mediation exercise cannot be gainsaid. In other jurisdictions, concern has been expressed on the lack of quality control and uniformity of practice in relation to the rapidly expanding number of commercial and voluntary organisations who are nurturing mediators and offering mediation services to the public and to the courts in England and Wales.[86] While discussing court – annexed mediation, Judge Kirkham observes that some judges have expressed concerns over the arrangement in place in England and Wales, where some court centres offer a court – annexed mediation service and trained lay mediators provide the service. The parties pay a nominal sum to the court and it is the court that provides the administration and the accommodation.[87]

Some judges express concern that this proximity gives rise to the perception on the part of the parties that the court in some way exercises control over the process. If a mediator is incompetent or if the process goes off the rails, the reputation of the court will suffer, yet the judges have no control at all over the process.[88] Hence, though courts are equipped with powerful weapons to help persuade parties to mediate, the

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

[86] A. Brandy, *Alternative Dispute Resolution (Mediation) Development for Non-Family Civil Disputes in England and Wales*, a paper presented at the World Jurist Association's 21st Biannual Conference on Law of the World (Sydney/ Adelaide: WJA Publication, August 17 – 23rd 2003).

[87] F. Kirkham, "Judicial Support for Arbitration and ADR in the Courts in England and Wales", 72 (1) *Arbitration* 53, (2006).

[88] *Ibid*, p. 56.

concerns raised by the judge should be addressed if the benefits mediation has to offer are to be reaped.

The law now provides for the establishment of an Accreditation Committee to regulate the quality and accreditation of mediation and mediators in Kenya.[89] Listing registered mediators promises to ensure the implementation of quality standards by the accreditation committee. A Code of Ethics for Mediators should substantively address matters of quality of mediation practice. There is, however, a need to introduce elements of self-regulatory processes for mediators and to further promote the proliferation of mediation centers and institutions in Kenya.

(vii) Costs of Mediation

The establishment of mediation requires an incentive scheme to encourage the parties to engage in mediation even where there are viable alternatives.[90] Referral to mediation may happen after parties have incurred legal fees in drafting pleadings and filing the same. The lack of a reimbursement system for legal fees and other expenses is likely to make litigants resistant to mediation as it implies extra costs to the parties and there might be no provision for taxation of costs even where a mediated agreement is reached. The best starting point would have been to allow parties to reclaim court fees or part of it. Generally, much more needs to be done to seal the loopholes identified so that all the positive attributes of mediation can be enjoyed.

5.4.2 Reforming the Role of Court in ADR and TDR in Kenya

The Constitution places the court system in a pivotal position in efforts to streamline uptake of ADR and TDR practice in the country. There are a number of reforms to the legal framework that may be considered to streamline the role of the court in these processes. As a way of cutting down on potential escalation of costs and time, there may be need to consider introducing provisions on hybrid ADR mechanisms that may include even adjudication. The effect of a court order admitting challenges to enforcement of arbitral award is also not very clear. This needs to be balanced against the need for preserving the perceived merits of ADR and TDR processes. Otherwise, the constitutional spirit of promoting ADR for efficient access to justice may be defeated. In order to safeguard against affront to party autonomy in

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

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

ADR, there is need to ensure that the role of court is more facilitative than domineering. Indeed, it has been asserted that frequent judicial interference with awards is a paralyzing blow to the healthy functioning of the arbitral process and a clear violation of the legislative purpose.[91]

There is also no reason why the bulk of jurisdiction on arbitration matters should be limited only to the High Court. Presently, the parties are constrained to the extent that where the value of some of the dispute does not merit a suit in the High Court they opt not to seek court intervention. It would be better if a graduated system, just like in civil litigation, was worked out for determining jurisdiction depending on the value of the subject-matter. If anything, the costs of litigation in High Court are higher compared to those of litigation in the lower courts and the High Court is not always in the vicinity of the parties except for those in the urban areas.

5.5 Conclusion

There is now in place a legal framework governing ADR in Kenya. With the passage of the constitution of Kenya 2010, ADR was explicitly recognized by Kenyan law. ADR mechanisms can now be effectively applied in resolving a wide range of commercial disputes, family disputes and natural resource based conflicts, among others thus easing access to justice. It is essential that in the application of ADR and to achieve a just and expeditious resolution of disputes, the Bill of rights as enshrined in the constitution must at all times be kept in mind and upheld.

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.[92] They are highly accessible and recognized at the grassroots and often compete with the formal mechanisms. 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.[93] The informal systems

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[91] Jones FE, 'The Nature of the Court's "Jurisdiction" in Statutory Arbitration Post-Award Motions' *California Law Review*, Vol. 46, Iss. 3, 1958, pp. 411-437, p. 437.

[92] See generally, Molloy, M.S. & Rubenstein, W., 'Principles of Alternative Environmental Dispute Resolution: Abstracted, Restated and Annotated,' (University of Florida, Levin College of Law, Fall 2000). Available at *https://www.law.ufl.edu/_pdf/academics/centers-linics/clinics/conservation/resources/ADR_principles.pdf* [Accessed on 28/10/2015].

[93] 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 12/03/2015].

such as the council of elders possess some attributes of mediation in the political process in that: parties have a choice of the mediator; the outcome is enduring; they are flexible; speedy; non-coercive; mutually satisfying; foster relationships; are cost effective; addresses the root causes of the conflict; the parties have autonomy about the forum and reject power-based outcomes.[94]

Informality of mediation as a conflict resolution mechanism makes it flexible, expeditious and speedier, it fosters relationships and is cost-effective. It also means that since parties exhibit autonomy over the process and outcome of the mediation process, the outcome is usually acceptable and durable. Similarly, mediation addresses the underlying causes of conflicts preventing them from flaring up later on. These positive attributes of mediation can only be realized if mediation is conceptualized as an informal process as it was in the customary, communal and informal context and not as a legal process.

Conflict resolution especially the use of negotiation and mediation was customary and is an everyday affair. It was thus common to see people sitting down informally and agreeing on certain issues. These practices foster broken relationships and enhance peaceful coexistence among the people ensuring conflicts were managed.[95]

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.[96] Success in mediation can therefore be attributed to both the process and the outcome of the mediation.[97] Informality of mediation as a conflict resolution mechanism makes it

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[94] See discussion in K. Muigua, *Resolving Conflicts through Mediation in Kenya*, Chapter Two, *op cit* pp. 20-35; 'Chapter 5: Alternative Dispute Resolution and Meaningful' *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, available at *http://www.usccr.gov/pubs/envjust/ch5.htm* [Accessed on 16/11/2015].

[95] See generally Kenyatta, J., *Facing Mount Kenya, The Tribal Life of the Kikuyu*, *op cit.*

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

[97] Sheppard, B., *Third Party Conflict Intervention: A Procedural Framework*, 6 RES. ORG. BEHAV.226, 226-275 (1984)

flexible, expeditious and speedier, it fosters relationships and is cost-effective. It also means that since parties exhibit autonomy over the process and outcome of the mediation process, the outcome is usually acceptable and durable. Similarly, mediation addresses the underlying causes of conflicts preventing them from flaring up later on. These positive attributes of mediation can only be realized if mediation is conceptualized as an informal process as it was in the customary, communal and informal context and not as a legal process.

Mediation in the African social setting was conducted as a political process leading to resolution and not a settlement.[98] Mediation in the customary, communal and informal setting has operated and functioned within the wider societal context in which case it is influenced by factors such as the *actor*s, *their communication*, *expectations*, *experience*, *resources*, *interests*, and *the situation in which they all find themselves* (emphasis added). It is thus not a linear cause-and-effect interaction but a reciprocal give-and-take process. Legislators should be careful not to kill mediation by strictly annexing it to the court system and making it a judicial process. Informal mediators may still have a big role to play in making mediation work in Kenya.
Societal norms, traditions, customs, religious and other practices forming part of the culture of a people do serve as a powerful force that motivates disputants to seek assistance from third parties.

Before the advent of contemporary conflict management mechanisms, traditional communities developed and refined, over time, their own mechanisms for resolving local level disputes, both within their communities and with others. These were based on solid community institutions such as mediation through a Council of Elders. These institutions were respected by community members and hence those affected generally complied with their decisions.[99]

Traditional African communities had traditions, customs and norms that were pivotal in conflict management. Such traditions, customs and norms were highly valued and adhered to by members of the community. Indeed, these customs and norms still play a pivotal role in the lives of communities and have even been recognised in

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[98] See Kenyatta, J., *Facing Mount Kenya, The Tribal Life of the Kikuyu*, *op cit*; See also Muigua, K., *Resolving Environmental Conflicts through Mediation in Kenya, op cit* at p.58.

[99] 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.

the constitution as such.[100] It is noteworthy that Kenyans can and still use negotiation and mediation, amongst other mechanisms, in their communities either amongst themselves or while engaging other communities.[101]

[100] Article 11, Constitution of Kenya 2010. The Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation; See also Article 44 thereof.

[101] See Triche, R., "Pastoral conflict in Kenya: Transforming mimetic violence to mimetic blessings between Turkana and Pokot communities." *African Journal on Conflict Resolution*, AJCR Volume 14 No. 2, 2014, pp. 81-101 at pp. 96-97.

Chapter Six

ADR and Access to Justice

6.1 Introduction

The right of access to justice is an internationally acclaimed human right which is considered to be basic and inviolable. It is guaranteed under various human rights instruments.[1] Justice has been conceptualized as existing in at least four forms namely: Distributive justice (economic justice), which is concerned with fairness in sharing; Procedural justice which entails the principle of fairness in the idea of fair play; Restorative justice (corrective justice); and Retributive justice.[2]This arises from the idea that justice does not apply in a blanket form and what is considered as justice to one person may be different from another. Justice is believed to be a part of human virtue and the bond which joins human beings together in a state or society.[3]

The term 'access to justice' has been widely used to describe a situation where people in need of help, find effective solutions available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and a greater role for alternative dispute resolution.[4]It refers to judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved

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[1] Access to justice has been recognised by the law, including Article 48 of the Constitution of Kenya and Article 8 of the Universal Declaration of Human Rights. Therefore, in a very literal way, irrespective of the problems in nomenclature and actualization of this right, it is now well settled that access to justice is a fundamental freedom owed to all persons.

[2] 'Four Types of Justice' Available at *http://changingminds.org/explanations/trust/four_justice.htm* [8th March, 2014]

[3] Bhandari, D.R., 'Plato's Concept of Justice: An Analysis' *Ancient Philosophy,* Paideia, Available at *https://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm* [Accessed on 05/10/2015].

[4] Ladan, M.T., 'Access To Justice As A Human Right Under The Ecowas Community Law' *A Paper Presented At: The Commonwealth Regional Conference On The Theme: - The 21st Century Lawyer: Present Challenges And Future Skills*, Abuja, Nigeria, 8 – 11 APRIL, 2010, available at *http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07-* [Accessed on 20th March, 2014]

by an issue. It refers also to a fair and equitable legal framework that protects human rights and ensures delivery of justice.[5]

Access to justice has, thus, two dimensions: procedural access (having a fair hearing before a tribunal) and also substantive justice (to receive a fair and just remedy for a violation of one's rights). [6] It refers not only to the courts, but also to civil and administrative processes such as immigration review or state compensation funds.[7]

Although the concept of access to justice does not have a single universally accepted definition, usually the term is used to refer to opening up the formal systems and structures of the law to disadvantaged groups in society and includes removing legal and financial barriers, but also social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.[8]In *Dry Associates Limited v Capital Markets Authority & anor*,[9] the court was of the view that, access to justice includes the enshrinement of rights in the law; awareness of and understanding of the law; access to information; equality in the protection of rights; access to justice systems particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.

Realization of the right of access to justice requires an effective legal and institutional framework. Access to justice can only be as effective as the available mechanisms to facilitate the same. It has been rightly noted that a right is not just the ability to do something that is among your important interests (whatever they are), but

[5] *Ibid*.

[6] *Kenya Bus Service Ltd v Minister of Transport & 2 others* (2012) eKLR.

[7] M.T. Ladan, 'Access to Justice as a Human Right under the ECOWAS Community Law' (2009) <*http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url+http%3A%2Fwww.abu.edu.ng%2Fpublications%2F2009-07*> (accessed on 10 September 2014).

[8] Global Alliance Against Traffic in Women (GAATW), Available at *http://www.gaatw.org/atj/* [Accessed on 9th March, 2014]

[9] *Dry Associates Limited v Capital Markets Authority & anor* Nairobi Petition No. 358 of 2011 (unreported).

a guarantee or empowerment to actually do it, because it is the correct thing that you have this empowerment.[10]

It has been asserted that people who believe that they have been treated in a procedurally fair manner are more likely to conclude that the resulting outcome is substantively fair, whether favourable to them or not.[11] Further, it is argued that people's perceptions of decision maker's procedural fairness affect the respect and loyalty accorded to that decision maker and the institution that sponsored the decision-making process.[12] Since power is closely associated with the concept of fairness, for any process to satisfy the parties' sense of fairness, it must be deemed to have neutralized any power imbalances; giving the parties a feeling of autonomy over the process or at least being given a chance to fully state their case.[13] It is worth mentioning that whether or not the power being exercised is statutory, the rules of natural justice must be observed in exercising such power that could affect the rights, interests or legitimate expectations of individuals.[14]

The criteria for determining procedural fairness has been identified as: First, people are more likely to judge a process as fair if they are given a meaningful opportunity to tell their story (i.e., an opportunity for voice); second, people care about the consideration that they receive from the decision maker, that is, they receive assurance that the decision maker has listened to them and understood and cared about

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[10] 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 13th March, 2014]

[11] Nancy A. Welsh, 'Perceptions of Fairness in Negotiation', *Marquette Law Review,* Vol. 87, 2004, pp. 753-767, at pp. 761-762. Available at *http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1196&context=mulr*[Accessed on 14th March, 2014]

[12] *Ibid*. at p. 762; See also generally Brockner, J., *et.al,* 'Procedural fairness, outcome favorability, and judgments of an authority's responsibility'. (2007). *Journal of Applied Psychology*, Vol. 92, No. 6, pp. 1657-1671, (Research Collection Lee Kong Chian School of Business). Available at: http [Accessed on 18/03/2014].

[13] *Ibid*.

[14] *Natural Justice/Procedural Fairness*, Fact Series No. 14, p. 1, NSW Ombudsman, August 2003, Available at *http://www.utas.edu.au/__data/assets/pdf_file/0011/434486/FS_PublicSector_14_Natural_Justice1*.pdf [Accessed on 14th March, 2014]; See also Articles 10, 20 and 159 of the Constitution of Kenya 2010

what they had to say; Third, people watch for signs that the decision maker is trying to treat them in an even-handed and fair manner; and finally, people value a process that accords them dignity and respect.[15]

Section 1A (1) of the *Civil Procedure Act*[16] provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The judiciary is enjoined to exercise its powers and interpretation of the civil procedure to give effect to the overriding objective.[17] Further, Section 1B thereof provides that the aims of ensuring a just, expeditious, proportionate and affordable resolution of civil disputes include the just determination of proceedings, efficient disposal of Court business, efficient use of judicial and administrative resources, timely disposal of proceedings, affordable costs and use of appropriate technology. In effect, this implies that the court in its interpretation of laws and issuance of orders should ensure that the civil procedure is not, as far as possible, used to inflict injustice or delay the proceedings and thus minimize the litigation costs for the parties. This provision can also serve as a basis for the court to employ rules of procedure that provide for use of Alternative Dispute Resolution mechanisms, to ensure that they serve the ends of the overriding objective.

The principal constitutional provisions concerning to procedural claims within the administrative process are; Article 47 of the Constitution of Kenya 2010[18]which provides for an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; Article 48 which obligates the State to ensure access to justice for all persons and, if any fee is required, that it shall be reasonable and shall not impede access to justice; and Article 50(1)thereof which guarantees the right to a fair hearing by stating that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

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[15] Welsh, N.A, 'Perceptions of Fairness in Negotiation' op. cit. at pp.763-764.; See also generally Rottman,D. B., 'How to Enhance Public Perceptions of the Courts and Increase Community Collaboration' *NACM'S 2010-2015 National Agenda Priorities,* Available at *http://www.proceduralfairness.org/Resources/~/media/Microsites/Files/proceduralfairness/Rottman%20from%20Fall%202011%20CourtExpess.ashx*[Accessed on 18/03/2014].

[16] Cap 21, Laws of Kenya.

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

[18] Government Printer, Nairobi, 2010.

It is against this background that this section examines how this right of access to justice, as conceptualized herein, can be actualized for all persons, through diversification of available mechanisms. People evaluate both their own experience and views about the general operation of the legal system against a guide of fair procedures that involves neutrality, transparency, and respect for rights, issues that also form the basis forth rule of law.[19]Procedural justice in general legal language is used to refer to the fairness of a process by which a decision is reached. In contrast, procedural justice in psychology entails the *subjective* assessments by individuals of the fairness of a decision making process.[20]

The discussion herein uses access to procedural justice, in the context referred to in the psychological definition of the concept. Justice must demonstrate *inter alia* fairness, affordability, and flexibility, rule of law, and equality of opportunity, even-handedness, procedural efficacy, party satisfaction, non-discrimination and human dignity. Any process used in facilitating access to justice must be able to rise above parties' power imbalances to ensure that the right of access to justice is enjoyed by all and not dependent on the parties' social status.

6.2 Access to Justice in Kenya

The actualization of the right of access to justice in Kenya relies on several instruments and institutions, including: - Judicial, Constitutional, Legislative, Policy and International human rights amongst others.

Article 22(1) of the constitution of Kenya provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 22(3) thereof further provides that the Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy amongst others the criteria that: formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation; and the court, while observing the rules of natural justice, shall not be unreasonably restricted by

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[19] R.H Blumoff & T.R. Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', *Journal of Dispute Resolution,* Vol. 2011, Issue 1 [2011], Art. 2, p. 3.Available at: *http://scholarship.law.missouri.edu/jdr/vol2011/iss1/2* [Accessed on 14/03/2014].

[20] *Ibid* at p. 3.

procedural technicalities.[21] Clause (4) provides that the absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

Further, Article 48 thereof is to the effect that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Article 159 (1) of the Constitution provides that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and that it is administered without undue regard to procedural technicalities.[22] It echoes the right of all persons to have access to justice as guaranteed by Article 48 of the constitution. It also reflects the spirit of Article 27 (1) which provides that "*every person is equal before the law and has the right to equal protection and equal benefit of the law*" [Emphasis ours].[23] Despite these provisions, access to justice especially through litigation is usually hampered by some challenges as discussed in the next section.

6.3 Challenges facing Actualization of Access to Justice

Among the most significant obstacles to rule of law are lack of infrastructure (i.e., the presence of legal institutions), high costs of advocacy, illiteracy and/or lack of information.[24] Any interference with the rule of law (in the context of promoting justice for all) greatly affects people's ability to access justice.

The challenges facing access to justice encompass: legal, institutional and structural challenges; Institutional and procedural obstacles; Social barriers; and Practical and economic challenges.[25]Closely related to these are high court fees,

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[21] Article 22(3) (b) (d) *Constitution of Kenya*, 2010.

[22] *Ibid*, Article 159(2) (d).

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

[24] Dag Hammarskjold Foundation, 'Rule of Law and Equal Access to Justice', op. cit. p. 1; See also Ojwang', J. B. "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

[25] Access to Justice–Concept Note for Half Day General Discussion Endorsed by the Committee on the Elimination of Discrimination against Women at its 53rd Session, p. 9, Available at *http://www.ohchr.org/Documents/HRBodies/CEDAW/AccesstoJustice/ConceptNoteAccessToJustice.pdf*

geographical location, complexity of rules and procedure and the use of legalese.[26]Justice has for the longest time been perceived to be a privilege reserved for a select few in society, who had the financial ability to seek the services of the formal institutions of justice. This is because many people have always taken litigation to be the major conflict management channel widely recognized under the laws as a means to accessing justice. The absence of an efficient system to facilitate the rule of law also contributes to this situation as people are usually out of touch with the existing legal and institutional frameworks on access to justice.[27]

Sometimes litigation does not achieve fair administration of justice due to a number of factors as highlighted above. The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.[28] Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. Litigation is often slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world.[29] Litigation should however not be harshly judged as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary. Criminal justice may also be achieved through litigation especially where the cases involved are very serious. Litigation is associated with the following advantages: the process is open, transparent and public; it is based on the strict, uniform compliance with the law of the land; determination is final and

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

[27] See Toope, S. J., "Legal and Judicial Reform through Development Assistance: Some Lessons", McGill *Law Journal / Revue De Droit De McGill,* [Vol. 48, 2003], pp. 358-412, p. 358.

[28] Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," op cit.

[29] *Ibid*, p. 7; See also Mbote, P.K., et al., *Kenya: Justice Sector and the Rule of Law*, Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011, available at *http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-2011* [Accessed on 7th March, 2014]

binding (subject possibly to appeal to a higher court).[30] Litigation can also be useful in advancing the human rights including the right of access to justice.[31] It is noteworthy that the civil Rights Movement would not have prospered without recourse to litigation. Further, the outcome of ADR mechanisms such as arbitral awards relies on the court system for enforcement. However, there are also many shortcomings associated with litigation so that it should not be the only means of access to justice. Some of these have been highlighted above. Litigation is not necessarily a process of solving problems; it is a process of winning arguments.[32]

6.4 Towards Actualization of the Right of Access to Justice

For the constitutional right of access to justice to be actualized, there has to be a framework based on the principles of: *expedition*; *proportionality*; *equality of opportunity*; *fairness of process*; *party autonomy*; *cost-effectiveness*; *party satisfaction* and *effectiveness of remedies* [Emphasis ours].[33] Recognition of ADR and traditional dispute resolution mechanisms is predicated on these cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system.[34]

In a report on access to justice in Malawi, the authors appropriately noted that *'access to justice* does not mean merely access to the institutions, but *also means access to fair laws, procedures, affordable, implementable and appropriate remedies*

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[30] Chartered Institute of Arbitrators, Litigation: Dispute Resolution, Available at *http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation* [Accessed on 7th March, 2014]

[31] See Articles 22, 70, Constitution of Kenya 2010; See also generally, Fiss, O., and "Against Settlement" 93 *Yale Law* Journal 1073 (1984). Fiss argues that litigation is the most viable channel for fighting for civil rights; See also Moffitt, M.L., 'Three Things to be against ('Settlement' Not Included) - A Response to Owen Fiss,' *Fordham Law Review*, Forthcoming, May 30, 2009.

[32] Advantages & Disadvantages of Traditional Adversarial Litigation, Available at *http://www.beckerlegalgroup.com/a-d-traditional-litigation [*Accessed on 7/03/2014]

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

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

in terms of values that are in conformity to constitutional values and directives'(emphasis added).[35] If the foregoing is anything to go by, then litigation cannot score highly especially in terms of access to fair procedures and affordability. On the contrary, ADR mechanisms can be flexible, cost-effective, and expeditious; may foster relationships; are non-coercive and result in mutually satisfying outcomes. They are thus more appropriate in enhancing access to justice by the poor in society as they are closer to them. They may also help in reducing backlog of cases in courts.[36] The net benefit to the court system would be a lower case load as the courts' attention would be focused on more serious matters which warrant the attention of the court and the resources of the State.[37] Case backlog is arguably one of the indicators used to assess the quality of a country's judicial system.[38]

Courts have been depicted as being capable of delivering justice according to law and not what may be considered to be fair by the judge or any other person, especially if such conception would depart from statutes or any other established legal principles.[39] It has been observed that the perceived legitimacy of law may depend more upon the fact that it has been enacted through democratic process than because people think it is a good law. Further, the idea of justice for most people is said to be larger than "justice according to law"-going beyond allocation of rights, duties, liabilities and punishments and the award of legal remedies.[40] It is remarkable that

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[35] Schärf, W., *et al., Access to Justice for the Poor of Malawi? An Appraisal Of Access To Justice Provided To The Poor Of Malawi By The Lower Subordinate Courts And The Customary Justice Forums*, p. 4, Available at *http://www.gsdrc.org/docs/open/SSAJ99.pdf* [Accessed on 8/03/2014]

[36] See Khadka, S.S., *et al., Promoting Alternate Dispute Resolution to reduce backlog cases and enhance access to justice of the poor and disadvantaged people through organizing Settlement Fairs in Nepal*, Case Studies on Access to Justice by the Poor and Disadvantaged, (July 2003) Asia-Pacific Rights And Justice Initiative, Available at *http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/Nepal-SettlementFair* [Accessed on 08th March, 2014].

[37] *Ibid*

[38] Nicholls, A., *Alternative Dispute Resolution: A viable solution for reducing Barbados' case backlog?* , p. 1, Available at *http://www.adrbarbados.org/docs/ADR%Nicholls* [Accessed on 08/03/2014]

[39] French, R., "Justice in the Eye of the Beholder" in 'The Commonwealth Lawyer' *Journal of the Commonwealth Lawyer's Association*, Vol. 22, No.3, December, 2013, pp. 17-20, at p. 19

[40] *Ibid*, pp. 19-20.

litigation aims at promoting and achieving all these for the people but justice requires more than that in that it also entails a psychological aspect that needs to be addressed for full satisfaction.

To ensure that the constitutionally guaranteed right of access to justice is fully achieved and enjoyed by all, it is therefore important to explore the potential and the extent to which ADR mechanisms may serve the purpose, as most of them have been applied to achieve even the psychological aspect of justice.

6.4.1 Access to Justice through TDR and ADR Mechanisms in Kenya

Access to justice is one of the most critical human rights since it also acts as the basis for the enjoyment of other rights and it requires an enabling framework for its realisation.[41] The Constitution provides for the right of access to justice and obligates the state to ensure access to justice for all persons.[42] Access to justice by majority of citizenry has been hampered by many unfavourable factors which include *inter alia*, high filing fees, bureaucracy, complex procedures, illiteracy, distance from the courts and lack of legal knowhow.[43] This makes access to justice through litigation a preserve of select few.

Generally, proponents of ADR submit that its methods address many systemic problems in litigation and offer several benefits not available through traditional litigation. ADR could relieve congested court dockets while also offering expedited resolution to parties. Second, ADR techniques such as negotiation, mediation and party conciliation could give parties to disputes more control over the resolution process. The flexibility of ADR is also said to create opportunities for creative remedies that could more appropriately address underlying concerns in a dispute than could traditional remedies in litigation. ADR mechanisms are likely and do often achieve party satisfaction in terms facilitating achievement of psychologically satisfying outcomes. By offering the opportunity for consensus-based resolution, ADR also is

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[41] See Rhode, D.L., "Access to Justice," *Fordham Law Review,* Vol. 69, 2001. pp. 1785-1819; See generally, Carmona, M.S. & Donald, K., 'Access to justice for persons living in poverty: a human rights approach,' Ministry for Foreign Affairs, Finland. pp.8-9. Available at *https://www.academia.edu/6907000/Access_to_justice_for_persons_living_in_poverty_a_human_rights_approach* [Accessed on 2/07/2015].

[42] Article 48.

[43] Ojwang', J.B. "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," *Kenya Law Review Journal,* Vol. 1, No.19, 2007, pp. 19-29 at p. 29.

arguably better suited than litigation to preserving long-term relationships and solving community-based disputes.[44]

Through providing for the use of ADR and TDR mechanisms to enhance access to justice, the Constitution of Kenya was responding to the foregoing challenge in order to make the right of access to justice accessible by all.[45] It was in recognition of the fact that TDR and other ADR mechanisms are vital in promoting access to justice among many communities in Kenya. Indeed, a great percentage of disputes in Kenya are resolved at the community level through the use of community elders and other persons mandated to keep peace and order.[46]

Notably, the Constitution provides that one of the principles of land policy in Kenya is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.[47] This is reaffirmed under Article 67(2) (f) which provides that one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.

The recognition of ADR and TDR mechanisms under Article 159 of the Constitution is a restatement of the customary jurisprudence of Kenya.[48] This is because TDR mechanisms existed from time immemorial and are therefore derived from the customs and traditions of the communities in which they operate. In most African communities, TDR mechanisms existed even before the formal dispute

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[44] Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases' *Utah Law Review,* (2009) [NO. 3] PP. 801-802, Available at *http://epubs.utah.edu/index.php/ulr/article/viewFile/244/216* [Accessed on 12/03/ 2014]

[45] Article 159(2); Article 48.

[46] Muigua, K., *Resolving Conflicts through Mediation in Kenya*, (Glenwood Publishers, 2012). pp. 21-22; See generally J. Kenyatta, *Facing Mount Kenya*, *The Tribal Life of the Kikuyu*, *op cit*.

[47] Article 60(1) (g).

[48] Muigua, K., "Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010," p. 2. Available at *http://www.chuitech.com/kmco/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf; See also I.K.E., Oraegbunam, The Principles and Practice of Justice in Traditional Igbo Jurisprudence, African Journal Online, p.53*. Available at *http://www.ajol.info/index.php/og/article/download/52335/40960*[Accessed on 30/06/2015].

settlement mechanisms were introduced.[49] The formal courts, being adversarial in nature, greatly eroded the traditional conflict resolution mechanisms.[50] The use of TDR in accessing justice and conflict management in Africa is still relevant especially due to the fact that they are closer to the people, flexible, expeditious, foster relationships, voluntary-based and cost-effective. For this reason, most communities in Africa still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.[51]

The use of TDR mechanisms fosters societal harmony over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa.[52] Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts. Unlike the court process which delivers retributive justice, TDR mechanisms encourage resolution of disputes through restorative justice remedies. TDR mechanisms derive their validity from customs and traditions of the community in which they operate. The diversities notwithstanding, the overall objective of all TDR mechanisms is to foster peace, cohesion and resolve disputes in the community.[53] The other advantages of TDR mechanisms and other community based justice systems are that: traditional values are part of the heritage of the people hence people subscribe to its principles; promotes social cohesion, peace and harmony; proximity to the people/accessibility and use of language that the people understand; the mechanisms

[49] See generally Myers, L.J. & Shinn, D.H., 'Appreciating Traditional Forms of Healing Conflict in Africa and the World, 2010, available at *scholarworks.iu.edu/journals/index.php/bdr/article/download/.../1220* [Accessed on 29/06/2015].

[50] Kenyatta, J., *op.cit*. pp. 259-269.

[51] Muigua, K., *Resolving Conflicts through Mediation in Kenya*, *op cit* at pp.21-22; See also N.N. Ntuli, 'Policy and Government's Role in Constructive ADR Developments in Africa.' *Presented at a conference "ADR and Arbitration in Africa; Cape Town 28th and 29th November 2013.* pp. 2-3. Available at *http://capechamber.co.za/wp-content/uploads/2013/11/POLICY-IN-AFRICA-AND-GOVERNMENT.pdf[* Accessed on 30/06/2015].

[52] *Ibid*, p.23.

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

are affordable; TDR are resolution mechanisms; are cost effective since parties can easily represent themselves in such forums; proceedings undertaken are confidential; TDR and ADR mechanisms are flexible since they do not adhere to strict rules of procedure or evidence and they yield durable solutions.[54]

TDR mechanisms are also preferable because: they decongest the courts and prisons, respect the traditional cultures and traditions, decisions emanating from such mechanisms are easily acceptable to communities, they promote peace, harmony, co-existence among communities and security, they are expeditious and most cases are resolved by elders who have background knowledge and understanding of cases and the people hence allow for handling matters discreetly for quick resolution, they are less costly and easy accessible to the poor, resolve disputes at grassroots' level and enhance access to justice, they also provide local solutions which are more acceptable to people and they are agents of change and promote economic development, foster love, cohesion, integrity and promote respect for each other.[55]

In recognition of this, the Constitution obligates the State to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.[56] According to the Food and Agricultural Organisation of the United Nations, indigenous knowledge can been conceptualised as a repertoire of ideas and actions from which community members faced with specific problems can draw, depending on their level of knowledge, their preferences, and their ability and motivation to act. In this regard, it would involve improvisation and flexibility in response to ongoing conditions. Dispute processing, is similarly characterized as a repertoire of processes which communities and their members respond to dynamically and differentially.[57] It has been argued that chances for peaceful resolution of Africa's

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[54] Muigua, K., *Resolving Conflicts through Mediation in Kenya*, *op cit* pp. 23-26; see also A.A. Theresa, 'Methods of Conflict Resolution in African Traditional Society,' *Indexed African Journal Online*, vol. 8(2), Serial No. 33, April, 2014: pp. 138-157 at pp. 151-152.

[55] Hwedie, K. O. & Rankopo, M. J., *Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana*, *op* cit, p. 33.

[56] Article 69(1) (c).

[57] Food and Agricultural Organisation of the United Nations, 'Indigenous Knowledge And Conflict Management: Exploring Local Perspectives And Mechanisms For Dealing With Community Forestry Disputes,' *Paper Prepared for the United Nations Food and Agriculture Organization, Community Forestry Unit, for the Global Electronic Conference on "Addressing Natural Resource Conflicts Through Community Forestry," January-April 1996.* Available at *http://www.fao.org/docrep/005/AC696E/AC696E09.htm* [Accessed 4/07/2015]

conflicts can be enhanced considerably if the region's indigenous principles, skills, and methods of conflict resolution are understood and harmonized with those of the modern nation-state.[58]

It is for this reason that the Constitutional provisions on the protection and enhancement of intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the Kenyan communities should be actualized through ensuring that there is put in place supportive policy and legal framework. This is because despite the constitutional spirit of promoting ADR and TDR mechanisms most of which rely on indigenous knowledge of the respective communities, what is not clear is how this should be carried out because as it is now, there is no defined procedure on how they should determine the matters to go for TDR and those for courts or even who should carry out the TDR. While it is true that the use of ADR and TDR mechanisms can go a long way in resolving some of the long standing conflicts over natural resources in Kenya, this well intentioned constitutional provision may be defeated owing to lack of a proper legal framework or guidelines on how they should be implemented. Arguably, a strong legal system based on a fusion of formal and informal justice systems improves the capacity of citizens to access justice. This is because the two justice systems complement each other and citizens are at liberty to choose the most appropriate and affordable system for themselves.[59] Most of the ADR mechanisms offer resolution of conflicts as against settlement, with the exception of a few such as arbitration. It is noteworthy that although ADR generally promotes access to justice, not all of the mechanisms achieve this by resolution; others are dispute settlement, much the same way as litigation. It is for this reason that this section sets

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[58] Mensah, F.B., 'Indigenous Approaches to Conflict Resolution in Africa,' in the World Bank, *Indigenous Knowledge: Local Pathways to Global Development*, 2004. pp. 39-44 at p. 39. Available at *http://www.worldbank.org/afr/ik/ikcomplete.pdf* [Accessed 4/07/2015]; Yance S & Yance S, 'Blending the Law, the Individual, and Traditional Values to Create an Effective ADR System : A Study on the ADR Processes in Rwanda and Nicaragua' *Pepperdine Dispute Resolution Law Journal*, Vol. 14 No. 3, (2014) 14.

[59] See Venerando, K., *et al,* United Nations Development Programme, "Access to Justice in Asia and the Pacific: A DGTTF Comparative Experience Note Covering Projects in Cambodia, India, Indonesia and Sri Lanka," *The DGTTF Lessons Learned Series, 2009*. Available at *http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dgttf-/access-to-justice-in-asia-and-the-pacific/UNDP_CE%20Paper_Asia_web.pdf* [Accessed on 29/06/2015] p. 11.

out to explore how best each of these mechanisms can be utilised in facilitating access to justice.

(i) Access to Justice through Negotiation

Negotiation is a process that involves parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.[60]The parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation. Negotiation thus allows party autonomy in the process and over the outcome. It is non-coercive thus allowing parties the room to come up with creative solutions.

The Ireland Law Reform Commission in their consultation paper on ADR posits four fundamental principles of what they call principled negotiation: Firstly, Separating the people from the problem; Secondly, Focusing on interests, not positions; Thirdly, Inventing options for mutual gain; and finally, insisting on objective criteria.[61] As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests.

It has been said that negotiators rely upon their perceptions of distributive and procedural fairness in making offers and demands, reacting to the offers and demands of others, and deciding whether to reach an agreement or end negotiations.[62] The argument is that if no relationship exists between negotiators, self-interest will guide their choice of the appropriate allocation principle to use in negotiation. A negotiator

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[60] Negotiations in Debt and Financial Management 'Theoretical Introduction to Negotiation: What Is Negotiation?' Document No.4, December 1994, Available at *http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document4/3Theoretical.htm [*Accessed on 8/03/2014]; See also Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, op cit. p. 2.

[61] Fisher, R. & Ury,W., *Getting to Yes-Negotiating Agreement Without Giving in* Op cit., p. 42; See also Ireland Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, p. 43

[62] Welsh, N.A., 'Perceptions of Fairness in Negotiation', *Marquette Law Review,* Vol. 87, pp. 753-767, *op. cit*, p. 753.

who does not expect future interactions with the other person will use whatever principle-need, generosity, equality, or equity-produces the better result for them. Relationships apparently matter in negotiators' definitions of fair outcomes.[63]

It may be argued that negotiation is by far the most efficient conflict management mechanism in terms of management of time, costs and preservation of relationships and has been seen as the preferred route in most disputes.[64] Negotiation can be interest-based, rights-based or power-based and each can result in different outcomes.[65] However, the most common form of negotiation depends upon successfully taking and the giving up a sequence of positions.[66]

It has been noted that positional bargaining is not the best form of negotiation due to a number of reasons namely: arguing over positions results in unwise agreements because when negotiators bargain over positions, they tend to lock themselves into those positions; argument over positions is inefficient as it creates incentives that stall settlement, with parties stubbornly holding onto their extreme opening positions; it endangers an ongoing relationship-anger and resentment often result as one side sees itself bending to the rigid will of the other while its own legitimate concerns go unaddressed; and where there are many parties involved, positional bargaining leads to the formation of coalition among parties whose shared interests are often more symbolic than substantive.[67]

Interest-based negotiation shifts the focus of the discussion from positions to interests, raising a discussion based on a range of possibilities and creative options, for the parties to arrive at an agreement that will satisfy the needs and interests of the

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[63] *Ibid*, p. 756.

[64] Attorney General's Office, Ministry of Justice, *The Dispute Resolution Commitment-Guidance For Government Departments And Agencies*, May, 2011, available at *http://www.justice.gov.uk/downloads/courts/mediation/drc-guidance-may2011.pdf* [Accessed on 08/08/2015]; See also Muigua, K., *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, p. 8, Available at *http://www.chuitech.com/kmco/attachments/article/101/pdf* [Accessed on 08/08/2015].

[65] Ury, B. & Goldberg, "Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict" *Program on Negotiation at Harvard Law School Cambridge, Massachusetts* 1993, available at *www.williamury.com,* [Accessed on 08/08/2015].

[66] Fisher, R. & Ury, W., *Getting to Yes-Negotiating Agreement Without Giving in, op cit*., p.4

[67] *Ibid*, pp. 4-8.

parties.[68] This way, both parties do not feel discriminated in their efforts for the realization of the right of access to justice.

There can be either soft bargaining or hard bargaining. Soft bargaining as a negotiation strategy primarily emphasizes on the preservation of friendly relationships with the other side. However, while the strategy is likely to reduce the level of conflict, it can also increase the risk that one party would be exploited by the other, who uses hard bargaining techniques.[69] Hard bargaining on the other hand emphasizes results over relationships with insistence by hard bargainers being that their demands be completely agreed to and accepted before any agreement is reached at. This approach avoids the need to make concessions, reduces the likelihood of successful negotiation and harms the relationship with the other side.[70]

It is noteworthy that the most effective form of negotiation is principled negotiation. This form of negotiation is pegged on some basic principles, touching on the point of focus of the parties as well as the people's attitude and behaviour.[71]

People tend to become personally involved with issues and with their own side's positions and thus they take responses to those issues and positions as personal attacks. This arises from differences in perception, emotions and communication. Thus, separating people from the issues allows the parties to address the issues without damaging their relationship and also helps them to get a clearer view of the substantive

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[68] UNESCO-IHP, "Alternative Dispute Resolution Approaches And Their Application In Water Management: A Focus On Negotiation, Mediation And Consensus Building" Abridged version of Yona Shamir, Alternative Dispute Resolution Approaches and their Application, Accessible at
http://unesdoc.unesco.org/images/0013/001332/133287e.pdf [Accessed on 08/08/2015].

[69] Conflict Research Consortium, University of Colorado, available at
http://www.colorado.edu/conflict/peace/!treating_core.htm [Accessed on 08/08/2015]

[70] See generally Chapter-V, 'Non Adjudicatory Methods of Alternative Disputes Resolution' Available at
http://shodhganga.inflibnet.ac.in/bitstream/10603/10373/11/11_chapter%205.pdf [Accessed on 15th March, 2014]

[71] See Conflict Research Consortium, "Principled Negotiation at Camp David" as described in Getting to Yes, Fisher, R. & Ury, W., (New York: Penguin Books, 1981); See also generally, Cutts, R.N., 'Conflict Management: Using Principled Negotiation to Resolve Workplace Issues', Available at
http://nl.walterkaitz.org/rnicolecutts_principlednegotiation.pdf [Accessed on 08/08/2015]

problem.[72] This way, perceptions of actualized access to justice becomes a reality to the parties, who walk away satisfied with the outcome.

It has been postulated that when a problem is defined in terms of the parties' underlying interests it is often possible to find a solution which satisfies both parties' interests. Indeed, it has been observed that information is the life force of negotiation. The more you can learn about the other party's target, resistance point, motives, feelings of confidence, and so on, the more able you will be to strike a favourable agreement with parties focusing on their interests while at the same time remaining open to different proposals and positions.[73]

Parties may generate a number of options before settling on an agreement. However, there exist obstructions to this: parties may decide to take hardline positions without the willingness to consider alternatives; parties may be intent on narrowing their options to find the single answer; parties may define the problem in win-lose terms, assuming that the only options are for one side to win and the other to lose; or a party may decide that it is up to the other side to come up with a solution to the problem.[74] The assertion is that by focusing on criteria rather than what the parties are willing or unwilling to do, neither party needs to give in to the other; both can defer to a fair solution.[75]

The Constitution requires cooperation between national and county governments.[76] The two levels of government are to *inter alia,* assist, support and consult and, as appropriate, implement the legislation of the other level of government; and liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.[77] In

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[72] Fisher, R. and Ury,W., *Getting to Yes-Negotiating Agreement Without Giving in,* Op cit., pp. 10-11

[73] See Chapter 2 'Strategy and Tactics of Distributive Bargaining' p. 23,
Available at *http://highered.mcgraw-hill.com/sites/dl/free/0070979960/894027/lew79960_chapter02.pdf* [Accessed on 19th March, 2014].

[74] *Ibid*, pp. 24-25.

[75] See generally, Dawson, R., '5 Basic Principles for Better Negotiating Skills'Available at *http://www.creonline.com/principles-for-better-negotiation-skills.html* [Accessed on 19th March, 2014].

[76] Art. 189.

[77] Art. 189(1) (b) (c).

case of any dispute between the governments, they are to make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation. Such national legislation are to provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.[78]

It is worth noting that the Governments are to ensure participation by the public in conducting their affairs.[79] Negotiation offers a viable avenue for such consultations and exchange of information especially when seeking the views of the residents on development projects. Where community members feel aggrieved by the actions of their county governments, they can seek to engage them through negotiation before exploring any other means, in case of a deadlock. Armed with the relevant information, such members are able to appreciate the work of their governments and also feel a sense of ownership and belonging. They are able to have their concerns addressed in a way that leaves them satisfied.

Negotiation has been used since time immemorial among African communities and it is still applied widely in Kenya today.[80] It can be used as a powerful empowering tool to assist the Kenyan people to manage their conflicts effectively.

In conclusion, negotiation can be used in facilitating access to justice. What needs to be done is ensuring that from the start, parties ought identify their interests and decide on the best way to reach a consensus.[81] The advantages therein defeat the few disadvantages of power imbalance in some approaches to negotiation, as already discussed. It is a mechanism worth exploring as it has been successfully used to achieve the right of access to justice for parties.

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[78] Art. 189(3) (4).

[79] Art. 196.

[80] Muigua, K., *Resolving Conflicts through Mediation in Kenya, op. cit.*, chapter 2; Kenyatta, J., *Facing Mount Kenya: The Tribal life of the Gikuyu,* (Vintage Books, New York, 1965).

[81] See generally, Amendola, A.F, 'Combating Adversarialism In Negotiation: An Evolution Towards More Therapeutic Approaches' *Nujs Law Review* 4 Nujs L. Rev. (July - September, 2011) pp. 347-370, Available at *http://www.nujslawreview.org/pdf/articles/2011_3/andrew-f-amendola.pdf* [Accessed on 19/03/2014]

(ii) Mediation and Justice

Mediation in the political process, which is informed by resolution, allows parties to have autonomy over the choice of the mediator, the process and the outcome. With the perceived advantages as discussed elsewhere in this book, the process is more likely to meet each party's expectations and achieve justice through a procedurally and substantively fair process of justice.[82] It is essential that a party not only accesses justice but feels satisfied by the outcome at the psychological level.

Rules have been defined as requiring, prohibiting or attaching specific consequences to acts and place them in the realm of adjudication. By contrast, mediation is seen as one concerned primarily with persons and relationships, and it deals with precepts eliciting dispositions of the person, including a willingness to respond to somewhat shifting and indefinite 'role expectations. 'Mediation is conceived as one that has no role to play in the interpretation and enforcement of laws; that is the role of courts and the function of adjudication. Conflict resolution processes, in their focus on people and relationships, do not require impersonal, act-prescribing rules" and therefore are particularly well-suited for dealing with the kinds of "shifting contingencies" inherent in ongoing and complex relationships.[83]

Thus, mediation, especially mediation in the political process indeed broadens access to justice for parties, when effectively practised. This is because, 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.[84]

(iii) Justice via Conciliation

Conciliation has all the advantages and corresponding disadvantages of negotiation and can, where applicable, enhance access to justice.

(iv) Seeking Justice through Arbitration

In disputes involving parties with equal bargaining power and with the need for faster settlement of disputes, especially business related, arbitration arguably offers the best vehicle among the ADR mechanisms to facilitate access to justice.

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[82] See generally Muigua, K., "Resolving Environmental Conflicts through Mediation in Kenya" (Ph.D Thesis, 2011, *Unpublished,*) op cit.

[83] *Ibid*, p. 803.

[84] K. Muigua, *Resolving Environmental Conflicts through Mediation in Kenya, op cit* at p.48.

(v) Justice through Med-Arb

Med-Arb can successfully be employed where the parties are looking for a final and binding decision but would like the opportunity to first discuss the issues involved in the dispute with the other party with the understanding that some or all of the issues may be settled prior to going into the arbitration process, with the assistance of a trained and experienced mediator.[85] This is likely to make the process faster and cheaper for them thus facilitating access to justice. Elsewhere, the courts have held, the success of the hybrid mediation/arbitration process depends on the efficacy of the consent to the process entered into by the parties.[86]

(vi) The Arb-Med Justice Option

In Arb-Med, parties start with arbitration and thereafter opt to resolve the dispute through mediation. It is best to have different persons mediate and arbitrate. This is because a person arbitrating may have made up his mind who is the successful party and thus be biased during the mediation process if he transforms himself into a mediator. For instance, in the Chinese case of *GaoHai Yan & Another v Keeneye Holdings Ltd & Others*,[87] the Hong Kong Court of First Instance refused enforcement of an arbitral award made in mainland China on public policy grounds. The court held that the conduct of the arbitrators turned mediators in the case would "cause a fair-minded observer to apprehend a real risk of bias".[88] Although the decision not to enforce the award was later reversed, the Court of Appeal did not have a problem with the observation on risks involved but with the particular details of that case where the parties were deemed to have waived their right to choose a new third party in the matter.[89]

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[85] Mediation-Arbitration (Med-Arb), Available at *http://www.constructiondisputes-cdrs.com/about%20MEDIATION-ARBITRATION.htm* [Accessed on 08th March, 2014]

[86] Sussman, E., Developing an Effective Med-Arb/Arb-Med Process, *NYSBA New York Dispute Resolution Lawyer,* Spring 2009, Vol. 2, No. 1, p. 73, available at *http://www.sussmanadr.com/docs/Med%20arb%PDF.pdf* [Accessed on 08th March, 2014]

[87] [2011] HKEC 514 and [2011] HKEC 1626 ("Keeneye").

[88] Goodrich, M., Arb-med: ideal solution or dangerous heresy? p. 1, March 2012, Available at *http://www.whitecase.com/files/Publication/fb366225-8b08-421b-9777 a914587c9c0a/Presentation* [Accessed on 08th March, 2014].

[89] *Ibid*.

Arb-med can be used to achieve justice where it emerges that the relationship between the parties needs to be preserved and that there are underlying issues that need to be addressed before any acceptable outcome can be achieved. Mediation, a resolution mechanism is better suited to achieve this as opposed to arbitration, a settlement process.

(vii) Adjudication and Justice

Due to the limited time frames, adjudication can be an effective tool of actualizing access to justice for disputants who are in need of addressing the dispute in the shortest time possible and resuming business to mitigate any economic or business losses.

(viii) Traditional Justice Systems

It is noteworthy that there is an overlap between the forms of ADR mechanisms and traditional justice systems. The Kenyan communities and Africa in general, have engaged in informal negotiation and mediation since time immemorial in the management of conflicts. Mediation as practised by traditional African communities was informal, flexible, voluntary and expeditious and it aimed at fostering relationships and peaceful coexistence.

Effective application of traditional conflict resolution mechanisms in Kenya can indeed bolster access to justice for all, including those communities whose areas of living poses a challenge to accessing courts of law, and whose conflicts may pose challenges to the court in addressing them.

However, the scope of application of these traditional mechanisms, especially in the area of criminal law is not yet settled. For instance, in the case of *Republic v. Mohamed Abdow Mohamed*[90] the accused was charged with murder but pleaded not guilty. On the hearing date, the court was informed that the family of the deceased had written to the Director of Public Prosecutions (DPP) requesting to have the murder charge withdrawn on grounds of a settlement reached between the families of the accused and the deceased respectively. Subsequently, counsel for the State on behalf of the DPP made an oral application to have the matter marked as settled, contending that the parties had submitted themselves to traditional and Islamic laws which provide as avenue for reconciliation. He cited Article 159 (1) of the Constitution which allowed the courts and tribunals to be guided by alternative dispute resolution including

[90] Criminal Case No. 86 of 2011 (May, 2013), High Court at Nairobi.

reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The issues were whether a murder charge can be withdrawn on account of a settlement reached between the families of an accused and the deceased; and whether alternative dispute resolution mechanisms as espoused by the Constitution of Kenya, 2010 extended to criminal matters. It was held that under article 157 of the Constitution of Kenya, 2010, the Director of Public Prosecutions is mandated to exercise state powers of prosecution and may discontinue at any stage criminal proceedings against any person; and that the ends of justice would be met by allowing rather than disallowing the application. The Application was thus allowed and the accused person discharged.

This case has however drawn criticism and approval in equal measure and thus the legal position is far from settled.[91] The debate on the applicability of ADR mechanisms in criminal justice is a worldwide one. For instance, it has been observed that criminal justice may either be retributive or restorative. It has been argued that while retributive theory holds that the imposition of some form of pain will vindicate, most frequently deprivation of liberty and even loss of life in some cases, restorative theory argues that "what truly vindicates is acknowledgement of victims' harms and needs, combined with an active effort to encourage offenders to take responsibility, make right the wrongs, and address the causes of their behavior.".[92] Further, the conventional criminal justice system focuses upon three questions namely: What laws have been broken? Who did it? And what do they deserve? From a restorative justice perspective, it is said that an entirely different set of questions are asked: Who has been hurt? What are their needs? And whose obligations are these?[93]

The answers to the foregoing questions may have an impact on how the whole process is handled and further the decision on which one to use depends on such factors as other laws that may only provide for retributive justice in some of the criminal cases while at the same time limiting use of restorative justice. Whichever the case, what

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[91] See Bowry, P., 'High Court opens Pandora's Box on criminality', *Standard Newspaper*, Wednesday, June 12th 2013, Available at *http://www.standardmedia.co.ke/?articleID=2000085732* [Accessed on 20/03/2014]

[92] Umbreit, M.S., *et al*, 'Restorative Justice In The Twenty first Century: A Social Movement Full Of Opportunities And Pitfalls' *Marquette Law Review*, [89:251, 2005] pp. 251-304, p. 257, Available at *http://www.cehd.umn.edu/ssw/rjp/resources/rj_dialogue_resources/RJ_Principles/Marquette%20RJ%2021st%20Century%20Social%20Movement%20Full%20of%20Pitfalls%20and%20%20Opportunities.pdf* [Accessed on 21st March, 2014].

[93] *Ibid*, p. 258.

remains clear is that restorative justice in criminal matters considered serious, which may involve use of ADR more than use of litigation may have to wait a little longer.

6.5 Conclusion

Access to justice as a right is perceived in diverse ways by the persons concerned. This depends on the unique circumstances of the case and what the parties in that case really need to see addressed for them to feel satisfied. It therefore follows that one general approach to addressing these needs, like litigation only, can turn out to be very ineffective and often unsuccessful in addressing the unique needs of justice of each party. While litigation would be useful in addressing some of the needs, especially if a party was seeking retributive justice, it may fail to address the needs of a party who were more after achieving restorative justice rather retributive justice depending on the nature of the dispute in question.

The UN Secretary-General has indicated that justice is "an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Its administration involves both formal judicial and informal/customary/traditional mechanisms." Indeed, most African countries still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.

It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.[94] Another author confirms that access to justice has always been one of the fundamental pillars of many African societies. He notes that 'Igbo justice is practised in land matters, inheritance issues, socio-communal development strategies, interpersonal relationships and sundry avenues'.[95]

Courts can only handle a fraction of all the disputes that take place in society. Courts have had to deal with an overwhelming number of cases and as one author notes

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

[95] Ikenga K. E. Oraegbunam, The Principles and Practice of Justice in Traditional Igbo Jurisprudence, *African Journal Online,* p. 53, Available at *http://www.ajol.info/index.php/og/article/download/52335/40960* [Accessed on 8/03/2014]; See also generally Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), op.cit. 40-42.

'one reason the courts have become overburdened is that parties are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Again, as already discussed elsewhere justice is a multi-faceted concept that requires the satisfaction of various concerns for any process to be deemed effective. Courts cannot address some of the ingredients of justice as conceived in this section. For instance, courts will not address the real problem or allow parties to air their genuine expectations, especially when they are not legally conceivable. Courts will seek to settle the disputes by striking a balance between the conflicting interests. ADR, on the other hand, seeks to achieve more than that; some of the mechanisms seek to come up with a mutually satisfying outcome. In fact, ADR has been successfully employed in addressing matrimonial causes, inter-community conflicts, business related disputes, amongst others.

It is not enough that the right of access to justice is guaranteed both under the international and national frameworks on human rights. Making the enjoyment of these rights a reality requires the concerted efforts of all stakeholders, in reforming the existing frameworks as well as taking up new measures to facilitate the same.

As already noted litigation plays an important role in disputes management and must therefore be made available for clients. However, this should not be the only available option since it may not be very effective in facilitating realization of the right of access to justice in some other instances. The application of ADR to achieve a just and expeditious resolution of conflicts should be actively promoted since it is a very viable option for parties whose conflict's nature requires either specialized expertise or requires preservation of relationships.

Chapter Seven

Regulating ADR Practice in Kenya

7.1 Introduction

ADR and TDR mechanisms are now formally recognized in the Constitution of Kenya. Therefore, it is expected that a good number of disputes that used to end up in court will be managed using these mechanisms. Courts have a constitutional obligation to promote their utilisation whether within the formal framework, that is, court-annexed ADR, or as informal mechanisms as envisaged in the various constitutional provisions.[1] Alongside this is the fact that in the last few years, ADR practice has emerged as an area of specialisation with both lawyers and non-lawyers acting as ADR practitioners.

This section grapples with the question as to whether or not ADR and TDR practice should formally be regulated. It examines various arguments by writers and practitioners who believe that ADR, just like lawyers in the court process, should be regulated by an overall body. On the other hand, there are those who believe that ADR practice should be left within the ambit of private regulation by private bodies. This debate is far from being finalised and the author herein explores a number of issues.

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

7.2 To Regulate or Not To Regulate?

Regulation of ADR is a subject wrought with contentious discourse. There are those who strongly advocate for ADR to be deregulated, while others argue for strong state regulation. On one end, the legislation of ADR carries with it the advantages of encouraging its adoption nationally; establishing standards of ADR practitioner's

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[1] See Art. 60, 67, 159 of the Constitution of Kenya.

competence; developing systems of compliance and complaints; [2] addressing weaknesses of ADR such as ensuring the fairness of the procedure and building capacity and coherence of the ADR field. Proponents of regulation have argued that regulation of ADR will increase the use and demand of services and create or enhance an ADR "market".[3]

There are those who believe that the regulation of ADR may have its value in assuring that the parties employ qualified, neutral and skilled mediators and arbitrators in resolving a wide variety of disputes.[4] However, this is countered by the argument that in mediation where the parties select private non-government mediators, monitoring is complimented by the fact that the parties share in the compensation of such neutrals, better assuring their freedom from bias.[5]

This assertion may be relevant to Kenya considering that private mediators are also appointed and compensated the same way. It is therefore possible to argue that the mediator may be compelled by this fact to act fairly. Contention would, however, arise where there are allegations of corruption. It is not clear, at least in Kenya, how the parties would deal with the same. This is because, unlike in arbitration where parties may seek court's intervention in setting aside the otherwise binding arbitral award, mediation award is non-binding and wholly relies on the goodwill of the parties to respect the same. Therefore, faced with the risk of corruption and the potential non-acceptance of the outcome by the parties, it is arguable that the foregoing argument of the compensation being a sufficient incentive may not be satisfactory. This may, arguably call for better mechanisms of safeguarding the parties' interests. In arbitration, the argument advanced is that whether of interests or rights disputes, the

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

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

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

[5] *Ibid*.

same process of joint selection and joint funding coupled with mutual selection of neutral from a tried and experienced cadre of professional arbitrators further assures their independence and neutrality, with protection of their integrity as their only ticket to future designations.[6] Again, the issue of independent practitioners would arise. For instance, in Kenya, there has been increased number of professionals taking up ADR. Professional bodies and higher institutions of learning have increased their rate of teaching ADR, as professional course and academic course respectively.

The net effect of this will be increased number of ADR practitioners in the country. As part of professional development, not all of those who get the academic qualifications may enroll with the local institutions for certification as practitioners. There are also those who may obtain foreign qualifications and later seek such certification. However, there are those who are not affiliated to any institution or body. In such instances, it would only be hoped that they would conduct themselves in a professional manner, bearing in mind that any misconduct or unfair conduct may lead to setting aside of the award or even removal as an arbitrator by the High Court. The court process obviously comes with extra costs and it would probably have been more effective to have a supervisory body or institution to report the unscrupulous practitioner for action, without necessarily involving the court. Such instances may thus justify the need for formal regulation, especially for the more formal mechanisms.

Currently, there are attempts to make referral to ADR mandatory in Kenya. This is especially evidenced by the recently gazetted *Mediation (Pilot Project) Rules, 2015,* which provide that every civil action instituted in court after commencement of these Rules, must be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable and may be referred to mediation.[7] Thus, there is no choice as to whether one may submit the matters voluntarily or otherwise. While this may promote the use of mediation where the parties are generally satisfied with the outcome, the opposite may also be true. Caution ought to be exercised in balancing the need for facilitating expeditious access to justice through ADR and retaining the positive aspects of the processes. For instance, in other jurisdictions where there is provision for mandatory promotion of ADR processes, the use of those processes has

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[6] *Ibid*.

[7] *Mediation (Pilot Project) Rules, 2015*, Rule 4(1).

not necessarily become common.[8] Among the reasons given for this reluctance towards the adoption of ADR include lack of education and training in the field, lack of court-connected programs, whether voluntary or mandated and not enough legislation.[9] The argument is thus made that when introducing ADR for the first time, there may be a need for some element of compulsion or legislative control, as this can support its growth.[10] This is the path that the Kenyan Judiciary has taken. The Judiciary mediation programme is on a trial basis and the outcome will inform future framework or direction. The pilot program will define how the practitioners as well as the general public perceive court-annexed mediation and ADR in general. It is therefore important that the concerned drivers of this project use the opportunity to promote educational programming, with the efforts including workshops and seminars among the local practicing lawyers to inform them about ADR and the services provided by the pilot centre.[11] This, it is argued, may enable them to assist their clients in making informed decisions about whether or not to use ADR.[12]

On the other end, it has been argued that legislative regulation, no matter how well meaning, inevitably limits and restrains.[13] The regulation of ADR is feared to hamper its advantages.[14] The developing country's experience with court-annexed ADR indicates that when a judge imposes a conciliator or mediator on the parties, it

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

[9] *Ibid*.

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

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

[12] *Ibid*, p. 414.

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

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

does not provide the proper incentive for the parties to be candid about the case.[15] ADR advantages such as low cost, procedural flexibility, enhanced access for marginalized groups and a predictable forum for conflict management tend to disappear when there is discretionary power with court personnel, procedural formalities within the ADR process or an artificial limit to competition within the ADR market.[16]

Court mandated mediation has been argued to negate the fundamental aspects of voluntariness and party control that distinguish it from litigation, the very aspects attributed to its success in a vast number of cases.[17] In addition, the "one size fits all" approach taken by legislation that encourages or requires all to use ADR, without regard to needs in various contexts and to the distinctions among the various processes, is another reason why ADR legislation should be undertaken with caution.[18] For instance, in the Kenyan situation, while the *Mediation (Pilot Project) Rules, 2015* requires screening of civil matters for possible submission for mediation, it is possible for the Registrar to realise that some of the cases may be appropriate for arbitration instead of mediation. The programme only takes care of mediation process with no reference to arbitration or any other process, well, apart from litigation. The question that would, therefore, arise is whether the Registrar has powers to force parties into arbitration as well. Further, if they have such powers, the next question would be who would pay for the process, bearing in mind that it is potentially cost-effective but may be expensive as well. On the other hand, if the Registrar lacks such powers, it is also a question worth addressing what the Court would do if it ordered the parties to resort to arbitration but both parties fail to do so due to such factors as costs.

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

[16] *Ibid*.

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

[18] See Syme, D. & Bryson, D., 'A Framework for ADR Standards: Questions and Answers on NADRAC's Report,' *op cit.*

It is, therefore, worth considering whether the Mediation Accreditation Committee, established under the Civil Procedure Act[19], should be have its mandate expanded to deal with all processes, or whether there should be set up another body to deal with the other processes.

7.3 A Case for a Multi-Layered Approach

It has been argued that 'deregulation' does not in fact refer to the absolute lack of regulation, but rather the lack or removal of one particular type of regulation which is legislation. In real sense, deregulation or market regulation is regulated by market forces, in which competition results in private regulation or self-regulation.[20]

According to some proponents, the benefits of industry self-regulation are apparent: speed, flexibility, sensitivity to market circumstances and lower costs.[21] It is argued that because standard setting and identification of breaches are the responsibility of practitioners with detailed knowledge of the industry, this will arguably lead to more practicable standards, more effectively policed.[22] Yet, in practice, say critics, self-regulation often fails to fulfill its theoretical promise, more commonly serving the industry rather than the public interest.[23] Self-regulation refers to the mechanisms used by companies or organisations, both individually and in conjunction with others, to raise and maintain standards of corporate conduct.[24]

Contemporary best practice models recommend a combination of private and public mechanisms with a high level of responsiveness to needs, interests and change

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[19] S. 59A, S.59B, Cap 21, Laws of Kenya.

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

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

[22] *Ibid*.

[23] *Ibid*.

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

in regulated markets. Experts further suggest that reflexive and responsive processes –often associated with self-regulatory approaches and even formal framework approaches – encourage performance beyond compliance.[25] It has been argued that participation in ADR should be compulsory only where there is appropriate assessment of whether the dispute is suitable to be referred to ADR and where appropriate professional standards are maintained and enforced.[26] Currently, the main practice in Kenya is that majority of ADR practitioners are regulated by their respective accrediting professional bodies. While there exists institutional rules for the various institutions in the country, statutory law, such as Arbitration Act, 1995, has provisions that are meant to regulate some of the critical issues such as confidentiality, ethics and enforceability of awards or outcomes of ADR mechanisms. It is, however, important to point out that while the court plays a significant in upholding professional ethics of ADR practitioners, especially mediators and arbitrators, the same is limited in effectiveness. This is because the statutory provision on the court's power to remove an arbitrator on grounds of misconduct is vague on what exactly entails misconduct. This is where institutional rules or statutory regulations would come in handy to clearly spell out the code of ethics. For the practitioners that are affiliated to institutions, reference can be made to the institutional rules. A challenge arises when the ADR practitioners in questions are independent practitioners. This may therefore require a multi-layered approach to regulation, where we should have private regulation coupled with statutory regulation to ensure that there are no gaps.

7.4 Processes or type of ADR

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

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

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

Section 159(2) (c) of the Constitution of Kenya makes mention of reconciliation, mediation, arbitration and traditional justice systems.[27] The Civil Procedure Act, which provides for court-mandated mediation, defines mediation as 'an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto.'[28] Notably, the Mediation (Pilot Project) Rules, 2015 also adopts this definition.[29]

The Act also provides for the referral of matters to other alternative dispute resolution mechanisms where the parties decides or the court sees it suitable,[30] only making reference to arbitration in a separate section.[31] It conspicuously does not define ADR, nor does it give the list of mechanisms which would fall under its umbrella. Although, this broad provision covers under it a number of terms, policy makers would do well to actually set out these mechanisms, as this is the foundation of the regulation of ADR such as setting standards for ADR practitioners.

Using consistent terms serves important functions.[32] First, it ensures those who use, or are referred to, conflict management services receive consistent and accurate information and have realistic and accurate expectations about the processes they are undertaking. This will enhance their confidence in, and acceptance of, conflict management services. Secondly, it helps courts and other referrers to match processes to specific disputes and different parties. Better matching improves outcomes from these processes. Thirdly, it helps service providers and practitioners to develop consistent and comparable standards. Such understanding also underpins contractual obligations and the effective handling of complaints about conflict management services. Fourthly, it provides a basis for policy and program development, data

[27] Constitution of Kenya, 2010, S. 159(2) (c).

[28] Civil Procedure Act, Chapter 21, S. 59B &D & S. 2.

[29] Rule 3, Mediation (Pilot Project) Rules, 2015.

[30] *Ibid*, S. 59C.

[31] *Ibid*, S. 59.

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

collection and evaluation. The flipside to outlining an exhaustive list would however be that some of the TDR mechanisms that the policy makers would be unaware of risk being left out and consequently be undermined.

It is important to also be aware of the diverse contexts in which ADR is used. Thus, definition or outlining an exhaustive list may impede access to justice through locking out some useful yet unlisted mechanisms. National Alternative Dispute Resolution Advisory Council (NADRAC), advocates for the 'description' of terms as opposed to their definition, as this sets out the contexts in which such terms are used as opposed to their essential features.[33] This may be useful in contemplating every possible ADR and TDR mechanism as recognised settings. It is imperative to point out that the Constitution of Kenya recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.[34] Further, it requires the State to, inter alia, promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage.[35]

In traditional settings, some of the conflict management mechanisms could be classified as forms of cultural expressions. For instance, the mechanisms they used include, kinship systems, joking relations, third party approach, consensus approach, *riika* (age-sets) social groups, women/men elders and blood brotherhood.[36] Caution should, therefore, be exercised while approaching the issue of definition to ensure that such mechanisms are given a chance. Courts ought to appreciate the fact that culture has a role to play in conflict management. Indeed, the 2010 Constitution of Kenya recognises culture as the foundation of the nation and as cumulative civilisation of the Kenyan people and nation.[37] Further, one of the principles of land policy is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.[38] It is therefore imperative that

[33] *Ibid*.

[34] Art. 11(1).

[35] Art. 11(2).

[36] See Muigua, K., *Resolving Conflicts through Mediation in Kenya, op. cit.*, pp. 30-37.

[37] Art. 11.

[38] Art. 60 (1) (g).

in matters that affect a whole community or even individuals, but with a bearing on cultural factors, courts should take into consideration such factors.

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

7.5 Referral of disputes to ADR

Law makers need to decide which method of ADR referral should be employed. Referral may be compulsory by a court or voluntary, where parties are at will to decide whether to submit their dispute to an ADR forum. It may also be mandatory or at the discretion of the referrer, as contemplated in the Mediation (Pilot Project) Rules, 2015. The Civil Procedure Act provides for discretionary compulsory referral as well as voluntary referral.[39]

Where there is compulsory participation, it is important that there be established professional standards for the process as well as for the practitioners, to ensure a quality process and a quality outcome. These processes also need to be described so as effectively promote public confidence.

It is noteworthy that one of the main reasons why most of the ADR mechanisms are popular and preferred to litigation are their relative party autonomy which makes parties gain and retain control over the process and the outcome. It is therefore important for the court to ensure that there is no foreseeable factor that may interfere with this autonomy as it may defeat the main purpose of engaging in these processes.

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

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

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

7.6 Obligations of parties to participate in ADR

Compulsory participation in ADR is highly opposed by those in favour of voluntary participation in ADR who argue that conciliation or mediation is essentially a consensual process that requires the co-operation and consent of the parties.[40] On the other hand, those who argue in favour of compulsory participation in ADR respond that if the dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, then even the most fundamental resistance to compromise can turn to co-operation and consent.[41]

The element of 'good faith' which is usually present in voluntary ADR is not assured in compulsory ADR, leading states and courts to give rules requiring parties to participate in ADR in good faith or 'in a meaningful manner.'[42] Courts also sanction parties for violations of a good-faith-participation requirement such as for failing to attend or participate in an ADR process or engaging in a pattern of obstructive, abusive, or dilatory tactics.[43] Sanctions include the shifting of costs and attorney's fees, contempt, denial of trial de novo, and even dismissal of the lawsuit.[44] Law makers should thus have regard to what conduct constitutes good conduct, a system of handling claims of bad faith, maintenance of the confidentiality of the process even as such case of bad faith is before the court and the effects of non-compliance with the good faith participation requirement.[45]

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

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

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

[43] English, R.P., 'Annotation, Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in Mediation' op cit.

[44] *Ibid*.

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

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

7.7 Standards and Accreditation of ADR practitioners

It has been argued that development of standards of practitioners will ensure much greater accountability of practitioners. Sociologists argue that professionals perform better "on stage" (in public) than they do "off stage" (in private) and this has consequences for issues of integrity in arbitration.[46] It is argued that documented standards would also provide a source of information to enable consumers to know what to expect of an ADR practitioner, a basis for choosing a particular type of ADR, and an 'industry norm' against which to measure the performance of the practitioner.[47] They would also improve the public awareness of ADR.

These standards may be provided by either professional groups or by the government. The standards of conduct of individual professional groups are still the primary source of regulation in most states. Codes of professional conduct tailored to mediation and ADR have been issued by various professional organizations.[48]

It is argued that as governments are increasingly legislating to require parties to attend ADR, such as in the litigation context, they need to be accountable for the competence of practitioners performing these services.[49] Legislative instruments that provide for compulsory submission of a dispute to ADR should thus also provide minimum standards of conduct for the practitioners. The provision of standards will

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

[47] National ADR Advisory Council (NADRAC), 'The Development of Standards for ADR: Discussion Paper' (March, 2000).

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

[49] See English, R.P., 'Annotation, Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in Mediation' op cit.

also go towards boosting the public's confidence in ADR, as parties need to have confidence that the quality of the ADR service will meet the standards of professionalism. Knowledge of how the practitioner's standards are met through training and accreditation, as well as a complaints mechanism will also boost public awareness and public confidence.[50]

Standards may, however, in detailing the structure of ADR, restrain creative ways of solving disputes, and with ADR being applicable in a variety of contexts, standards may not be applicable in all the available contexts.[51] Standards should be formulated with the objective of ensuring a fair ADR process, protecting the consumer, establishing public confidence and building capacity in the field. Issues to consider when setting out the duties and standards of ADR practitioners include: how the practitioner is to be selected, the role of the practitioner, impartiality, conflicts of interest, competence, confidentiality, the quality of the process, the termination of the ADR process, recording settlement, publicity, advertising and fees.[52]

It has been suggested that rather than establishing a single body to accredit each mediator individually, a system is required to accredit organisations which in turn accredit mediators. In order for these organisations to be approved, they would need to develop common standards for initial assessment, as well as ongoing monitoring, review and disciplinary processes for mediator.[53]

The downside to this kind of approach would be the risk of locking out those who acquire their skills and expertise outside this jurisdiction as it would not be clear

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[50] See Leon, J.A.R, 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model', Journal of Dispute Resolution, (2005), p. 50; see also Deane, P., et al, 'Making Mediation Mainstream: A User/Customer Perspective,' (International Mediation Institute, 2010). Available at *https://imimediation.org/private/downloads/A_W2d3vlh6edvLHjbTa0Kw/making-mediation-mainstream-1-article.pdf* [Accessed on 10/12/2015]; De Palo, G., et al, ''Rebooting' The Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU,' (European Union, 2014).

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

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

[53] *Ibid*, p. 62.

if they would need to compulsorily become members of local organisations for accreditation. For mediation, there is already in place Mediation Accreditation Committee but for the other mechanisms it is not clear how such an approach would be implemented as there exists no body at the moment. This also risks leaving out the informal experts who may be lacking in the required 'professional' qualifications to qualify to join such bodies. This requires careful consideration by the concerned stakeholders.

7.8 Confidentiality of communications made during ADR and Inadmissibility of Evidence

Confidentiality is central to ADR as it allow parties to freely engage in candid, informal discussions of their interests to reach the best possible settlement of their dispute.[54] The parties to the dispute and the neutral third party have a duty to maintain such confidentiality, with the neutral being held to a higher standard of non-disclosure. The neutral has a duty not to disclose to a third party, as well as not to disclose to the other party what has been told to him by a party in private. The question that law makers should consider is whether confidentiality should be mandated by statute, and what sanctions will be employed when breach occurs.[55] They should also consider the circumstances under which an exception to confidentiality lies.[56]

Limitations of confidentiality arise in a variety of instances: by consent of the parties; where mandated by law; where a crime is committed or a threat is made to commit such crime.[57]

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

[55] Leon, J.A.R, 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model', Journal of Dispute Resolution, (2005), p. 73.

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

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

7.9 Confidentiality Issues

Inadmissibility is intertwined with the issue of confidentiality of communications during ADR. This is an approach taken to protect the confidentiality of the ADR process, by statutory provision that evidence of matters in an ADR proceeding is inadmissible in later court proceedings.[58] This issue also includes the compellability of ADR practitioners to give witness before a subsequent court proceeding.[59] The mediation (Pilot Project) Rules, 2015 also recognises the importance of this and provides that all communication during mediation including the mediator's notes are to be deemed to be confidential and shall not be admissible in evidence in any current or subsequent litigation or proceedings.[60]

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

7.10 Conclusion

The Government policy is to encourage ADR to foster a more conciliatory approach to conflict management. It can also be important that parties have a choice to use an effective ADR process.[61] This overcomes the risk that parties will fail to suggest ADR from fear they will appear weak to the other party.[62] However, there are limitations to the use of formal law in regulating ADR. ADR is practiced in diverse contexts and a single law is unlikely to be able to address all these areas. This explains

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

[59] *Ibid*, p. 64.

[60] Rule 12(1).

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

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

the widespread use of sector-specific legislation in other jurisdictions, which have deliberately chosen not to enact comprehensive general national ADR legislation.[63]

The inadequacy of the common law to govern ADR in Kenya is plain. It has been rightly observed that the objective of dispute resolution in many non-Western traditions typically is not the ascertainment of legal rights and the allocation of blame and entitlement, as it is in the West; the objective is a resolution, and hopefully a reconciliation, whatever the result.[64] The western concept of contract implies rights and obligations, whereas ADR and TDR have the object of preserving the relationship of the parties, and are thus inconsistent. Furthermore, TDR is practiced in the context of society while contract law is based on an individualistic western culture, which does not uphold the same values. Parties engaging in TDR are unlikely to have fulfilled the elements compounding a contract, such as offer, acceptance, consideration etc. There is thus a need for legislative governance of these informal systems.

Policy-makers should recognise the desirability of enabling diversity, flexibility and dynamism in conflict management practices and processes. They should also have in mind that ADR processes cannot be viewed in isolation. Party autonomy allows the parties to craft a hybrid process, linking different techniques and processes to meet their contextual need. They thus need to be viewed in the larger ADR context.[65] In drafting legislation, provision should thus be made for parties to retain some autonomy.

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

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

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

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

Chapter Eight

The Lawyer as a Negotiator, Mediator and Peacemaker

8.1 Introduction

With the promulgation of the current Constitution of Kenya 2010, there has been a renewed push for mainstreaming and use of Alternative Dispute Resolution Mechanisms (ADR) in conflict management in the country. This presents both a challenge and an opportunity for today's lawyer to get involved in the ADR processes as a matter of necessity. Courts have moved more towards compulsory referral of matters to ADR as a legal requirement[1] and this practice requires that if the lawyer is to remain as an all-round conflict management expert, then they must be willing to venture into the ADR arena.

As promoters of a peaceful and just society, lawyers can play a major role in facilitating negotiation and mediation as tools of conflict management in the country for peace building and development. Through peace building, lawyers can go a long way in tackling injustice in non-violent ways and to transform the structural conditions that generate deadly conflict, and ultimately help in not only eradicating conflicts, but also in building communities, institutions, policies, and relationships that are better able to sustain peace and justice. The end result would be development and security for all. It is noteworthy that some of the internal human conflicts that are often experienced in parts of Kenya can be addressed through ADR and specifically negotiation and mediation as opposed to litigation as attested to by the Kofi Annan-led 2008 mediation process.[2]

This section focuses on how best the lawyers can participate in negotiation and mediation processes with a view to promoting a peaceful and just society for prosperity. Arguably, successful and comprehensive peace building requires the consolidation of internal and external security, the strengthening of political

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[1] Civil Procedure Act, Cap 21, Laws of Kenya- See Order 46, r. 20; S. 59B.

[2] ReliefWeb, 'Kenya: Mediation is making progress - Kofi Annan,' *Report from Government of Kenya*, 15 Feb 2008, available at *http://reliefweb.int/report/kenya/kenya-mediation-making-progress-kofi-annan* [Accessed on 1/08/2015]; See also G. Machel & B. Mkapa, *Back from the Brink: the 2008 mediation process and reforms in Kenya*, (African Union Commission, 2014).

institutions and good governance, promotion of economic, social rehabilitation, as well as transformation and development.[3] Going by the nature of their job, lawyers have a duty to contribute to the general stability and social development of a society through effective conflict management.

8.2 Lawyers and Society

Lawyers are viewed as social engineers, and as such, a lawyer's workspace is expected to extend beyond the courtroom or law office and into the wider society.[4]Law and lawyers form a very important part of the society, due to the role they play in shaping the human society.[5] It has been argued that law is not an abstract concept but a product of the internal conflicts in a society, created to ensure harmony and co-existence. As such, lawyers who are part of that society are expected to possess and demonstrate knowledge, skills and compassion and be rich enough to encompass the societal dynamics including economics, counseling, negotiations and management.[6] It is important to point out that development is not feasible in a conflict situation and such conflicts and disputes must be managed effectively and expeditiously for development to take place.[7] The effects that these conflicts have on society, the economy and development are severe.[8] Therefore, lawyers play the critical role of

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[3] Mulu, F.K., *International Peace: The Nexus between Security and Development,* (Catholic University of Eastern Africa Press, 2014). p.8.

[4] Uzoechina, L. O., 'Appropriate Dispute Resolution: The Search for Viable Alternatives to Litigation and Arbitration in Nigeria,' (Scribd, 2009), available at *http://www.scribd.com/doc/24492949/Appropriate-Dispute-Resolution* [Accessed on 1/08/2015].

[5] Clark, R.C., 'Why So Many Lawyers? Are They Good or Bad?' *Fordham Law Review*, Vol. 61, Issue 2, 1992, p.277.

[6] Weda, A.O., *The Ideal Lawyer*, (Law Africa Publishing (K) Ltd, 2014), p.21.

[7] See Muigua. K. & Kariuki, F., 'ADR, Access to Justice and Development in Kenya,' *Strathmore Law Journal,* Vol. 1, No.1, June 2015, pp. 1-21, p. 1.

[8] Loode, S., *et al*, 'Conflict Management Processes for Land-related conflict,' (Pacific Islands Forum Secretariat, Fiji, 2009), p.12, available at *http://espace.library.uq.edu.au/view/UQ:196546* [Accessed on 1/08/2015].

upholding law and order in the society, in collaboration with other stakeholders, for holistic development in Kenyan society.

The foregoing expectations from clients imply that clients expect lawyers to possess more than legal skills; they expect lawyers to be problem-solvers, regardless of the nature of the problem, provided it has what they consider to be legal aspects however remote.[9] However, this is not always the case with lawyers. This is partly occasioned by the reality that the core of legal education is mainly legal analysis through the case method. The case method teaches problem solving by asking, in one situation after another, about rights and liabilities of the parties.[10] It relies on a given set of facts and precedents, to determine rights and liabilities of the parties, and although this provides the essential foundation for the lawyer's core task of advising clients about the legal consequences of particular courses of action, it does not take proper consideration of situations where the expected end game is not only determination of rights and liabilities of the parties, but also restoration or *preservation of relations, be they social or commercial in nature* (emphasis added). Law schools often leave out other useful skills that are needed for dealing with problems arising in the today's dynamic world.

As an opinion leader and peacebuilder in society, it is important that the contemporary lawyer in Kenya broadens their areas of practice and expertise to include out of court conflict management mechanisms and specifically, negotiation and mediation. These mechanisms can go a long way in enhancing lawyers' effectiveness as problem solvers in society. However, there are certain skills that any lawyer who wishes to engage in negotiation and mediation must acquire to enable them effectively participate in the process.

8.3 Lawyers in the Negotiation Process

Negotiation is one of the informal methods of conflict resolution, and one that offers the parties maximum control over the process.[11]It has also been described as a

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[9] Clark, R.C., 'Why So Many Lawyers? Are They Good or Bad?' *op cit*, p.277.

[10] Brest, P., 'The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers,' *Law and Contemporary Problems,* Vol. 58, Summer 1995, pp. 5-17, p.7.

[11] See Animashaun, O. & Odeku, K. O., 'Industrial Conflict Resolution using Court-connected Alternative Dispute Resolution,' *Mediterranean Journal of Social Sciences*, Vol. 5, No 16, July 2014, pp. 683-691, p. 685.

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.[12]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.[13]

It has been observed that negotiations take place when both parties to a conflict lose faith in their chances of winning and see an opportunity for cutting losses and achieving satisfaction through accommodation.[14] Despite the popular and often misleading perception that negotiation which is classified as part of ADR is alternative to litigation, lawyers spend more time on settlement discussions than on research or on trials and appeals.[15] It is noteworthy that legal negotiation is conducted by agents (lawyer), rather than the principal (the client).[16] Arguably, this therefore places negotiation in a central point in the conflict management efforts and especially with regard to litigation process. In negotiation, the two parties directly and voluntarily exchange information back and forth, until the decision-maker makes his final decision.[17]

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[12] United Nations Institute of Training and Research (UNITAR), 'Negotiations in Debt and Financial Management,' *Document No.4*, December 1994.

[13] Fisher, R., *et al*, *Getting to Yes: Negotiating an Agreement without Giving In,* (3rd ed., Random House Business Books, 2012), p. 27.

[14] Mulu, F.K., *The Role of Regional Organizations in Conflict Management: IGAD and the Sudanese Civil War,* The Catholic University of Eastern Africa, 2008. p. xvii.

[15] Galanter, M., "Worlds of Deals: Using Negotiation to Teach about Legal Process," *Journal of Legal Education*,1984, 34, pp.28-276 at p. 269; See also Rubin, A.B., *A Causerie of Lawyers' Ethics in Negotiation*, 35 La. L. Rev. (1975), pp.577-578.

[16] Blumoff, R.H., "Just Negotiation," 88 *Wash. U.L. Rev.* 381 (2010-2011) at p. 381.

[17] Goltsman, M., *et al,* "Mediation, Arbitration and Negotiation," *Journal of Economic Theory* 144 (2009), pp.1397–1420 at 1398.

It has been observed that all lawyers negotiate, but few of them have either a conceptual understanding of the process or particular skills in it.[18] It is therefore suggested that if lawyers chose to specialise in negotiation, it would improve both their understanding of the process and the relevant skills.[19] There is a fundamental shift in lawyers' conduct, and especially ethical guidelines or rules when it comes to ADR. The lawyer must use different persuasive tactics when it comes to ADR as compared to the court process.[20]

It is suggested that instead of approaching negotiations as a battle with winners or losers, one can view negotiations as involving two parties, each with a problem that needs to be solved. By taking a collaborative rather than a competitive approach to negotiation, parties can attempt to find a solution satisfactory to both parties-making both sides feel like winners.[21] The outcome of a collaborative approach to negotiations is: improved relationships; a better chance of building trust and respect; self-confidence; more enjoyment; less stress; and more satisfactory results.[22] It is therefore imperative that when getting into negotiations, lawyers ought to have a mental shift from battling to win your initial position, to adopting approaches that help them genuinely look for more creative ways where a 'win-win' outcome can be achieved.[23]

8.3.1 Methods of Negotiation

There are various approaches to negotiation which include: positional negotiation; principled negotiation; and interest-based negotiation.[24]

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[18] Roger, F. "What about Negotiation as a Specialty," *A.B.A. J.*, Vol. 69, 1983, p.1221.

[19] *Ibid*.

[20] See Schmitz, S.J., 'What Should We Teach in ADR Courses? Concepts and Skills for Lawyers Representing Clients in Mediation,' *Harvard Negotiation Law Review*, Vol.6, spring 2001, p.289.

[21] French, A., Negotiating *Skills*, (Alchemy, 2003), p. viii.

[22] *Ibid*.

[23] *Ibid*.

[24] Fisher, R., *et al*, *Getting to Yes: Negotiating an Agreement without Giving In, op cit*, pp. xxvi-xxvii.

Positional bargaining is not the best form of negotiation because arguing over hardline positions produces unwise agreements, is inefficient, endangers an ongoing relationship and also leads to formation of coalition among parties whose shared interests are often more symbolic than substantive.[25]

Principled negotiation on the other hand, decides issues on their merits rather than through a haggling process focused on what each side says it will and will not do. It suggests that a negotiator should look for mutual gains whenever possible, and that where various interests conflict, negotiators are encouraged to have a result based on some fair standards independent of the will of either side.[26] Principled negotiation, which is the focus of this discussion, allows parties to obtain their fair share while still protecting them against exploitation of such fairness.[27]

Negotiation as discussed in this paper is meant to be a tool for peacebuilding. Accordingly, the aim in negotiations is to arrive at "win-win" solutions to the dispute at hand.

8.3.2 Negotiation Skills for Lawyers

a. Flexibility in Negotiation

It has been rightly observed that the most important characteristic of an effective negotiator is flexibility, that is, the ability to adapt to the situation and adopt a different approach as the circumstances demand.[28] Negotiating flexibility can also be defined as any action taken to facilitate a movement in the direction of a mutually acceptable agreement.[29] It is important for lawyers in negotiation to remember that the aim of

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[25] *Ibid*, p.23.

[26] *Ibid*.

[27] *Ibid*, p. xxvi.

[28] Raasch, J.E., 'Win-Win Negotiation Skills for Lawyers: The Art of Getting What You Both Want,' available at *http://www.cba.org/cba/PracticeLink/WWP/negotiation.aspx* [Accessed on 30/07/2015].

[29] Atiyas, N.B., 'Mediating Regional Conflicts and Negotiating Flexibility: Peace Efforts in Bosnia-Herzegovina,' *The Annals of the American Academy,* Vol.542, November 1995, pp. 185-201, at pp. 186-7.

negotiation is to look out for mutually satisfying outcomes and as such, it is important to be flexible in the process, instead of adopting hardline positions, so as to facilitate resolution.

b. People Skills

It is important to point out negotiations are always about two things, namely, people and issues. Lawyers were taught in law school to think like lawyers, and were discouraged from thinking about anything that was emotional. They were also taught skills of litigation, in drawing fine distinctions that focus on the differences between people while debating positions rather than engaging in dialogue focused on understanding each other.[30]

It is therefore important that lawyers, while engaged in negotiations, should not get carried away by issues to the extent of forgetting the people involved therein. It is essential that one develops or acquires people skills to improve the way they handle people since this, normally informs the perception parties have towards the negotiator.[31] It is important to separate people from the issues. A negotiator ought to maintain a positive and friendly attitude towards the other party while at the same time being tough about working to find a solution that satisfies both parties' needs.[32] The approach should be different from that exhibited in adversarial settings since addressing parties' personal issues such as feelings is part of the solution process.[33]

c. Listening and Questioning

Listening and questioning skills are important for a negotiator mainly because they help one to understand the issues and underlying interests and build relationships,

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[30] Wright, J.K., 'Chapter One of Lawyers as Peacemakers, Practicing Holistic, Problem-Solving Law,' (Resourceful Internet Solutions, 2010), available at *http://www.mediate.com/articles/wrightK1.cfm* [Accessed on 1/08/2015].

[31] French, A., *Negotiating Skills*, *op cit*, p.11.

[32] *Ibid*, p. 48.

[33] Fisher, R., *et al*, *Getting to Yes: Negotiating an Agreement without Giving In*, *op cit*, p.21; See also D. Carneiro, *et al*, 'The Conflict Resolution Process,' *Law, Governance and Technology Series*, Vol. 18, 2014, pp. 163-186.

as well as asking the right questions.[34] It is important to remember that if parties feel that their needs are genuinely understood and being addressed, chances of parties accepting the outcome are high, even if the same is achieved by way of reasonable compromise by parties involved. The knowledge of available options, openness and the willingness to accept a compromise are the main factors contributing to a real and voluntary agreement.[35] As such, it is important that negotiators polish their listening and questioning skills so as to understand the issues to be addressed.

d. Handling Emotions

At times, pressure builds around the negotiator to succeed in negotiation processes. It is important that one develops the skill to keep emotions in check since they can easily hamper the ability to think straight, be creative or get accurate information.[36] It is also important to handle the other party or parties well to avoid making them feel misunderstood, and in the process causing a flare up of emotions which would affect the process. Having the ability to identify the psychological dimensions of the conflict can effectively assist in concluding negotiations and reach mutually acceptable solutions.[37]

e. Building Rapport

Building rapport by the negotiators on both sides can help keep the process going, to the benefit of all parties. One should start the negotiation by establishing rapport and mutual interests, while focusing on parties' interests and not positions.[38] It is important for the negotiator to come up with creative options based on both sides' interests.[39]

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[34] French, A., *Negotiating Skills*, *op cit*, p.12.

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

[36] French, A., *Negotiating Skills*, *op cit*, p.62.

[37] Muigua, K., *Resolving Conflicts through Mediation in Kenya*, *op cit,* pp. 110-111.

[38] French, A., *Negotiating Skills*, *op cit*, p. 49.

[39] *Ibid*, p. 50.

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.[40]

8.4 Lawyers and the Mediation Process

As already noted, mediation applies to different fields, with some common elements and some differences for each of its specialties. However, its main fields of application are business/commerce, environmental disputes, family disputes and minor forms found in other fields. Indeed, it is noteworthy that mediation has been made the *primary* conflict management process in family law in Australia and is increasingly being promoted in other legal contexts.[41]

Mediation is a useful and effective tool to resolve current conflicts and prevent future disputes. Mediation has a number of distinct advantages and unlike litigation, there are only parties in mediation and not adversaries. Mediation is associated with the bonus feature of providing speedy resolution of conflicts at low cost while at the same time preserving relationships. It also provides empowerment as it gives all involved parties a share of responsibility for a negotiation and develops in them the ability to make an independent contribution to a dispute's solution. In addition, mediation can open a dialogue between parties and also identify alternative solutions towards a win for all parties.[42]

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[40] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, *op cit*, pp. 115-116; See also Riskin, L.L., 'Mediation and Lawyers,' *Ohio State Law Journal*, Vol. 43, 1982, pp. 29-60 at pp. 35-36.

[41] D. Bagshaw, "Mediation, human rights and peace building in the Asia-Pacific," p. 195 in R.G., Garbutt (ed.), *Activating Human Rights and Peace: Universal Responsibility Conference 2008 Conference Proceedings*, *Byron Bay, NSW, 1-4 July, 2008*, (Centre for Peace and Social Justice, Southern Cross University, Lismore, NSW, 2008).

[42] UNESCO-IHP, 'Alternative Dispute Resolution Approaches and Their Application in Water Management: A Focus On Negotiation, Mediation And Consensus Building,' available at *http://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_background_paper.pdf* [Accessed on 30/07/2015]; See also Considine, M., 'Beyond Winning: Unlocking Entrenched Conflict Using Principles and Practices of Negotiation in the Mediation Room,' p.12, available at *http://eprints.maynoothuniversity.ie/5840/1/M.Considine_Final_14th_Feb.pdf* [Accessed on 30/07/2015].

In relation to litigation, mediation is usually faster, more cost-effective, private and confidential, and it gives participants the chance to create their own agreement since the outcome is entirely dependent on the parties' concessions. Mediation also creates the appropriate environment to address the conflict and this may also result in an understanding on how to deal with similar issues should they arise in future.[43]

The foregoing advantages however, do not mean that mediation has no demerits. Its success lies on the willingness of the parties to make the necessary concessions.[44] Secondly, mediation can only be as effective as the parties wish it to be and this is governed by their immediate situation.[45]

It is also non-binding in nature and parties have sometimes used it merely as a delaying technique in the negotiation process or to obtain more information about the other party's case.[46]

It has been observed that given the flexible nature of mediation as a conflict resolution mechanism, it is the attitude adopted towards it in a legal system that determines the roles lawyers play in mediation and their effectiveness in the same.[47] It is important to point out that the term 'lawyer' is used in this discussion in its broader term to mean anyone whose profession is about the law (law professors, attorneys,

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[43] UNESCO-IHP, 'Alternative Dispute Resolution Approaches and Their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building,' *op cit,* p.12.

[44] Merrills, J.G., *International Dispute Settlement,* (Cambridge University Press, 1991), p. 39.

[45] Yahaya, S., 'Is Mediation a Viable Option for resolving International Disputes?' (University of Dundee, Centre Energy, petroleum and Mineral Law and Policy), p.16, available at *www.dundee.ac.uk/cepmlp/gateway/files*. [Accessed on 30/06/2015].

[46] See Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict*, 2nd ed., (San Francisco: Jossey-Bass Publishers, 1996); See also Ravdin, L. J., 'Coping with the Difficult Lawyer in Settlement Negotiations,' *The Complete Lawyer*, Vol. 13, No. 2, Spring 1996.

[47] Shamir, Y., 'Alternative Dispute Resolution Approaches and Their Application,' (Israel Center for Negotiation and Mediation, 2003), p.33, available at *http://webworld.unesco.org/water/wwap/pccp/cd/pdf/negotiation_mediation_facilitation/alternative_dispute_resolution_approaches.pdf* [Accessed on 2/07/2015]; Ooi, C. SS, 'The Role of Lawyers in Mediation: What the Future Holds,' *The Malaysian Bar*, August, 2005, available at *http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=1757* [Accessed on 2/07/2015].

notaries, legal officers, non-practicing members of the legal profession, judges, amongst others) as opposed to only advocates who are lawyers admitted to the bar and entitled to and represent persons in courts of law.

Arguably, involvement of lawyers in the process can help surmount the limitations highlighted above. However, this calls for the lawyers to understand the difference between mediation and adversarial advocacy. The lawyers also have to be committed to deliver client satisfaction without allowing themselves to be used unprofessionally by the clients.[48] That way, the lawyers can gauge their client's objectives in mediation and judge whether the same are sustainable. The lawyers stand to give advice to their clients on their case and what they can gain if they utilize mediation so that the client does not enter mediation under the illusion that there is a boon awaiting them. Lastly, the lawyers can help in reducing the final product of mediation into a binding instrument and therefore ensure the whole process is not rendered futile.[49]

The question that arises therefore is: Considering the general perception that mediation and other ADR methods are still viewed as alternatives to law and lawyers, how come the presence of lawyers in mediation is still inevitable? Invariably, lawyers end up at the mediation table for a number of reasons.

To begin with, disputes usually come with lawyers involved. It may happen that an advocate is already on record if the dispute has reached the litigation arena. Further, if the mediation is triggered by a contractual clause mandating mediation as a precondition to the filing of lawsuit, the lawyer is usually already part of the remedial process. In fact, the real world scenario is that many, if not most, mediations are initiated by lawyers. After an assessment of the client's case, and in particular the relationship of the parties, the lawyer may advise the client to take the advantages offered by mediation. This is especially so where the case has slim chances of success and the other side is willing to mediate.[50]

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[48] Meadow, C. M., 'Pursuing Settlement in an Adversary Culture: a Tale of Innovation Co-opted or the Law of ADR,' *Fla. St. UL Rev.,* Vol.19, 1991, p.1.

[49] See Cockburn, T. & Shirley, M., 'Setting Aside Agreements Reached at Court-Annexed Mediation: Procedural Grounds and the Role of Unconscionability,' *Western Australian Law Review*, Vol.31, February, 2003, pp. 70-86.

[50] See Breger, M.J., 'Should an Attorney be required to Advise Client of ADR Options?' *Geo. J. Legal Ethics*, Vol.13, 2000, p. 427.

Secondly, lawyers understand the risks involved better. Often, a client may not fully appreciate what is at stake should he/she lose a claim or defence. However, lawyers are well versed with court matters and taxation of cases. The lawyer also understands better what the impact of a failed effort to compromise might be. Importantly, the clients understand that lawyers have superior knowledge of the matter at hand and are willing to take their counsel.[51]

Thus, lawyers invariably find themselves advising clients before and during mediation process on what interests to secure protection for and the positions to take. In mediation also, every party is in theory entitled to the partisan advocacy of his or her lawyer. The lawyer knows that in many instances, the strength of the client's case and likelihood of prevailing is offset by the costs and uncertainties of a trial. By bringing in the experienced mediator, the lawyer is providing the client a valuable reality check by an impartial third person without appearing to be foregoing his or her duty to represent that client and be their advocate.[52]

Thirdly, the lawyer's role invites involvement. A lawyer can and should be an important part of the mediation process. The conscientious lawyer can influence his client to consider mediation when a dispute arises, or ideally in advance by the policy of using a mediation clause in the contracting documents of each transaction.[53] The lawyer can retain the posture of an advocate for his client, while letting the mediator deal with the development of issues of compromise. In addition, through the judicious selection of an experienced mediator, the lawyer will be saving much time and cost for their client since the parties will not have to take the time to educate a court on the issues and practices common to a particular industry or area.

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[51] See Zacharias, F.C., 'The Pre-employment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries?', *William & Mary Law Review*, Vol.49, No. 2, 2007, pp.569-641;

[52] See Benjamin, R.D., 'Considering Mediation: What Lawyers and Clients Should Know,' *ABA Journal*, Vol. 18, No.7, October/November 2001.

[53] See Benjamin, R.D., 'The Use of Mediative Strategies in Traditional Legal Practice,' *Journal of the American Academy of Matrimonial Lawyers*, Vol. 14, No. 2, 1997, pp. 203-231, p.214.

Through incorporation of mediation into the resolution process, the lawyer can reduce the stress endemic to dispute and increase the likelihood of the preservation of important relationships.[54]
Finally, lawyers can help in achieving client's satisfaction. A successful mediation usually produces a satisfied client. Even where mediation does not result in a compromise agreement it is useful and satisfying in that it usually clarifies, eliminates or consolidates the issues, and enables the parties to meet in a temperate setting for what has probably been the first direct exchange of views between them since the dispute arose.[55]

8.4.1 Making Positive impact to the mediation Process

The main question is how lawyers can enhance the mediation process. It is noteworthy that more and more lawyers in Kenya nowadays are beginning to understand and appreciate mediation. Advocates who are well informed on mediation are in a better position to transmit that understanding to their clients and to participate in preparing and coaching to take full advantage of what mediation has to offer.[56]

Lawyers can help clients make informed decisions. One of the foundational principles of mediation is informed decision-making by parties. In fact, mediation proceedings can easily stall when parties lack critical information. To participate meaningfully in the process, parties should fully understand the mediation process itself, the issues involved, options for settlement, and the alternatives that await the parties in the event that no agreement is reached. Attorneys at the table can provide their clients with the advice and information that they need to make the most of

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[54] Linda, J.R., "Lawyers and Mediation: Their Role as Consultants," 2007.Available at *http://www.familydisputesolutions.com/pdf/lawyermediation.pdf* [Accessed on 30/05/2015].

[55] See Rix, B., "The Interface of Mediation and Litigation," *Chartered Institute of Arbitrators 6th Mediation Symposium 2013* in Chartered Institute of Arbitrators, *The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 80, No. 1, February 2014, pp. 21-27 at pp. 24-25.

[56] Mosten, F.S., 'Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court,' *Family Law Quarterly*, Vol. 43, No. 3, Fall 2009, p. 489–518; Mosten, F.S., 'Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making,' *Journal Of Dispute Resolution*, Vol. 2008, No. 1, 2008, pp. 163-193.

mediation. They also assist the clients evaluate options on the table and weigh the merits of settlement proposals.[57]

Lawyers can also enhance client's participation in the mediation process. Mediators can inform mediation clients about general legal issues that need to be addressed by the parties, but they cannot give specific legal advice. As a result, clients are encouraged by mediators to seek advice of lawyers at all points in the process. A good advocate will know and understand their client's interests and can help their client communicate those interests clearly and effectively in the mediation table.[58]

In addition to the foregoing, lawyers are also useful in promoting creative problem-solving. First, as a lawyer, one is a skilled problem solver since it is part of their job. Secondly, there is the "two heads are better than one" phenomenon-an advocate and their client can arguably work together to brainstorm solutions and fine-tune options with the mediator's help.[59]They can do so through assisting settlement by reframing the issues and potential outcomes, such as by broadening them to include "non-legal" and non-monetary issues when they are important to the resolution of the dispute or by emphasizing the benefits of resolving the dispute and the costs of not settling.[60]

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[57] *Ibid*; See also Levin, D., 'Bridging the divide between lawyers and mediators, Part 3: what lawyers can do for mediators,' (Online Guide to Mediation, March, 12, 2007), available at *http://mediationblog.blogspot.co.ke/2007/03/bridging-divide-between-lawyers-and.html* [Accessed on 2/08/2015]; See also Emerson, M., 'Tips to enhance mediation and negotiation skills,' (Emerson Family Law Partner – Brisbane Mediations, 2011), available at *http://www.emfl.com.au/.../Tips%20to%20Enhance%20Mediation%20&%20N...* [Accessed on 2/08/2015].

[58] See American Bar Association, *Ethical Guidelines for Settlement Negotiations*, August 2002, p.2, available at *http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/settlementnegotiations.authcheckdam.pdf* [Accessed on 2/08/2015].

[59] See Lawrence, J.K.L., "Mediation Advocacy: Partnering With the Mediator," 2000, 15, *Ohio Journal Dispute Resolution,* 425.

[60] McEwen, C.A. & Wissler, R.L., Finding out If It Is True: Comparing Mediation and Negotiation through Research, *Journal of Dispute Resolution, Vol. 2002, Iss. 1 [2002], Art. 8*, pp. 130-142 at pp. 137-138.

Lawyers can also help in offsetting power imbalances which can easily throw mediation out of the right course. The presence of advocates at the mediation table can act as a safeguard to ensure that each party is able to make decisions free from intimidation, influence or pressure by the other. Indeed, it has been argued that a mediator is a catalytic agent whose mere presence besides anything he or she may do or say will bring about positive changes in the behaviour of the disputing parties, and that progress achieved through the mediator's presence brings about nothing more than temperate speech.[61]

Lawyers can further help their clients strategically assess their Best Alternative to a Negotiated Agreement (BATNA). It is however important to point out that "Best" may not mean "good". If the BATNA is trial, advocates know from experience that the possibility of success in court and how much time trial, with the possibility of appeal, may realistically take.[62]

Lawyers can also help in taking care of the details. After all the hard work that goes into mediation, no one wants a mediated agreement to fall apart later. A critical role that lawyers can and do play is to make sure that no details in an agreement have been left to chance and hence enhance chances of success of the settlement.[63]

To make the foregoing contribution in the mediation process, lawyers need to acquire basic skills that will enhance their role in the process. It is however noteworthy that some of the skills are natural and instinctive, but they can be enhanced or polished. It has rightly been pointed out that unless a lawyer is familiar with mediation (or any other ADR mechanism) and when it can be useful, he will not be inclined to recommend it to his clients.[64] This is important to enable them shift their approach to the process from the *rights-based training in law schools to the interest-based approach in mediation* (emphasis added).

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

[62] Fisher, R., *et al*, *Getting to Yes: Negotiating an Agreement without Giving In*, *op cit*, pp.99-108.

[63] See Rix, B., "The Interface of Mediation and Litigation," *Chartered Institute of Arbitrators 6th Mediation Symposium 2013*, *op cit*, p.27.

[64] See Riskin, L.L., 'Mediation and Lawyers,' *Ohio State Law Journal*, op cit, p. 41.

8.4.2 Mediation Skills for Lawyers

a. Active Listening Techniques

One of the principal functions of the mediator has been identified as managing the communications process. He or she must intervene carefully at the correct moments and also, they must understand interpersonal relations and negotiations. They must also be able to listen well and perceive the underlying emotional, psychological, and value orientations that may hold the keys to resolving more quantifiable issues.[65] It has been noted that nearly all mediation efforts distinguish between the functions of the lawyer and those of the mediator, even where the mediator is a lawyer.[66]

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,[67] reflecting, summarizing and validating. To be an active listener, the mediator must ensure that they do not pay attention to their own emotions; should react to ideas and not a person; must recognize own prejudices; must avoid assumptions/judgments; use non-verbal behavior to show understanding and acceptance; show empathy; rephrase/ restate/reframe key thoughts and feelings and must conduct caucuses.[68]

b. Non-Verbal Communication Techniques

A mediator needs to display in the mediation process are: maintaining frequent eye contact with the parties; body movements such as nodding and positioning; voice tone; keeping body oriented towards the speaker and showing a genuine curiosity to whatever is being said.

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[65] Riskin, L.L., 'Mediation and lawyers,' *op cit*, p.36.

[66] *Ibid*, p. 36.

[67] 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.

[68] 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.

These techniques allow the mediator to know and meet the parties' needs. They also help the to make proposals which allow both parties to save face and enter an agreement, that neither is willing to propose, and come up with creative solutions to the conflict.

c. Rapport Building

In order to establish relationships of trust and respect with the parties and their advisors, mediators need to build rapport using various ways which include: including everyone in the discussions; attentive listening; being neutral and non-judgmental; being approachable, open, honest and friendly; being harmonious in verbal and non-verbal language, amongst others.[69]

With the foregoing skills, lawyers can resourcefully participate and enhance the effectiveness of a mediation process for mutually satisfying outcomes for the parties. The development of mediation can greatly be influenced by the attitudes and involvement of the legal profession, either positively or negatively.[70]

8.5 Role of the Lawyer as a Peacemaker in Society

Peace has been described as either negative peace, that is, the absence of violence or fear of violence, or positive peace which is defined as the attitudes, institutions and structures that, when strengthened, lead to a more peaceful society.[71] The Institute for Economics and Peace, identifies eight pillars of peace which they associate with peaceful environments and are both inter-dependent and mutually reinforcing, such that improvements in one factor would tend to strengthen others and vice versa. These include: a well-functioning government; a sound business environment; an equitable distribution of resources; an acceptance of the rights of others; good relations with neighbours; free flow of information; a high level of human

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[69] Richbell, D., *Module 1: Commercial Mediation Training Handbook,* (Chartered Institute of Arbitrators, 2014), p.14.

[70] Riskin, L.L., 'Mediation and lawyers,' *op cit*, p.36.

[71] Institute for Economics and Peace, 'Pillars of Peace: Understanding the key attitudes and institutions that underpin peaceful societies,' *Global Peace Index Report*, *2014,* p.1, available at *http://economicsandpeace.org/wp-content/uploads/2015/06/Pillars-of-Peace-Report-IEP2.pdf [Accessed on 31/07/2015].*

capital; and low levels of corruption.[72] Conflict is grounded in social, structural, cultural, political and economic factors as seen from the foregoing pillars, since depreciation in one increases chances of conflict in a particular society.[73]

It has been argued that peaceful nations are better equipped through their attitudes, institutions and structures to respond to external shocks. This can be seen with internal peace correlating strongly to measures of inter-group cohesion and civic activism, which are key proxies that indicate the ability of societies to resolve internal political, economic, and cultural conflicts as well as being able to respond to external shocks.[74] The quest for a united, stable and more developed country calls for the active involvement of all parties, including lawyers. Peace is statistically associated with better business environments, higher per capita income, higher educational attainment and stronger social cohesion.[75] Better community relationships tend to encourage greater levels of peace, by discouraging the formation of tensions and reducing chances of tensions devolving into conflict.[76]

As already observed, lawyers are important in a societal setup as problem solvers. It has been observed that when a client with a problem consults a lawyer, it is because they perceive the problem to have a significant legal dimension.[77] However, since few real world problems conform to the boundaries that define and separate

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[72] *Ibid*, pp.1-2.

[73] Maiese, M., 'Social Structural Change,' in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, July 2003), available at *http://www.beyondintractability.org/essay/social-structural-changes [Accessed on 31/07/2015]; See also Maiese, M., 'Causes of Disputes and Conflicts,' in G. Burgess & H. Burgess (eds), Beyond Intractability, (Conflict Information Consortium, University of Colorado, Boulder, October, 2003),* available at *http://www.beyondintractability.org/essay/underlying-causes* [Accessed on 31/07/2015].

[74] Institute for Economics and Peace, 'Pillars of Peace: Understanding the key attitudes and institutions that underpin peaceful societies,' *op cit*, p. 5.

[75] *Ibid*, *op cit*, p. 2.

[76] *Ibid*, *op cit*, p. 6.

[77] Brest, P. & Krieger, L. H., 'New Roles: Problem Solving Lawyers as Problem Solvers,' *Temple Law Review,* Vol. 72, 1999, p.811.

different professional disciplines, it is contended, therefore, that it is only a rare client who wants his or lawyer to confine themselves strictly to "the law." Rather, most clients expect their lawyers to integrate legal considerations with other aspects of their problems to come up with solutions that are often constrained or facilitated by the law, but finding the best solution - a solution that addresses all of the client's concerns.[78]

It is noteworthy that such solutions may not always be reached through the court process; there are those situations that require alternative approaches, depending on the expected outcome. These alternative approaches may include, but not limited to alternative dispute resolution mechanisms (ADR) such as negotiation and mediation, amongst others. Indeed, it has been observed that in addition to being trained as adversaries, however, lawyers are also trained to resolve disputes. As a result, only the poor lawyer mechanically applies legal principles and in so doing fails to recognize a client's underlying interests and emotions. The prospect of mediating such interests and of bringing parties together in the process is not without foundation in the traditional practice of law.[79]

It has been argued that the essence of lawyers in society is that they create, find, interpret, adapt, apply, and enforce rules and principles that structure human relationships and interactions, that is, they "handle" the rules and norms that define rights and duties among people and organizations.[80] In other words, they are viewed as specialists in societal ordering since they engage in various activities that form aspects of normative ordering, including, legislation, administrative rule-making, private contracting and deal-making, counseling and planning, mediation, arbitration, and litigation which all involve the processing of rules and norms that structure and stabilize human relationships.[81] It is noteworthy that law should not be practiced in the abstract since the societal context is important. Lawyers have a role to play as negotiators and peacebuilders. They are opinion shapers in society and what they say matters. The many lawyers in Kenya are leaders in their counties and villages or

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[78] *Ibid*.

[79] Rich, W., 'The Role of Lawyers: Beyond Advocacy,' *BYU Law Review*, Vol. 1980, Issue 4, 1980, pp. 767-784 at p.767.

[80] Clark, R.C., 'Why So Many Lawyers? Are They Good or Bad? *op cit,* p.281.

[81] *Ibid*, p. 282.

communities where they come from. It has been observed that the leadership roles that lawyers play in society tend to bring them into situations of greater, not less, uncertainty. They need to know how to make unbiased assessments of risky situations.[82] As such, a good lawyer can assist clients in articulating their problems, defining their interests, ordering their objectives, and generating, assessing, and implementing alternative solutions.[83] This demands multifaceted problem-solving and decision-making skills, amongst other skills as highlighted elsewhere, which in turn requires a broad approach to teaching and training of lawyers.[84]

8.6 Remoulding the Lawyer

It has been observed that negotiation tends to be used when conflicts are relatively simple, of a low intensity, and when both parties are relatively equal in power while mediation, on the other hand, tends to be used in disputes characterized by high complexity, high intensity, long duration, unequal and fractionated parties, and where the willingness of the parties to settle peacefully is in doubt.[85] Both negotiation and mediation are vital ingredients to peacebuilding. Lawyers have a role to play in the processes. It is however necessary to remould their thinking and effect necessary reforms so as to enable the lawyer to participate as a negotiator, mediator and peacemaker more effectively.

8.6.1 Guaranteed Remuneration

As way of encouraging more lawyers to take up ADR practice, the *Advocates (Remuneration) (Amendment) Order*, 2014 can be reviewed so as to include provisions on charges for ADR services rendered by advocates acting as ADR practitioners. This is because, as it is now, the Order mainly provides guidelines on fees related to matters that are considered 'legal' in terms of content and the arising rights or obligations. That

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[82] Brest, P., 'The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers,' *op cit,* p.11.

[83] *Ibid,* p.9.

[84] *Ibid.*

[85] Bercovitch, J. & Jackson, R., "Negotiation or Mediation? An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict," *Negotiation Journal*, Vol. 17, Issue 1, January 2001, pp. 59–77, p.59.

is, it contemplates matters or transactions that relate to justiciable rights and obligations which can be defended through litigation, when violated. It thus leaves out services or processes carried out by lawyers, as problem solvers, with the aim of addressing human needs and desires which are more psychological than material in nature. The effect is that few lawyers engage in direct peacebuilding because, amongst other possible reasons, there is no financial incentive to do so. It needs not be emphasised that human needs and desires are some of the main issues that affect peace, stability and the general wellbeing of a society. ADR mechanisms offer the perfect opportunity to address such issues and should therefore be encouraged. Including a charging schedule for ADR services offered by practicing lawyers can assure them of income, and this perhaps would address the existing fear that promotion of ADR may deny the advocates income. Instead, this would offer the country a chance to tap into the benefits that come with the exploitation of these mechanisms. ADR practitioners would also be motivated by the guaranteed income to engage in ADR and even promote its use in the country. The outcome would be savings in cost and time and ultimately, creation of a just, secure and peaceful society for all. With internal peace and harmony guaranteed, it becomes easier to deal with external threats to the country's peace and cohesion.

8.6.2 Training in ADR

The changing practice of law means that lawyers should be dynamic in their practice of law. There is need for reconceptualization of a lawyer's job to make their formal engagement as negotiators, mediators and peacebuilders part of what they do, and charge for it. There should be a formal mechanism that provides guidelines on how lawyers can be engaged to act as negotiators, mediators and peacebuilders in resolving community conflicts.[86] Conflict resolution processes have evolved as major alternatives to the litigation or adversary system, and practice in these processes continues to increase.[87] Another focus of law practice and legal education in the twenty-first century involves creative problem solving as an evolving role for

[86] For instance, in the 2008 post-election violence in Kenya, the involvement of lawyers as peacebuilders was minimal.

[87] Kovach, K.K., "Lawyer Ethics must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards." *Idaho L. Rev*., Vol. 39, 2003, pp. 399-713.

lawyers.[88] They should be ready to embrace the non-adversarial approaches instead of traditional litigation strategies and this may include the practice of preventive law which departs from the more common litigation or court system approach and focuses primarily on counseling and regular "legal check-ups," in order to anticipate or avoid legal matters.[89] Lawyers ought to be problem solvers and peace makers, not ones obsessed with 'winning' cases.[90] In both mediation and negotiation, lawyers should reduce unrealistic expectations by their clients while maintaining the confidence of their clients to reach favourable outcomes for them.

8.6.3 Holistic Law Curriculum

Arguably, both legal education and the lawyering process could benefit from careful attention to the skills and concepts needed for effective non-adversarial conflict management.[91] There is need to change the way university law schools in Kenya train lawyers. Right from first year, they are taught how to be combative in court. Attention is not drawn to the potential that exists in the ADR arena. Lawyers are not taught that they can be boardroom negotiators dealing with millions of dollars. They are not taught to be community peacemakers. 'Legal practice' needs to be redefined and include ADR practice considering that this is now part of Kenya's legal framework.[92] It has been argued that the need for these skills can only grow as law school graduates encounter problems with increasingly complex technological, global, financial, institutional, and ethical dimensions.[93] This is important if the legal education offered

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[88] Morgan, T.D., 'The Changing Face of Legal Education: Its Impact on what it Means to Be a Lawyer,' *Akron L. Rev*., Vol. 45, 2011, p. 811.

[89] *Ibid*.

[90] See generally Meadow, C.J.M., "When Winning Isn't Everything: The Lawyer as Problem Solver," *Hofstra Law Review*: Vol. 28: Iss.4, 2000.

[91] Rich, W., 'The Role of Lawyers: Beyond Advocacy,' *op cit* p.777.

[92] The Policy, legal and institutional framework for ADR is systematically falling in place with the promulgation of the 2010 Constitution, the amendment to the Civil Procedure Rules and acceptance of ADR as an effective conflict management tool by various stakeholders.

[93] Brest, P., 'The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers,' *op cit*, p.5.

in law schools is to effectively prepare the lawyers in addressing the needs of a changing society.[94] This way, it is argued, students can develop lawyering skills in the contexts of different areas of practice, emphasizing those that fit their particular interests and career plans.[95]

Law schools can adequately prepare lawyers through equipping them with basic skills in negotiation and mediation, which will in turn help them play an active role in nation-building and peace building for a better Kenya. To give them such a voice, they should be equipped with negotiation and mediation skills right from school or college level. Arguably, as a country, we might have been able to resolve the Kenyan 2007/2008 post-election crisis faster, had we had prominent lawyers engaged in the peace process. They would have participated as peacemakers not as hawkish partisans, like everyone else. Nelson Mandela, former South Africa's President, was a lawyer and a peacebuilder and his contribution to society was not in courtroom battles and submissions. His legacy is in what he did to ensure a peaceful transition. George J. Mitchell, a former U.S. Senate majority leader and lawyer known for efforts at brokering peace in Northern Ireland and the Middle East, was described in a May 2012 statement by President of the United States, Barack Obama, as "a tireless advocate for peace."[96] Obama went on to state that "His [George's] deep commitment to resolving conflict and advancing democracy has contributed immeasurably to the goal of two states living side by side in peace and security."[97]

It has been argued that although no law school curriculum can substitute for good mentoring in a lawyer's early years of practice and for the experience of grappling with actual problems day to day, law schools can however, provide a strong foundation for the ongoing, reflective self-education that is integral to any successful professional

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[94] *Ibid*.

[95] *Ibid*, p.6.

[96] McNeill, B., 'Former U.S. Sen. George Mitchell to Receive Thomas Jefferson Foundation Medal in Law,' (University of Virginia School of Law, Feb. 28, 2012), available at *http://www.law.virginia.edu/html/news/2012_spr/mitchell_tj_medal.htm* [Accessed on 1/08/2015].

[97] *Ibid*. George Mitchell served as special envoy (until May 2012) for Middle East peace under President Barack Obama, a role in which he led American efforts to advance Israeli-Palestinian peace negotiations.

career.[98]It is further contended that ensuring that today's law students graduate with this foundation will not, by itself, turn the legal profession around. However, to the extent that we increase the number of lawyers who possess the requisite skills for negotiation and mediation for peacebuilding we will improve the effectiveness of lawyers in their work, especially as peacemakers and development agents in the society.[99]

8.7 Conclusion

It is evident from the discussion above that lawyers have a critical role to play in society. They can enhance the rule of law through peacebuilding and engaging in ADR processes such as negotiation and mediation. Peace is necessary for development to take root. Lawyers have a role to play.[100] It is argued that lawyers' role in the early stages of disputes places them in a position of great responsibility and opportunity.[101] Their role includes their complicity in identifying problems as legitimate, their involvement, linguistically as well as concretely, in transforming problems into disputes, and their interest in turning disputes into claims for redress.[102] Thus, it is believed that lawyers can do as much or as little as they choose. They can use ADR as a means to improve access or merely as a means to improve their income.[103]Based on this special position, it is, therefore, possible to remould the Kenyan lawyer to be the

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[98] Brest, P., 'The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers,' *op cit*, p.17.

[99] *Ibid*, p.17.

[100] "Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will be business enough." Abraham Lincoln, *'Notes for a Law Lecture'* July 1, 1850, p. 81; *'Collected Works of Abraham Lincoln.'* Volume 2.Lincoln, Abraham, 1809-1865.*Fragment: Notes for a Law Lecture*, Available at *http://quod.lib.umich.edu/l/lincoln/lincoln2/1:134.1?rgn=div2;view=fulltext*[Accessed on 21/10/2015].

[101] Marshall, P, 'Would ADR Have Saved Romeo and Juliet?' (1998), *op cit*, p. 780.

[102] *Ibid*.

[103] *Ibid*.

ultimate negotiator, mediator and peacemaker in a society that aims at achieving the rule of law, development and prosperity. By competently assisting clients to choose between ADR and TDR on the one hand, and adjudication one the other hand, lawyers can enhance the citizenry's channels of accessing justice.

Chapter Nine

The Future of ADR in Kenya

9.1 Introduction

Incorporation of Alternative Dispute Resolution in the formal legal system is a young bud well on its way to blooming in Kenya. Its incorporation in the Constitution of Kenya and several Acts, including the Land Act and Civil Procedure Act, has gone a long way in entrenching it in Kenya's conflict management system. The launch of the Mediation Pilot Project in 2016 by the Milimani Commercial Law Courts and Family Division is also a sign as to the commitment of the courts to the installation of ADR as a tool of judicial reform.[1] The project is even closer to fruition, with the recent gazettement of the *Mediation (Pilot Project) Rules, 2015*.[2] As already observed, these rules are to apply to all civil actions filed in the Commercial and Family Divisions of the High Court of Kenya at Milimani Law Courts, Nairobi, during the Pilot Project.[3] To ensure that Kenya fully benefits from the several advantages of ADR, several issues need to be addressed.

9.2 Scope of ADR and TDR

ADR is stated, in several legislative instruments as a principle that should guide several bodies including the courts, the National Land Commission[4] and the Commission on Administrative Justice[5], in executing their duties. The Constitution only provides parameters for Traditional Dispute Resolution Mechanisms, stating that

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[1] Law Society of Kenya, 'Why Lawyers Should Warm up for Mediation,' (2nd November 2015) Weekly Newsletter.

[2] Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170,* 9th October, 2015, pp. 1283-1291 (Government Printer, Nairobi, 2015).

[3] Rule 2. "Pilot project" means the mediation program conducted by the court under these Rules. (R. 3).

[4] Art. 67(2) (f), Constitution of Kenya 2010.

[5] Commission on Administrative Justice Act, 2011. Under section 8 (f), the Commission is mandated to work with various public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration.

they should not be used in a way that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law[6].

The repugnancy clause is a restatement of a similar clause in the Judicature Act.[7] What exactly constitutes repugnancy to law has been left to the court's discretion, with decisions often being inconsistent with each other.[8]

The circumstances under which ADR is to apply under Kenyan law are currently unrestricted, a circumstance that has already brought issues to the table, with regard to the application of ADR in criminal matters.[9] The question of the application of ADR in constitutional matters, issues of government regulation and issues of great public concern also needs to be addressed is one pertinent to this discussion.

In private disputes it is argued that ADR is superior to court litigation, with parties having the freedom to select neutrals with expertise knowledge and the chance to look at disputes substantively without the haze of procedural laws.[10] It has been argued if ADR is however extended to resolve difficult issues of constitutional or public law - making use of non-legal values to resolve important social issues or allowing those the law seeks to regulate to delimit public rights and duties - there is real reason for concern.[11]

In drawing a distinction between public and private disputes, it is argued that it must be considered whether the disputes that will be resolved pursuant to an ADR system will involve significant public rights and duties. In other words, whether ADR will result in an abandonment of our constitutional system in which the "rule of law"

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[6] Art. 159(2) (c) (3).

[7] Laws of Kenya, Chapter 8, Judicature Act

[8] As seen in the cases of *Virginia Edith Wambui v. Joash Ochieng Ougo and Omolo Siranga (1982-88)1 KAR, Wambugi w/o Gatimu v. Stephen Nyaga Kimani [1992] KAR 292 (Court of Appeal),* and *Kamete Ene Ateti Marine v. Mosupai ole Ateti Nbi. High Court Civil Appeal No. 224 of 1995,* cited in Musyoka, W., Law of Succession (Nairobi, LawAfrica, 2006) at 17.

[9] *Republic V Mohamed Abdow Mohamed* [2013] eKLR, Criminal Case 86 of 2011.

[10] Edwards, H.T., 'Alternative Dispute Resolution: Panacea or Anathema?' (Jan., 1986) *Harvard Law Review*, Vol. 99, No. 3, pp. 668-684. Available at: *http://www.jstor.org/stable/1341152*

[11] *Ibid*

is created and principally enforced by legitimate branches of government and whether rights and duties will be delimited by those the law seeks to regulate.[12]

Kenyan lawmakers should thus take note of the tension between ADR and the Rule of Law, lest justice be sacrificed for the sake of peaceful resolution. The use of ADR ought to enhance the rule of law and facilitate access to justice but not undermining it.

9.3 Professionalization of ADR: ADR and Public Trust

Currently, in Kenya and other ADR hubs, ADR practitioners tend to be professionals from various fields, such as lawyers, doctors, engineers, which is attributed to ADR's wide applicability to several sectors. There is a move, however, as supported by the American Society of Professionals in Dispute Resolution and the Australian National Alternative Dispute Resolution Advisory Council, to regard ADR as a profession in its own right. The movement is also backed by the fact that there is a lot of concern about competency, quality and ethics in ADR.[13]

The provision of standards of accreditation of practitioners and standards of the ADR process, go a long way in ensuring that the public trusts ADR. They do so by giving an objective stamp of approval such that the public, when engaging with an accredited ADR practitioner are assured as to their competence. Provision of standards as to ethics also give assurance that disputants have an established system through which they can seek recourse in the occurrence of fraud of any kind in the ADR process. These standards also are a channel through which the public is informed about the various ADR processes and what they entail.

In court mandated ADR, the conduct of the neutral and the fairness of the process itself will also secure public confidence in the courts themselves. Courts must therefore have full confidence that the ADR practitioners they are 'releasing' to the public are competent.[14] Caution should however be taken to ensure that ADR does not lose its flexibility and variety of process.

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[12] Edwards, H.T., Alternative Dispute Resolution: Panacea or Anathema, 99, *Harvard Law Review,* 668, 671 (1986).

[13] Haley, J.N., 'Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective,' (2002) 7 *Harv. Negot. L. Rev.* 235.

[14] Brazil, W.D., 'Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts', Journal of Dispute Resolution, Vol. 11, 2000.

With the provision of ADR processes in our laws, there is a need for the state to professionalize ADR so as to ensure quality control of ADR processes. This is a need that Kenyan lawmakers acknowledge, as seen in the establishment of the Mediation Accreditation Committee under the Civil Procedure Act, whose tasks include maintaining a register of qualified mediators.[15] This will help keep in check rogue practitioners, especially in the instances where ADR is mandated by the court, this will ensure that parties have access to justice that is expeditious, proportionate and leads to an affordable resolution.[16]

The existing institutions cannot possibly meet the needs for capacity building and therefore, more institutions ought to take up the training of ADR practitioners, more so the several middle level university colleges spread all over the country.

9.4 Streamlining TDR mechanisms

The National Land Commission, the Environmental Land Court and courts in general, are encouraged to employ the use of Traditional Dispute Resolution (TDR) mechanisms in resolving land disputes by the National Land Commission and the Environment and Land Court.[17] The repugnancy clause as stated in the Judicature Act, and as restated in the 2010 Constitution has sought to function as a statutory filter; seeking to make the most out of the good elements of customary law while sifting out the bad ones. This has, however, not led to the adaptation of customary law to the bill of rights or to the written law. Rather, elements of customary law are dealt with in court as opposed to within the community in which it is practiced. The first step to be taken with regards to TDR mechanisms should thus involve community civil education, especially for the elders in the community.

In a community where gender and age is discriminated, these prejudices will continue to be perpetuated by their customs, unless the community is sensitized about these issues. Mainstreaming of gender and equality rights and what the law provides will go a long way in ensuring that TDR respects the rights of all humans.

Currently, there is no outlined method through which disputes are to be referred to TDR. In the situation where a dispute has escalated and parties have gone to court

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[15] Laws of Kenya, Civil Procedure Act, Cap 21, S. 59A.

[16] *Ibid*, S. 1A.

[17] Laws of Kenya, National Land Commission Act, S. 5 (2) (f); Environment and Land Court Act, S. 18 (a) (ii).

to seek judicial decision, courts can from that point refer the dispute for traditional dispute resolution. The question then arises, what about the disputes that do not go to court and heighten to violence? Does the court or the NLC have the mandate to involve TDR practitioners without such order being sought? Further, who are the TDR practitioners being sent to resolve these conflicts? What are their qualifications?

Conflicts in the community are often resolved through dialogue, negotiation and through the council of elders. In a study on the traditional conflict resolution mechanisms employed by the Samburu, Pokot, Marakwet and Turkana, it was found that the elders in these communities form a dominant component of the customary mechanisms of conflict management.[18] The authority held by the elders is derived from their position in society.[19]

However, it has been established that there has been inadequate enforcement mechanisms to effect what the elders and other traditional courts have ruled, and made the proposal for increased collaboration and networking between the government and customary institutions of governance.[20]

The need for sensitization on human rights is plain. The government may, through the courts also train the elders on 'modern' ADR methods that would enhance their skills as TDR practitioners. Courts should also step in and help the traditional courts in enforcing their rulings.

9.5 Statute on ADR and TDR Mechanisms

The question as to whether Kenya should develop a legal instrument that reduces into writing the standards for ADR practitioners, the principles of ADR that must be upheld and the duties and responsibilities of disputants and the relevant institutions has been discussed earlier extensively.

It should be taken into consideration that an ADR act would not be in accordance with international best standards, with most countries employing self-regulation as opposed to state regulation. Self-regulation in Kenya may however, not be the most effective seeing that the ADR market is still in development. At such an early stage,

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[18] Pkalya, R., et al, 'Indigenous Democracy: Traditional Conflict Resolution Mechanisms (Pokot, Turkana, Samburu and Marakwet)' (Intermediate Technology Development Group-Eastern Africa, January, 2004).

[19] *Ibid*, p. vi; See also generally, Sally M Newman, et al, *Intergenerational Relationships: Conversations on Practice and Research Across Cultures* (Routledge 2012).

[20] *Ibid*

state regulation would help in the infiltration of ADR into society, but it may result in not only standardizing ADR, but also the loss of its creativity and flexibility, which are central to ADR. Seeing that self-regulation and state-regulation both have their weaknesses, the government should incorporate both these systems, working together with the various ADR stakeholders in Kenya to create a framework that is optimum for the blooming of the ADR blossom.

9.6 Acceptance by the society

The Kenyan populace is still a believer in getting their day in court. Many people would rather have an order of the court or a decision of an administrative tribunal to enforce, rather than a negotiated agreement that is wholly dependent of parties' goodwill. Even where the law has put in place enforcement mechanisms for negotiated settlements, people still desire the coercive nature of courts and other tribunals, as opposed to all the cordial talks that are ADR.

The major selling point of the ADR approaches of conflict management is their attributes of flexibility, low cost and lack of complex procedures. These attributes are no longer tenable in arbitration as it is gradually becoming as expensive as litigation, especially when the arbitral process is challenged in court. When the matter goes to court, it is back to the same old technicalities that are present in civil proceedings.

This challenge also brings in the other factor that is changing the face of arbitration; interference by courts. Ordinarily, courts are not supposed to delve into the arena of the arbitral proceedings, even where the same are court mandated. Courts are entertaining all manner of applications by parties' intent on derailing the arbitral proceedings and thus delaying justice for all concerned.

This means then that parties are slowly losing confidence in the arbitral process at it makes no sense to engage in arbitration for years only for the dispute to end up in courts of law for determination.[21] ADR is mainly concerned with enabling parties take charge of their situations and relationships.

The *United Nations Declaration on the Rights of Indigenous Peoples* guarantees that indigenous peoples have the right to access to and prompt decision through just and fair procedures for the management of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision is to give due consideration to the customs, traditions,

[21] See argument by Fiss, Owen F.., 'Against Settlement,' (1984) Faculty Scholarship Series, Paper 1215.

rules and legal systems of the indigenous peoples concerned and international human rights.[22] This provision contemplates conflicts and disputes management mechanisms that give the indigenous peoples control over the processes and to a large extent the outcome of the process. The role of the local people in conflict management is crucial and it has actually been argued that that even in the face of extreme poverty, conflict and crisis, civilians often play a critical role in responding to threats to their safety and dignity and violations of their fundamental rights.[23]

The desire for dignity is said to be a motivating force behind all human interaction and when it is violated, the response is likely to involve aggression, even violence, hatred, and vengeance.[24] The United Nations observes that today, some of the most serious threats to international peace and security are armed conflicts that arise, not among nations, but among warring factions within a State.[25] Further, the human rights abuses prevalent in internal conflicts are said to be now among the most atrocious in the world.[26] On the other hand, when people treat one another with dignity, they become more connected and are able to create more meaningful relationships.[27] It is thus essential to devise ways of eradicating these problems that undermine human dignity for purposes of eradicating poverty and ultimately empowering people.

When people feel that they are treated fairly and justly, by individuals or institutions, they are more likely to support or approve a particular system. Although conflicts are part of any society, any mechanisms employed in dealing with them ought

[22] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Article 40.

[23] Eby, J., et. al., "Exploring the role of community partnerships and empowerment approaches in protection", *Humanitarian Exchange Magazine*, Issue 46, March 2010. Available at *http://www.odihpn.org/humanitarian-exchange-magazine/issue-46/exploring-the-role-of-community-partnerships-and-empowerment-approaches-in-protection* [Accessed on 26/02/2015].

[24] Hicks, D. & Tutu, D., *Dignity: The Essential Role It Plays in Resolving Conflict*. Yale University Press, 2011.

[25] United Nations, Human Rights and Conflicts: A United Nations Priority. Available at *http://www.un.org/rights/HRToday/hrconfl.htm* [Accessed on 25/02/2015].

[26] *Ibid*.

[27] Hicks, D., *Dignity: Its Essential Role in Resolving Conflict*, Yale University Press; Reprint edition (January 29, 2013)

to, as much as possible, help in creating an environment that fosters development, peace, social justice amongst other positive values. It has been stated that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as Ubuntu in South Africa and Utu in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.[28] It has been rightly observed that the objective of conflict management in many non-Western traditions typically is not the ascertainment of legal rights and the allocation of blame and entitlement, as it is in the West; the objective is a resolution, and hopefully a reconciliation, whatever the result.[29]

As such, ADR mechanisms are seen as viable for conflicts management because of their focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by common law and statutory measures on disputes and conflicts management.[30] They are also advocated for as an effective vehicle for mobilizing community talent, for preventing unnecessary violence and for revitalizing the self-help capacities of ordinary citizens.[31]

Traditional approaches to justice and reconciliation are also preferred due to their focus on the psycho-social and spiritual dimensions of violent conflicts.[32] They

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

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

[30] Idornigie, P.O., "Overview of ADR in Nigeria", 73 (1) *Arbitration* 73, (2007), p. 73.D.

[31] Merry, S.A. and Milner, NA. (Eds), *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States*, University of Michigan Press, 1995. p.67.Available at *http://books.google.co.ke/books?hl=en&lr=&id=guIG64KCttYC&oi=fnd&pg=PA67&dq=adr+and+political+empowerment&ots=I4QWemArtq&sig=B2eIL1rqu5Nub5vl8daDEqojg7c&redir_esc=y#v=onepage&q=adr%20and%20political%20empowerment&f=false* [Accessed on 25/02/2015].

[32] Haider, H., "Community-based Approaches to Peace building in Conflict-affected and Fragile Contexts", *Governance and Social Development Resource Centre Issues Paper*, November 2009, p. 6.Available at *http://www.gsdrc.org/docs/open/EIRS8.pdf* [Accessed on 28/02/2015].

are also often inclusive, with the aim of reintegrating parties on both sides of the conflict into the community.[33]

This is however not to say that litigation is not always useful. Where there are power imbalances and need for protection of human rights, then courts are the most viable channel to seek redress. In instances of gross violation of human rights, ADR or even traditional justice systems cannot work. Examples of these are the *Endorois case*[34]and the *Ogiek case*[35] where the two communities separately sought the intervention of the African Court on Human and People's Rights to compel Kenya respect their rights by refraining from evicting them from their ancestral lands.

It cannot, however, be overstressed that some of the traditional practices have negative impacts such as discrimination of women and persons with disabilities.[36] In fact, it is against this fact that the Constitution retains the test of non-repugnancy while applying traditional justice systems.[37] This is where the Courts come in as the legal guardians of the Bill of Human rights as envisaged in the Constitution.[38]

9.7 Accountability/Public Participation and ADR

One of the national values and principles of governance as outlined in the current Constitution of Kenya 2010 is accountability.[39] It also provides for accountability to the public for decisions and actions as one of guiding principles of

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[33] *Ibid*.

[34] *276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*.

[35] *African Commission on Human and Peoples Rights V Republic of Kenya,* Application 006/2012.

[36] 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.*

[37] Art. 159(3).

[38] Art. 23.

[39] Art. 10(2).

leadership and integrity.[40] There have been problems of accountability from the Kenyan leaders, with the local people being sidelined in the political decision making on matters that affect their leaders. There has been inequitable benefit sharing, exclusion of the poor and the marginalised in decision making system and indiscriminate environmental degradation.[41]

The effect of this has been massive poverty on the citizenry since the available resources are not properly utilized to empower the people. Indeed, this informed the formation of the current devolved system of governance in Kenya.[42] Devolution is expected to improve the performance of government by making it more accountable and responsive to the needs and aspirations of the Kenyan people and secondly, to facilitate the development and consolidation of participatory democracy.[43] This is because it entails moving away from the state-centric resource control towards approaches in which the local people and authorities play a much more active role in managing the resources around them.[44] Their involvement increases resource user participation in natural resource management decisions and the accruing benefits.[45]

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[40] Art. 73(2) (d).

[41] Yatich T, et al. 'Policy and institutional context for NRM in Kenya: Challenges and opportunities for Landcare.'*ICRAF Working paper-no. 43*, 2007. Nairobi: World Agro forestry Centre.

[42] Chapter 11, Constitution of Kenya 2010.

[43] Oloo, O.M., 'Devolving Corruption? Kenya's Transition to Devolution, Experiences and Lessons from the decade of Constituency Development Fund in Kenya'. *Paper Presented at Workshop on Devolution and Local Development in Kenya*, June 26th 2014 Nairobi. p.5.

[44] See generally, Muigua, K. & Kariuki, F., ADR, 'Access to Justice and Development in Kenya', Paper Presented At *Strathmore Annual Law Conference 2014* held on 3rd & 4th July, 2014 at Strathmore University Law School, Nairobi. Available at *http://caselap.uonbi.ac.ke/sites/default/files/chss/law/law/ADR%20access%20to%20justice%20and%20development%20in%20Kenya%20-%20STRATHMORE%20CONFERENCE%20PRESENTATION*.pdf

[45] Shackleton, S., *et al*. 'Devolution and community based natural resource management. *'Natural Resource perspectives (ODI)*, Number 76, March 2002. P. 1

Transparency and accountability with regard to government management of natural wealth and the revenues it generates are crucial.[46] People are able to voice their views and engage the authorities through *negotiation* (emphasis added) especially in relation to their most preferred use of the resources in their area for purposes of coming up with economic investments that will ultimately benefit most people and in a better way. The Government's priority development projects may not always necessarily be the most beneficial to the targeted groups of persons at least in addressing their immediate needs. There arises a need to consider the implications of these projects on the social, cultural, political and economic aspects of the affected communities.

As such, the use of ADR mechanisms such as *negotiation, convening, facilitation* or *dispute resolution panels* (emphasis ours) can go a long way in enabling the State authorities and the local communities work together in development projects that have the social acceptability in those particular areas.The overall effect of this may be eradication of poverty as a result of the all-round empowerment of people in social, cultural, political and economic aspects of their lives.

9.8 Court Practice

Although the Act provides for minimal intervention or interference by courts, the situation on the ground has been a mixed one where on the one hand courts seem to recognise and acknowledge that arbitration should bear minimum court interference while on the other hand they appear to violate this important objective of the Act of minimal court interference. The aforementioned instances of court intervention are at times stretched too much as to defeat the essence of the process of arbitration. This is especially well demonstrated when it comes to the issue of recognition and enforcement of arbitral awards.

The court has no legal right to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act. This was observed and upheld in the Kenyan case of *Anne Mumbi Hinga V Victoria Njoki Gathara*.[47] This was also reaffirmed in the

[46] Maphosa, S.B., "Natural Resources and Conflict: Unlocking the economic dimension of peace-building in Africa". *Africa Institute of South Africa Policy Brief*, *op cit*. p.3.

[47] Court of Appeal at Nairobi, Civil Appeal 8 of 2009 [2009] eKLR

recent case of *Nyutu Agrovet Ltd* (2015)[48] Indeed, the Court of Appeal made an important observation that most of the applications going to court to have the award set aside will be on grounds of public policy. It however stated that one of the underlying principles in the *Arbitration Act* is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards. Secondly, although public policy can never be defined exhaustively and should be approached with extreme caution. Failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised.[49]

The court of Appeal in this case held that it was wrong for the High court to have entertained a challenge to an arbitral award aimed at reviewing or setting aside an award outside the provisions specifically set out in the Arbitration Act 1995. The position clearly indicates that courts will not interfere with arbitration unnecessarily. Courts in their facilitative role have affirmed that the provisions of section 36 are mandatory. However, other cases give conflicting signs. This is especially where courts decline enforcement of awards on grounds of public policy. This may cause delay in enforcement of awards. In the foregoing *case of Hinga*, the Court of Appeal observed that had the superior court played a supportive role as contemplated in section 10 of the Arbitration Act and the other provisions in the Act which invite courts intervention, the consequential delay of close to 10 years in enforcing the award the subject matter of this appeal would have been avoided. The Court also stated that '*it follows therefore all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court suo moto because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd 1989 KLR 1.'*
In the Indian case of *Renusagar Power Company Ltd vs. General Electric Company* (1994) AIR 860, the Supreme Court of India observed;

> *"While observing that "from the very nature of things the expressions 'public policy', 'opposed to public policy' or 'contrary to public(*sic*) policy' are incapable of precise definition", this court has laid down: . . . Public Policy is*

[48] *Ibid.*

[49] *Ibid.*

some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time."(Emphasis added)

In Kenya, public policy was defined by Ringera J (as he then was), in ***Christ for All Nationals vs. Apollo Insurance Co. Ltd*** **in** the following words: -
"Although public policy is a most broad concept incapable of precise definition…an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:

a) Inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or
b) inimical to the national interest of Kenya; or
c) Contrary to justice and morality."

The lack of a clear meaning of public policy gives courts more opportunities to interfere with arbitration proceedings. This uncertainty in court intervention discourages and intimidates local as well as foreign investors who carry on business in Kenya from settling their commercial disputes in Kenya but instead opt for foreign jurisdictions. It has been argued that arbitration is the backbone for protecting international commercial arrangements. In case of a dispute commercial parties can resolve their differences without having to resort to the courts in the other party's country of residence or incorporation.[50] Further, International arbitration has been regarded as being very effective in the international business arena since arbitral awards are readily enforceable under the New York Convention in most of the world's key economic nations and the awards can only be challenged on very limited grounds.[51] There is therefore, need for consistent practice from our courts as well as clear definition of what entails public policy.

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[50] Leah Ratcliff, 'Investors beware - Indian Supreme Court asserts jurisdiction to set aside foreign arbitral awards,' *International Arbitration Insights*, 18 June 2008, Available at *http://www.claytonutz.com/publications/newsletters/international_arbitration_insights/2008*

[51] *Ibid.*

9.9 Conclusion

Although ADR mechanisms have been used by human society since antique times, it only got wide acceptance and recognition in many countries' laws recently.[52] With regard to arbitration, the expanded arbitrability scope has the implication of dragging more matters into the scope of ADR.[53] Consequently, there is likely to emerge more issues and new problems to deal with. This is because even as the formal application of ADR takes root in Kenya, it must be consistent with the other laws of the land, especially the Constitution. It is against this reality that this section has highlighted some of these issues and the various challenges that threaten to defeat the effective application of these mechanisms. These issues may need further study in order to make ADR practice in Kenya more effective. However, what remains clear is that ADR and TDR mechanisms have a role to play in promoting access to justice in Kenya. There is, therefore, need for concerted efforts from all the relevant stakeholders towards ensuring that these mechanisms are effectively utilised to bring justice closer to the people.

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[52] Esthete, T., & Getup, M., 'Alternative Dispute Resolution, Teaching Material' *Justice and Legal System Research Institute*, Pg. 3, Available at *www.joptc.gov.et/joptc/LinkClick.aspx?fileticket...203*. [Accessed on 02 March, 2014].

[53] *Ibid*.

Chapter Ten

Conclusion

The previous chapters in this book have focused on various issues relating to the law and practice of ADR in Kenya. Across the chapters, the author has defined and examined the various concepts in conflict management mechanisms, and especially ADR. As it has been elucidated throughout the book, ADR mechanisms are generally different in their mode of operation but largely similar in their outcome. Where there is a dispute, arbitration, a settlement mechanism, may be the best suited approach since it can be as coercive as litigation. The other mechanisms can be very effective in addressing conflict situations in a quest for justice. Therefore, even though the Constitution provides for the use of ADR, these mechanisms cannot be applied in a blind manner. It is important that a distinction be drawn as to the instances of their application, based on suitability and effectiveness. Otherwise, the perceived advantages that are associated with ADR and TDR mechanisms risk being lost in the process.

Effective application of ADR and TDR mechanisms does not only rely on the choice of the mechanism to be used; it also relies on the effectiveness of the third party umpire, where the process requires one. They must be able to appreciate the distinct characteristics of the conflict or dispute at hand, and effectively apply the appropriate mechanism.[1] It is also imperative to reaffirm that courts still have a role to play in conflict and disputes management, and therefore, matters or aspects of a conflict that are best suited to be handled through litigation should not be taken through the ADR forum. It is noteworthy that litigation and ADR mechanisms can be mutually applied in some cases. On the one hand, the court can calm down the parties using coercion, where necessary, and then have the parties come to the table for ADR. On the other hand, since ADR mechanisms address the root causes of conflict while mostly preserving relationships, they are necessary in achieving a lasting solution, an outcome that courts would not achieve. For instance, some of the chronic inter-clan and inter-community conflicts can effectively be addressed through ADR mechanisms and thus, they remain relevant in promoting peace and access to justice in Kenya. Through their

[1] See generally, NADRAC, 'Issues of Fairness and Justice in Alternative Dispute Resolution' *Discussion Paper,* (Canberra, November 1997).

ability to address the root causes of conflict, ADR and TDR mechanisms hold one of the keys to the realisation of a peaceful country for all.

ADR and TDR mechanisms have always been part of the traditional African societies, only that they were operating outside the scope of law.[2] The way they have been envisaged in the 2010 Constitution of Kenya may be construed to mean that they will be operating in the shadow of courts. Within the constitutional provisions, courts are required to encourage the application of ADR and TDR mechanisms in the appropriate instances.[3] While it is to be appreciated that some of the ADR and TDR mechanisms require the assistance of the court system, especially in the enforcement of the award or outcome, caution should be exercised to ensure that their advantages in conflict management are preserved. As already noted, court-annexed ADR is prone to losing its perceived advantages where there is too much emphasis on adherence to procedural technicalities. Through playing a facilitative rather than a domineering role, courts can effectively promote the implementation of ADR and TDR mechanisms for access to justice.

Parties should be able to engage in ADR without feeling that courts are exerting undue pressure on the process as this might make them shun the mechanisms. While it is true that courts still have a role to play in ADR mechanisms, they should do so without undermining the advantages that come with these processes. Party autonomy, flexibility, informality, cost-effectiveness and speed are some of the most valued attributes of ADR and TDR mechanisms. These should be protected and upheld if the processes are to remain competent in conflict management.

Although the current Constitution of Kenya holds hope for the Kenyan people, there is urgent need for putting in place measures that will facilitate implementation of

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[2] See generally, Danne A, 'Customary and Indigenous Law in Transitional Post-Conflict States: A South Sudanese Case Study' (2004) 30 *Monash University Law Review* 199; Jok, A.A., et al, 'A Study of Customary Law in Contemporary Southern Sudan,' (World Vision International And The South Sudan Secretariat of Legal and Constitutional Affairs, March 2004); 'Access to Justice in Africa And Beyond: Making the Rule of Law a Reality,' (Penal Reform International and the Bluhm Legal Clinic of the Northwestern University School of Law Chicago, Illinois, 2007). Available at *http://www.etc-graz.at/typo3/fileadmin/user_upload/ETC-Hauptseite/Menschenrechte_lernen/POOL/AcesstoJusticeAfirca.PDF* [Accessed on 20/11/2015].

[3] Art. 159(2) (3).

the constitutional provisions aimed at promoting ADR and TDR mechanisms. This calls for an integrated approach to deal with the challenges impeding their use. As already pointed out in the preceding chapters, ADR and TDR mechanisms are not without demerits. However, their advantages outweigh the disadvantages thereof and are, therefore, worth exploring in the quest for justice for the Kenyan people. They can be applied alongside the court process, not as alternative, but as appropriate means where the situation so demands. Within the right framework, the two systems can work together towards ensuring that justice is released in an expeditious manner that is cost-effective and one that achieves parties' satisfaction.

The various ADR mechanisms such as *negotiation, mediation, facilitation* and *convening* can be useful tools for the different sections of society to mount pressure on both the national and devolved Governments for reforms in general matters relating to governance in the country.[4]

The direct inclusion, as opposed to inference, of ADR mechanisms as part of the means of conflict management in the Constitution and in Acts of Parliament is a bold ground breaking move. However, there is need for caution so that this effort is not defeated by institutional capacity challenges, some of which have been discussed in preceding chapters. It has been asserted that Alternative Dispute Resolution must be seen as an integral part of any modern civil justice system. It must become such a well-established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like what, if any, expert evidence is required.[5] While litigation must always remain available for clients, this can be a very stressful undertaking and should be seen as the final place for resolving a conflict.[6]

With the formal recognition of Alternative Dispute Resolution and traditional dispute resolution mechanisms, it is expected that a good number of disputes will be

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[4] See generally, Kanyinga K, *Kenya: Democracy and Political Participation* (A review by AfriMAP, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS), University of Nairobi, 2014). Available at *https://www.opensocietyfoundations.org/sites/default/files/kenya-democracy-political-participation-20140514.pdf* [Accessed on 24/11/2015].

[5] Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, *op cit*, p. 34.

[6] *Ibid.*

managed using these mechanisms. In order to realize access to justice through these mechanisms, they must be effectively embedded within the justice system. Caution should be taken in linking these mechanisms to the court system to ensure that they are not completely merged with the formal system as is the case with arbitration.

The legal environment has swallowed arbitral practice in Kenya.[7] It has become a court process in which lawyers use court technicalities to derail the process. The same is true of the practice of mediation in Kenya which has become a court process. There is thus, a need to create awareness especially among the judicial officers on the effective use of these mechanisms to realize access to justice. Judges, magistrates, lawyers and even the public need to be made aware that ADR mechanisms are effective and that their application will enhance access to justice. They will need continuous training on ADR mechanisms and operationalisation of the same. Subject to confidentiality requirements, the decisions, negotiated settlements and awards made by ADR practitioners should be given a similar publicity to that given to court judgments by the National Council for Law Reporting to promote public confidence in these mechanisms.

The policy and legal framework on the use of traditional dispute mechanisms should also come up with a very clear criterion for the selection and accreditation of traditional dispute resolution practitioners, their areas of jurisdiction and the types of disputes that they are to handle and community conflict management committees. It is noteworthy that there exists the Mediation (Pilot Project) Rules, 2015. However, they are not comprehensive and leave out the foregoing issues. In this regard guidelines should be developed on the best way forward on ADR to ensure adequate training of arbitrators and mediators. This could also include accreditation of ADR practitioners to ensure quality control, disciplinary mechanisms and the necessary accreditation of institutions thereof. The Ministry of Justice should also come up with an ADR curriculum for arbitrators, mediators and negotiators, who shall be locally involved in conflict management across the 47 counties. To achieve this, , funding should also be directed towards creating public awareness on the ADR mechanisms and the opportunities they offer in enhancing access to justice and public participation.

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[7] See also Mwagiru, who argues that legal environment has swallowed mediation. (Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006); See also Muigua, K., "Role of the Court under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya", *Kenya Law Review*, 2008-2010.

Such initiatives should take cognizance of the devolved units. Laws and regulations on the effective implementation of ADR and traditional conflict management mechanisms should be developed, designed and well entrenched to ensure public participation and enhance access to justice. They should be well linked with the courts to avoid conflicts. As such mapping ADR mechanisms and all TDR mechanisms should be done to be able to determine the most applicable ones in the circumstances.

Funding from the government and the development partners should be directed towards operationalisation of Article 159 of the Constitution and implementation of ADR and TDR mechanisms due to their suitability to enhance access to justice and involve the public in decision-making processes. The laws contemplated under Article 189 (4) should be well designed and entrenched in the national and county government systems to facilitate the expeditious resolution of disputes therein with maximum participation of the public at both levels of government. It is essential that in the application of ADR and to achieve a just and expeditious resolution of disputes, the Bill of rights as enshrined in the constitution must at all times be kept in mind and upheld.[8]

Finally, a party who wishes to avoid the complexities of litigation can legally seek the services of ADR mechanism experts. There may come a time when ADR becomes the norm rather than the exception in conflict management in our fast growing country and one embracing globalisation where court systems differ significantly.

The prospect of ADR in Kenya as a conflict management option is brilliant and one capable of bringing about a just society where disputes are disposed of more expeditiously and at lower costs, without having to resort to judicial settlements. Parties should find solace in the understanding that whoever wishes to avoid the complexities of litigation can seek the services of ADR mechanism experts if the subject matter of the dispute so requires.

It is possible to actualize this right of access to justice through the use of ADR in Kenya. ADR offers a viable route to achievement of a just society for all, where there is something for everyone in terms of the available mechanisms for achieving justice, regardless of their social status in the society. Indeed, ADR can provide the road to true justice in Kenya in diverse issues currently facing the Kenyan people.

[8] Articles 19-51, Constitution of Kenya, 2010.

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A

access to justice · 9, 13, 17, 23, 31, 53, 57, 58, 61, 67, 69, 71, 72, 73, 74, 81, 82, 85, 86, 87, 89, 90, 91, 93, 104, 116, 117, 121, 122, 124, 125, 126, 128, 129, 130, 131, 133, 134, 137, 138, 139, 140, 141, 142, 144, 145, 148, 154, 155, 157, 161, 189, 190, 200, 201, 202, 204, 205, 223, 230, 235
adjudication · 15, 19, 52, 54, 55, 95, 116, 140, 142, 186
adversarial · 8, 19, 25, 26, 34, 42, 132, 153, 156, 168, 172, 183
Alternative Dispute Resolution
ADR mechanisms · i, 1, 8, 16, 19, 20, 21, 26, 40, 48, 57, 58, 60, 72, 74, 77, 78, 82, 84, 91, 92, 114, 115, 118, 124, 125, 127, 129, 135, 136, 137, 149, 156, 157, 159, 162, 164, 170, 171, 187, 188, 189, 200, 201, 203, 206, 209, 211, 213, 214, 215, 218, 219, 223, 225, 228, 229, 230, 233, 235, 236
Arbitration · xii, xiv, xvi, 17, 26, 28, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 47, 48, 49, 55, 73, 75, 76, 77, 78, 92, 94, 95, 96, 97, 98, 105, 106, 115, 117, 132, 140, 141, 152, 157, 161, 163, 165, 174, 194, 197, 198, 199, 209, 211, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 226, 227, 231, 232, 234, 236, 237
Arbitration Act · xii, 34, 35, 38, 40, 42, 43, 48, 73, 75, 76, 77, 78, 92, 95, 96, 97, 98, 152, 197, 198, 199, 232
Arb-Med · 48, 141, 221
autonomy · 10, 17, 22, 24, 27, 28, 44, 56, 72, 94, 103, 104, 106, 114, 116, 118, 123, 128, 135, 140, 155, 161, 202

B

bargaining · 136

C

Civil Procedure Rules · 24, 25, 27, 30, 31, 32, 35, 75, 76, 80, 81, 87, 88, 91, 92, 93, 95, 100, 101, 102, 106, 112, 113, 116, 117, 124, 151, 153, 155, 162, 187, 190
Conciliation · xvi, 16, 17, 32, 33, 34, 70, 140, 222, 223
Conflict · 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 21, 22, 23, 24, 25, 26, 27, 29, 35, 41, 52, 53, 59, 60, 67, 68, 70, 71, 72, 87, 109, 113, 114, 118, 120, 127, 128, 132, 133, 134, 136, 137, 140, 144, 147, 161, 163, 164, 165, 168, 170, 171, 179,181, 182, 191, 193, 194, 197, 202, 204, 206, 207, 208, 209, 210, 212, 213, 214, 215, 217, 218, 219, 220, 221, 225, 226, 228, 229, 230, 231, 232, 233, 234, 235, 236
conflict management · 5, 7, 8, 10, 13, 16, 17, 19, 20, 21, 22, 23, 24, 29, 32, 35, 44, 48, 52, 56, 58, 59, 65, 66, 68, 69, 70, 71, 72, 74, 79, 80, 87, 89, 90, 105, 110, 118, 119, 127, 132, 136, 150, 153, 154, 155, 160, 161, 162, 163, 164, 165, 170, 183, 187, 191, 192, 193, 194, 201, 202, 203, 204, 205

Conflict resolution · 11, 12, 13, 22, 23, 68, 118, 140, 182
Constitution of Kenya · 9, 16, 20, 21, 37, 53, 59, 64, 65, 66, 67, 68, 72, 74, 78, 82, 83, 86, 90, 91, 95, 108, 120, 121, 123, 124, 126, 128, 131, 132, 135, 143, 146, 153, 154, 157, 162, 187, 195, 196, 202, 205, 209, 217, 232
customary · 28, 31, 35, 52, 54, 58, 62, 63, 64, 79, 80, 89, 108, 118, 119, 131, 144, 190, 191

D

democracy · 89, 184, 196, 203, 230
Dispute · i, xvi, 1, 8, 9, 10, 11, 16, 19, 20, 21, 23, 26, 28, 29, 32, 33, 40, 42, 46, 47, 48, 49, 50, 52, 57, 58, 60, 68, 71, 72, 73, 74, 77, 78, 82, 83, 84, 90, 91, 92, 113, 114, 115, 117, 118, 124, 125, 127, 128, 129, 131, 133, 134, 135, 136, 137, 141, 147, 149, 153, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 170, 171, 174, 175, 187, 188, 189, 190, 200, 201, 203, 206, 207, 208, 209, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 232, 233, 234, 235, 236, 237
dispute settlement · 8, 11, 12, 15, 44, 78, 134

E

elders · 19, 20, 22, 30, 31, 52, 83, 85, 87, 89, 118, 131, 133, 154, 190, 191

F

fairness · 16, 28, 45, 48, 66, 72, 96, 114, 121, 123, 125, 128, 135, 140, 144, 147, 167, 189, 211

H

human rights · 22, 52, 61, 68, 70, 79, 121, 122, 125, 128, 130, 145, 170, 191, 193, 195, 210, 225

I

impartial · 25, 51, 67, 94, 124, 153, 173
inclusiveness · 82, 89
interests · 2, 3, 4, 5, 6, 7, 12, 14, 15, 16, 20, 23, 26, 27, 28, 31, 32, 34, 45, 46, 47, 53, 54, 58, 69, 71, 106, 119, 122, 123, 132, 135, 136, 138, 139, 144, 145, 147, 151, 159, 165, 167, 168, 169, 173, 175, 180, 181, 184, 194

J

judicial reform. · 187
Justice System · 61, 110, 231

L

litigation · 6, 9, 11, 12, 17, 19, 21, 22, 30, 31, 34, 38, 40, 41, 42, 43, 44, 50, 51, 55, 56, 66, 68, 69, 70, 71, 72, 84, 100, 103, 110, 112, 117, 124, 126, 127, 128, 129, 130, 134, 144, 145, 150, 155, 157, 160, 162, 165, 168, 170, 171, 172,

180, 182, 185, 188, 192, 195, 201, 203, 205, 217, 224, 226

M

Med-Arb · 44, 46, 48, 141, 221, 229, 231, 235, 237
Mediation · xiv, xvi, 4, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 44, 47, 48, 50, 59, 68, 70, 72, 78, 80, 88, 91, 92, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 111, 112, 114, 115, 116, 118, 119, 131, 132, 133, 137, 139, 140, 141, 142, 148, 150, 151, 152, 153, 154, 155, 156, 157, 159, 161, 162, 165, 166, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 181, 187, 189, 190, 194, 204, 206, 208, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 222, 223, 226, 228, 230, 231, 232, 233, 234, 235, 236, 237
Mediation Accreditation Committee · xvi, 30, 80, 91, 101, 102, 106, 107, 151, 159, 190
Mediator · 102, 162, 175, 176, 217
Mini Trial · 51

N

natural resources · 4, 14, 83, 134
needs · 3, 5, 7, 10, 11, 12, 13, 14, 16, 20, 24, 27, 31, 32, 60, 63, 66, 68, 71, 81, 86, 88, 89, 105, 114, 115, 116, 130, 136, 138, 139, 142, 143, 144, 150, 151, 155, 166, 168, 169, 177, 178, 182, 183, 188, 190, 194, 196, 197
Negotiation · 4, 13, 15, 17, 23, 24, 69, 123, 124, 135, 136, 137, 139, 164, 165, 166, 167, 170, 171, 175, 181, 209, 210, 214, 216, 220, 222, 226, 227, 228, 233, 234, 235, 236
negotiator · 29, 135, 167, 168, 169, 181, 186
Neutral Evaluation · 50
non-discrimination · 82, 89, 125

P

Participation · 156, 195, 203, 222, 229
party satisfaction · 28, 72, 125, 128, 130, 140
Peace · 3, 5, 7, 10, 11, 15, 22, 67, 110, 163, 167, 170, 178, 179, 185, 194, 208, 210, 213, 214, 215, 216, 222, 229, 231, 233
positional bargaining · 136
problem solving · 11, 17, 68, 164, 182

R

reconciliation · 19, 21, 34, 52, 59, 65, 71, 74, 76, 85, 91, 108, 109, 110, 142, 153, 161, 194
Root Causes · 8, 12, 213

S

settlement · 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 21, 22, 23, 25, 27, 33, 34, 35, 44, 50, 51, 52, 54, 65, 66, 67, 68, 75, 78, 81, 94, 95, 98, 100, 101, 109, 111, 112, 119, 132, 134, 136, 140, 142, 158, 159, 165, 174, 175, 176, 201

T

third party · 17, 23, 24, 25, 29, 32, 33, 34, 35, 44, 45, 47, 50, 51, 69, 94, 106, 135, 141, 154, 157, 159, 201
traditional dispute resolution · 21, 65, 70, 72, 74, 76, 79, 81, 82, 83, 85, 86, 88, 90, 91, 128, 131, 132, 143, 144, 191, 203, 204
Traditional Justice Systems · xvi, 52, 63, 113, 142

V

violence · 6, 7, 14, 15, 19, 46, 60, 120, 159, 178, 182, 191, 193, 194, 221

W

win-win · 16, 105, 166, 167