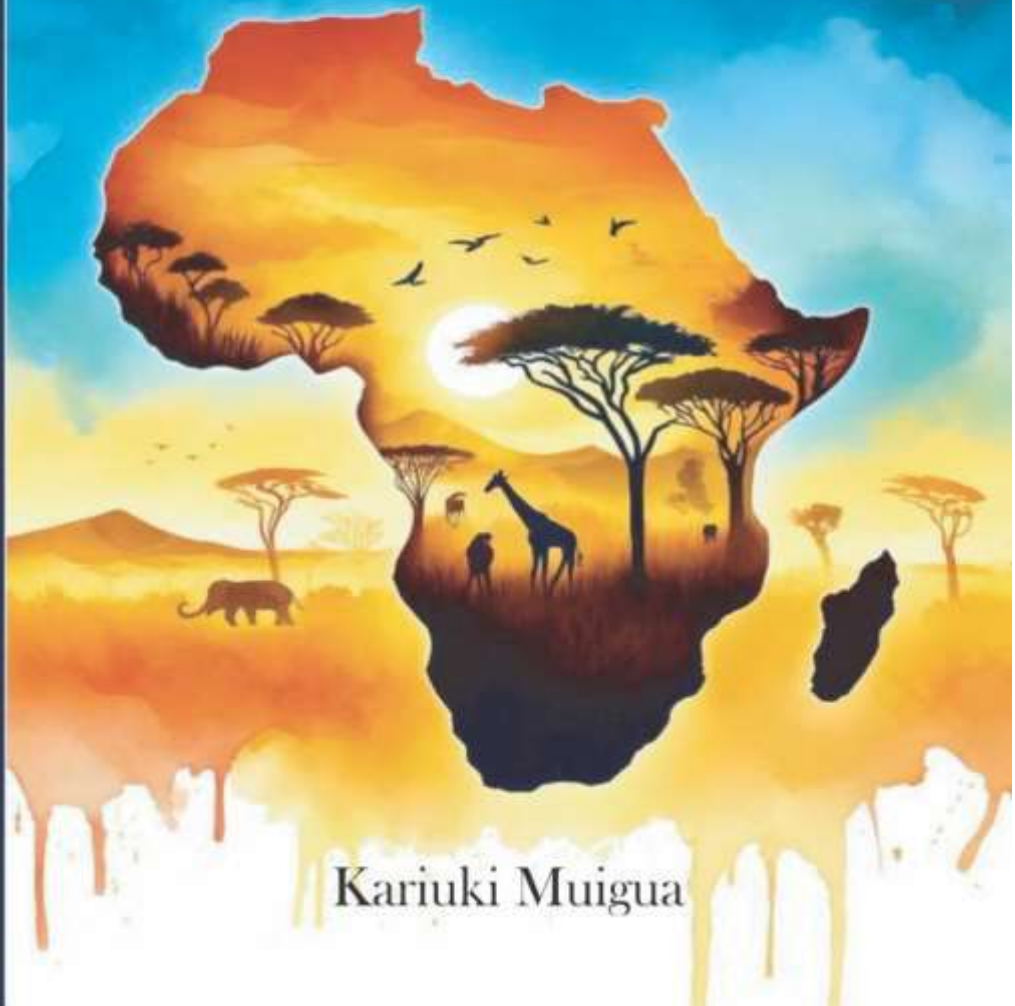


**Securing Lasting Peace and
Justice in Africa
through
Appropriate Dispute Resolution**



Kariuki Muigua

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Justice in Africa
through
Appropriate Dispute Resolution**

Hon. Prof. Kariuki Muigua, Ph.D; FCIArb; Ch.Arb; OGW

Securing Lasting Peace and Justice in Africa through Appropriate Dispute Resolution

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Dedication

This book is dedicated
to the idea
that Lasting peace and
Justice in Africa
is possible.

That Africa has to find
its own solutions
to its problems

That Alternative Dispute Resolution
may not be alternative
in the African context

And that we must find mechanisms
that are appropriate
for Dispute Resolution in
Africa

That Appropriate Dispute Resolution
can be utilized
to secure lasting Peace
and Justice in Africa.

Dedicated to the idea
that we must reframe
Conflict Management in
Africa

And use appropriate methods
to Resolve them

That there must be
Effective management of
Conflicts in the
African context

Dedicated to the ideal
of utilizing the available tools
to effectively manage conflicts

Dedicated to the idea
That
Exploring collaboration
Harmony and Ubuntu
Has a place in the
search for lasting
Peace
and Justice in Africa

Dedicated to the ideal
of achieving Peace
Environmental Security
for Sustainable Development

This book advances the thought
that we must fight for
Environmental Democracy
and ensure all persons
have a say in decisions
that affect the
Environment
and their daily lives.

Dedicated to those who
have struggled
To ensure that modern
slavery, Racism
and discrimination
are eradicated
from the face of the
Earth.

Dedicated to the Environmental

Defenders
who struggle to secure
Justice for Nature
and People
through Climate Action.

To those who believe
in using
peaceful means
to Access Justice
in Africa

Dedicated to those
who pursue Environmental
Justice
using tools that enhance
Environmental Rule of Law
both formal and
informal
And through Pluralistic
Legal systems

Dedicated to the idea
that Conflicts are
Culture-specific
And that it is possible
to resolve them
through
Negotiation, Diplomacy and
mediation in Africa

Dedicated to those who
believe
in Reconciliation
Collaboration
Peacemaking
and Peace Building

This book is for those
who wish to craft
a future
that is better than today
A green tomorrow
where the rights of the
Planet and nature
are respected.

This book is dedicated
to those who advance
the Rights of Nature
and Human Rights

And to those who believe
that achieving Harmony
Human Rights, Peace
and Prosperity for all
is possible.

This book is for those
who never ever give up
To those who rise
again and again
and keep going
in the face of adversity
pain and
suffering.

This book is for those
who dream big dreams
And to those know
that what was once a dream
will become a reality

This book is for those
who know
that 'luck'

is something that
can be harnessed

To those who know
that though today may be
dark

The warmth of the sun
will meet the dawn
of tomorrow

So let us take this walk
towards lasting peace
and Justice in Africa
through Appropriate Dispute
Resolution

Securing lasting Peace and Justice
in Africa
through Appropriate Dispute Resolution
is possible.

Author's Note

This compendium under the theme “Securing Peace and Justice in Africa through Appropriate Dispute Resolution” takes the readers through a journey where we delve into the question of how to achieve lasting Peace and Justice in Africa.

The papers in this volume examine Alternative Dispute Resolution (ADR) and access to Justice in the African context.

The author critically discusses whether ADR is indeed alternative. Could it be reframed to be Appropriate Dispute Resolution?

Other themes covered in the volume include Human and Environmental Rights; Environmental Democracy; Conflict Management; Sustainable Development; Environmental Rule of Law; Justice for Nature; Climate Action; Climate Change; and Natural Resources.

The book is aimed at researchers, students, peacemakers, environmental defenders and the general reader.

4th February 2025,

Prof. Kariuki Muigua PhD, Ch. Arb, OGW

Professor of Environmental Law & Conflict Management,

University of Nairobi.

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My maker has allowed me to see this great warm day. For that I am grateful.

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My sincere gratitude to friends and colleagues who look out for me; To those who have taught me valuable lessons that enable me to live a meaningful life.

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Finally, I acknowledge my entire family. Together we have gone through rainy and sunny days. You inspire me to keep going and never ever give up.

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Friends of Lake Turkana Trust vs Attorney General & 2 others., ELC Suit No. 825 of 2012, (2014) eKLR

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List of Abbreviations

ADR-Alternative Dispute Resolution
AfCFTA - African Continental Free Trade Area
AI - Artificial Intelligence
AJS - Alternative Justice Systems
CEN-SAD - the Community of Sahel-Saharan States
CIJ - Customary and Informal Justice Systems
CSR-Corporate social responsibility
EAC - the East African Community
EAC-East African Community
ECCAS - the Economic Community of Central African States
ECOWAS - the Economic Community of West African States
ESG - Environmental, Social, and Governance
HDI - Human Development Index
ICESCR -International Covenant on Economic, Social and Cultural Rights
IGAD - the Intergovernmental Authority on Development
IMO - International Maritime Organization
MEAs - Multilateral Environmental Agreements
NET-National Environment Tribunal
NGOs-Non-Governmental Organizations
OECD-Organisation for Economic Co-operation and Development.
RECs - Regional Economic Communities
SADC-Southern African Development Community
SDGs-Sustainable Development Goals
STI - Science, Technology and Innovation
TDRMs - Traditional Dispute Resolution Mechanisms
UDHR -Universal Declaration of Human Rights
UHC - Universal Health Coverage
UMA - the COMESA - Common Market for Eastern and Southern Africa
UNCTAD - United Nations Trade and Development
UNDP-United Nations Development Programme
UNFCCC - United Nations Framework Convention on Climate Change
UN-United Nations

Securing Lasting Peace through Appropriate Dispute Resolution: A Reflection

Abstract

Securing lasting peace is a global ideal. The United Nations notes that peace and development are indivisible. Peace is at the heart of the United Nation's 2030 Agenda for Sustainable Development which recognizes that there can be no Sustainable Development without peace and no peace without Sustainable Development. As a result, Sustainable Development Goal (SDG) 16 aims to achieve peaceful and inclusive societies for Sustainable Development, foster access to justice for all and build effective, accountable and inclusive institutions at all levels. This paper critically reflects on the need to secure lasting peace through Appropriate Dispute Resolution. The paper posits that Alternative Dispute Resolution (ADR) processes are appropriate in fostering lasting peace for development. The paper critically examines the concept of ADR and asserts that these processes are 'Appropriate' and not 'Alternative' in securing lasting peace. It explores some of the setbacks towards achieving peace and suggests ways through which ADR processes can be effectively utilized to secure lasting peace for Sustainable Development.

1.0 Introduction

Peace is a fundamental human ideal. It has been noted that the absence of violent conflict and the presence of respect and understanding between people and communities are the two characteristics that define peace¹. In addition negotiation, compromise, and cooperation among individual and groups with different interests and viewpoints are frequently necessary to bring about peace². The concept of peace is therefore associated with the ideals of harmony, tranquility, cooperation, alliance, well-being, and agreement³. At its core, peace encompasses far more than just the absence of violence or conflict⁴. It is a state of harmony in which individuals and communities coexist in respect and understanding⁵. Peace therefore envisages not only the absence of war but

¹ Mustafa. G et al., 'Peace: A Conceptual Understanding' Available at https://www.researchgate.net/publication/370062968_Peace_A_Conceptual_Understanding (Accessed on 24/08/2024)

² Ibid

³ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

⁴ Gray Group International., 'Understanding Peace: A Comprehensive Guide to Achieving Global Harmony' Available at <https://www.graygroupintl.com/blog/peace> (Accessed on 24/08/2024)

⁵ Ibid

Securing Lasting Peace through Appropriate Dispute Resolution: A Reflection

also the presence of positive elements, such as justice, harmony, equality, and compassion⁶.

According to the United Nations, peace and development are indivisible⁷. It notes that peace cannot be sustainable without development, and lasting peace is essential for the preservation of development gains all over the world⁸. Securing lasting peace is therefore vital in fostering Sustainable Development throughout the world. Achieving peace on a global scale is a complex endeavor that requires understanding, cooperation, and concerted efforts from individuals, communities, governments, and organizations all over the world⁹.

The *United Nations 2030 Agenda for Sustainable Development*¹⁰ recognizes the need to secure lasting peace for development. According to the Agenda, there can be no Sustainable Development without peace and no peace without Sustainable Development¹¹. The 2030 Agenda for Sustainable Development seeks to foster peaceful, just and inclusive societies which are free from fear and violence¹². SDG 16 aims to achieve peaceful and inclusive societies for Sustainable Development, foster access to justice for all and build effective, accountable and inclusive institutions at all levels which are all prerequisites for securing lasting peace¹³. The 2030 Agenda for Sustainable Development therefore recognizes not only that peace and security are prerequisites for achieving Sustainable Development, but also that Sustainable Development provides the pathway to peaceful societies¹⁴.

⁶ Ibid

⁷ United Nations., 'Sustainability, Peace, Security 'best guarantee against instability' Guterres to Security Council' Available at <https://www.un.org/africarenewal/news/sustainability-peace-security-%E2%80%98best-guarantee-against-instability%E2%80%99-guterres-security-council> (Accessed on 24/08/2024)

⁸ Ibid

⁹ Gray Group International., 'Understanding Peace: A Comprehensive Guide to Achieving Global Harmony' Op Cit

¹⁰ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 24/08/2024)

¹¹ Ibid

¹² Ibid

¹³ Ibid

¹⁴ Ibid

This paper critically reflects on the need to secure lasting peace through Appropriate Dispute Resolution. The paper posits that ADR processes are appropriate in fostering lasting peace for development. The paper critically examines the concept of ADR and asserts that these processes are 'Appropriate' and not 'Alternative' in securing lasting peace. It explores some of the setbacks towards achieving peace and suggests ways through which ADR processes can be effectively utilized to secure lasting peace for Sustainable Development.

2.0 Defining Appropriate Dispute Resolution

ADR has been defined as a spectrum of less costly and more expeditious alternatives to litigation, where a neutral party assists the disputing parties in reaching resolution¹⁵. However, in some ADR processes such as negotiation, parties meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party¹⁶. ADR has also been defined as a set of processes that are applied to manage disputes without resort to adversarial litigation¹⁷. It covers various processes including negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others¹⁸. It has been noted that ADR techniques may be linked to but function outside formal court litigation processes¹⁹.

It has been argued that the use of the term 'Alternative' to describe ADR mechanisms is misleading since it may be understood to imply that these mechanisms are second-best to litigation which is not the case²⁰. In many contexts, ADR techniques are considered as 'Appropriate' and not 'Alternative' in conflict management²¹. For example, conflict management amongst African societies has since time immemorial taken the form of

¹⁵ JAMS ADR., 'What is ADR? Defining the Alternative Dispute Resolution Spectrum' Available at <https://www.jamsadr.com/adr-spectrum/> (Accessed on 24/08/2024)

¹⁶ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

²⁰ P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), pp. 50-52

²¹ Ibid

Securing Lasting Peace through Appropriate Dispute Resolution: A Reflection

informal negotiation, mediation, reconciliation and arbitration²². These processes fitted comfortably within traditional concepts of African justice, particularly its core values of reconciliation and restorative justice²³. They were therefore considered 'Appropriate' and not 'Alternative' and were the first point of call in conflict management among African societies²⁴.

ADR processes contain certain attributes which makes them 'Appropriate' in conflict management. These features include informality, flexibility, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost-effective management of disputes²⁵. ADR processes also allow for more creative and collaborative solutions than that of traditional litigation²⁶. In addition, some ADR techniques such as negotiation and mediation have the ability to preserve and even enhance the relationship of parties to a conflict and are therefore suitable and 'Appropriate' in managing conflicts²⁷.

Due to their appropriateness, ADR processes are being embraced for effective management of conflicts globally. The *Charter of the United Nations*²⁸ sets out the legal framework for utilizing ADR processes at the global stage. The Charter provides that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice* (Emphasis added)²⁹.

ADR processes are therefore 'Appropriate' and not 'Alternative' in conflict management. It is imperative to embrace Appropriate Dispute Resolution in order to secure lasting peace for development.

²² Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successeschallengesand-opportunities-1.pdf> (Accessed on 24/08/2024)

²³ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.'

²⁴ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

²⁵ Ibid

²⁶ JAMS ADR., 'What is ADR? Defining the Alternative Dispute Resolution Spectrum' Op Cit

²⁷ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

²⁸ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

²⁹ Ibid, article 33 (1)

3.0 Securing Lasting Peace through Appropriate Dispute Resolution: Opportunities and Challenges

ADR techniques play a fundamental role in enhancing sustainable peace and strengthening peace building efforts³⁰. These processes are not only vital in addressing internal conflicts but also doing so in ways that enhance sustainable peace rather than dividing people further as would be the case with adversarial court processes³¹. It has been noted that in order to effectively address conflicts and secure lasting peace, it is essential to delve into the root causes that give rise to them³². In addition, it has been observed that conflicts are not isolated incidents but are often deeply rooted in underlying factors and dynamics³³. Therefore, by understanding such root causes, it is possible to develop sustainable solutions that address the fundamental issues at play³⁴.

For example, it has been argued that securing lasting peace in Africa requires root causes of conflicts to be addressed beyond traditional responses³⁵. For many decades, a significant number of countries in the continent have been characterized by internal conflicts, intra and inter-state wars, and political instability threatening peace, security, and stability³⁶. As a result of these conflicts, it has become more challenging to secure lasting peace in Africa, with protracted and recurring conflict more difficult to prevent or resolve, often because their underlying causes are not well understood or addressed³⁷.

³⁰ Muigua. K., 'Towards Effective Peacebuilding and Conflict Management in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2021/05/Towards-Peacebuilding-and-Conflict-Managementin-Kenya.docx-Kariuiki-Muigua-MAY-2021x.pdf> (Accessed on 25/08/2024)

³¹ Ibid

³² Saaida. M., 'Peace Studies: Conflict Resolution and Mediation Strategies' Available at https://www.researchgate.net/publication/372289839_Peace_Studies_Conflict_Resolution_and_Mediation_Strategies (Accessed on 25/08/2024)

³³ Ibid

³⁴ Ibid

³⁵ United Nations., 'Root Causes of Conflicts in Africa Must Be Addressed beyond Traditional Response, Special Adviser Tells Security Council Debate on Silencing Guns.' Available at <https://press.un.org/en/2023/sc15249.doc.htm> (Accessed on 25/08/2024)

³⁶ Olaosebikan. A., 'Conflicts in Africa: Meaning, Causes, Impact and Solution.' *African Research Review.*, Volume 4, No. 4 (2010)

³⁷ United Nations., 'Promotion of Durable Peace and Sustainable Development in Africa.' Available at

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Therefore, addressing the internal and external root causes of conflicts in Africa beyond the traditional response, which only tackled their symptoms, would create the capacities that help African countries overcome the peace and security challenges they face, which have deep historical roots³⁸. ADR processes are ideal in meeting these objectives and securing lasting peace.

Mediation addresses the root causes of conflict resulting in mutually satisfying and long-lasting outcomes therefore creating a suitable environment for peace by eliminating the likelihood of conflicts reemerging in future³⁹. It also has the potential to preserve and at times even enhance the relationship of parties to a conflict making it an ideal process in promoting lasting peace⁴⁰. In addition, it has been noted that mediation can lead to more sustainable and long-lasting resolutions compared to imposed solutions⁴¹. By involving all parties in the decision-making process, mediation helps create a sense of ownership and commitment to the agreed-upon outcomes⁴². Mediation is therefore a suitable process in securing lasting peace by providing a structured and neutral platform for dialogue and negotiation⁴³. By enabling constructive communication among parties, mediation helps parties to better understand each other's perspectives, find common ground, and work towards mutually acceptable solutions⁴⁴.

Mediation has often been utilized by the United Nations in peacebuilding efforts⁴⁵. The United Nations has played a crucial role in helping to mediate inter- and intra-State conflicts at all stages: before they escalate into armed conflict, after the outbreak of violence, and during implementation of peace

https://www.un.org/osaa/sites/www.un.org.osaa/files/docs/2109875_osaa_sg_report_web_new.pdf (Accessed on 25/08/2024)

³⁸ United Nations., 'Root Causes of Conflicts in Africa Must Be Addressed beyond Traditional Response, Special Adviser Tells Security Council Debate on Silencing Guns.' Op Cit

³⁹ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

⁴⁰ Ibid

⁴¹ Saaida. M., 'Peace Studies: Conflict Resolution and Mediation Strategies' Op Cit

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ United Nations., 'Prevention and Mediation' Available at <https://dppa.un.org/en/prevention-and-mediation> (Accessed on 25/08/2024)

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agreements⁴⁶. In addition, the Secretary-General of the United Nations and his representatives carry out good offices and mediation efforts at the request of parties to disputes, on the Secretary General's initiative, or in response to a request from the Security Council or the General Assembly of the United Nations⁴⁷. Through the use of mediation among other Appropriate Dispute Resolution processes, the United Nations continues to play a prominent role in peacemaking, working increasingly in partnership with regional organizations in order to bring ongoing conflicts to an end, and to prevent new crises from emerging or escalating in order to secure lasting peace throughout the world⁴⁸. The Charter of the United Nations identifies mediation as an important means for the peaceful settlement of disputes and conflicts, and it has proven to be an effective instrument to address both inter-State and intra-State conflict⁴⁹. For example, the African Union led mediation was instrumental in restoring peace and stability following the post-election violence in Kenya in 2007-2008⁵⁰. The successful mediation efforts led by the former Secretary-General of the United Nations, Kofi Annan, led to the signing of the National Accord and the formation of the Grand Coalition Government in Kenya⁵¹.

Negotiation is also an ideal process in securing lasting peace. Negotiation is an informal process that involves parties to a conflict meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party⁵². It is one of the most fundamental methods of managing conflicts which offers parties maximum control over the process and outcome⁵³. It has been argued that conflict management in most contexts is anchored on the ability of people to negotiate⁵⁴. The success of peacebuilding efforts not only depends on the effective negotiation of peace agreements, but

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ United Nations., 'Guidance for Effective Mediation' Available at https://peacemaker.un.org/sites/peacemaker.un.org/files/GuidanceEffectiveMediation_UNDPA2012%28english%29_0.pdf (Accessed on 25/08/2024)

⁵⁰ Kofi Annan Foundation., 'Back from the Brink: the 2008 mediation process and reforms in Kenya' Available at <https://www.kofiannanfoundation.org/publication/back-from-the-brink-the-2008-mediation-process-and-reforms-in-kenya/> (Accessed on 25/08/2024)

⁵¹ Ibid

⁵² Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁵³ Ibid

⁵⁴ Ibid

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essentially also on how negotiations fare during the practical implementation of peacebuilding policies on the ground⁵⁵. Peacebuilding is therefore a constant negotiation process⁵⁶. Negotiations do not stop after the conclusion of a peace agreement; peacebuilding goals and practice continue to be negotiated at every step of policymaking⁵⁷. Negotiations have been identified as central part of the daily business of United Nations peacebuilding operations⁵⁸. It is therefore necessary to embrace negotiation in order to secure lasting peace.

Arbitration has also made a difference and contributed to peaceful resolution of conflicts⁵⁹. It has been noted that arbitration has largely succeeded in peacefully resolving international disputes⁶⁰. For instance, in violent conflicts involving land boundary disputes, political and military tensions may run so high that the parties to the dispute are unable to resolve their differences themselves⁶¹. In such cases, even when parties have concluded a cease-fire agreement to halt hostilities, the delimitation of a boundary can prove to be too sensitive and too technical to be settled through bilateral dispute settlement techniques, such as negotiation or mediation⁶². Therefore, international arbitration is often the most suitable process wherein an arbitrator makes a final and binding decision on the issues in dispute⁶³. However, it has been cautioned that arbitration may not be suitable in ending political disputes⁶⁴. For example, the *Abyei arbitration*⁶⁵, which concerned Sudan's highly political and emotive situation of the delimitation of the country's oil-rich Abyei region

⁵⁵ German Institute of Development and Sustainability., 'Negotiating the Implementation of Peacebuilding: A Challenge for the Transition to Peace and Democracy' Available at https://www.idos-research.de/uploads/media/BP_10.2017.pdf (Accessed on 25/08/2024)

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Franke. U., Magnusson. A., Dahlquist. J., 'Arbitrating for Peace: How Arbitration Made A Difference' *Kluwer Law International.*, 2016

⁶⁰ Ibid

⁶¹ Duijzentkunst. B., & Dawkins. S., 'Arbitrary Peace? Consent Management in International Arbitration' *European Journal of International Law.*, Volume 26, Issue 1, (2015)

⁶² Ibid

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Permanent Court of Arbitration., 'The Government of Sudan / The Sudan People's Liberation Movement/Army (Abyei Arbitration)' Available at <https://pca-cpa.org/en/cases/92/> (Accessed on 25/08/2024)

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only proved successful for a short period of time with the dispute escalating later especially after the independence of South Sudan⁶⁶. In political disputes, it is therefore necessary to embrace other Appropriate Dispute Resolution mechanisms such as mediation and diplomacy⁶⁷. Further, it has been noted that successful peace process depends on the consent of the parties and therefore is imperative to ensure that consent is obtained in order to secure lasting peace through arbitration⁶⁸.

ADR techniques are also suitable in securing lasting peace by fostering the participation and inclusion of all stakeholders in peace building efforts⁶⁹. It has been noted that embracing the participation of a broad range of parties including civil society and women's groups in peace initiatives can mitigate the risks of conflict and instability and increase the effectiveness of peacebuilding initiatives⁷⁰. Further, it has been argued that the recognition of gender is crucial in conflict resolution processes and peace building⁷¹. Gender-sensitive approaches towards conflict management acknowledge that men, women, and marginalized groups experience conflicts differently and have distinct needs, experiences, and contributions to make in peacebuilding efforts⁷². Therefore, by considering gender dynamics, these approaches strive to ensure equality and social justice in conflict resolution and peace initiatives⁷³. According to the United Nations, the inclusion, particularly gender-equality, is foundational to building sustainable peace⁷⁴. It further points out that gender inclusivity and ensuring the full and active participation of women and young

⁶⁶ Ibid

⁶⁷ Miles. W., & Mallett. D., 'The Abyei Arbitration and the Use of Arbitration to Resolve Inter-state and Intra-state Conflicts' *Journal of International Dispute Settlement.*, Volume 1, Issue , (2010)

⁶⁸ Duijzentkunst. B., & Dawkins. S., 'Arbitrary Peace? Consent Management in International Arbitration' Op Cit

⁶⁹ Fuentes-Julio. C., & Ibrahim. R., 'A Human Rights Approach to Conflict Resolution' Available at <https://www.ethicsandinternationalaffairs.org/journal/a-human-rights-approach-to-conflict-resolution> (Accessed on 25/08/2024)

⁷⁰ Ibid

⁷¹ Saaida. M., 'Peace Studies: Conflict Resolution and Mediation Strategies' Op Cit

⁷² Ibid

⁷³ Ibid

⁷⁴ United Nations., 'Addressing Root Causes of Conflict Vital for Sustaining Peace as COVID-19 Reverses Peacebuilding Gains, Facilitates Intolerance, Speakers Warn Security Council' Available at <https://press.un.org/en/2021/sc14659.doc.htm> (Accessed on 25/08/2024)

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people in conflict resolution processes is necessary for achieving durable peace⁷⁵. ADR processes such as negotiation and mediation are ideal in enhancing participation and inclusivity in conflict management and are therefore key in securing lasting peace⁷⁶.

It is therefore possible to secure lasting peace through Appropriate Dispute Resolution. ADR is a practical tool to foster peacebuilding and conflict resolution at the interpersonal, community, national, regional, and global levels⁷⁷. However, these processes are often underutilized in peacebuilding efforts⁷⁸. It is therefore vital to secure lasting peace through Appropriate Dispute Resolution for prosperity.

4.0 Conclusion

Securing lasting peace is a global ideal. The United Nations 2030 Agenda for Sustainable Development recognizes not only that peace and security are prerequisites for achieving Sustainable Development, but also that Sustainable Development provides the pathway to peaceful societies⁷⁹. Peace entails more than the absence of violence and conflicts⁸⁰. This notion of negative peace is an incomplete picture and leads to many misconceptions of how peace can be attained⁸¹. As a result, it is imperative to embrace new approaches to peacebuilding and development; ones that extend beyond security and create the conditions necessary to restructure our societies so that they have the capacity to adapt and modify to our constantly changing environments⁸². Peace

⁷⁵ Ibid

⁷⁶ Muigua. K., 'Building Peace in Africa through Alternative Dispute Resolution' Available at <https://kmco.co.ke/wp-content/uploads/2023/10/Building-Peace-in-Africa-through-Alternative-Dispute-Resolution-.pdf> (Accessed on 25/08/2024)

⁷⁷ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

⁷⁸ Ibid

⁷⁹ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1. Op Cit

⁸⁰ Vision of Humanity., 'Here's Why we Need a New Definition of Peace' Available at <https://www.visionofhumanity.org/why-we-need-a-new-definition-of-peace/#:~:text=Without%20peace%2C%20it%20will%20not,to%20changes%20in%20their%20environments> (Accessed on 25/08/2024)

⁸¹ Ibid

⁸² Ibid

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therefore envisages the presence of positive elements, such as justice, harmony, equality, and compassion⁸³.

Securing lasting peace is key for development and human well-being. It has been noted that countries that enjoy peace and stability are among the best performers in terms of the Human Development Index (HDI), a summary measure of human development that takes into account: a long and healthy life, being knowledgeable and having a decent standard of living⁸⁴. Without peace and stability, it is impossible to achieve progress at any level⁸⁵. Wars and conflicts disrupt economies, displace communities, and exacerbate poverty and inequalities⁸⁶. Therefore, in order to make progress towards peace and achieve development, meaningful actions must be taken at every level of society, to build a world not only free of conflicts and wars but also a world where justice, equality, and human rights are upheld⁸⁷.

ADR techniques are ideal in securing lasting peace. Processes such as mediation and negotiation are suitable in securing lasting peace by addressing the root causes of conflicts, enhancing collaboration, and ensuring participation and inclusivity in conflict management⁸⁸. In some contexts, arbitration is ideal in peacefully resolving international disputes⁸⁹. ADR techniques have been identified as valuable for stabilization and statebuilding efforts towards securing lasting peace⁹⁰. These processes are being increasingly embraced in peacebuilding efforts at both the global level through initiatives by the United Nations and on a regional level through the African Union

⁸³ Gray Group International., 'Understanding Peace: A Comprehensive Guide to Achieving Global Harmony' Op Cit

⁸⁴ United Nations Development Programme., 'Sustainable Peace for Sustainable Development - A Global Challenge that Calls for Collective Action' Available at <https://www.undp.org/rwanda/blog/sustainable-peace-sustainable-development-global-challenge-calls-collective-action> (Accessed on 25/08/2024)

⁸⁵ Ibid

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ United Nations., 'Root Causes of Conflicts in Africa Must Be Addressed beyond Traditional Response, Special Adviser Tells Security Council Debate on Silencing Guns.' Op Cit

⁸⁹ Duijzentkunst. B., & Dawkins. S., 'Arbitrary Peace? Consent Management in International Arbitration' Op Cit

⁹⁰ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

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Mediation and Dialogue Initiative⁹¹. It is therefore necessary to embrace these techniques in order to secure lasting peace through Appropriate Dispute Resolution.

ADR processes should be embraced as 'Appropriate' and not 'Alternative' since they are key in securing lasting peace by allowing parties to come up with collaborative approaches, addressing the root causes of conflicts for durable peace, and ensuring the participation of all stakeholders including women, youth, and Indigenous Peoples in conflict management⁹². It is also pertinent for states to bolster their legal, policy, institutional, and human capacity in ADR in order to bolster the role of these processes in peacebuilding⁹³.

Securing lasting peace through Appropriate Dispute Resolution is therefore necessary and feasible. It is imperative to pursue this agenda all over the world for development and posterity.

⁹¹ African Union., 'Mediation and Dialogue' Available at <https://au.int/en/directorates/mediation-and-dialogue> (Accessed on 25/08/2024)

⁹² Saaida. M., 'Peace Studies: Conflict Resolution and Mediation Strategies' Op Cit

⁹³ Muigua. K., 'Building Peace in Africa through Alternative Dispute Resolution' Op Cit

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Abstract

This paper critically examines the role of ADR in fostering justice in Africa. The paper argues that ADR is an 'appropriate' and not 'alternative' mode of delivering justice in Africa. The paper notes that ADR has been part and parcel of conflict management in Africa for many centuries. It further asserts that ADR mechanisms fit well within the notions of justice in Africa and its core values including reconciliation, harmony, and peace. Despite its suitability in enhancing access to justice in Africa, the paper argues that several factors and challenges have resulted in ADR being conceptualised as 'alternative' in the African context. The paper suggests how ADR can be reframed from 'alternative' to 'appropriate' in order to ensure effective justice in Africa.

1.0 Introduction

The term ADR widely known as '*Alternative Dispute Resolution*' has been defined as an umbrella term that covers a range of tools and skills that can be utilised to manage conflicts and disputes without resort to courts¹. ADR has also been defined as a spectrum of less costly and more expeditious alternatives to litigation, where a neutral party assists the disputing parties in reaching resolution². However, it has been noted that in some ADR processes such as negotiation, parties to a conflict meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party³. Further, ADR has also been described as a set of processes which seek to resolve disputes in non-adversarial ways in order to reach outcomes of mutual benefit for all parties⁴. The United Nations defines ADR as a set of

¹ Environmental Law Institute., '*A Community Guide to Using Alternative Dispute Resolution to Secure Environmental Justice*' Available at <https://www.eli.org/environmental-governance/community-guideusing-alternative-dispute-resolution-secure-1> (Accessed on 29/01/2025)

² JAMS ADR., '*What is ADR*' Available at <https://www.jamsadr.com/adr-spectrum/> (Accessed on 29/01/2025)

³ Muigua. K., '*Alternative Dispute Resolution and Access to Justice in Kenya*.' Glenwood Publishers Limited, 2015

⁴ World Intellectual Property Organization., '*Alternative Dispute Resolution for Disputes Related to Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources*' Available at <https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2023-5-8-en-alternative-dispute-resolution-for-disputes-related-to-intellectual-property-and-traditional->

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approaches and techniques aimed at resolving disputes in a non-confrontational manner⁵.

ADR is an all-encompassing term covering various processes including negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs)⁶. The United Nations points out that ADR covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party imposes a solution⁷. Further, it points out that somewhere along the axis of ADR approaches, between these two extremes, lies mediation, a process by which a third party aids the disputants to reach a mutually agreed solution⁸. ADR mechanisms may be linked to but function outside formal court litigation processes⁹.

The idea of ADR has been embraced at both global and national levels. At the global level the *Charter of the United Nations* encourages a peaceful approach to management of conflicts amongst states¹⁰. The Charter provides that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration*, judicial settlement, resort to regional agencies or arrangements, or other *peaceful means* of their own choice¹¹ (Emphasis added). At a national level, the *Constitution of Kenya*¹² mandates courts and tribunals to

[knowledge-traditional-cultural-expressions-and-genetic-resources.pdf](#) (Accessed on 29/01/2025)

⁵ United Nations., 'Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building' Available at https://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_backgroud_paper.pdf (Accessed on 29/01/2025)

⁶ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁷ United Nations., 'Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building' Op Cit

⁸ Ibid

⁹ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

¹⁰ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

¹¹ Ibid, article 33 (1)

¹² Constitution of Kenya., 2010., Government Printer, Nairobi

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promote ADR mechanisms including reconciliation, mediation, arbitration and TDRMs¹³.

Due to their recognition, ADR processes are being widely utilised to manage disputes at the global, regional and national levels. For instance, ADR techniques such as international commercial arbitration and international commercial mediation have emerged as the preferable mode of managing commercial disputes involving parties from different nationalities¹⁴. In addition, the United Nations also often employs ADR techniques including diplomacy and mediation in managing conflicts and fostering international peace and security¹⁵. Further, ADR in Africa has risen as an increasingly popular alternative to the formal legal channels, particularly in managing civil disputes, promising efficiency and increasing the perception of justice¹⁶. Due to their increasing role in enhancing access to justice and fostering peace at the global, regional, and national levels, it has been argued that it is necessary to embrace ADR as 'appropriate' and not 'alternative'¹⁷.

This paper critically examines the role of ADR in fostering justice in Africa. The paper argues that ADR is an 'appropriate' and not 'alternative' mode of delivering justice in Africa. The paper notes that ADR has been part and parcel of conflict management in Africa for many centuries. It further asserts that

¹³ Ibid, article 159 (2) (c)

¹⁴ World Bank Group., 'Arbitrating and Mediating Disputes : Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment (English)' Available at <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/554271468340163221/arbitrating-and-mediating-disputes-benchmarking-arbitration-and-mediation-regimes-for-commercial-disputes-related-to-foreign-direct-investment> (Accessed on 29/01/2025)

¹⁵ United Nations., 'Maintain International Peace and Security' Available at <https://www.un.org/en/our-work/maintain-international-peace-and-security#:~:text=The%20United%20Nations%20plays%20an,political%20missions%20in%20the%20field.> (Accessed on 29/01/2025)

¹⁶ Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' *Pepperdine Dispute Resolution Law Journal*, Volume 18, Issue 3

¹⁷ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution' Available at <https://kmco.co.ke/wp-content/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Moving-from-Alternative-to-Appropriate-Dispute-Resolution-1.pdf> (Accessed on 29/01/2025)

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ADR mechanisms fit well within the notions of justice in Africa and its core values including reconciliation, harmony, and peace. Despite its suitability in enhancing access to justice in Africa, the paper argues that several factors and challenges have resulted in ADR being conceptualised as 'alternative' in the African context. The paper suggests how ADR can be reframed from 'alternative' to 'appropriate' in order to ensure effective justice in Africa.

2.0 ADR as 'Appropriate' Dispute Resolution

It has been noted that ADR mechanisms should be considered as '*appropriate*' and not '*alternative*' in the quest towards justice¹⁸. Most ADR mechanisms possess key attributes including informality, privacy, confidentiality, flexibility and the ability to promote expeditious and cost-effective management of disputes which makes them a viable tool in enhancing access to justice¹⁹. Further, ADR allows for more creative and collaborative solutions than that those available in traditional litigation and are therefore '*appropriate*' in dispensing justice²⁰. It has been noted that with the exception of binding arbitration, the goal of ADR is to provide a forum for the parties to work toward a voluntary, consensual agreement, as opposed to having a judge or other authority determine a dispute²¹. ADR also improves communication between parties in conflict and provides a forum for creative solutions to disputes that better meet the needs of the parties²².

According to the United Nations, ADR provides a wide range of options and possibilities that parties may choose to use, with the intent of removing a potential source of conflict, preventing its escalation and finding the way back to a constructive cooperative and a potentially productive future working relationship²³. Most ADR processes are ideal in promoting effective solutions

¹⁸ Ibid

¹⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

²⁰ JAMS ADR., 'What is ADR' Op Cit

²¹ Alternative Dispute Resolution., Available at <https://www.dol.gov/general/topic/labor-relations/adr#:~:text=Types%20of%20ADR%20include%20arbitration,%2C%20neutral%20factfinding%2C%20and%20minitrials>. (Accessed on 29/01/2025)

²² Ibid

²³ United Nations., 'Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building' Op Cit

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that respects each side's perspectives while minimising the negative impact of conflicts²⁴. Further, ADR mechanisms such as negotiation and mediation can preserve and in some cases even enhance the relationship between the parties once an agreement has been reached between them²⁵. These processes focus on collaboration and cooperation among parties and are therefore suitable in preserving relationships, building trust, and promoting long-term and sustainable solutions²⁶.

ADR is also a viable tool towards building peace²⁷. ADR processes provide a forum for parties to manage their conflicts and disputes in non-confrontational manner²⁸. Through this, ADR processes play a fundamental role in enhancing sustainable peace and strengthening peace building efforts²⁹. For example, in Africa, it has suggested that ADR is an appropriate tool in strengthening dispute settlement systems and bridging the gap between formal legal systems and traditional modes of African justice³⁰. These processes may have particular value in stabilization and state building efforts especially when judicial institutions are weak and social tensions are high³¹. ADR has therefore been identified as a suitable tool towards achieving sustainable peace in Africa through decongestion of the court system thus enhancing access to justice,

²⁴ The Role of Negotiation in Conflict Resolution Strategies., Available at <https://www.karrass.com/blog/conflict-resolution-strategies> (Accessed on 29/01/2025)

²⁵ Negotiation., Available at <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/03.html#:~:text=Negotiations%20allow%20the%20parties%20to,the%20form%20of%20an%20agreement> (Accessed on 29/01/2025)

²⁶ Miroslavov. M., 'Mastering the Collaborating Conflict Style In 2024' Available at <https://www.officernd.com/blog/collaboratingconflictstyle/#:~:text=It's%20one%20of%20the%20strategies,their%20underlying%20needs%20and%20interests> (Accessed on 29/01/2025)

²⁷ Muigua. K., 'Towards Effective Peacebuilding and Conflict Management in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2021/05/Towards-Peacebuilding-and-Conflict-Management-in-Kenya.docx-Kariuiki-Muigua-MAY-2021x.pdf> (Accessed on 29/01/2025)

²⁸ United Nations., 'Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building' Op Cit

²⁹ Muigua. K., 'Towards Effective Peacebuilding and Conflict Management in Kenya.' Op Cit

³⁰ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

³¹ Ibid

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promotion of peaceful out of court settlements, promoting conflict prevention or de-escalation, and timely management of conflicts³². In addition some ADR techniques such as mediation and negotiation address the root causes of conflict resulting in mutually satisfying and long-lasting outcomes therefore creating a suitable environment for peace by eliminating the likelihood of conflicts reemerging in future³³.

Due to the foregoing advantages, it is imperative to consider ADR as 'appropriate' and not 'alternative'. It has been argued that the term 'alternative' is a misnomer since it may be understood to imply that ADR mechanisms are second-best to litigation which is not the case³⁴. The term 'alternative' presupposes that the judicial process is the predominant means for vindicating legal rights, maintaining social order, and resolving disputes in a democratic society³⁵. However, ADR processes allow parties in conflict to develop their own mutually agreeable outcomes, perhaps to blunt the potentially harsh or unsatisfying results that may result from the court process³⁶. In addition, access to justice through formal court processes is hindered by several challenges including costs, bureaucracy, complex legal procedures, illiteracy, corruption, distance from formal courts, backlog of cases in courts and lack of legal knowhow³⁷. ADR processes are able to cure these challenges by enhancing flexibility, efficiency, party autonomy, and expeditiousness in managing disputes³⁸.

The term 'alternative' is therefore misleading since it suggests that ADR processes are unusual and that the judicial process is the predominant mode of

³² Uwazie. E., 'Alternative Dispute Resolution and Peace-building in Africa.' Available at <https://www.cambridgescholars.com/resources/pdfs/978-1-4438-5707-9-sample.pdf> (Accessed on 29/01/2025)

³³ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

³⁴ P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), pp. 50-52

³⁵ Eisenberg. D., 'Beyond Settlement: Reconceptualizing ADR as "Conflict Process Strategy' Available at https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2636&context=fac_pubs (Accessed on 29/01/2025)

³⁶ Ibid

³⁷ 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

³⁸ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

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managing conflicts and disputes. However, it has been noted that this is inaccurate in modern society since ADR is widely utilised in managing disputes³⁹. For instance, a tenant may prefer to negotiate a rental payment plan with a landlord rather than have an eviction judgment issued by a court; divorcing parents may wish to work out custody and visitation plans on their own rather than being compelled to so by courts; companies with on-going dealings may prefer to negotiate with suppliers in order to retain positive business relations; and an offender may want a chance to make amends through restorative justice and avoid a criminal record⁴⁰. ADR is therefore part and parcel of day to day conflict management.

3.0 'Appropriate' Dispute Resolution in Africa: Opportunities and Challenges

ADR in the African context is considered as '*appropriate*' and not '*alternative*'. It has been noted that ADR mechanisms have been part and parcel of the African culture since time immemorial⁴¹. Conflict management in African societies has for many centuries taken the form of informal negotiation, mediation, reconciliation and arbitration among other techniques⁴². These mechanisms are considered '*appropriate*' and not '*alternative*' in management of disputes since they are able to safeguard values that are inherent in African societies and foster peace and social cohesion⁴³. It has been correctly noted that conflict management is largely influenced by culture⁴⁴. For instance, culture serves as the vehicle for identifying and distinguishing the individuals and groups that

³⁹ Eisenberg. D., 'Beyond Settlement: Reconceptualizing ADR as "Conflict Process Strategy' Op Cit

⁴⁰ Ibid

⁴¹ Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' <https://kmco.co.ke/wp-content/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-Dispute-Resolution-in-Kenya-Prospects-and-Challenges.pdf> (Accessed on 29/01/2025)

⁴² Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf> (Accessed on 29/01/2025)

⁴³ Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).

⁴⁴ LeBaron. M., 'Culture and Conflict' Available at https://www.beyondintractability.org/essay/culture_conflict (Accessed on 29/01/2025)

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are likely to be parties to conflict⁴⁵. In addition, culture shapes the way in which individuals perceive a conflict and respond to it⁴⁶. Culture therefore plays an important role in conflict management and shapes the way in which individuals or groups frame and respond to conflicts⁴⁷.

Most African cultures are anchored by values aimed at promoting social cohesion⁴⁸. These values include peaceful coexistence, harmony, truth, honesty, unity, cooperation, forgiveness and respect⁴⁹. Throughout Africa, the culture and traditions of African communities emphasise harmony/togetherness over individual interest and humanness as expressed in the African philosophy of *Ubuntu/Utu*⁵⁰. This philosophy aims at upholding values for the greater good of the community including sympathy, compassion, benevolence, solidarity, hospitality, generosity, sharing, openness, affirming, being available, kindness, caring, harmony, interdependence, obedience, collectivity and consensus⁵¹. *Ubuntu/Utu* seeks to deter vengeance, confrontation and retribution and on the other hand values life, dignity, compassion, humaneness harmony and reconciliation⁵².

ADR is well-entrenched in the African philosophy of *Ubuntu/Utu*. It has been noted that ADR techniques fit comfortably within the concept of justice in Africa, particularly its core value of reconciliation⁵³. Conflict management in African societies involved informal hearings led by highly respected individuals in the society and institutions such as the council of elders in which

⁴⁵ Worchel. S., 'Culture's Role in Conflict and Conflict Management: Some Suggestions, Many Questions.' *International Journal of Intercultural Relations.*, Volume 29, Issue 6 (2005)

⁴⁶ Ibid

⁴⁷ LeBaron. M., 'Culture and Conflict' Op Cit

⁴⁸ Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa* , Volume 17, No.1, 2015

⁴⁹ Ibid

⁵⁰ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁵¹ Mugumbate. J., & Nyanguru. A., 'Exploring African Philosophy: The Value of Ubuntu in Social Work.' Available at <https://ro.uow.edu.au/cgi/viewcontent.cgi?article=4272&context=sspapers&httpsredir=1&referer#:~:text=Ubuntu%20can%20best%20be%20described,ngumuntu%20ngabantu%20in%20Zulu%20language> (Accessed on 29/01/2025)

⁵² Ibid

⁵³ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

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a discussion ensued whereby an amicable decision was reached⁵⁴. It has been noted such individuals including elders served as mediators rather than judges⁵⁵. The philosophy of Ubuntu/Ututu was applied in conflict management with humanness at the centre of the decision-making process⁵⁶. Conflict management in African societies was therefore aimed at creating consensus, facilitating reconciliation, fostering peace, harmony and cohesion and gave prominence to communal needs over individual needs in line with the African philosophy of *Ubuntu/Ututu*⁵⁷.

The concept of ADR is therefore '*appropriate*' and not '*alternative*' in Africa. It has been noted that many African countries are still struggling to establish functional, timely, and trusted judicial systems⁵⁸. As a result, many African citizens have lost faith in the ability of their nations' courts to provide timely or just closure to their grievances⁵⁹. In post-conflict and fragile contexts, where societal tensions are already high and justice systems typically do not function as in the case of some African countries, the need for prompt resolution of disputes is particularly vital⁶⁰. Effective management of disputes in such contexts is necessary in order to spur peace and stability. Consequently, ADR in Africa has emerged as an increasingly popular channel outside formal procedures to resolve disputes in timely manner, while restoring the parties' sense of justice⁶¹. Further, ADR in Africa has been identified as a practical tool to foster peacebuilding and conflict resolution at both the interpersonal and community levels⁶². It has been pointed out that ADR aligns with Africa's

⁵⁴ Batchelor. B., Chetty. N., & Makore. S., 'Incorporating Afrocentric Alternative Dispute Resolution in South Africa's Clinical Legal Education' Available at <https://www.saflii.org/za/journals/LDD/2021/17.pdf> (Accessed on 29/01/2025)

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁵⁸ Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Op Cit

⁵⁹ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

⁶⁰ Ibid

⁶¹ Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' Op Cit

⁶² Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

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community-oriented societies, where reconciliation is prioritized over retribution⁶³. ADR in Africa is therefore '*appropriate*' and not '*alternative*'.

Despite the appropriateness of ADR in Africa, these mechanisms have been largely disregarded in favour of formal justice systems hence being described as '*alternative*'. It has been noted that the indigenous practices and institutions on conflict management in Africa were largely weakened and even destroyed during the colonial era since the colonial powers introduced formal justice processes such as law courts, which came to pronounce judgments rather than resolve conflicts according to the African concepts of justice⁶⁴. Conflicts that were hitherto handled through traditional amicable settlements practices, with emphasis on reconciliation and the restoration of social harmony among the people of Africa were now being handled on the basis of punishment of the conflicting parties⁶⁵. This resulted in subjugation of indigenous and customary dispute resolution practices which are now subjected to Western conceptions of justice. For instance, the Constitution of Kenya provides that TDRMs shall not be used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality⁶⁶. Such labelling has resulted in disregard of TDRMs since it subjects them to the Western concepts of justice and morality yet African societies who have their own conceptions of justice and morality which places emphasis on reconciliation and harmony⁶⁷. It has also been observed that the practice of ADR as we know it today originated and developed within specific cultural, ideological and political contexts inherent in the West and therefore, its application in non-Western societies especially Africa may turn out to be counter-productive since the latter exhibit markedly different social, historical and political conditions⁶⁸. As

⁶³ Africa: A Rising Hub for Alternative Dispute Resolution., Available at <https://www.linkedin.com/pulse/africa-rising-hub-alternative-dispute-1vlye/> (Accessed on 29/01/2025)

⁶⁴ Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit

⁶⁵ Ibid

⁶⁶ Constitution of Kenya, 2010., Article 159 (3)(b)., Government Printer, Nairobi

⁶⁷ Muigua. K., 'Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf> (Accessed 30/01/2025)

⁶⁸ Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Available at

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a result, most of the ADR mechanisms being practiced in Africa including arbitration, mediation and adjudication are largely influenced by the Western conceptions of justice⁶⁹.

The foregoing challenges undermine the appropriateness of ADR and its role in fostering justice in Africa. It is therefore necessary to reframe ADR from '*alternative*' to '*appropriate*' in order to ensure justice in Africa.

4.0 Conclusion

It is imperative to reframe ADR from '*alternative*' to '*appropriate*' in Africa. ADR has been part and parcel of conflict management in Africa for many centuries⁷⁰. ADR is rooted in the culture and customs of the African people including the philosophy of *Ubuntu/Utu*⁷¹. ADR is therefore an '*appropriate*' tool of conflict management in Africa since it aligns with the ideal of justice in the African context including creating consensus, facilitating reconciliation, fostering peace, harmony and cohesion in line with the African philosophy of *Ubuntu/Utu*⁷². The concept of ADR is suitable in delivering justice for Africans since it is able to foster restorative justice, ensures more social inclusion since it is participatory in nature, is more affordable, has minimum formalities and technicalities and focuses on substantive justice, is more expeditious, and ensures collaborative, creative and long-lasting outcomes that preserve relationships⁷³. With many African countries still struggling to establish functional, timely, and trusted judicial systems, it is necessary to bolster ADR for justice in Africa⁷⁴.

ADR should therefore be widely embraced in Africa including through putting in place appropriate legal, policy, and institutional frameworks in order to

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612865 (Accessed on 30/01/2025)

⁶⁹ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

⁷⁰ Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Op Cit

⁷¹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁷² Ibid

⁷³ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy' Available at https://www.unodc.org/documents/easternafrika//Criminal%20Justice/AJS_Baseline_Policy_2020_Kenya.pdf (Accessed on 30/01/2025)

⁷⁴ Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Op Cit

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encourage their uptake⁷⁵. Further, it is necessary to promote public awareness on ADR in order to encourage citizens to embrace ADR processes for timely, effective, and efficient access to justice⁷⁶. Indigenous and customary systems of conflict management in Africa should also be recognised and strengthened⁷⁷. For example, elders among other institutions of conflict management in Africa need to be empowered and trained in order to build their capacity and skills on fundamental and universal tenets of justice such as human rights⁷⁸. Clear systems of referral should also be established between ADR and the formal justice system in order to encourage the management of disputes through ADR for effective justice⁷⁹.

ADR holds the promise of effective justice in Africa. It is therefore necessary to reframe ADR in Africa from '*alternative*' to '*appropriate*' in order to achieve this dream.

⁷⁵ Muigua. K., 'Effective Justice for Kenyans: Is ADR Really Alternative?' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/Alternative-Dispute-Resolution-or-Appropriate-Dispute-Resolution.pdf> (Accessed on 30/01/2025)

⁷⁶ Ibid

⁷⁷ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy' Op Cit

⁷⁸ Ibid

⁷⁹ Ibid

Achieving Peace, Justice and Environmental Security for Sustainable Development

Abstract

This paper critically discusses the role of peace, justice and environmental security in Sustainable Development. The paper argues that peace, justice and environmental security are key elements of sustainability. It conceptualizes peace, justice and environmental security and examines their role in the quest towards Sustainable Development. The paper also explores some of the factors undermining peace, justice and environmental security and their impact on Sustainable Development. In addition, the paper sets out interventions towards achieving peace, justice and environmental security for Sustainable Development.

1.0 Introduction

Sustainable Development is an ideal that seeks to balance social, environmental and economic targets¹. It entails harmonizing three core elements: economic growth, social equity and environmental conservation in order to achieve a holistic approach towards development for the benefit of present and future generations². Sustainable Development therefore involves fostering development that meets the needs of the present generations without compromising the ability of future generations to meet their own needs³. The United Nation's 2030 Agenda for Sustainable Development was adopted in 2015 as a global blueprint for development⁴. It represents a plan of action towards achieving the ideal of Sustainable Development through 17 Sustainable Development Goals (SDGs) that integrate the economic, social, and environmental facets of Sustainable Development⁵.

Achieving Sustainable Development however continues to be an elusive reality for the global community. The world is facing mounting environmental

¹ World Commission on Environment and Development., 'Our Common Future.' Oxford, (Oxford University Press, 1987)

² What is Sustainable Development?., Available at <https://www.eeb.gov.hk/en/susdev/sd/index.htm> (Accessed on 26/10/2024)

³ World Commission on Environment and Development., 'Our Common Future.' Op Cit

⁴ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 26/10/2024)

⁵ Ibid

challenges such as climate change, pollution, and loss of biodiversity; and economic and social problems including poverty⁶, gender inequalities, conflicts and wars, unemployment, economic recession, and rising inequalities within and among nations which hinder the quest towards Sustainable Development⁷. In light of these challenges, it is imperative to take urgent action to actualize the Sustainable Development agenda and its SDGs. The 2030 Agenda for Sustainable Development recognizes peace, justice and environmental security as vital components of the sustainability debate. Achieving peace, justice and environmental security is therefore critical for Sustainable Development.

This paper critically discusses the role of peace, justice and environmental security in Sustainable Development. The paper argues that peace, justice and environmental security are key elements of sustainability. It conceptualizes peace, justice and environmental security and examines their role in the quest towards Sustainable Development. The paper also explores some of the factors undermining peace, justice and environmental security and their impact on Sustainable Development. In addition, the paper sets out interventions towards achieving peace, justice and environmental security for Sustainable Development.

2.0 Defining Peace, Justice and Environmental Security

It has been noted that every culture has a unique but related understanding of what peace entails⁸. At its core, the term peace is associated with the concepts of harmony, tranquility, cooperation, alliance, well-being, and agreement⁹. According to the United Nations, peace is not only the absence of wars and conflicts, but also requires a positive, dynamic participatory process where dialogue is encouraged and conflicts are solved in a spirit of mutual

⁶ Giovannoni, E., & Fabietti, G., 'What Is Sustainability? A Review of the Concept and Its Applications.' In: Busco, C., Frigo, M., Riccaboni, A., Quattrone, P. (eds) Integrated Reporting. Springer, Cham. Available at https://doi.org/10.1007/978-3-319-02168-3_2 (Accessed on 26/10/2024)

⁷ Ibid

⁸ Muigua, K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

⁹ Ibid

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understanding and cooperation¹⁰. Peace thus also means dignity and well-being for all and not just absence of war¹¹. Peace can therefore be classified into positive peace and negative peace¹². Positive peace entails attitudes, institutions and structures, that when strengthened, lead to peaceful societies¹³. Negative peace on the other hand entails the absence of violence, wars and conflicts¹⁴. It has been noted that peace goes beyond temporary ceasefire agreements; it also involves addressing the root causes of conflict and working towards long-term solutions that promote human well-being and Sustainable Development¹⁵. True and sustainable peace involves eliminating the root causes of conflicts, wars, violence, and injustices and the conscious attempt to build inclusive societies that reflect attitudes, institutions and structures that when strengthened, lead to peaceful societies¹⁶.

Justice can be conceptualized in various forms including: *distributive justice* (economic justice) that involves fairness in sharing resources and opportunities¹⁷; *procedural justice* which focuses on fair and impartial decision making procedures¹⁸; *restorative justice* whose aim is to repair harm to victims of crimes and rehabilitate offenders¹⁹; and *retributive justice* that focuses on punishing crimes in a society²⁰ (Emphasis added). Justice has also been described as a central moral notion, associated with fair and impartial decision

¹⁰ United Nations., 'Cultivating a Culture of Peace' Available at <https://www.un.org/en/observances/international-day-peace> (Accessed on 27/10/2024)

¹¹ United Nations., 'Peace means dignity, well-being for all, not just absence of war – UN officials' Available at <https://news.un.org/en/story/2014/09/476992> (Accessed on 27/10/2024)

¹² Herath. O., 'A critical analysis of Positive and Negative Peace.' Available at <http://repository.kln.ac.lk/bitstream/handle/123456789/12056/journal1%20%281%29.104-107.pdf?sequence=1&isAllowed=y> (Accessed on 27/10/2024)

¹³ Ibid

¹⁴ Ibid

¹⁵ Gray Group International., 'Understanding Peace: A Comprehensive Guide to Achieving Global Harmony' Available at <https://www.graygroupintl.com/blog/peace> (Accessed on 27/10/2024)

¹⁶ Herath. O., 'A critical analysis of Positive and Negative Peace.' Op Cit

¹⁷ Maiese. M., & Burgess. H., 'Types of Justice' Available at https://www.beyondintractability.org/essay/types_of_justice (Accessed on 27/10/2024)

¹⁸ Ibid

¹⁹ Ibid

²⁰ Ibid

procedures (procedural justice) and with persons and groups being treated even-handedly (formal justice, treating like cases alike) and in a morally fitting way (material or substantive justice)²¹.

Environmental security has been described as the process of peacefully reducing human vulnerability to human-induced environmental degradation by addressing the root causes of environmental degradation and human insecurity²². It has also been defined as a process that engenders cooperation among nations and regions to solve environmental problems and advance the goals of political stability, economic development, and peace²³. Environmental security focuses on the ways in which environmental change puts national, regional, and global security at risk, the ways in which it may be a factor in violent conflicts, and the ways in which environmental change also puts human security at risk²⁴. It entails understanding how environmental change including environmental degradation and climate change interact with peace and security dynamics²⁵. Environmental security aims to effectively respond to changing environmental conditions that have the potential to reduce peace and stability at the global, regional, and national levels²⁶. It has been noted that peace and environmental security are interdependent and neither can be achieved without the other²⁷.

3.0 The Role of Peace, Justice and Environmental Security in Sustainable Development

Peace, justice and environmental security are vital elements in the quest towards Sustainable Development. This relationship is recognized under the

²¹ Pogge. T., 'Justice: Philosophical Aspects' *International Encyclopedia of the Social & Behavioral Sciences*, 2nd Edition, 2015, pp 943-948

²² Rita. F., 'The Environmental Security Debate and its Significance for Climate Change' *Italian Journal of International Affairs.*, Volume 43, Issue 3 (2008) pp 51-65

²³

²⁴ Barnett. J., 'Environmental Security' *International Encyclopedia of Human Geography.*, (2009) pp 553-557

²⁵ United Nations Environment Programme., 'Environment Security' Available at <https://www.unep.org/topics/disasters-and-conflicts/environment-security> (Accessed on 27/10/2024)

²⁶ King. C., 'A Strategic Analytic Approach to the Environmental Security Program for NATO' Available at https://www.nato.int/docu/comm/2008/0803-science/pdf/chris_king.pdf (Accessed on 27/10/2024)

²⁷ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Op Cit

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2030 Agenda for Sustainable Development which acknowledges that there can be Sustainable Development without peace and no peace without Sustainable Development²⁸. The Agenda also notes the key role that justice plays in Sustainable Development and envisages a world of justice, equality, and non-discrimination towards peace and prosperity²⁹. SDG 16 seeks to promote peaceful and inclusive societies for Sustainable Development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels³⁰.

According to the United Nations, peace is a fundamental precondition for social and economic development³¹. For instance, without peace, societies are often plagued by conflict, violence, and instability, which can hinder progress and result in the loss of lives and resources³². Further, it has been noted that sustainable peace cannot prevail where conflicts, poverty, discrimination, and injustices are prevalent³³. Absence of peace has been identified as a path to extreme poverty, while presence of peace is a path to development and prosperity³⁴. Nations and societies that are plagued with violence, conflicts, wars and insecurity often suffer from high levels of poverty and underdevelopment³⁵. In conflict-ridden situations, development operations are disrupted due to the unreliable social services resulting in the prevalence of social problems such as poverty, hunger and inequality³⁶. Achieving peace

²⁸ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015' Op Cit

²⁹ Ibid

³⁰ Ibid

³¹ United Nations., 'Goal 16: Peace, Justice, and Strong Institutions' Available at <https://www.un.org/sustainabledevelopment/peace-justice/> (Accessed on 27/10/2024)

³² Ibid

³³ United Nations Development Programme., 'Sustainable Peace for Sustainable Development - A Global Challenge that Calls for Collective Action.' Available at [https://www.undp.org/rwanda/blog/sustainable-peace-sustainable-development-global-challenge-calls-collective-action#:~:text=The%20Sustainable%20Development%20Goals%20\(SDGs\)%2C%20agreed%20to%20by%20all,for%20peace%20and%20strong%20institutions.](https://www.undp.org/rwanda/blog/sustainable-peace-sustainable-development-global-challenge-calls-collective-action#:~:text=The%20Sustainable%20Development%20Goals%20(SDGs)%2C%20agreed%20to%20by%20all,for%20peace%20and%20strong%20institutions.) (Accessed on 27/10/2024)

³⁴ Ibid

³⁵ Ibid

³⁶ The Link Between Peace and Sustainable Development., Available at <https://www.adecesg.com/resources/blog/the-link-between-peace-and-sustainable-development/> (Accessed on 27/10/2024)

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leads to Sustainable Development by reducing poverty and preventing conflict, translating to a healthier business environment that allows for a more effective delivery of products and services³⁷.

Justice is also vital in the quest towards Sustainable Development. For example, the idea of social justice permeates each SDG, insisting that the Sustainable Development agenda cannot be met without meeting the needs of the most vulnerable and marginalized populations³⁸. It has been noted that inclusivity, equity and justice are at the core of the Sustainable Development agenda driving collective efforts to correct imbalances in economic growth, to tackle extreme poverty, and to ensure that the environment and natural resources are sustainably used and preserved for the benefit of both present and future generations³⁹. Strengthening access to justice is also key in achieving Sustainable Development. Equal access to justice has been identified as essential for protecting the rights of all individuals, resolving disputes, and ensuring that vulnerable populations are not marginalized or mistreated towards inclusive growth⁴⁰. For instance, enhancing access to justice empowers traditionally marginalized populations including the youth, the elderly, women, indigenous peoples, persons with disabilities and migrants to participate in legal processes that promote inclusive growth in sectors such as health, employment, education, housing, and entrepreneurship towards Sustainable Development⁴¹. Achieving justice is therefore crucial for Sustainable Development.

³⁷ Ibid

³⁸ Social Justice., Available at <https://sdgresources.relx.com/social-justice-0> (Accessed on 27/10/2024)

³⁹ International Development Law Organization., 'Doing Justice to Sustainable Development Integrating The Rule of Law into The Post-2015 Development Agenda' Available at <https://www.idlo.int/sites/default/files/pdfs/publications/Doing%20Justice%20to%20Sustainable%20Development.pdf> (Accessed on 27/10/2024)

⁴⁰ United Nations., 'Goal 16: Peace, Justice, and Strong Institutions' Available at <https://www.un.org/sustainabledevelopment/peace-justice/> (Accessed on 27/10/2024)

⁴¹ Organisation for Economic Co-operation and Development., 'Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All.' Available at <https://www.oecd.org/gov/delivering-access-to-justice-for-all.pdf> (Accessed on 27/10/2024)

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Realising environmental security is also a pertinent agenda in the quest towards Sustainable Development⁴². Environmental security recognizes the impact of environmental changes including environmental degradation and climate change on human security⁴³. For example, it has been noted that as climate change intensifies, its impacts worsen existing social, economic, and environmental challenges in many contexts, which can contribute to insecurity at local, national, regional, and global levels⁴⁴. The security concerns linked to climate change include impacts on food, water and energy supplies, increased competition over scarce natural resources, loss of livelihoods, climate-related disasters, and forced migration and displacement of populations⁴⁵. Environmental security is achieved when the environment and natural resources provide full environmental services to all human beings who depend on them and when this condition is sustainable⁴⁶. It has been noted that a healthy environment that supports the needs of communities, with natural ability for replenishment means that there is enough for everyone and a similar guarantee for future generations for Sustainable Development⁴⁷. Environmental security therefore ensures the sustainable use of natural resources while tackling the impacts of environmental changes on human security for peace, stability, and Sustainable Development⁴⁸.

Achieving peace, justice and environmental security is therefore vital for Sustainable Development. However, the prevalence of conflicts, wars, and insecurities all over the world undermine peace and sustainability⁴⁹. Inequalities within and among nations as evidenced by unequal distribution of wealth, resources, and opportunities further undermine the ideal of social

⁴² Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Op Cit

⁴³ Ibid

⁴⁴ United Nations Environment Programme., 'Climate Change and Security Risks' Available at <https://www.unep.org/topics/fresh-water/disasters-and-climate-change/climate-change-and-security-risks#:~:text=Security%20concerns%20linked%20to%20climate,and%20forced%20migration%20and%20displacement>. (Accessed on 27/10/2024)

⁴⁵ Ibid

⁴⁶ Muigua. K., 'Achieving Environmental Security in Kenya' (2022) *Journal of cmsd*, Volume 8(3)

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ United Nations., 'Global Issues: Africa' Available at <https://www.un.org/en/global-issues/africa> (Accessed on 27/10/2024)

justice⁵⁰. Realizing access to justice for Sustainable Development also continues to be a challenge especially for the poor, vulnerable and disadvantaged individuals and communities due to several unfavorable factors in formal justice systems including high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow⁵¹. Environmental changes such as environmental degradation and climate change are further posing rising environmental insecurities⁵². It is necessary to tackle these challenges in order to achieve peace, justice and environmental security for Sustainable Development.

4.0 Conclusion

Peace, justice, and environmental security are vital elements of the Sustainable Development agenda. SDG 16 urges all countries to promote peaceful and inclusive societies for Sustainable Development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels⁵³. The agenda also recognizes the role of environmental sustainability including its key element of environmental security in the quest towards Sustainable Development⁵⁴. However, it has been noted that ongoing and new violent conflicts and wars around the world are derailing the global path to peace and achievement of the Sustainable Development agenda⁵⁵. According to the United Nations, high levels of armed violence and insecurity have a destructive impact on a country's development, while sexual violence, crime, exploitation and torture are prevalent where there is conflict or no rule of law⁵⁶. It further notes that lack of access to justice means that conflicts remain unresolved and people cannot obtain protection and redress in case of violation

⁵⁰ Development Bank of Southern Africa., 'How the Public and Private Sectors can Promote Social Justice across Africa' Available at <https://www.dbsa.org/article/how-public-and-private-sectors-can-promote-social-justice-across-africa> (Accessed on 27/10/2024)

⁵¹ 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

⁵² Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Op Cit

⁵³ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015' Op Cit

⁵⁴ Ibid

⁵⁵ United Nations., 'Goal 16: Promote Just, Peaceful and Inclusive Societies' Available at <https://www.un.org/sustainabledevelopment/peace-justice/> (Accessed on 27/10/2024)

⁵⁶ Ibid

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of their fundamental rights and freedoms⁵⁷. Further, environmental changes including environmental degradation and climate change are interacting with peace and security dynamics hindering the ideal of environmental security⁵⁸. In wake of these challenges, it is imperative to achieve peace, justice and environmental security for Sustainable Development.

Achieving and sustaining peace is an ideal that involves addressing root causes of conflicts and fostering inclusive dialogue involving all stakeholders⁵⁹. Further, in conflict prone areas, achieving peace requires state and non-state actors to engage in political negotiations and develop and implement military confidence-and security-building mechanisms⁶⁰. It has also been noted that Alternative Dispute Resolution (ADR) processes including mediation and negotiation have a key role to play in promoting peaceful solutions to protracted conflicts for Sustainable Development⁶¹. States should also ensure equal access to justice for all people which is essential for protecting the rights of individuals, resolving disputes, and ensuring that vulnerable populations are not marginalized or mistreated⁶². Equal access to justice can be achieved by strengthening formal justice systems by making them affordable, accessible, efficient and reliable while also utilizing ADR processes such as arbitration, mediation, negotiation, and Alternative Justice Systems for effective, efficient, and expeditious management of disputes⁶³. Establishing effective, accountable and inclusive institutions at all levels is also key in achieving justice by protecting human rights, fostering transparency, and ensuring fair and equal participation by all stakeholders towards sustainability⁶⁴. Further, a better understanding of the links between environment and human security is vital in achieving environmental security for effective conflict prevention, post-

⁵⁷ Ibid

⁵⁸ United Nations Environment Programme., 'Environment Security' Op Cit

⁵⁹ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Op Cit

⁶⁰ Organization for Security and Co-Operation in Europe., 'Goal 16: Peace, Justice and Strong Institutions' Available at <https://www.osce.org/sustainable-development-goals/16-Peace-justice> (Accessed on 27/10/2024)

⁶¹ Ibid

⁶² United Nations., 'Goal 16: Peace, Justice, and Strong Institutions' Op Cit

⁶³ Muigua. K., 'Alternative Dispute Resolution and Access to Justice.' Glenwood Publishers Limited, 2015

⁶⁴ IPHRD Africa., 'Promoting Peace, Human Rights and Sustainable Development in Africa' Available at <https://iphirdafrica.org/> (Accessed on 27/10/2024)

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conflict reconstruction and promotion of peaceful and inclusive societies⁶⁵. Achieving environmental security also involves peacefully reducing vulnerability to human-induced environmental degradation by addressing the root causes of environmental degradation and human insecurity⁶⁶.

Achieving peace, justice and environmental security for Sustainable Development is thus an ideal and achievable agenda for sustainability.

⁶⁵ United Nations Environment Programme., 'Goal 16: Peace, Justice and Strong Institutions' Available at <https://www.unep.org/topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-16-peace> (Accessed on 27/10/2024)

⁶⁶ Rita. F., 'The Environmental Security Debate and its Significance for Climate Change' Op Cit

Ensuring Transparency in Investor-State Arbitration: Promises and Challenges

Abstract

This paper critically discusses the need to ensure transparency in investor-state arbitration. The paper defines investor-state arbitration as a form of international arbitration. It argues that transparency is a key requirement towards ensuring the efficiency and effectiveness of investor-state arbitration. The paper examines the progress made towards fostering transparency in investor-state arbitration. It also explores some of the key issues undermining transparency in investor-state arbitration. In addition, the paper proposes reforms towards ensuring transparency in investor-state arbitration.

1.0 Introduction

Arbitration is one of the mechanisms that are commonly referred to as Alternative Dispute Resolution (ADR). The idea of ADR has been described as an all-encompassing term that entails multiple non-judicial methods of managing conflicts¹. It refers to a set of processes that are used to manage conflicts without resort to courts². ADR mechanisms may be linked to but function outside formal court litigation processes³. According to the United Nations, ADR (sometimes also referred to as “Appropriate Dispute Resolution”) is a general term, used to define a set of approaches and techniques aimed at resolving disputes in a non-confrontational way⁴. The United Nations notes that ADR covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party imposes a solution⁵. In addition, it points out that

¹ Block. M. J., ‘The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes.’ *Rutgers Law Record.*, Volume 44, 2016-2017

² Muigua. K., ‘Alternative Dispute Resolution and Access to Justice in Kenya.’ Glenwood Publishers Limited, 2015

³ Uwazie. E., ‘Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.’ *Africa Security Brief*, No. 16 of 2011

⁴ United Nations., ‘Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building’ Available

at https://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_backgroud_paper.pdf (Accessed on 17/01/2025)

⁵ Ibid

somewhere along the axis of ADR approaches, between these two extremes, lies mediation, a process by which a third party aids the disputants to reach a mutually agreed solution⁶.

ADR therefore covers multiple techniques including negotiation, mediation, arbitration, adjudication, neutral evaluation, enquiry, expert determination, Traditional Dispute Resolution Mechanisms (TDRMs) and conciliation among others⁷. These techniques have been recognized at the global level under the *Charter of the United Nations*⁸. The Charter provides that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration*, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice (emphasis added)⁹. ADR has also been embraced at national levels including in Kenya. The *Constitution of Kenya*¹⁰ mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and TDRMs¹¹.

Arbitration as a form of ADR refers to a private and consensual process where parties in dispute agree to present their grievances to a third party for resolution¹². It has also been defined as a dispute management mechanism where parties through an agreement submit their dispute to one or more neutral third parties who make a binding decision on the dispute¹³. Further, arbitration can also be described as a consensual dispute settlement process based on the parties' agreement to submit their disputes to a single arbitrator or an arbitral tribunal usually appointed by or on behalf of the parties¹⁴. It has been noted that arbitration is usually conducted in accordance with the terms

⁶ Ibid

⁷ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁸ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

⁹ Ibid, article 33 (1)

¹⁰ Constitution of Kenya., 2010., Government Printer, Nairobi

¹¹ Ibid, 159 (2) (c)

¹² Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers, 4th Edition, 2022

¹³ World Intellectual Property Organization., 'What is Arbitration' Available at <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> (Accessed on 17/01/2025)

¹⁴ Hong Kong International Arbitration Centre., 'What is Arbitration?' Available at <https://www.hkiac.org/arbitration/what-is-arbitration> (Accessed on 17/01/2025)

of the parties' arbitration agreement which are often found in the provisions of a commercial contract or applicable investment treaty¹⁵.

Arbitration has a number of key attributes that makes it ideal in managing disputes including privacy, confidentiality, party autonomy, flexibility, and finality¹⁶. Arbitration is also renowned for its procedural flexibility which allows parties to engage in an efficient, confidential and fair process leading to a final, binding and enforceable award¹⁷. In addition, arbitration also has a transnational applicability which means that it applies across different jurisdictions and therefore guarantees neutrality in the determination of disputes by addressing differences that may arise as a result of multiple legal systems¹⁸. Due to its transnational applicability, arbitration has emerged as the preferred mechanism for managing disputes in the global arena¹⁹. This process guarantees enforcement of decisions through the *New York Convention*²⁰ which provides a harmonized legal framework for the recognition and enforcement of foreign awards in arbitration.

International arbitration is being practiced through various forms including interstate arbitration, investor-state arbitration, and international commercial arbitration²¹. Despite its promise, international arbitration raises several concerns including choice of law issues, costs, delays, third party funding, domestic court oversight, and transparency challenges²². This paper critically discusses the need to ensure transparency in investor-state arbitration. The paper defines investor-state arbitration as a form of international arbitration. It argues that transparency is a key requirement towards ensuring the efficiency

¹⁵ Ibid

¹⁶ Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Op Cit

¹⁷ Hong Kong International Arbitration Centre., 'What is Arbitration?' Op Cit

¹⁸ Moses, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

¹⁹ Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONALCOMMERCIALARBITRATION-IN-AFRICA.pdf> (Accessed on 17/01/2025)

²⁰ United Nations Commission on International Trade Law., 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards.' (New York, 1958)

²¹ Shonk. K., 'International Arbitration: What it is and How it Works' Available at <https://www.pon.harvard.edu/daily/international-negotiation-daily/international-arbitration-what-it-is-and-how-it-works/> (Accessed on 17/01/2025)

²² Moses, 'The Principles and Practice of International Commercial Arbitration' Op Cit

and effectiveness of investor-state arbitration. The paper examines the progress made towards fostering transparency in investor-state arbitration. It also explores some of the key issues undermining transparency in investor-state arbitration. In addition, the paper proposes reforms towards ensuring transparency in investor-state arbitration.

2.0 Defining Investor-State Arbitration

Investor-state arbitration has been described as an evolutionary innovation in international dispute settlement²³. The idea of investor-state dispute settlement (ISDS) is a key feature of international investment agreements²⁴. It has been noted that by creating a system for the settlement of disputes between investors and host governments, countries had sought to create a neutral forum that offers the possibility of a fair hearing before a tribunal unencumbered by domestic political considerations²⁵.

It has been observed that ISDS are found in most international investment treaties between states and foreign investors²⁶. This form of dispute settlement was created to protect investors from arbitrary expropriation and ensure non-discriminatory treatment for foreign investments, in countries considered risky²⁷. It has been noted that in some countries where the judiciary is not fully independent from government, arbitration is considered a more neutral avenue to ensure enforcement of the host state's obligations towards investors²⁸. ISDS therefore allows foreign investors (individuals and companies) to allege violation of international investment treaties by suing host states through arbitration²⁹.

²³ Shonk. K., 'International Arbitration: What it is and How it Works' Op Cit

²⁴ United Nations Conference on Trade and Development., 'Investor-State Dispute Settlement' Available at https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf (Accessed on 17/01/2025)

²⁵ Ibid

²⁶ European Parliament., 'Investor-State Dispute Settlement (ISDS) State of play and prospects for reform' Available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS_BRI%282015%29545736_EN.pdf (Accessed on 17/01/2025)

²⁷ Ibid

²⁸ Ibid

²⁹ Columbia Center on Sustainable Investment., 'Primer on International Investment Treaties and Investor-State Dispute Settlement' Available at <https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement> (Accessed on 17/01/2025)

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In addition, to foreign investors, it has been noted that ISDS gives powers to host states to hold foreign investors accountable for their obligations under international investment treaties³⁰. For instance, it has been noted that host states are increasingly utilising investor-state arbitration to enforce the tenets of Sustainable Development including environmental protection and human rights against multinational corporations³¹. Human rights are often invoked in arbitration between states and foreign investors, through allegations of either state or investor infringements of such rights in investor-state arbitration³². For example, an alleged failure by foreign investors to respect the rights of indigenous peoples, environmental rights, or labour rights may lead to a dispute with a local population that escalates into an international investment dispute under the auspices of investor-state arbitration³³.

Investor-state arbitration is therefore a form of international arbitration that involves managing disputes between states and private foreign investors, such as foreign nationals or companies under the ISDS regime³⁴. This form of arbitration is envisaged under the *Convention on the Settlement of Investment Disputes between States and Nationals of other States*³⁵ which establishes the International Centre for Settlement of Investment Disputes (ICSID) to provide facilities for conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states³⁶. Investor-state arbitration provisions are contained in many international agreements including free trade agreements, bilateral investment treaties, multilateral

³⁰ Goh. N., 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' *The Journal of World Energy Law & Business.*, Volume 15, Issue 6, 2022

³¹ Ibid

³² Agius. M., 'Human Rights in International Arbitration' Available at <https://globalarbitrationreview.com/review/the-european-arbitrationreview/2023/article/humanrights-in-international-arbitration> (Accessed on 17/01/2025)

³³ Feldman. J., 'Human Rights and International Investment Arbitration: A snapshot' Available at <https://www.nortonrosefulbright.com/en/knowledge/publications/11a8c614/human-rights-and-international-investment-arbitration-a-snapshot> (Accessed on 17/01/2025)

³⁴ Shonk. K., 'International Arbitration: What it is and How it Works' Op Cit

³⁵ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159

³⁶ Ibid, article 1

investment agreements, national investment laws, and investment contracts³⁷. Under this form of an arbitration, if an investor from one country (the home state) invests in another country (the host state), both of which have agreed to ISDS, and the host state violates the rights granted to the investor under public international law such as the right not to have property expropriated without prompt, adequate, and effective compensation, then that investor may sue the host state in through arbitration in a neutral forum rather than in the domestic courts of the host state³⁸. Further, a host state can also sue an investor under investor-state arbitration where that investor violates its obligations including the need to uphold human rights, promote sound labour practices, and foster environmental conservation³⁹. Investor-state arbitration is therefore a key tool towards ensuring accountability among host states and investors under international investment treaties.

3.0 Transparency in Investor-State Arbitration: Promises and Challenges

Ensuring transparency is a key ideal in both domestic and international arbitration. It has been correctly noted that transparency is a necessity for the just determination of disputes through arbitration⁴⁰. Transparency in arbitration implies openness, communication and accountability⁴¹. In addition, it has been noted that transparency is an ideal which seeks to make the arbitration process more open to the public⁴². Fostering transparency in arbitration may therefore involve giving the general public access to the record of the arbitration (including the parties' submissions, witness statements and expert reports), to the hearing (either in person, via online platforms, or through the publication of the transcript), and to the arbitral tribunal's awards, decisions, and orders⁴³.

³⁷ Investor-State Dispute Settlement (ISDS), Available at [https://uk.practicallaw.thomsonreuters.com/0-624-6147?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/0-624-6147?transitionType=Default&contextData=(sc.Default)) (Accessed on 17/01/2025)

³⁸ Ibid

³⁹ Goh. N., 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' Op Cit

⁴⁰ Udoh. V., 'Transparency in Arbitration, Desired or Necessary?' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3689698 (Accessed on 17/01/2025)

⁴¹ Ibid

⁴² Transparency., Available at <https://jusmundi.com/en/document/publication/en-transparency> (Accessed on 17/01/2025)

⁴³ Ibid

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It has been noted that transparency is increasingly gaining prominence especially in international arbitration⁴⁴. For a long time, international arbitration has been perceived as a purview for a selected view where the process and determination of cases is outside the reach of the wider public⁴⁵. Therefore, in order to change this perspective and retain its legitimacy and pre-eminence, international arbitration has begun to offer enhanced transparency about arbitrator selection and the arbitration process among other aspects⁴⁶. It has been argued that the more visibility into institutional decision-making processes and, by extension, approaches adopted by decision-makers, the more likely it is that potential users of international arbitration will view the arbitral process as reliable and legitimate⁴⁷.

Transparency is therefore of utmost importance in international arbitration. This concept governs the extent to which the public can access arbitral proceedings and information pertaining to those proceedings⁴⁸. It seeks to enhance public access to arbitration proceedings and disclosure of documents and information⁴⁹. Ensuring transparency is vital in increasing the public confidence in arbitration, improving diversity among arbitral tribunals, fostering accountability among arbitral institutions and arbitrators, and ensuring the overall success of arbitration proceedings⁵⁰. It has been noted that by promoting transparency, third parties, such as Non-Governmental Organizations (NGOs), may contribute their opinions in arbitration proceedings thus enabling the tribunal to consider any large-scale effect the case may have outside of the context of the two parties⁵¹. Further, since

⁴⁴ Schimmel. D., 'Transparency in Arbitration' Available at <https://foleyhoag.com/Foley/files/f8/f80c0169-5ea8-4b96-a943-0529193d0c2c.pdf> (Accessed on 17/01/2025)

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Martinez. S., 'Transparency Rules in Investment Arbitration: Institutional Differences and Prospects of Standardisation' Available at <https://arbitrationblog.kluwarbitration.com/2021/04/08/transparency-rules-in-investment-arbitration-institutional-differences-and-prospects-of-standardisation/> (Accessed on 17/01/2025)

⁴⁹ Udoh. V., 'Transparency in Arbitration, Desired or Necessary?' Op Cit

⁵⁰ Schimmel. D., 'Transparency in Arbitration' Op Cit

⁵¹ Udoh. V., 'Transparency in Arbitration, Desired or Necessary?' Op Cit

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transparency requires accessibility to awards, governments are guided through precedent for future legislation⁵².

In light of the vital importance of transparency in international arbitration, there has been greater emphasis on ensuring transparency in investor-state arbitration⁵³. For instance, there is an element of public interest in investor-state arbitration⁵⁴. Investor-state arbitration may arise from the exploitation of important natural resources, such as oil and gas, hard rock minerals, forests, freshwater resources, and fisheries, or major built infrastructure such as facilities regarding water, sanitation, roads and other transport, power generation, and dams⁵⁵. The public therefore has a pertinent interest in such actions in order to ensure that natural resources are sustainably used and the accruing benefits shared equitably, and that public funds are accounted for⁵⁶. Further, it has been noted that investor-state disputes may be of significant interest to potentially affected communities, such as those involving environmental or human rights concerns, state concessions over natural resources or approvals of the privatisation of public services, and disputes resulting in a state's liability for which payment may be absorbed by public tax money⁵⁷. Demands for enhanced transparency are therefore justified in such circumstances.

It has been argued that transparency in investor-state arbitration is crucial towards fostering accountability, good governance, and the rule of law, elements which are, in turn, vital for Sustainable Development⁵⁸. For example, open and transparent engagement in respect of investment projects has been

⁵² Ibid

⁵³ Magraw. D. B., & Amerasinghe. N.M., 'Transparency and Public Participation in Investor-State Arbitration' Available at <https://nsuworks.nova.edu/cgi/viewcontent.cgi?referer&httpsredir=1&article=1642&context=ilsajournal/#:~:text=Generally%20speaking%2C%20the%20disputing%20parties,spite%20of%20the%20parties'%20wishes.> (Accessed on 17/01/2025)

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Martinez. S., 'Transparency Rules in Investment Arbitration: Institutional Differences and Prospects of Standardisation' Op Cit

⁵⁸ Columbia Center on Sustainable Investment., 'Promoting Transparency in Investor-State Arbitration' Available at <https://ccsi.columbia.edu/content/promoting-transparency-investor-state-arbitration> (Accessed on 17/01/2025)

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identified as an essential element of good international practice⁵⁹. It has been asserted that in order to be meaningful, transparency regarding investor-state relations must also include open and accountable dispute resolution processes at the national and international levels⁶⁰.

Transparency in investor-state arbitration has been described as a powerful weapon with the potential to achieve greater normative uniformity across arbitral institutions and boost the subjective acceptance of the regime, towards increasing the legitimacy of investment arbitration⁶¹. Implementing more robust requirements can increase public confidence in investor-state arbitration by enhancing openness and accountability⁶². It has also been argued that transparency in arbitral decisions under investor-state arbitration contributes to the development of new international investment treaties and increases the predictability of investment law, consequently leading to enhanced participation and confidence in ISDS particularly for the less knowledgeable investors and host states⁶³. Greater transparency particularly in respect of the publication of arbitral awards, subject to necessary safeguards for the protection of confidential business and governmental information, is therefore key in enhancing effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence in investor-state arbitration⁶⁴. Transparency is therefore an effective tool towards promoting and ensuring effective

⁵⁹ Columbia Center on Sustainable Development, 'Illustrative Suggestions for Amendments to the ICSID Arbitration Rules' Available at <https://ccsi.columbia.edu/sites/default/files/content/docs/ICSID-Rule-Revisions-Comment-31-March-17-FINAL.pdf> (Accessed on 17/01/2025)

⁶⁰ Ibid

⁶¹ Martinez. S., 'Transparency Rules in Investment Arbitration: Institutional Differences and Prospects of Standardisation' Op Cit

⁶² Ibid

⁶³ Ibid

⁶⁴ Organisation for Economic Co-operation and Development, 'Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures' Available at https://www.oecd.org/content/dam/oecd/en/publications/reports/2005/05/transparency-and-third-party-participation-in-investor-state-dispute-settlement-procedures_g17a16e5/524613550768.pdf (Accessed on 17/01/2025)

democratic participation, good governance, accountability, predictability and the rule of law in investor-state arbitration⁶⁵.

The need to ensure transparency in investor-state arbitration is recognised under *United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration*⁶⁶. The UNCITRAL Rules recognise the importance of transparency in investor-state arbitration due to the public interest involved in such arbitrations⁶⁷. The Rules acknowledge that transparency in investor-state arbitration is necessary for a fair and efficient settlement of international investment disputes, fostering accountability and promoting good governance⁶⁸. The Rules provide several measures towards ensuring transparency in investor-state arbitration including publication of information and the commencement of arbitration proceedings, publication of documents, acceptance of submissions by third persons under particular circumstances, submissions on issues of treaty interpretation from a non-disputing party to the treaty, and conduct of hearings in public⁶⁹. These measures are vital towards ensuring transparency in investor-state arbitration. The UNCITRAL Rules further limit transparency in certain instances such as in cases of confidential and protected information⁷⁰. This is aimed at protecting the sanctity of the arbitration process by ensuring the protection of confidential business information including trade secrets and matters within the knowledge of a state which if disclosed can undermine national security⁷¹.

⁶⁵ International Institute for Sustainable Development., 'New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps' Available at https://www.iisd.org/itn/en/2013/09/18/new-uncitral-arbitration-rules-on-transparency-application-content-and-next-steps-2/#_ftn8 (Accessed on 17/01/2025)

⁶⁶ United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration., Available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf> (Accessed on 17/01/2025)

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Ibid, article 7

⁷¹ Martinez. S., 'Transparency Rules in Investment Arbitration: Institutional Differences and Prospects of Standardisation' Op Cit

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The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)⁷² is another key instrument adopted towards ensuring transparency in investor-state arbitration. The Convention supplements existing investment treaties with respect to transparency-related obligations⁷³. The Convention applies to arbitration between an investor and a state or a regional economic integration organization conducted on the basis of an investment treaty concluded before 1st April 2014⁷⁴. In contrast to the UNCITRAL Rules on Transparency, whether an arbitration is initiated under the UNCITRAL Arbitration Rules or not does not have any impact on the application of the Convention⁷⁵. However, a party to the Mauritius Convention has the flexibility to formulate reservations, thereby excluding from the application of the Convention a specific investment treaty or a specific set of arbitration rules other than the UNCITRAL Arbitration Rules⁷⁶. It has been noted that alongside the UNCITRAL Rules on Transparency, the Mauritius Convention takes into the account both the public interest in investor-state arbitration and the interest of the parties to resolve disputes in a fair and efficient manner⁷⁷. It is therefore necessary to implement this Convention towards ensuring transparency in investor-state arbitration.

There has also been progress towards fostering transparency under the *ICSID Arbitration Rules, 2022*⁷⁸. Under the Rules, parties can consent to ICSID's publication of the award or the final decision in a post-award remedy proceeding⁷⁹. In addition, the Rules also allow persons in addition to

⁷² The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention), Available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf> (Accessed on 17/01/2025)

⁷³ Ibid

⁷⁴ Ibid, article 1 (1)

⁷⁵ Ibid, article 2

⁷⁶ Ibid, article 3

⁷⁷ United Nations., 'United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency")' Available at <https://uncitral.un.org/texts/arbitration/conventions/transparency> (Accessed on 17/01/2025)

⁷⁸ International Centre for Settlement of Investment Disputes., Arbitration Rules., Available at https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf (Accessed on 17/01/2025)

⁷⁹ Ibid, rule 62

the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal, to observe hearings, unless either party objects⁸⁰. Further, upon request of a party, ICSID is allowed to publish recordings or transcripts of hearings, unless the other party objects⁸¹. The ICSID Arbitration Rules further allow a non-disputing party to apply for permission to file written submissions in arbitral proceedings⁸². They also allow a non-disputing treaty party to make a submission on the interpretation of the treaty at issue in the dispute and upon which consent to arbitration is based⁸³. The Rules however prevent confidential or protected information including confidential business information, protected personal information, and matters pertaining national security from disclosure to the public⁸⁴. The ICSID Arbitration Rules are therefore key in ensuring transparency in investor-state arbitration.

Transparency is therefore a fundamental ideal in investor-state arbitration. However, too much emphasis on transparency in investor-state arbitration raises several fundamental concerns. For instance, it has been noted that when trade secrets, know-how, and intellectual property rights are at stake, confidentiality helps to limit the competitors' access to such information⁸⁵. In such circumstances, transparency may not be desirable. Further, transparency is associated with increased costs in investor-state arbitration⁸⁶. For instance, the process of making information public necessarily entails administrative costs to tribunals, thus increased transparency will increase tribunal costs to a significant extent⁸⁷. It may also result in delays since making information available and allowing public participation in arbitration proceedings can cause delays in the resolution of disputes⁸⁸. There is also a risk of conflict of interest since the arbitrators constituting the tribunal may have relationships with third parties submitting their submissions in the investor-state arbitration

⁸⁰ Ibid, rule 65 (1)

⁸¹ Ibid, rule 65 (3)

⁸² Ibid, rule 67 (1)

⁸³ Ibid, rule 68 (1)

⁸⁴ Ibid, rule 66

⁸⁵ Udoh. V., 'Transparency in Arbitration, Desired or Necessary?' Op Cit

⁸⁶ Magraw. D. B., & Amerasinghe. N.M., 'Transparency and Public Participation in Investor-State Arbitration' Op Cit

⁸⁷ Ibid

⁸⁸ Ibid

proceedings⁸⁹. In light of these challenges, it is imperative to foster transparency in investor-state arbitration while balancing it against the core tenets of arbitration including privacy, confidentiality, expeditious resolution of disputes, and cost-effectiveness⁹⁰.

4.0 Conclusion

Ensuring transparency in investor-state arbitration has emerged as a core ideal towards fostering effectiveness of this process. Transparency is necessary towards improving the quality of decision-making in investor-state arbitration, fostering the realisation of human rights, promoting consistency in decision-making, enhancing legitimacy and accountability in investor-state arbitration, and enabling reform of ISDS through better laws and institutions⁹¹. The need for transparency in investor-state arbitration has been recognised under several instruments such as the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*⁹², the *Mauritius Convention*⁹³, and the *ICSID Arbitration Rules, 2022*⁹⁴. Despite its benefits, transparency in investor-state arbitration is also associated with several challenges including curtailing privacy especially in relation to trade secrets and protected personal information, delays, costs, and the potential of conflict of interest⁹⁵.

It is therefore necessary to foster transparency in investor-state arbitration including through publication of information including documents, transcript of hearings and awards and ensuring public participation through acceptance of submissions by third persons such as a non-disputing party to the treaty,

⁸⁹ Ibid

⁹⁰ Ribeiro, J., & Douglas, M., 'Transparency in Investor-State Arbitration: The Way Forward' Available at https://espace.curtin.edu.au/bitstream/handle/20.500.11937/47596/228217_228217.pdf?sequence=2 (Accessed on 18/01/2025)

⁹¹ Magraw, D. B., & Amerasinghe, N.M., 'Transparency and Public Participation in Investor-State Arbitration' Op Cit

⁹² United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration., Op Cit

⁹³ The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)., Op Cit

⁹⁴ International Centre for Settlement of Investment Disputes., Arbitration Rules., Op Cit

⁹⁵ Magraw, D. B., & Amerasinghe, N.M., 'Transparency and Public Participation in Investor-State Arbitration' Op Cit

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and conduct of hearings in public⁹⁶. However, while fostering transparency, there is also need to ensure privacy by protecting certain information including confidential business information such as trade secrets, protected personal information, and matters pertaining national security⁹⁷.

Ensuring transparency in investor-state arbitration is fundamental towards harnessing the full benefits of this vital process. It is therefore necessary to enhance this agenda globally.

⁹⁶ United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration., Op Cit

⁹⁷ International Centre for Settlement of Investment Disputes., Arbitration Rules., Op Cit

Alternative Dispute Resolution in a New Age: Navigating Turbulent Seas with Optimism

Abstract

Alternative Dispute Resolution (ADR) mechanisms are being increasingly recognized as 'Appropriate' and ideal in managing disputes due to their several advantages. As a result, these processes have been embraced globally, regionally, and nationally to foster effective management of disputes. ADR mechanism are also proving to be useful in new world of technological advancements, greater regional integration, and the drive towards green growth. This paper critically examines the opportunities and challenges for ADR in a new age. The paper posits that ADR is vital in light of emerging issues such as green growth, climate change, regional integration, and technological advancements. It also points out the opportunities for ADR in these contexts. The paper also discusses challenges facing ADR in a new age. The paper also suggests measures towards navigating these challenges with optimism towards a bright tomorrow for ADR.

1.0 Introduction

Alternative Dispute Resolution (ADR) is an umbrella term that refers to a set of processes that are applied to manage disputes without resort to adversarial litigation¹. ADR has also been defined as a term that encompasses a series of mechanisms for resolving disputes that are linked to but function outside formal court litigation processes². According to the United Nations, ADR is a general term, used to define a set of approaches and techniques aimed at resolving disputes in a nonconfrontational way³. The United Nations notes that ADR covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party imposes a solution⁴. In addition, somewhere along the axis of ADR approaches

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

² Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

³ United Nations., 'Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building' Available at https://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_background_paper.pdf

⁴ Ibid

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between these two extremes lies mediation, a process by which a third party aids the disputants to reach a mutually acceptable solution⁵. ADR therefore covers various techniques including negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others⁶.

ADR techniques offer several benefits in conflict management. These mechanisms are associated with features such as informality, flexibility, efficiency, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost-effective management of disputes⁷. As a result of these features, ADR offers significant advantages, such as reducing case backlogs, lowering costs of managing conflicts, and promoting peaceful dispute resolution⁸. In addition, ADR processes also allow for more creative and collaborative outcomes than those available through litigation⁹. Some ADR techniques such as negotiation and mediation are also key in preserving and even enhancing the relationship of parties to a conflict¹⁰. These advantages of ADR enhance justice system effectiveness and accessibility, aligning with values of fairness, equity, and access to justice¹¹.

Due to the foregoing advantages, it has been argued that there is need to embrace ADR as 'Appropriate Dispute Resolution'¹². These processes are suitable in delivering ideal and long-lasting outcomes and are therefore

⁵ Ibid

⁶ Ibid

⁷ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁸ American Bar Association., 'Unlocking the Power of Alternative Dispute Resolution: Beyond Courts and Conflict' Available at <https://www.americanbar.org/advocacy/global-programs/news/2024/unlocking-power-alternative-dispute-resolution/#:~:text=ADR%20offers%20significant%20benefits%2C%20such,equity%2C%20and%20access%20to%20justice>. (Accessed on 26/08/2024)

⁹ JAMS ADR., 'What is ADR? Defining the Alternative Dispute Resolution Spectrum' Available at <https://www.jamsadr.com/adr-spectrum/> (Accessed on 26/08/2024)

¹⁰ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

¹¹ American Bar Association., 'Unlocking the Power of Alternative Dispute Resolution: Beyond Courts and Conflict' Op Cit

¹² United Nations., 'Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building' Op Cit

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‘Appropriate’ and not ‘Alternative’ in managing disputes¹³. Due to their appropriateness, ADR mechanisms have been embraced globally, regionally, and nationally to foster effective management of disputes. The *Charter of the United Nations*¹⁴ sets out the legal framework for utilizing ADR processes at the global stage. The Charter provides that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means* of their own choice (Emphasis added)¹⁵. At a regional level, the *Treaty Establishing the East African Community*¹⁶ mandates the East African Court of Justice (EACJ) to foster ADR processes including arbitration¹⁷. At a national level, the Constitution of Kenya urges courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and TDRMs¹⁸. The Constitution of Uganda also urges courts in adjudicating cases of both a civil and criminal nature to promote reconciliation between parties¹⁹.

The potential of ADR has therefore been recognized globally, regionally, and nationally. ADR mechanisms are also proving to be useful in the new world of technological advancements, greater regional integration, and the drive toward green growth²⁰. This paper critically examines the opportunities and challenges for ADR in new age. The paper posits that ADR is vital in in light of emerging issues such as green growth, climate change, regional integration, and technological advancements. It also points out the opportunities for ADR

¹³ P. Fenn, “Introduction to Civil and Commercial Mediation”, in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), pp. 50-52

¹⁴ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

¹⁵ Ibid, article 33 (1)

¹⁶ Treaty Establishing the East African Community., Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2487/download> (Accessed on 26/08/2024)

¹⁷ Ibid, article 32

¹⁸ Constitution of Kenya, 2010., Article 159 (2) (c)., Government Printer, Nairobi

¹⁹ Constitution of Uganda., Article 126 (2) (d)., Available at <https://www.parliament.go.ug/documents/1240/constitution> (Accessed on 26/08/2024)

²⁰ Muigua. K., ‘Alternative Dispute Resolution in the Context of Emerging Challenges of Climate Change, Cyber Security, and Globalization’ Available at <https://kmco.co.ke/wp-content/uploads/2024/04/Alternative-Dispute-Resolution-in-the-Context-of-Emerging-Challenges-of-Climate-Change-Cyber-Security-and-Globalization.pdf> (Accessed on 26/08/2024)

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in these contexts. The paper also discusses challenges facing ADR in a new age. The paper also suggests measures towards navigating these challenges with optimism towards a bright tomorrow for ADR.

2.0 Alternative Dispute Resolution in a New Age

The concept of ADR is relevant in light of emerging issues including technological advancement, greater regional integration, and the quest towards green growth. The rapid growth of technology has permeated into all aspects of life including the field of dispute resolution²¹. Technology is seen as a disruptive phenomenon that has the capacity to end traditional business models, to cast whole industries into oblivion, and to destroy traditional crafts, arts, and professions²². In the age of rapid technological advancements, Online Dispute Resolution (ODR) platforms have become increasingly vital for addressing consumer disputes effectively and efficiently²³. ODR consists of mechanisms for resolving disputes facilitated through the use of electronic communications and other information and communication technology²⁴. It has also been described as the application of Information and Communications Technology to the practice of dispute resolution²⁵. As a result of technological advancements, new forms of ADR such as online mediation, online arbitration, and block chain arbitration have emerged²⁶.

²¹ Muigua. K., 'The Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya' Available at <https://kmco.co.ke/wp-content/uploads/2022/04/The-EvolvingAlternative-Dispute-Resolution-Practice-Investing-in-Digital-Dispute-Resolution-in-Kenya-KariukiMuigua.pdf> (Accessed on 26/08/2024)

²² Eidemuller. H., & Wagner. G., 'Digital Dispute Resolution.' Available at <https://blogs.law.ox.ac.uk/business-law-blog/blog/2021/09/digital-dispute-resolution> (Accessed on 26/08/2024)

²³ United Nations Trade and Development., 'Technology and the Future of Online Dispute Resolution Platforms for Consumer Protection Agencies' Available at <https://unctad.org/publication/technology-and-future-online-dispute-resolution-platforms-consumer-protection-agencies#:~:text=Consumer%20ODR%20consists%20of%20mechanisms,other%20information%20and%20communication%20technology.> (Accessed on 26/08/2024)

²⁴ Ibid

²⁵ Rule. C., 'Technology and the Future of Dispute Resolution' Available at <https://law.scu.edu/wp-content/uploads/Rule-Technology-and-the-Future-of-Dispute-Resolution-copy.pdf> (Accessed on 26/08/2024)

²⁶ Muigua. K., 'The Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya' Op Cit

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It has been noted that technology has the ability to make dispute resolution more efficient²⁷. It holds the promise for an improved dispute resolution landscape that is based on fewer physical, conceptual, psychological and professional boundaries, while enjoying a higher degree of transparency, expeditiousness, efficiency, accessibility, participation and change²⁸. ODR can also foster access to justice for geographically separated parties²⁹. It can also enable parties access information relevant to their dispute in real time therefore enhancing the efficacy of dispute resolution³⁰. Further, as a result of technological advancement, it is possible to use software algorithms to keep communication focused on key issues that need to be addressed while structuring negotiations to keep them moving toward resolution³¹. ADR therefore holds immense promise in light of technological advancement. ADR, with its diverse range of methods such as mediation, arbitration, and negotiation, presents a viable option that aligns with the dynamic nature of technological advancement while addressing the specific demands of disputes in the cyberspace³².

Technology is therefore revolutionizing ADR. For example, Artificial Intelligence (AI) is significantly impacting ADR by automating and enhancing various aspects of the dispute resolution process³³. AI algorithms have the ability to analyse vast amounts of legal data to predict outcomes and suggest resolutions based on historical trends and case law³⁴. This capacity is key in not only expediting dispute resolution but also aiding arbitrators and mediators in

²⁷ Mania. K., 'Online Dispute Resolution: The Future of Justice.' *International Comparative Jurisprudence*, No. 1 of 2015, (pg 76-86)

²⁸ Rabinovich-Einy..O., & Katsh. E., 'Reshaping Boundaries in an Online Dispute Resolution Environment.' *International Journal of Online Dispute Resolution*, Volume 1, No. 1 (2014)

²⁹ Rule. C., 'Technology and the Future of Dispute Resolution' Op Cit

³⁰ Ibid

³¹ Ibid

³² Singh. B., 'Unleashing Alternative Dispute Resolution (ADR) in Resolving Complex Legal-Technical Issues arising in Cyberspace Lensing E-Commerce and Intellectual Property' Available at <https://rbadr.emnuvens.com.br/rbadr/article/view/183> (Accessed on 26/08/2024)

³³ Shaheen. M. S., 'Technology in ADR: An Overview of Transformative Tools' Available at <https://www.linkedin.com/pulse/technology-adr-overview-transformative-tools-saleem-shaheen-j4j3e/> (Accessed on 27/08/2024)

³⁴ Ibid

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making more informed decisions³⁵. In addition, the use of blockchain in creating smart contracts has been a major development in dispute resolution and ADR³⁶. These contracts execute automatically when predetermined conditions are met, therefore minimizing disputes³⁷.

ADR is also relevant in light of greater emphasis on regional integration. In Africa, regional economic integration aims to create larger, more attractive markets, link landlocked countries to international markets and support intra-African trade³⁸. There have been efforts towards bolstering regional integration in Africa through the formation of Regional Economic Communities (RECs) and inter-governmental organizations including the Arab Maghreb Union (UMA); the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel-Saharan States (CEN-SAD); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC)³⁹. In addition, the establishment of the African Continental Free Trade Area (AfCFTA) is anticipated to deepen integration, foster trade and investment, enhance the mobility of capital and labour, support industrialization, and the development of a dynamic services sector in Africa⁴⁰.

ADR presents numerous benefits in light of these efforts towards regional integration. For example, the *Protocol on Rules and Procedures on the Settlement*

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

³⁸ African Development Bank Group., 'Regional Integration' Available at <https://www.afdb.org/en/topics-and-sectors/topics/regional-integration> (Accessed on 26/08/2024)

³⁹ Africa Union., 'Regional Economic Communities.' Available at [https://au.int/en/recs#:~:text=The%20purpose%20of%20the%20RECs,the%20Abuja%20Treaty%20\(1991\)](https://au.int/en/recs#:~:text=The%20purpose%20of%20the%20RECs,the%20Abuja%20Treaty%20(1991)) (Accessed on 26/08/2024)

⁴⁰ United Nations., 'Africa's Free Trade on Track, More Efforts Needed.' Available at [https://www.un.org/africarenewal/magazine/january-2023/africa%E2%80%99s-free-trade-track-moreefforts-needed#:~:text=lies%20ahead%2C%20though.-,Presently%2C%20intra%20Africa%20trade%20stands%20low%20at%20just%2014.4%25%20of,day\)%2C%20according%20to%20UNCTAD](https://www.un.org/africarenewal/magazine/january-2023/africa%E2%80%99s-free-trade-track-moreefforts-needed#:~:text=lies%20ahead%2C%20though.-,Presently%2C%20intra%20Africa%20trade%20stands%20low%20at%20just%2014.4%25%20of,day)%2C%20according%20to%20UNCTAD) (Accessed on 26/08/2024)

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of Disputes under the Agreement establishing the AfCFTA⁴¹ envisages the use of ADR processes including negotiation, mediation, arbitration, conciliation, and good offices to manage disputes under the AfCFTA. ADR processes can therefore strengthen efforts towards regional integration in Africa by ensuring efficiency, neutrality of forum, and expeditious management of disputes under the AfCFTA⁴². In addition, the formation of regional ADR centres in Africa including the Nairobi Centre for International Arbitration, the Kigali International Arbitration Centre, and the Cairo Regional Centre for International Commercial Arbitration is key in bringing the continent together in the field of dispute resolution⁴³.

ADR is also relevant in the quest towards green growth. The concept of green growth aims to foster economic growth that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities⁴⁴. It involves promoting economic growth and development, while ensuring that natural assets continue to provide the resources and environmental services on which human well-being relies⁴⁵. Green growth is therefore an idea that seeks to achieve environmentally

⁴¹ African Union., 'Agreement Establishing the African Continental Free Trade Area.' Available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (Accessed on 26/08/2024)

⁴² The Efficiency of the AfCFTA Dispute Resolution Mechanism: An In-Depth Analysis., Available at <https://arbitrationblog.kluwerarbitration.com/2023/07/11/the-efficiency-of-the-afcfta-dispute-resolution-mechanism-an-in-depth-analysis/> (Accessed on 26/08/2024)

⁴³ ALN Africa., 'Africa's Growing Dispute Resolution Landscape' Available at <https://aln.africa/wp-content/uploads/2023/06/Africas-Growing-Dispute-Resolution-Landscape.pdf> (Accessed on 26/08/2024)

⁴⁴ United Nations Economic Commission for Africa., 'Enabling Measures for an Inclusive Green Economy in Africa' Available at https://www.greenpolicyplatform.org/sites/default/files/downloads/resource/UNECA_Enabling%20measures%20for%20an%20inclusive%20green%20economy%20in%20Africa.pdf (Accessed on 26/08/2024)

⁴⁵ Organisation for Economic Cooperation and Development., 'Towards Green Growth' Available at <https://www.oecd-ilibrary.org/docserver/9789264111318-sumen.pdf?expires=1724073546&id=id&accname=guest&checksum=E34A1AF0D5BEFA1932CC992346CAD9> (Accessed on 26/08/2024)

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sustainable economic and social growth⁴⁶. Green growth is low carbon, resource efficient and socially inclusive⁴⁷. In addition, green growth ensures that growth in employment and income are driven by public and private investment into such economic activities, infrastructure and assets that allow reduced carbon emissions and pollution, enhanced energy and resource efficiency, and prevention of the loss of biodiversity and ecosystem services⁴⁸.

It has been noted that in the quest towards green growth, disputes may occur in key sectors including renewable energy, carbon reduction, waste management, electrification, transport and other initiatives and collaborations aimed at developing and implementing sustainable innovation⁴⁹. Further, with the urgent need to combat climate change for green growth, the risk of disputes related to sustainability and green growth is on the rise⁵⁰. ADR mechanisms are suitable in resolving disputes related to green growth in areas such as climate change, renewable energy, infrastructure, transport, agriculture and other land use and food production systems⁵¹. As time- and cost-efficient alternatives to litigation, ADR allows parties to choose a mediator, arbitrator or expert with legal and technical expertise in thematic areas within the green growth discourse⁵². ADR also provides a neutral forum for managing cross

⁴⁶ World Bank Group., 'Inclusive Green Growth' Available at <https://documents1.worldbank.org/curated/en/129971468157532224/pdf/793260BRI0v20R00Box037737400Public0.pdf> (Accessed on 26/08/2024)

⁴⁷ United Nations Environment Programme., 'Green Economy' Available at <https://www.unep.org/regions/asia-and-pacific/regional-initiatives/supporting-resourceefficiency/green-economy> (Accessed on 26/08/2024)

⁴⁸ Ibid

⁴⁹ World Intellectual Property Organization., 'WIPO Alternative Dispute Resolution for Green Technology and Sustainability' Available at <https://www.wipo.int/amc/en/center/specific-sectors/greentechnology-sustainability/> (Accessed on 26/08/2024)

⁵⁰ Ibid

⁵¹ International Chamber of Commerce., 'Resolving Climate Change Related Disputes through Arbitration and ADR' Available at <https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf> (Accessed on 26/08/2024)

⁵² World Intellectual Property Organization., 'WIPO Alternative Dispute Resolution for Green Technology and Sustainability' Op Cit

border disputes through which disputes can be resolved through a single procedure while also ensuring efficient enforcement of outcomes⁵³.

From the foregoing, it emerges that there are immense opportunities for ADR in a new age. However, several challenges are also emerging within the practice of ADR in a new age.

3.0 Challenges facing ADR in a New Age

Despite its numerous benefits, the practice of ADR in a new age raises several concerns. For example, the technology systems supporting digital dispute resolution may be subject to cyberattacks⁵⁴. Unauthorized persons may access the technology supporting digital dispute resolution and engage in unwarranted practices such as stealing of information, deleting information or sending unwanted information to the detriment of the parties⁵⁵. It has been noted that technology simultaneously presents the biggest opportunity and the biggest challenge for the practice of dispute resolution⁵⁶. On the positive side, it has the ability to improve access to justice, and provide speedier and better outcomes⁵⁷. However, on the negative side, concerns around data privacy and the potential for algorithmic bias in AI are major challenges for ADR in the era of technological advancement⁵⁸. Further, some technologies are expensive and maybe out of reach for ordinary citizens therefore creating barriers in embracing online dispute resolution⁵⁹.

Further, the role of ADR in the context of regional integration is hindered by several obstacles including. For example, ADR in Africa faces key challenges including inadequate political support, human resources, legal foundations,

⁵³ Ibid

⁵⁴ Muigua. K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice' available at <http://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-andNew-Frontiers-EmbracingTechnology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-MuiguaPh.DJune-2020.pdf> (Accessed on 27/08/2024)

⁵⁵ Ibid

⁵⁶ Rule. C., 'Technology and the Future of Dispute Resolution' Op Cit

⁵⁷ Ibid

⁵⁸ Shaheen. M. S., 'Technology in ADR: An Overview of Transformative Tools' Op Cit

⁵⁹ Ibid

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and sustainable financing⁶⁰. These challenges are hindering the development of the legal and institutional capacity on ADR in Africa including the growth of regional ADR centres⁶¹.

In the context of green growth, it has been noted that the promise of litigation remains at a more ideal and policy-based level when compared with the real and practical impact of ADR mechanisms⁶². Litigation has been more effective than ADR in fostering green growth through court rulings that take into account the principles of Sustainable Development⁶³. Through litigation, governments are being held accountable and required to implement green growth strategies including sustainable infrastructure, green jobs, sustainable fisheries, renewable energy, sustainable tourism, sustainable waste management, and sustainable agricultural practices⁶⁴. It is therefore imperative to enhance the role of ADR in green growth.

4.0 Conclusion

ADR holds immense promise in a new age. As digital technologies continue to advance, they have also begun to revolutionize various aspects of ADR processes⁶⁵. Technology is enhancing the efficiency, accessibility, and effectiveness of dispute resolution processes⁶⁶. ODR has emerged as a viable process for managing disputes that arise in a variety of contexts, including e-commerce transactions, online services, and other forms of online

⁶⁰ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

⁶¹ Asian African Legal Consultative Organization., 'Alternative Dispute Resolution: Asian-African Perspectives' Available at <https://www.aalco.int/ADR-PAPER22may2011.pdf> (Accessed on 27/08/2024)

⁶² Orsua. R., 'Resolving Climate Change-Related Disputes through Alternative Modes of Dispute Resolution' Available at <https://www.hkiac.org/content/resolving-climate-change-related-disputes-through-alternative-modes-dispute-resolution> (Accessed on 27/08/2024)

⁶³ International Development Law Organization., 'Laws for the Planet: Using Law to Deliver Sustainability and Green Growth' Available at <https://www.idlo.int/news/speeches-and-advocacy/laws-planet-using-law-deliver-sustainability-and-green-growth> (Accessed on 27/08/2024)

⁶⁴ Ibid

⁶⁵ The Impact of Digital Technologies on Alternative Dispute Resolution., Available at <https://rbadr.emnuvens.com.br/rbadr/article/view/175#:~:text=Abstract,various%20aspects%20of%20ADR%20processes.> (Accessed on 27/08/2024)

⁶⁶ Ibid

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interactions⁶⁷. This form of ADR offers various advantages such as accessibility by parties regardless of geographical distances, cost-effectiveness, automation of administrative tasks associated with dispute resolution, such as document management and scheduling and the availability of an online repository for all communications and actions taken during the dispute resolution process⁶⁸. ADR is also relevant in the context of regional integration. For example, establishment of the AfCFTA provides opportunities for utilizing ADR processes to boost Intra-African trade and strengthen efforts towards regional integration in Africa by ensuring efficiency, neutrality of forum, and expeditious management of disputes⁶⁹. The establishment of regional ADR centres in Africa is also key in fostering regional integration through ADR⁷⁰. ADR processes are also ideal in the green growth agenda by providing appropriate forums for managing disputes in areas such as climate change, renewable energy, infrastructure, transport, agriculture and other land use and food production systems⁷¹.

Despite this optimism, ADR in a new age faces several hurdles. Technology raises challenges related to data privacy, potential for algorithmic bias, and accessibility especially for poor citizens⁷². The role of ADR in regional integration is hindered by inadequate political support, human resources, legal foundations, and sustainable financing⁷³. Further, litigation is proving to be more practical than ADR in holding governments accountable and shaping green growth policies⁷⁴. It is therefore imperative to navigate these challenges in order to enhance the potential of ADR in a new age.

⁶⁷ Use of Technology in ADR: A case for Online Dispute Resolution (ODR)., Available at <https://medium.com/@legalpayofficial/use-of-technology-in-adr-a-case-for-online-dispute-resolution-odr-df1296b9296c> (Accessed on 27/08/2024)

⁶⁸ Ibid

⁶⁹ The Efficiency of the AfCFTA Dispute Resolution Mechanism: An In-Depth Analysis., Op Cit

⁷⁰ ALN Africa., 'Africa's Growing Dispute Resolution Landscape' Op Cit

⁷¹ International Chamber of Commerce., 'Resolving Climate Change Related Disputes through Arbitration and ADR' Op Cit

⁷² Shaheen. M. S., 'Technology in ADR: An Overview of Transformative Tools' Op Cit

⁷³ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

⁷⁴ Orsua. R., 'Resolving Climate Change-Related Disputes through Alternative Modes of Dispute Resolution' Op Cit

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In order to enhance the appropriateness of ADR in a world of technological advancement, concerns around data privacy and the potential for algorithmic bias must be addressed to maintain the integrity of the process⁷⁵. It is imperative to enhance data privacy and security in digital dispute resolution in order to enhance the viability of ADR in the cyber space⁷⁶. It is also important to foster access to technology in order to avoid a digital divide in dispute resolution⁷⁷. Further, in light of greater regional integration, it is necessary to enhance political support and sustainable financing for the growth of ADR processes at a regional level⁷⁸. It is imperative for countries to enhance their legal, policy, and institutional frameworks on ADR in order to ensure the acceptability of these mechanisms at national and regional levels⁷⁹. Establishment of more ADR centres offering a broad range of services including arbitration, mediation, and conciliation is also necessary to foster regional integration through ADR⁸⁰. In addition, it is necessary to widely embrace ADR in green growth for effective management of disputes on climate change, renewable energy, infrastructure, transport, and industrialization among other key sectors⁸¹. ADR practitioners including arbitrators and mediators should also enhance their expertise on green growth in order to foster this agenda nationally, regionally, and globally⁸². ADR institutions also have a crucial role to play by developing rules and/or expertise specific to the resolution of disputes concerning green growth including environmental disputes⁸³.

⁷⁵ Shaheen. M. S., 'Technology in ADR: An Overview of Transformative Tools' Op Cit

⁷⁶ Muigua. K., 'Navigating the Digital Dispute Resolution Landscape: Challenges and Opportunities' Available at <https://kmco.co.ke/wp-content/uploads/2023/08/Navigating-the-Digital-DisputeResolution-Landscape-Challenges-and-Opportunities-.pdf> (Accessed on 27/08/2024)

⁷⁷ Shaheen. M. S., 'Technology in ADR: An Overview of Transformative Tools' Op Cit

⁷⁸ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Ci

⁷⁹ Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIALARBITRATION-IN-AFRICA-EAIA-Conference-Presentation.pdf> (Accessed on 27/08/2024)

⁸⁰ ALN Africa., 'Africa's Growing Dispute Resolution Landscape' Op Cit

⁸¹International Chamber of Commerce., 'Resolving Climate Change Related Disputes through Arbitration and ADR' Op Cit

⁸² Ibid

⁸³ Ibid

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ADR presents numerous opportunities in a new age of technological advancements, greater regional integration and a push for green growth. However, it vital to navigate the emerging challenges with optimism in order to ensure a bright tomorrow for ADR.

Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution

Abstract

The paper critically discusses the need to reframe conflict management in the East African Community (EAC) in order to fully capture the spirit of Alternative Dispute Resolution (ADR) mechanisms. The paper argues that ADR mechanisms in African societies including the EAC ought to be considered 'Appropriate' and not 'Alternative' in access to justice. It posits that ADR mechanisms have been part and parcel of African societies since time immemorial and were always the first point of call in management of disputes owing to their advantages. The paper explores the ADR framework within the EAC as set out under the Treaty Establishing the EAC. It further highlights challenges facing ADR mechanisms within the EAC. The paper further proposes interventions towards reframing conflict management in the EAC in order to fully capture the spirit of ADR as 'Appropriate' Dispute Resolution.

1.0 Introduction

Conflicts are a common phenomenon in human relationships and interactions. The term conflict has been defined as a situation in which two or more parties perceive that they possess mutually incompatible goals¹. It 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 desires². Conflicts often occur as a result of incompatibility of goals and interests between two or more individuals³. They can also occur due to misalignment of goals, actions or motivations which can be real or only perceived to exist⁴. Conflicts are an undesirable occurrence in any given society since they can affect peace, sustainability and development. Development is not feasible in a

¹ Demmers. J., *'Theories of Violent Conflict: An Introduction'* (Routledge, New York, 2012)

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

³ Kaushal. R., & Kwantes. C., *'The Role of Culture and Personality in Choice of Conflict Management*

Strategy.' International Journal of Intercultural Relations 30 (2006) 579–603

⁴ Ibid

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conflict situation⁵. Consequently, there is need for effective and expeditious management of conflicts in order to spur development⁶.

Conflict management refers to the processes and techniques adopted towards stopping or preventing overt conflicts and aiding the parties involved to reach a durable and peaceful solution to their differences⁷. Conflict management thus involves handling all stages of a conflict as well as the mechanisms used in the management of conflicts⁸. Various approaches and techniques can be adopted towards managing conflicts 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 procedure⁹.

The process of conflict management can either result in settlement or resolution¹⁰. Settlement refers to an agreement over the issues in a conflict which often involves a compromise¹¹. Settlement often seeks to mitigate a conflict without discovering or rectifying the underlying causes of such a conflict¹². Settlement mechanisms include litigation and arbitration. These mechanisms have been described as highly coercive, power based and involve a lot of compromise in addressing the conflict¹³. They may be effective in providing an immediate solution to a dispute but fail to address underlying issues in a dispute leaving the likelihood of disputes reemerging in future¹⁴. Resolution on the other hand refers to a process where the outcome is based on

⁵ Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf> (Accessed on 15/06/2023)

⁶ Ibid

⁷ Leeds. C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners.' *International Journal of Peace Studies*, Volume 2, No. 2, 1997

⁸ Ibid

⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

¹⁰ Ibid

¹¹ Bloomfield. D., 'Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland,' *Journal of Peace Research*

¹² Ibid

¹³ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

¹⁴ Mwagiru. M., 'Conflict in Africa: Theory, Processes and Institutions of Management, Centre for Conflict Research, Nairobi 2006

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mutual problem-sharing whereby parties to a conflict cooperate in order to redefine their conflict and relationships¹⁵. Resolution mechanisms include most Alternative Dispute Resolution (ADR) processes such as mediation, negotiation and facilitation¹⁶. These mechanisms are non-coercive, non-power based and focus on the needs and interest of parties¹⁷. They result in mutually satisfying outcomes that address the root causes of conflicts thus creating long lasting outcomes.

The paper seeks to critically discuss the place of ADR in conflict management within the East African community. The East African Community (EAC) is a regional intergovernmental organisation of seven partner states which are: The Republic of Burundi, the Democratic Republic of the Congo, the Republic of Kenya, the Republic of Rwanda, the Republic of South Sudan, the Republic of Uganda, and the United Republic of Tanzania with its headquarters in Arusha, Tanzania.¹⁸ It is established pursuant to the Treaty Establishing the East African Community¹⁹. The paper explores the role of ADR under the Treaty Establishing the East African Community. It highlights the challenges and opportunities for ADR within the EAC. The paper posits that there is need to reframe conflict management within the East African Community in order to fully capture the spirit of ADR as 'Appropriate' and not 'Alternative' Dispute Resolution.

2.0 Overview of Alternative Dispute Resolution (ADR) Mechanisms and their Role in Access to Justice

Alternative Dispute Resolution (ADR) is an all-encompassing term which refers to multiple non-judicial methods of handling conflicts between parties²⁰.

¹⁵ Bloomfield. D., 'Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland,' Op Cit

¹⁶ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
¹⁷ Ibid

¹⁸ East African Community., 'Overview of EAC.' Available at <https://www.eac.int/overview-of-eac> (Accessed on 15/06/2023)

¹⁹ Treaty Establishing the East African Community., Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2487/download> (Accessed on 15/06/2023)

²⁰ Block. M. J., 'The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes.' *Rutgers Law Record.*, Volume 44, 2016-2017

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ADR refers to a set of mechanisms that are used to manage conflicts without resort to courts²¹. These mechanisms include negotiation, mediation, arbitration, neutral evaluation, enquiry, expert determination and conciliation²². In Kenya, ADR mechanisms have been recognized under the Constitution which mandates courts and tribunals to promote alternative forms of dispute resolution²³.

ADR mechanisms have been classified by some authors into facilitative, evaluative and determinative processes²⁴. Facilitative processes such as mediation involve assisting parties to a dispute in identifying issues in dispute and in coming to an agreement about the dispute²⁵. Evaluative processes include early neutral evaluation and expert appraisal where a third party is more actively involved in advising the parties about the issues in dispute and various possible outcomes²⁶. Determinative processes include arbitration and expert determination where a third party makes a determination after parties have presented their arguments and evidence in relation to a dispute²⁷. However, this classification leaves out negotiation which involves parties discussing the issues at hand so as to arrive at mutually acceptable solutions without the help of a third party²⁸.

ADR mechanisms have been hailed as being ideal in enhancing the right of access to justice that has been enshrined under the Constitution²⁹. The right of access to justice in Kenya, East Africa and Africa at large has hitherto been hampered by many unfavourable factors such high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts,

²¹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

²² Block. M. J., 'The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes.' Op Cit

²³ Constitution of Kenya, 2010, article 159 (2) (c), Government Printer, Nairobi

²⁴ Xie Z, 'The Facilitative, Evaluative and Determinative Processes in ADR,' 2011-10-12, available at <http://www.xwqlaw.com/info/c47f5ff15b464882ad5c9a7f97338652> (Accessed on 15/06/2023)

²⁵ Ibid

²⁶ Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Op Cit

²⁷ Ibid

²⁸ Ibid

²⁹ Constitution of Kenya, 2010., Article 48

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backlog of cases in courts and lack of legal knowhow³⁰. ADR has the potential to address these challenges and promote the right of access to justice in Africa³¹. Most ADR mechanisms possess key attributes including informality, privacy, confidentiality, flexibility and the ability to promote expeditious and cost-effective management of disputes which makes them a viable tool of enhancing access to justice³².

ADR mechanisms have been practiced in Africa for many centuries³³. African communities gave preference to values such as harmony, togetherness, social cohesion and peace as expressed in terms such as '*ubuntu*.³⁴' Such values contributed to social harmony that ensured the stability of African societies and were subsequently incorporated in conflict management strategies³⁵. African societies developed conflict management strategies that were based on institutions such as the council of elders who ensured that the values and principles of African societies were respected and upheld³⁶. The values inherent in African societies remain virtually unchanged. ADR thus still has an important role to play in conflict management in current African societies including the East African Community.

³⁰ 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

³¹ Muigua. K., 'Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Heralding-a-New-Dawn-Access-to-Justice-PAPER.pdf> (Accessed on 15/06/2023)

³² Muigua. K., 'Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Available at <http://kmco.co.ke/wp-content/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-Dispute-Resolution-in-Kenya-Prospects-and-Challenges.pdf> (Accessed on 15/06/2023)

³³ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

³⁴ Muigua. K., 'Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya.' Op Cit

³⁵ Ibid

³⁶ Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf> (Accessed on 15/06/2023)

3.0 The ADR Framework within the East African Community

The legal basis for ADR mechanisms at the global level is set out under the *Charter of the United Nations*³⁷. It provides that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. The Charter of the United Nations thus provides the legal basis for adoption of ADR mechanisms across the world.

On a regional level, the *Treaty Establishing the East African Community* constitutes the East African Court of Justice (EACJ) as one of the principle organs of the EAC³⁸. The role of the EACJ as set out under the treaty is to be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with the treaty³⁹. The EACJ has jurisdiction to hear and determine disputes arising from an arbitration clause contained in a contract or agreement which confers jurisdiction to it to which the community or any of its institutions is a party⁴⁰. It can also hear and determine disputes arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the court⁴¹. The EACJ is thus mandated to promote arbitration as a dispute management mechanism within the EAC. The EACJ has since formulated its own arbitration rules in order to effectively discharge its mandate⁴².

In addition, the *East African Community Customs Union (Dispute Settlement Mechanism) Regulations* provide for the management of disputes through consultations in view of finding amicable resolution of disputes by the use of

³⁷ Charter of the United Nations., Available at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> (Accessed on 16/06/2023)

³⁸ Treaty Establishing the East African Community., Op Cit Article 9 (1) (e)

³⁹ Ibid, Article 23

⁴⁰ Ibid, Article 32 (a)

⁴¹ Ibid, Article 32 (c)

⁴² Arbitration Rules of the East African Court of Justice, Available at https://www.eacj.org/wp-content/uploads/2012/08/EACJ_Arbitration_Rules.pdf (Accessed on 16/06/2023)

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mechanisms such as conciliation and mediation⁴³. The Regulations further allow management of disputes through arbitration where parties consider it expedient to do so⁴⁴. The role of ADR mechanisms is thus firmly entrenched under these Regulations.

In addition to the foregoing provisions, various national Constitutions enshrine the use of ADR mechanisms in enhancing access to justice within the EAC. The Constitution of Kenya advocates the promotion of ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms⁴⁵. The Constitution of Uganda also advocates the promotion of reconciliation between parties in the administration of justice⁴⁶. ADR mechanisms are thus well stipulated under various legislations within the EAC. However, despite this recognition, several challenges hinder the efficacy of ADR mechanisms in the EAC.

4.0 Challenges Facing ADR in the EAC

Despite the efficacy of ADR mechanisms in conflict management within the EAC, several challenges hinder their uptake. These challenges are discussed below.

4.1 Inadequate Institutional Framework

It has been pointed out that one of major challenges facing the uptake of ADR mechanisms within the EAC is the issue of institutional capacity⁴⁷. There exists a challenge on the capacity of existing institutions to meet the demands of ADR mechanisms such as arbitration and mediation⁴⁸. The EACJ which is mandated

⁴³ East African Community Customs Union (Dispute Settlement Mechanism) Regulations., Regulation 5 (1) Available at https://www.eac.int/~eacint/news/index.php?option=com_content&view=article&id=474:all-set-for-eac-military-games&catid=48:eac-latest&Itemid=69 (Accessed on 16/06/2023)

⁴⁴ Ibid, Regulation 5 (8)

⁴⁵ Constitution of Kenya, 2010., Article 159 (2) (c)

⁴⁶ Constitution of Uganda., Article 126 (2) (d), Available at <https://www.parliament.go.ug/documents/1240/constitution> (Accessed on 16/06/2023)

⁴⁷ Muigua. K., 'Effectiveness of Arbitration Institutions in East Africa.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Effectiveness-of-Arbitration-Institutions-in-East-Africa-22-February-2016.pdf> (Accessed on 16/06/2023)

⁴⁸ Ibid

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to promote ADR mechanisms such as arbitration within the EAC cannot at the moment effectively promote mechanisms such as international commercial arbitration and international commercial mediation due to challenges related to personnel, funding and conflicting laws and policies in member countries⁴⁹. There is need to address such institutional challenges in order to foster ADR within the EAC.

4.2 Lack of Harmonized Legal Framework

There is lack of harmonized laws and rules within the EAC than could potentially hinder the use of ADR mechanisms. EAC member states generally fall into the category of Anglophone countries such as Kenya, Uganda and Tanzania and Francophone countries such as Rwanda, Burundi and the Democratic Republic of the Congo. Such differences result in different legal cultures, systems and laws⁵⁰. Consequently, the ADR framework varies from country to country within the EAC and it may be difficult to have a harmonized approach towards ADR with the exception of arbitration which is cross border in nature⁵¹.

4.3 Interference by National Courts in ADR

Courts often get involved in ADR mechanisms such as court-annexed mediation and arbitration in aspects such as enforcement of mediation settlement agreements and arbitral awards and setting aside of arbitral awards⁵². One of the major challenges facing ADR mechanisms such as international commercial arbitration is court interference on grounds such as public policy. Public policy is wide concept with no clear definition and this creates uncertainty and ambiguity when it comes to the enforcement of foreign

⁴⁹ Muigua. K., 'Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Building-Legal-Bridges-FOSTERING-EASTERN-AFRICA-INTEGRATION-THROUGH-COMMERCIAL-ARBITRATION-April-2015.pdf> (Accessed on 16/06/2023)

⁵⁰ Kariuki. F., 'Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Recognition-and-Enforcement-of-Foreign-Arbitral-Awards.pdf> (Accessed on 16/06/2023)

⁵¹ Muigua. K., 'Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration.' Op Cit

⁵² Sattar. S., 'National Courts and International Arbitration: A Double-edged Sword?' *Journal of International Arbitration*, Volume 27, Issue 1

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arbitral awards⁵³. An investor seeking recognition and enforcement of an arbitral award is thus never sure whether a particular municipal court might adopt a reasoning towards public policy whose effect would be to annul an award or not⁵⁴. Court interference in ADR mechanism such as arbitration can intimidate investors and hinder the growth of ADR mechanisms in EAC⁵⁵. There is need to delimit the confines of court involvement in ADR in order to promote these mechanisms in the EAC.

4.4 Inadequate Marketing of the EAC in ADR

The EAC and Africa in general have been portrayed as less developed and ill equipped in promoting ADR mechanisms such as international commercial arbitration and international commercial mediation⁵⁶. Many people outside the continent still view Africa as lacking the capacity in terms of personnel and resources to promote these mechanisms and little has been done in marketing Africa as a hub of ADR⁵⁷. There is need to effectively market the EAC and Africa at large as an ideal destination for ADR mechanisms.

4.5 Bias and Perception of Corruption against the EAC

There is a general bias against Africa and Africans in the international community. Africa is generally viewed as a corrupt and uncivilized continent⁵⁸. Further, the governance concerns prevalent in some African countries often result in the international community viewing the entire continent in negative terms. This hinders the growth and use of ADR mechanisms such as international commercial arbitration and international

⁵³ Kariuki. F., 'Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community.' Op Cit

⁵⁴ Ibid

⁵⁵ Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA-EAIA-Conference-Presentation.pdf> (Accessed on 16/06/2023)

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Amazu A. Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*, University Press, Cambridge, 2001. PP. 5-6 Available at <http://catdir.loc.gov/catdir/samples/cam031/2001018482.pdf> (Accessed on 16/06/2023)

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commercial mediation since it creates the perception that it is impossible to attain justice in Africa⁵⁹.

4.6 Disregard for Some ADR Mechanisms such as TDRMs

ADR mechanisms such as TDRMs have often been looked down upon by formal justice systems. In Kenya, the Constitution provides that TDRMs shall not be used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality⁶⁰. Such labelling has resulted in disregard of TDRMs since it subjects them to the Western concepts of justice and morality yet African societies who have their own conceptions of justice and morality⁶¹. There is need to redefine the conceptions of justice and morality in order to change the attitudes and perceptions towards ADR mechanisms such as TDRMs and elevate their role in conflict management in the EAC⁶².

5.0 Way Forward

There is need to reframe conflict management within the EAC in order to fully capture the spirit of ADR. The process of conflict management is largely influenced by culture⁶³. Difference in cultural aspects such as belief systems, attitudes, religious practices, social stratification, language and economic practices could potentially take different forms in each culture⁶⁴. Culture therefore plays an important role in conflict management. African societies have since time immemorial ascribed to values aimed at promoting social cohesion⁶⁵. Such values include peaceful coexistence, harmony, truth, honesty,

⁵⁹ Ibid

⁶⁰ Constitution of Kenya, 2010., Article 159 (3)(b)

⁶¹ Muigua. K., 'Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf> (Accessed on 16/06/2023)

⁶² Ibid

⁶³ Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

⁶⁴ Ibid

⁶⁵ Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa*, Volume 17, No.1, 2015

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unity, cooperation, forgiveness and respect⁶⁶. Conflicts in African societies were thus viewed as a threat to peaceful coexistence and harmony⁶⁷. African societies thus adopted conflict management strategies that were aimed at amicable management of conflicts in order to preserve the social fabric which tied such communities together⁶⁸.

Conflict management in African societies was aimed at creating consensus, facilitating reconciliation, fostering peace, harmony and cohesion and gave prominence to communal needs over individual needs⁶⁹. ADR mechanisms were therefore the first point of call in conflict management in African societies. Conflict management amongst African communities has since time immemorial taken the form of informal negotiation, mediation, reconciliation and arbitration⁷⁰. These mechanisms were administered by institutions such as the council of elders which ensured compliance with their outcomes⁷¹. ADR mechanisms have thus been part and parcel of the African culture⁷². These mechanisms were considered as 'Appropriate' and not 'Alternative' in management of disputes since they were able to safeguard values that were inherent in African societies and foster peace and social cohesion⁷³. Colonization resulted in subjugation of ADR mechanisms where they were regarded as 'Alternative' to formal justice systems⁷⁴. In order to enhance access to justice through ADR in the EAC, there is need to reframe conflict management and consider ADR mechanisms as 'Appropriate' and not 'Alternative' in the quest towards justice.

⁶⁶ Ibid

⁶⁷ Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).

⁶⁸ Ibid

⁶⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁷⁰ Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' Op Cit

⁷¹ Ibid

⁷² Muigua. K., 'Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Op Cit

⁷³ Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit

⁷⁴ Ghebretkle. T., & Rammala. M., 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' available at <https://www.ajol.info/index.php/mlr/article/view/186176> (Accessed on 16/06/2023)

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In addition there is need to enhance the capacity of ADR practitioners within the EAC through education, training and mentorship. There is need to set up more ADR institutions to facilitate training in ADR mechanisms such as arbitration, mediation and conciliation in addition to the existing institutions⁷⁵. Further, ADR institutions and practitioners should invest in modern technology such as virtual hearing infrastructure in order to fully promote ADR mechanisms such as international commercial arbitration, international commercial mediation and Online Dispute Resolution (ODR) especially in the face of rapidly growing networking and borderless legal practice⁷⁶. This will enhance efficiency, cost effectiveness and expeditiousness in the administration of justice which are salient features of ADR mechanisms⁷⁷.

The effectiveness of ADR mechanisms within the EAC can also be enhanced through adequate government support such as putting in place adequate legal regimes and infrastructure to enhance the uptake of ADR mechanisms⁷⁸. Governments can further enhance the role of ADR mechanisms within the EAC by designing laws that advocate for these mechanisms and institutionalizing ADR mechanisms in a manner which preserves their key attributes such as flexibility, informality, privacy and confidentiality⁷⁹. There is also need to enhance good governance within the EAC in order to promote confidence among investors as to the ability of the region as an ideal venue for ADR.

Further, there is need to delimit the role of courts in ADR mechanisms in order to cure the challenge of court interference in these mechanisms. The role of courts should merely be facilitative in aspects such as granting interim measures of protection and enforcement of decisions and should not be

⁷⁵ Muigua. K., 'Nurturing International Commercial Arbitration in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2021/10/Nurturing-International-Commercial-Arbitration-in-Kenya.pdf> (Accessed on 17/06/2023)

⁷⁶ Olowononi. E. O & Ogechukwu. J.I 'Recent Developments in 21st Century Global Legal Practice: Emerging Markets, Prospects, Challenges and Solutions for African Lawyers' (2019) 5 KIU *Journal of Social Sciences* 31

⁷⁷ Ibid

⁷⁸ Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Op Cit

⁷⁹ Muigua. K., 'Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Op Cit

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designed to stop or delay ADR proceedings⁸⁰. Finally, there is need to market the EAC as an ideal destination for ADR. Practitioners and ADR institutions can use marketing tools such as ADR conferences and collaborations with institutions in other continents in order to enhance their visibility in the ADR spectrum⁸¹. ADR practitioners can also tap into marketing tools such as publications, websites and social media in order to portray their skills and qualifications and promote confidence in people seeking their services. Through such measures, the role of ADR mechanisms in enhancing access to justice within the EAC will be enhanced.

6.0 Conclusion

The place of ADR mechanisms within the EAC is enshrined under the Treaty Establishing the EAC⁸². ADR mechanisms such as negotiation, mediation, conciliation, traditional justice systems and arbitration have been practiced in Africa for many centuries⁸³. These were mechanisms were considered 'Appropriate' and not 'Alternative' in managing conflicts and were always the first point of call whenever disputes emerged. However, modern conceptions of justice brought about by colonialism resulted in subjugation of ADR mechanisms where they were now considered 'Alternative' to formal justice systems⁸⁴. This has resulted in several challenges which hinder the efficacy of ADR mechanisms in the EAC and Africa at large. There is need to reframe conflict management in the EAC and correctly capture the spirit of ADR as 'Appropriate' and not 'Alternative' in the administration of justice. This will enhance the viability of ADR mechanisms in the EAC and promote the reputation of the region as an ideal venue for ADR. Reframing conflict management in the EAC is a noble idea.

⁸⁰ Kariuki. F., 'Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community.' Op Cit

⁸¹ Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Op Cit

⁸² 'Treaty Establishing the East African Community.' Op Cit

⁸³ Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' Op Cit

⁸⁴ Ghebretkle. T., & Rammala. M., 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' Op Cit

Achieving Environmental Democracy in Africa

Abstract

This paper critically examines the need to promote environmental democracy in Africa. The paper argues that environmental democracy is a vital tool towards fostering sound environmental governance and achieving Sustainable Development in Africa. The paper defines environmental democracy and discusses its salient elements. In addition, the paper explores the progress made towards fostering environmental democracy in Africa and challenges thereof. The paper also proposes recommendations towards achieving environmental democracy in Africa for sustainability.

1.0 Introduction

The environment plays a crucial role in fostering Sustainable Development. It provides the resources and ecosystem services including food, water, and energy that support human well-being, economic growth, and social progress¹. It has been noted that the environment is at the core of the Sustainable Development Agenda and its Sustainable Development Goals (SDGs) with humanity depending on nature for a wide range of products and services². The 2030 Agenda for Sustainable Development notes the crucial role of the environment in promoting Sustainable Development and seeks to ensure that humanity lives in productive harmony with nature³.

Despite its crucial role that the environment plays in enhancing Sustainable Development, the planet is witnessing unprecedented environmental crises including the depletion of natural resources, environmental degradation, pollution, desertification, drought, freshwater scarcity, loss of biodiversity, and climate change⁴. Responding to these challenges requires strengthening

¹ Environment and Sustainable Development., Available at <https://ncert.nic.in/textbook/pdf/keec109.pdf> (Accessed on 04/01/2025)

² United Nations Environment Programme., 'The UN Environment Programme and the Sustainable Development Goals' Available at <https://www.unep.org/unga/our-position/unep-and-sustainable-development-goals> (Accessed on 04/01/2025)

³ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 04/01/2025)

⁴ Ibid

environmental governance and the rule of law at all levels⁵. This involves building durable, effective and responsive democratic institutions, accountable systems of governance, and strong political will⁶. Environmental democracy has therefore emerged as a key ideal towards strengthening environmental governance and promoting Sustainable Development.

This paper critically examines the need to promote environmental democracy in Africa. The paper argues that environmental democracy is a vital tool towards fostering sound environmental governance and achieving Sustainable Development in Africa. The paper defines environmental democracy and discusses its salient elements. In addition, the paper explores the progress made towards fostering environmental democracy in Africa and challenges thereof. The paper also proposes recommendations towards achieving environmental democracy in Africa for sustainability.

2.0 Conceptualising Environmental Democracy

Environmental democracy is grounded in the idea that meaningful participation by the public is critical to ensuring that decisions related to the environment and natural resources adequately and equitably address the interests of all citizens⁷. It has been noted that its core, environmental democracy involves three salient and fundamental rights and obligations in respect of the environment⁸. These include the ability for people to freely access environmental information⁹; to participate meaningfully in decision-making relating to the environment¹⁰; and to seek enforcement of environmental laws or compensation in respect of environmental harms¹¹.

⁵ WFD's approach to environmental democracy., Available at https://www.wfd.org/sites/default/files/2021-11/Global-environmental-crises-a-democratic-response_WFD_2020-updated.pdf (Accessed on 04/01/2025)

⁶ Ibid

⁷ Worker. J., & Ratte. S., 'What Does Environmental Democracy Look Like?' Available at <https://www.wri.org/insights/what-does-environmental-democracy-look> (Accessed on 06/01/2025)

⁸ Center for International Environmental Law., 'Environmental Democracy and Access Rights' Available at <https://www.ciel.org/issue/environmental-democracy-access-rights/#:~:text=Environmental%20democracy%20is%20based%20on,how%20decisions%20should%20be%20made> (Accessed on 06/01/2025)

⁹ Ibid

¹⁰ Ibid

¹¹ Ibid

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Environmental democracy is therefore founded on three fundamental rights: access to information; public participation; and access to justice in environmental matters¹². In order to enhance access to environmental information, environmental democracy requires governments and companies to make information on environmental matters such as environmental impact assessments, development project plans, and pollution discharges freely available to the public¹³. By being informed, the public can participate more effectively in decision-making and hold companies and governments accountable for actions in respect of the environment that are not in accordance with the law¹⁴. Environmental democracy also enshrines the right of the public, particularly those affected by environmental hazards such as climate change, pollution and environmental degradation, to voice their concerns and influence policy-making for the right decisions to be made¹⁵. It requires the public to be informed early in the decision-making process about opportunities to participate, to be provided with any information necessary for meaningful engagement in environmental decision-making, and to be able to participate meaningfully in decision making processes without incurring burdensome costs¹⁶. Environmental democracy further sets out the need for effective mechanisms for challenging the action or inaction of governments and private entities in acting as environmental stewards for current and future generations¹⁷. It seeks to ensure that when members of the public lack access to information and participation, they are able to seek justice including compensation or appealing against a project¹⁸. In order to ensure effective access to justice, environmental democracy requires accountability mechanisms to be independent and impartial, and able to issue binding and enforceable decisions¹⁹.

¹² Worker. J., & Ratte. S., 'What Does Environmental Democracy Look Like?' Op Cit

¹³ Ibid

¹⁴ Ibid

¹⁵ WFD's approach to environmental democracy., Op Cit

¹⁶ Worker. J., & Ratte. S., 'What Does Environmental Democracy Look Like?' Op Cit

¹⁷ WFD's approach to environmental democracy., Op Cit

¹⁸ Worker. J., & Ratte. S., 'What Does Environmental Democracy Look Like?' Op Cit

¹⁹ Ibid

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The fundamental elements of environmental democracy are set out under principle 10 of the *Rio Declaration on Environment and Development*²⁰ which stipulates as follows:

'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided (emphasis added)²¹.

The Rio Declaration therefore captures the core tenets of environmental democracy which are: *public participation; access to information, and access to justice* in environmental matters (emphasis added). These elements are vital in strengthening environmental governance. For instance, access to environmental information empowers citizens and incentivises them to participate in decision and policy-making processes in an informed manner²². Further, public participation can improve the quality of decision-making by providing decision-makers with additional, unique information on local conditions in the context of social, environmental and economic decision making²³. It can also enhance policy implementation and foster peace and sustainability by increasing the legitimacy of the decision-making process and, in so doing, reduce instances of conflict²⁴. By improving the flow and exchange of information among communities, governments and the private sector,

²⁰ United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)

²¹ Ibid, Principle 10

²² United Nations Environment Programme., 'Principle 10' Available at <https://www.unep.org/civil-society-engagement/partnerships/principle-10> (Accessed on 06/01/2025)

²³ Cerezo. L, & Garcia. G., 'Lay Knowledge and Public Participation in Technological and Environmental Policy.' Available at <https://scholar.lib.vt.edu/ejournals/SPT/v2n1/pdf/CEREZO.PDF> (Accessed on 06/01/2025)

²⁴ Ibid

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public participation can also aid in avoiding unintended consequences, increase support for a decision, and lead to a more equitable distribution of costs and benefits²⁵. On the other hand, access to justice in environmental matters provides the foundation for realising the tenets of environmental democracy since it facilitates the public's ability to enforce their right to participate, to be informed, and to hold regulators and polluters accountable for environmental harm²⁶.

The tenets of environmental democracy are also stipulated under the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*²⁷. In order to foster environmental democracy, the Aarhus Convention requires all contracting states to enhance access to environmental information, promote public participation in environmental decision-making processes, and foster access to justice in environmental matters²⁸. The Aarhus Convention is therefore at the heart of achieving environmental democracy by stipulating a set of basic procedural rights for the public including access to information, public participation, and access to justice, imposing obligations on states and public authorities to enforce the core tenets of environmental democracy, enhancing transparency in environmental decision-making processes, and making governments more accountable to the people in environmental matters²⁹.

Environmental democracy is vital in strengthening environmental governance and promoting Sustainable Development. It is grounded on the idea that meaningful participation by the public is critical to ensuring that decisions related to the environment and natural resources adequately and equitably address the interests of all citizens³⁰. Strengthening democratic processes through access to information, meaningful involvement of the public in environmental decision-making processes, and access to adequate remedies is vital in bolstering environmental governance and addressing global

²⁵ Worker. J., & Ratte. S., 'What Does Environmental Democracy Look Like?' Op Cit

²⁶ United Nations Environment Programme., 'Principle 10' Op Cit

²⁷ The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters., 2161 UNTS 447, 38 ILM 517 (1999)

²⁸ Ibid

²⁹ European Commission., 'The Aarhus Convention and the EU' Available at https://environment.ec.europa.eu/law-and-governance/aarhus_en (Accessed on 06/01/2025)

³⁰ Worker. J., & Ratte. S., 'What Does Environmental Democracy Look Like?' Op Cit

environmental challenges including climate change, pollution, and biodiversity loss³¹. Achieving environmental democracy at all levels is therefore crucial in fostering sustainability.

3.0 Environmental Democracy in Africa

Environmental democracy is a key ideal for Africa. The continent is endowed with natural resources ranging from arable land, water, oil, natural gas, minerals, forests and wildlife³². These resources are vital in fostering socio-economic development in Africa. For instance, it has been noted that in most African countries, natural capital accounts for between 30 percent and 50 percent of total wealth³³. Further, it is estimated that over 70 per cent of people living in sub-Saharan Africa depend on forests and woodlands for their livelihoods³⁴. Africa therefore has much to gain by harnessing its vast natural resources to enhance the continent's development agenda towards greater prosperity for the people of Africa³⁵. This calls for sound environmental governance in Africa.

Responsible environmental stewardship has been identified as crucial towards ensuring sustainability in Africa³⁶. According to the African Union, sustainable environmental management is fundamental to the pursuit of food security, peace, security, and stability in Africa³⁷. Further, Africa Union's *Agenda 2063*³⁸, notes that Africa's natural resources play a critical role for vast segments of Africa's population who depend on the continent's biodiversity, forests and land for their livelihoods directly or indirectly³⁹. Further, Agenda 2063 further

³¹ WFD's approach to environmental democracy., Op Cit

³² United Nations Environment Programme., 'Our Work in Africa' Available at <https://www.unep.org/regions/africa/our-work-africa> (Accessed on 06/01/2025)

³³ Ibid

³⁴ Ibid

³⁵ Ibid

³⁶ African Development Bank Group., 'Catalyzing Growth and Development through Effective Natural Resources Management.' Available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/anrc/AfDB_ANRC_BROCHURE_en.pdf (Accessed on 06/01/2025)

³⁷ African Union., 'Africa Environment and Wangari Maathai Day.' Available at <https://au.int/en/wangari-maathai-day> (Accessed on 06/01/2025)

³⁸ African Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 06/01/2025)

³⁹ Ibid

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points out that Africa's natural resources also make a direct contribution to economic development through tourism, agriculture, fishing, logging among other economic activities⁴⁰. Since most citizens and African economies are heavily dependent on natural resources including land, forestry and fishing, mining and quarrying, and oil and natural gas, sound governance and management of the continent's natural resources is of paramount importance if the continent is to achieve the Sustainable Development agenda⁴¹.

Achieving environmental democracy is crucial in enabling Africa to reap from its vast natural resources potential⁴². Environmental democracy is crucial in ensuring inclusion of every person including indigenous and local communities in Africa in environmental and development decisions that will transform the continent towards greater prosperity⁴³. Environmental democracy is also vital in fostering the right to a clean, healthy, and sustainable environment in Africa, ensuring that governments and the private sector are accountable for their environmental acts and omissions, and providing avenues for citizens to actualise their environmental rights⁴⁴.

The people of Africa have been at the heart of environmental conservation for many centuries. For instance, it has been noted that indigenous people in Africa like those in other parts of the world have proved to be good custodians of their environment⁴⁵. Over a long period, indigenous people in Africa and other parts of the world have assimilated detailed knowledge about the functionality of their immediate environment through experiences, insights into nature and society relationship, and communal and institutional practices developed by keen observations, monitoring, innovation, practice, and experimentation⁴⁶.

⁴⁰ Ibid

⁴¹ African Union., 'Africa Environment and Wangari Maathai Day.' Op Cit

⁴² Burke. J., & Ooko. T. B., 'Building momentum towards the realisation of environmental rights in Africa' Available at <https://www.universal-rights.org/building-momentum-towards-the-realisation-of-environmental-rights-in-africa/#:~:text=Recognising%20the%20need%20to%20strengthen,momentum%20for%20the%20negotiation%20and> (Accessed on 06/01/2025)

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Attoh. E., & Ajayi. O., 'Indigenous Knowledge and Climate Change Adaptation in Africa: A Systematic Review' Available at <http://www.cabi.org/cabreviews> (Accessed on 06/01/2025)

⁴⁶ Ibid

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Indigenous peoples in Africa have therefore developed sophisticated indigenous knowledge systems based on their observations and interactions with the environment over generations that have enabled them to harness ecosystem services to support their livelihoods and survive socioecological changes including climate change for many centuries⁴⁷. Indigenous knowledge systems in Africa therefore offer valuable insights into sustainable environmental governance and conservation practices, which are increasingly recognized for their potential to address contemporary ecological challenges including climate change, environmental degradation, and biodiversity loss⁴⁸. Achieving environmental democracy in Africa including through ensuring that indigenous peoples and local communities have access to environmental information, participate in environmental decision-making, and have opportunities to seek legal redress is therefore key in harnessing indigenous knowledge for sound environmental governance in Africa⁴⁹.

Agenda 2063, sets out the importance of achieving environmental democracy in Africa⁵⁰. It recognises the importance of people-centred development and the need to ensure broad-based participation in the transformation of the continent across all sectors including environmental governance⁵¹. It urges Africa countries to put in place strong institutions to enhance citizens' participation in development and in economic and governance management⁵². It further requires African countries to guarantee freedom of access to information by all citizens, while safeguarding privacy⁵³. In addition, Agenda 2063 seeks to foster affordable and timely access to justice for all citizens in Africa⁵⁴. In order to achieve this goal, it urges African countries to ensure that all citizens enjoy access to independent courts and judiciaries that dispense and

⁴⁷ Zougmore. R., Segnon. A., & Thornton. P., 'Harnessing Indigenous Knowledge and Practices for Effective Adaptation in the Sahel' Available at <https://doi.org/10.1016/j.cosust.2023.101389> (Accessed on 06/01/2025)

⁴⁸ Ola. F., 'The Role Of Indigenous Knowledge In Environmental Conservation' Available at <https://olamidefrancis.medium.com/the-role-of-indigenous-knowledge-in-environmental-conservation-f16db06e5a83> (Accessed on 06/01/2025)

⁴⁹ Burke. J., & Ooko. T. B., 'Building momentum towards the realisation of environmental rights in Africa' Op Cit

⁵⁰ African Union., 'Agenda 2063: The Africa we Want.' Op Cit

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

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deliver justice with neither fear nor favour⁵⁵. Achieving the goals and aspirations of Agenda 2063 is therefore key towards realising environmental democracy in Africa.

At a national level, the *Constitution of Kenya*⁵⁶ further embraces the core tenets of environmental democracy. It urges the state to encourage public participation in the management, protection and conservation of the environment⁵⁷. Further, the Constitution provides an avenue towards ensuring access to justice in environmental matters⁵⁸. Under the Constitution, if a person alleges that a right to a clean and healthy environment recognised and protected under article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter⁵⁹. In such cases, the court may make any order it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment⁶⁰; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment⁶¹; and to provide compensation for any victim of a violation of the right to a clean and healthy environment⁶². Implementing these constitutional provisions is therefore key towards achieving environmental democracy in Kenya.

Despite the need for environmental democracy in Africa, it has been noted that environmental governance systems in most countries are strained, with marginalized groups often excluded from decision-making processes⁶³. Marginalized and vulnerable groups including women, the youth, indigenous peoples and local communities suffer persistently low levels of representation

⁵⁵ Ibid

⁵⁶ Constitution of Kenya., 2010., Government Printer, Nairobi

⁵⁷ Ibid, article 69 (1) (d)

⁵⁸ Ibid, article 70

⁵⁹ Ibid, article 70 (1)

⁶⁰ Ibid, article 70 (2) (a)

⁶¹ Ibid, article 70 (2) (b)

⁶² Ibid, article 70 (2) (c)

⁶³ United Nations Development Programme., 'Environmental Governance: Bolstering inclusive and effective governance systems that champion environmental justice and sustainability' Available at <https://www.undp.org/nature/our-work-areas/environmental-governance> (Accessed on 06/01/2025)

and participation in environmental decision-making processes⁶⁴. Failure to foster environmental democracy through access to information, public participation, and access to justice in environmental matters is worsening environmental challenges including the tripe planetary crisis of climate change, pollution, and biodiversity loss globally and in Africa⁶⁵. It is therefore necessary to achieve environmental democracy in Africa for sustainability.

4.0 Conclusion

It is important to achieve environmental democracy in Africa. The ideal of environmental democracy is crucial in fostering inclusive and participatory environmental governance for Sustainable Development in Africa⁶⁶. African countries should therefore strengthen the core tenets of environmental democracy including access to information, public participation, and access to justice in environmental matters. It is imperative to ensure broad access to information concerning the environment that is held by both public and private authorities in order to enable citizens to effectively participate in environmental decision-making⁶⁷. It has been noted that openness and transparency are required to help all stakeholders including citizens, civil society, media, businesses, and the international community understand key environmental decisions and challenges and how governments are responding to such matters⁶⁸.

It is also necessary to foster the meaningful participation of all stakeholders including women, the youth, indigenous peoples and local communities in order to improve the quality of environmental decisions⁶⁹. Ensuring the Free, Prior, and Informed Consent (FPIC) of indigenous peoples and local communities is also key in achieving environmental democracy in Africa⁷⁰.

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Burke. J., & Ooko. T. B., 'Building momentum towards the realisation of environmental rights in Africa' Op Cit

⁶⁷ United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' Op Cit

⁶⁸ WFD's approach to environmental democracy., Op Cit

⁶⁹ Ibid

⁷⁰ Muigua. K., 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya.' Available at <http://kmco.co.ke/wp->

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FPIC has been identified as a fundamental right of self-determination that ensures participation by indigenous communities in development projects in order to ensure that such projects are conducted in a sustainable manner taking into account their economic, social and cultural impact⁷¹. FPIC can therefore guarantee human rights such as the right to participation and economic development whilst promoting environmental protection and conservation⁷². Maximising FPIC is therefore key towards achieving environmental democracy by ensuring the participation of indigenous peoples and local communities in environmental decision making.

African countries should also ensure access to justice in environmental matters in order to enable citizens access remedies in cases where environmental rights have been breached⁷³. Without access to justice, citizens have no ability to hold polluters or their government accountable for environmental harm⁷⁴. It is therefore necessary to broaden access to justice in environmental matters including through embracing Alternative Dispute Resolution (ADR) processes such as mediation and in some cases arbitration⁷⁵. These techniques can enhance cooperation and collaboration while also allowing parties to come up with creative remedies and should therefore be encouraged towards achieving environmental democracy.

Achieving environmental democracy in Africa is therefore a key ideal towards Sustainable Development. It is necessary to pursue this ideal for posterity in Africa and all over the world.

[content/uploads/2019/03/Maximising-the-Rightto-FPIC-in-Kenya-Kariuki-Muigua-29th-March-2019.pdf](https://www.kmco.co.ke/wp-content/uploads/2019/03/Maximising-the-Rightto-FPIC-in-Kenya-Kariuki-Muigua-29th-March-2019.pdf) (Accessed on 06/01/2025)

⁷¹ Owen, J.R. and Kemp, D., "Free Prior and Informed Consent', Social Complexity and the Mining Industry: Establishing A Knowledge Base," *Resources Policy*, Vol.41 (2014): 91-100

⁷² Ibid

⁷³ WFD's approach to environmental democracy., Op Cit

⁷⁴ Ibid

⁷⁵ Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution' Available at <https://kmco.co.ke/wp-content/uploads/2023/07/Attaining-Environmental-Justice-through-Alternative-Dispute-Resolution.pdf> (Accessed on 06/01/2025)

Effective Management of Conflicts in the African Context: Exploring Collaboration, Harmony and Ubuntu

Abstract

This paper critically discusses the need for effective conflict management in Africa. The paper argues that Africa is highly susceptible to conflicts which undermine peace, security, and development in the continent. In addition, the paper notes that Africa has an opportunity to harness collaboration, harmony and ubuntu for effective conflict management. The paper argues that collaboration, harmony and ubuntu have been part and parcel of conflict management in Africa since time immemorial and can be utilised for effective conflict management in the continent. It proposes ideas towards fostering collaboration, harmony and Ubuntu for effective conflict management in Africa.

1.0 Introduction

A Conflict refers to a situation where two or more parties, however defined or structured, perceive that they possess mutually incompatible goals¹. According to this definition, any conflict consists of three essential parties: incompatibility of goals, attitudes and behaviour². 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 desires³. According to the United Nations, a conflict arises when two or more groups believe their interests are incompatible⁴. The term conflict has also been conceptualised as a clash between individuals arising out of a difference in thought process, attitudes, understanding, interests, requirements and even sometimes perceptions⁵. It usually entails some form of friction, disagreement, or discord arising within a group when the beliefs or actions of one or more members of the group are either resisted by or unacceptable to the others⁶. It has been noted that conflicts

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

² Ibid

³ Ibid

⁴ United Nations., 'Land and Conflict' Available at https://www.un.org/en/land-natural-resources-conflict/pdfs/GN_Land%20and%20Conflict.pdf (Accessed on 27/01/2025)

⁵ Khan. A., 'Understanding Conflict' Available at <https://mgcub.ac.in/pdf/material/20200407005750d5d6d7633c.pdf> (Accessed on 27/01/2025)

⁶ What is Conflict?., Available at <https://mariancrc.org/wp-content/uploads/2014/08/CONFLICT-AND-PEACE.pdf> (Accessed on 27/01/2025)

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can occur in various levels including intrapersonal (within an individual), interpersonal (between individuals), intragroup (within a group), intergroup (involving two or more groups), and intraorganizational (within organizations)⁷.

Conflicts have been identified as a common phenomenon in human relationships and interactions⁸. They are an inevitable part of living because they are related to situations of scarce resources, division of functions, power relations and role-differentiation⁹. According to the United Nations, conflict is not in itself a negative phenomenon¹⁰. For example, non-violent conflict can be an essential component of social change and development, and is a necessary component of human interaction¹¹. It has been noted that non-violent resolution of conflict is possible when individuals and groups have trust in their governing structures, society and institutions to manage incompatible interests¹². Non-violent conflicts are therefore necessary in human interactions and their resolution is key in defining and strengthening human relationships¹³.

However, in some circumstances, conflicts can be an undesirable occurrence and can affect peace, sustainability and development in any given society¹⁴.

⁷ Conflict Management., Available at https://healthnet.org.np/downloads/manual/Conflict_management.pdf (Accessed on 27/01/2025)

⁸ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at <https://kmco.co.ke/wpcontent/uploads/2023/06/Reframing-Conflict-Management-in-the-EastAfrican-CommunityMoving-from-Alternative-to-Appropriate-Dispute-Resolution> (Accessed on 27/01/2025)

⁹ Bercovitch. J., 'Conflict and Conflict Management in Organizations: A Framework for Analysis.' Available at <https://ocd.lcwu.edu.pk/cfiles/International%20Relations/EC/IR-403/Conflict.ConflictManagementinOrganizations.pdf> (Accessed on 27/01/2025)

¹⁰ United Nations., 'Land and Conflict' Op Cit

¹¹ Ibid

¹² Ibid

¹³ Ackerman. P., & Kruegler. C., 'Summary of "The Principles of Strategic Nonviolent Conflict' Available at <https://www.beyondintractability.org/artsum/ackerman-principles> (Accessed on 27/01/2025)

¹⁴ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

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Conflicts become problematic when societal mechanisms and institutions for managing and resolving them break down, giving way to violence¹⁵. Societies that are characterized by weak institutions, fragile political systems and divisive social relations can be drawn into endless cycles of conflict and violence threatening peace and development¹⁶. For instance, armed conflicts that occur in various parts of the world including in Africa place heavy burdens on the social development of countries, by decreasing revenues, increasing defense expenditure, and diverting funds away from social and development initiatives¹⁷. They also cause human suffering in terms of loss of lives, displacement of populations and increased levels of poverty¹⁸. It has been noted that the Sustainable Development Goals (SDGs) have an intrinsic relationship to peace and stability¹⁹. Effective management of conflicts is therefore necessary to spur peace, stability, and development.

This paper critically discusses the need for effective conflict management in Africa. The paper argues that Africa is highly susceptible to conflicts which undermine peace, security, and development in the continent. In addition, the paper notes that Africa has an opportunity to harness collaboration, harmony and ubuntu for effective conflict management. The paper argues that collaboration, harmony and ubuntu have been part and parcel of conflict management in Africa since time immemorial and can be utilised for effective conflict management in the continent. It proposes ideas towards fostering collaboration, harmony and *Ubuntu* for effective conflict management in Africa.

¹⁵ United Nations., 'Land and Conflict' Op Cit

¹⁶ Ibid

¹⁷ United Nations Economic Commission for Africa., 'Socioeconomic Impact of Conflict in Africa' Available at <https://repository.uneca.org/handle/10855/50100#:~:text=It%20places%20onerous%20burdens%20on,from%20social%20and%20development%20initiatives> (Accessed on 27/01/2025)

¹⁸ Swedish International Development Cooperation Agency., 'Conflict Prevention: Opportunities and Challenges in Implementing Key Policy Commitments and Priorities' Available at https://cdn.sida.se/app/uploads/2020/12/01125316/s209461_thematicoverview_conflict_prevention_webb_final.pdf (Accessed on 27/01/2025)

¹⁹ United Nations., 'No Peace, No Sustainable Development: A Vicious Cycle that We Can Break' Available at <https://www.un.org/en/chronicle/article/no-peace-no-sustainable-development-vicious-cycle-we-can-break> (Accessed on 27/01/2025)

2.0 The Need for Effective Conflict Management in Africa

Effective management of conflicts is a key priority for Africa. The continent has been highly susceptible to intra and inter- state wars and conflicts for many years²⁰. It has been pointed out that Africa comes second in the number of armed conflicts per region with more than 35 non-international armed conflicts taking place in various African countries including Burkina Faso, Cameroon, the Central African Republic (CAR), the Democratic Republic of the Congo, Ethiopia, Mali, Mozambique, Nigeria, Senegal, Somalia, South Sudan and Sudan²¹. Several armed groups fighting against government forces and/or against each other are involved in these conflicts²². Frequent conflicts are being experienced across the African continent, which are fueled by various factors, including but not limited to natural resources, fight for political control, poverty, negative ethnicity, religion, environmental causes, and external influence, among others²³.

A majority of the conflicts in Africa have been political in nature resulting in civil wars, military coups, and genocide as was in the case of Rwanda²⁴. In addition, natural resource- based conflicts have been a common occurrence in Africa for many decades²⁵. It has been observed that the abundance of natural resources has motivated and fueled armed conflicts in Africa threatening peace, security, and stability²⁶. Despite being a blessing for the continent, natural resources have also provided a parallel political economy for fueling

²⁰ Olaosebikan. A., 'Conflicts in Africa: Meaning, Causes, Impact and Solution.' *African Research Review*, Volume 4, No. 4 (2010)

²¹ Geneva Academy of International Humanitarian Law., 'Today's Armed Conflicts' Available at <https://geneva-academy.ch/galleries/today-s-armed-conflicts> (Accessed on 27/01/2025)

²² Ibid

²³ Muigua. K., 'Towards Effective Peacebuilding and Conflict Management in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2021/05/Towards-Peacebuilding-and-Conflict-Management-in-Kenya.docx-Kariuki-Muigua-MAY-2021x.pdf> (Accessed on 27/01/2025)

²⁴ Africa Center for Strategic Studies., 'African Conflicts Displace Over 40 Million People.' Available at <https://africacenter.org/spotlight/african-conflicts-displace-over-40-million-people/> (Accessed on 27/01/2025)

²⁵ Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

²⁶ Mwanika. PAN., 'Natural Resource Conflict: Management Processes and Strategies in Africa' Available at <https://www.files.ethz.ch/isn/136685/PAPER216.pdf> (Accessed on 27/01/2025)

wars and conflicts in Africa²⁷. This is evidenced by the illegal exploitation of diamonds during the civil war in Sierra Leone and the use of the profits from illicit diamond sales to procure small arms and light weapons and thus sustain armed conflict during Liberia's civil war²⁸. Africa therefore continues to experience the 'resource curse' which refers to the paradox that countries endowed with natural resources tend to be embroiled in conflicts and have incidences of poverty²⁹. Many African countries that are rich in natural resources including oil, gas, and minerals have been caught up in vicious cycles of conflicts undermining the potential of these resources to spur development³⁰.

Climate change is also a major cause of conflicts in Africa³¹. It has been noted that the environmental impacts of climate change, especially the depletion of natural resources creates conditions that increase the risk of violent conflict globally³². The adverse effects of climate change and environmental degradation extend far beyond the environmental realm and increasingly shape human activity by causing and worsening conflicts at the global, regional, national, and even local levels³³. For example, rising temperatures, more severe and frequent extreme weather events, and erratic rainfall patterns cause or exacerbate volatile food prices, insecure livelihoods, and large-scale displacement therefore posing the risk of conflicts³⁴. Further, the adverse environmental impacts of climate change create conditions which increase the risk of violent conflicts including water scarcity, crop failure, food insecurity,

²⁷ Ibid

²⁸ Ibid

²⁹ Henri. A., 'Natural Resources Curse: A Reality in Africa.' *Resources Policy*, Volume 63, 2019

³⁰ Ibid

³¹ International Institute for Sustainable Development., 'Climate change and conflict: Lessons from Community Conservancies in Northern Kenya' Available at https://www.iisd.org/system/files/publications/climate_change_conflict_kenya.pdf (Accessed on 27/01/2025)

³² Ibid

³³ United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Available at <https://peacemaker.un.org/sites/peacemaker.un.org/files/DPPAPracticeNote-TheImplicationsofClimateChangeforMediationandPeaceProcesses.pdf> (Accessed on 27/01/2025)

³⁴ Ibid

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migration, and displacement of populations³⁵. It has been observed that the effects of climate change including prolonged droughts are fueling land use conflicts and displacing populations thus causing and worsening conflicts in the continent³⁶. It has been noted that climate shocks such as droughts can magnify local tensions or conflict, particularly harming those who earn an income through agriculture³⁷. Further, droughts and floods also accelerate environmental degradation, which in turn intensifies disputes over land and water³⁸. Addressing climate change and its impacts is thus a key conflict prevention and management strategy in Africa.

Conflicts are therefore prevalent in Africa. These conflicts have been attributed to various factors including poverty, human rights violations, bad governance and corruption, ethnic marginalization and small arms proliferation³⁹. Natural resource-based conflicts are also being witnessed all over Africa⁴⁰. Climate change is also a major source of conflicts in Africa compounding existing risk factors such as scarcity of natural resources and rise in geo-political tensions over sharing of such resources⁴¹. The prevalence of conflicts in Africa is an undesirable phenomenon. According to the United Nations, conflicts and wars have been a major hindrance in the achievement of Sustainable Development in Africa⁴². Conflicts have adverse impacts on every aspect and corner of the African family, community and nation-state, with economic, cultural, political,

³⁵ Froese. R., & Janpeter. S, 'The Nexus of Climate Change, Land Use, and Conflicts' (2019)

³⁶ International Crisis Group., 'Absorbing Climate Shocks and Easing Conflict in Kenya's Rift Valley' Available at <https://www.crisisgroup.org/africa/east-and-southern-africa/kenya/b189-absorbing-climate-shocks-and-easing-conflict-kenyas-rift> (Accessed on 27/01/2025)

³⁷ Ibid

³⁸ Ibid

³⁹ Annan. N., 'Violent Conflicts and Civil Strife in West Africa: Causes, Challenges and Prospects' *International Journal of Security & Development.*, Volume 3, Issue 1, (2014)

⁴⁰ Mwanika. PAN., 'Natural Resource Conflict: Management Processes and Strategies in Africa' Op Cit

⁴¹ International Institute for Sustainable Development., 'Climate change and conflict: Lessons from Community Conservancies in Northern Kenya' Op Cit

⁴² United Nations., 'Promotion of Durable Peace and Sustainable Development in Africa.' Available at https://www.un.org/osaa/sites/www.un.org.osaa/files/docs/2109875_osaa_sg_report_web_new.pdf (Accessed on 28/01/2025)

social, and environmental costs⁴³. As a result, it is imperative to foster effective management of conflicts in the Africa for peace and development.

3.0 The Role of Collaboration, Harmony and Ubuntu in Conflict Management in Africa

The concept of conflict management seeks to resolve disagreements or conflicts with positive outcomes that satisfy all individuals involved or is beneficial to a whole group⁴⁴. It involves processes and techniques adopted towards stopping or preventing overt conflicts and aiding the parties involved to reach a durable and peaceful solution to their differences⁴⁵. Conflict management therefore involves handling all stages of a conflict as well as the mechanisms used in the management of conflicts⁴⁶. Conflict management has been described as an ongoing process by which conflicts are identified and handled, fairly and efficiently⁴⁷. The goal of conflict management is to minimise the potential negative impact that can arise from disagreements and encourage agreement and positive outcomes⁴⁸. It has been noted that various approaches and techniques can be adopted towards managing conflicts 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 procedure⁴⁹.

There is a range of conflict management mechanisms available to parties in conflict. For instance, the *Charter of the United Nations*⁵⁰ outlines various conflict management mechanisms that parties to a conflict or dispute may resort to. The Charter stipulates that '*parties to any dispute, the continuance of which is likely*

⁴³ Uwazie. E., 'Alternative Dispute Resolution and Peace-building in Africa.' Available at <https://www.cambridgescholars.com/resources/pdfs/978-1-4438-5707-9-sample.pdf> (Accessed on 28/01/2025)

⁴⁴ Ronquillo. Y., Ellis. V., & Toney-Butler. T., 'Conflict Management' Available at <https://www.ncbi.nlm.nih.gov/books/NBK470432/> (Accessed on 28/01/2025)

⁴⁵ Leeds. C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners.' *International Journal of Peace Studies*, Volume 2, No. 2, 1997

⁴⁶ Ibid

⁴⁷ Institute of Directors., 'Conflict Management' Available at <https://www.iod.com/resources/business-advice/conflict-management/> (Accessed on 28/01/2025)

⁴⁸ Ibid

⁴⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁵⁰ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

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to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice' (Emphasis added)⁵¹.

Collaboration, harmony and *Ubuntu* have been identified as core tenets towards effective management of conflicts in the African context⁵². The idea of collaboration in conflict management aims to resolve the root causes of a disagreement and develop a mutually acceptable solution that benefits all parties involved⁵³. Under this approach, all parties involved in a conflict are brought together and work towards resolving the underlying conflict through active listening and respectful communication⁵⁴. Collaboration encourages parties in conflict to work through disagreements through empathy, and listening towards mutually beneficial solutions⁵⁵. It has been identified as powerful approach to conflict management built on cooperation, open communication, and finding win-win outcomes⁵⁶. Collaboration aims to preserve relationships, build trust among parties, and foster long-term positive change⁵⁷. Collaboration therefore fosters cooperation in conflict management⁵⁸. Through this, parties in conflict are able to reach a solution that satisfies everyone therefore strengthening relationships in the process⁵⁹. It leads to more lasting outcomes therefore minimising the likelihood of conflicts reemerging in future⁶⁰.

⁵¹ Ibid, article 33 (1)

⁵² Akinola. A., & Uzodike. U., 'Ubuntu and the Quest for Conflict Resolution in Africa' *Journal of Black Studies.*, Volume 49, No. 2., (2018) pp 91-113

⁵³ Collaborating Conflict Resolution Style: Everything You Need to Know., Available at <https://conflict-resolution-training.com/blog/collaborative-conflict-resolution-style/> (Accessed on 28/01/2025)

⁵⁴ Ronquillo. Y., Ellis. V., & Toney-Butler. T., 'Conflict Management' Op Cit

⁵⁵ Miroslavov. M., 'Mastering The Collaborating Conflict Style In 2024' Available at <https://www.officernd.com/blog/collaborating-conflict-style/> (Accessed on 28/01/2025)

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Collaborating Conflict Resolution Style: Everything You Need to Know., Op Cit

⁵⁹ Ibid

⁶⁰ Ibid

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Harmony is a human value that involves compatibility and accord in feelings, actions, relationships, opinions, and interests⁶¹. Harmony has been described as a state of balance, peace, and coherence within individuals⁶². It has been noted that harmony is vital for successful cooperation, survival, longevity, and prosperity for humanity⁶³. Achieving harmony is fundamental in effective management of conflicts⁶⁴. It has been observed that by fostering open communication, empathy, and understanding, conflicts can be resolved in a harmonious and productive manner⁶⁵. Effective conflict management is vital in building positive relationship and fostering harmony⁶⁶.

Ubuntu has been described as an African philosophy that places emphasis on 'being self through others'⁶⁷. It is a form of humanism which can be expressed in the phrases 'I am because of who we all are'⁶⁸. *Ubuntu* also referred to as *Utu* in some parts of Africa especially in East Africa is an African philosophy geared towards upholding values for the greater good of the all community including sympathy, compassion, benevolence, solidarity, hospitality, generosity, sharing, openness, affirming, being available, kindness, caring, harmony, interdependence, obedience, collectivity and consensus⁶⁹. *Ubuntu* emphasizes

⁶¹ Chen. S. X., 'Harmony' Available at https://www.researchgate.net/publication/256649929_Harmony#:~:text=Harmony%20is%20usually%20identified%20as,and%20even%20opposing%20one%20another. (Accessed on 28/01/2025)

⁶² Hegde. S. B., 'Universal Human Values: Understanding Harmony and Ethical Human Conduct' Available at <https://www.jcethbl.edu.in/UNIVERSAL%20HUMAN%20VALUES%20II.pdf> (Accessed 28/01/2025)

⁶³ United Nations., 'The Philosophy of True Harmony in Global Citizenship' Available at <https://www.un.org/en/chronicle/article/philosophy-true-harmony-global-citizenship> (Accessed on 28/01/2025)

⁶⁴ The Art of Harmonious Coexistence: Conflict Management., Available at <https://hrme.org/the-art-of-harmonious-coexistence-conflict-management/> (Accessed on 28/01/2025)

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Mugumbate. J., & Nyanguru. A., 'Exploring African Philosophy: The Value of Ubuntu in Social Work.' Available at <https://ro.uow.edu.au/cgi/viewcontent.cgi?article=4272&context=sspapers&httpsredir=1&referer#:~:text=Ubuntu%20can%20best%20be%20described,ngumuntu%20ngabantu%20in%20Zulu%20language.> (Accessed on 28/01/2025)

⁶⁸ Ibid

⁶⁹ Ibid

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the interconnectedness of all humanity⁷⁰. The concept of *Ubuntu* stresses the importance of community and the interdependence of people⁷¹. It has been noted that *Ubuntu* rejects the Western emphasis on individualism but rather stresses collaboration and teamwork⁷². It stresses the fact that we are all connected, and that one can only grow and progress through the growth and progression of others⁷³.

Collaboration, harmony and *Ubuntu* have been utilised in conflict management in Africa since time immemorial⁷⁴. The process of conflict management is largely influenced by culture⁷⁵. Difference in cultural aspects such as belief systems, attitudes, religious practices, social stratification, language and economic practices mean that conflicts could potentially take different forms in each culture⁷⁶. As a result, culture has been identified as an essential component of conflicts and the conflict management process⁷⁷. For instance, all conflicts entail interpersonal interactions that occur in the context of cultures⁷⁸. In addition, culture shapes not only the possibilities for conflict resolution or transformation, but also the naming, interpretation, enactment and course of

⁷⁰ Omodan. B., 'Ubuntu Politics of Process: An Alternative Conflict Management Culture in Universities' Available at https://www.researchgate.net/publication/364033950_Ubuntu_Politics_of_Process_An_Alternative_Conflict_Management_Culture_in_Universities (Accessed on 28/01/2025)

⁷¹ Ibid

⁷² Embodying the African Spirit of Ubuntu at Work., Available at <https://ebsedu.org/blog/embodying-the-african-spirit-of-ubuntu-at-work/#:~:text=The%20book%20describes%20how%20leaders,partisanship%2C%20progeny%2C%20and%20production.> (Accessed on 28/01/2025)

⁷³ Ibid

⁷⁴ Akinola. A., & Uzodike. U., 'Ubuntu and the Quest for Conflict Resolution in Africa' Op Cit

⁷⁵ Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

⁷⁶ Ibid

⁷⁷ LeBaron. M., 'Culture and Conflict.' Available at https://www.beyondintractability.org/essay/culture_conflict (Accessed on 28/01/2025)

⁷⁸ Weiss, A., 'Power and Difference: An Extended Model for the Conflict Potentials in the Negotiation of Intercultural Conflicts'. 2000, Berlin: Berghof Institute. Available at <http://www.berghof-center.org/> (Accessed on 28/01/2025)

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conflicts⁷⁹. Therefore whether a conflict exists at all and the mechanisms adopted towards managing such conflicts are issues that are largely determined by culture⁸⁰. Therefore, culture is an essential part of conflict and conflict management.

It has been noted that African societies have since time immemorial ascribed to values aimed at promoting social cohesion⁸¹. These values include peaceful coexistence, harmony, truth, honesty, unity, cooperation, forgiveness and respect⁸². They are embedded in the culture and customs of the African people. These values are the foundation of African societies and cultures and are inextricably bound together in order to foster social harmony and cohesion⁸³. They influence every aspect of African societies including conflict management. Conflicts in Africa are viewed as a threat to peaceful existence and harmony. As a result, there is emphasis on amicable management of conflicts in order to preserve the social fabric which tied such communities together⁸⁴.

Conflict management in Africa is anchored in the values of collaboration, harmony and *Ubuntu*⁸⁵. It has been noted that the process of conflict management in African societies is well-entrenched in the traditions, customs, norms and taboos of the people⁸⁶. Conflict management is based on the principles of equity and justice, which are well entrenched in African customs

⁷⁹ LeBaron. M., 'Transforming Cultural Conflict in an Age of Complexity' Available at <https://researchers.allard.ubc.ca/ws/portalfiles/portal/39713135/Transforming%20Cultural%20Conflict%20in%20an%20Age%20of%20Complexity.pdf> (Accessed on 28/01/2025)

⁸⁰ Ibid

⁸¹ Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa*, Volume 17, No.1, 2015

⁸² Ibid

⁸³ Idang. G., 'African Cultures and Values.' Available at https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1561-40182015000200006 (Accessed on 28/01/2025)

⁸⁴ Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).

⁸⁵ Ibid

⁸⁶ Ademowo. A., 'Conflict Management in Traditional African Society.' Available at https://www.researchgate.net/publication/281749510_Conflict_management_in_Traditional_African_Society (Accessed on 28/01/2025)

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and traditions⁸⁷. In order to preserve harmony, African communities have therefore developed and embraced conflict management strategies that are aimed towards effectively dealing with conflicts⁸⁸. These mechanisms give prominence to communal needs over individual needs⁸⁹. It has been observed that conflict management in African societies is premised on the values that are held sacrosanct including peace, harmony, truth, honesty, unity, cooperation, forgiveness, reconciliation, and respect⁹⁰. The philosophy of *Ubuntu/Utu* is essential in fostering social harmony and has been effectively incorporated in conflict management strategies⁹¹.

Collaboration, harmony and *Ubuntu* are thus part and parcel of conflict management in Africa. These values fit well within the notion of justice in Africa and are aimed at creating consensus, facilitating reconciliation, fostering peace and cohesion and giving prominence to communal needs over individual needs⁹². Therefore by adopting and internalising the principles of collaboration, harmony and *Ubuntu*, it is possible to create healthy relationships based on the recognition that within the web of humanity everyone is linked to everyone else⁹³. These values are ideal in fostering cooperation, forgiveness, and reconciliation for effective conflict management and peacebuilding in Africa⁹⁴. They emphasise restorative justice (harmony in the community), rather than punitive justice⁹⁵. Collaboration, harmony and *Ubuntu* are rooted in reconciliation, sharing, compassion, civility, responsibility, trust, and reconciliation, and cooperation⁹⁶. They are therefore

⁸⁷ Ibid

⁸⁸ Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit

⁸⁹ Ibid

⁹⁰ Awoniyi. S., 'African Cultural Values: The Past, Present and Future' Op Cit

⁹¹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁹² Ibid

⁹³ Murithi. T., 'African Approaches to Building Peace and Social Solidarity' Available at <https://www.accord.org.za/ajcr-issues/african-approaches-to-building-peace-and-social-solidarity/> (Accessed on 28/01/2025)

⁹⁴ Ibid

⁹⁵ Van Norren. D., 'African Ubuntu and Sustainable Development Goals: seeking human mutual relations and service in development' Available at <https://www.tandfonline.com/doi/full/10.1080/01436597.2022.2109458#abstract> (Accessed on 28/01/2025)

⁹⁶ Ibid

anchored in the culture and customs of the people of Africa and can be utilised for effective conflict management in Africa.

It has been noted that many postcolonial African states have experienced and continue to experience violent conflicts, prompting the quest for viable approaches to conflict resolution and peace-building⁹⁷. The desire by certain individuals and groups to control power and resources at the expense of others lies at the heart of the frequent civil wars, armed insurrections, terrorism, ethnic conflict, genocide, xenophobia, and intracommunity and domestic conflict prevalent in Africa⁹⁸. The role of collaboration, harmony and *Ubuntu* in conflict management in Africa has been heavily undermined at the expense of formal justice systems and their emphasis on Western notions of justice⁹⁹. It is therefore necessary to reinvigorate collaboration, harmony and *Ubuntu* for effective conflict management in Africa.

4.0 Conclusion

Africa is highly susceptible to conflicts and wars. The continent has witnessed intra and inter- state wars and conflicts for many years¹⁰⁰. These conflicts and wars are often caused or worsened by a number of factors including poverty, human rights violations, bad governance and corruption, ethnic marginalization and small arms proliferation¹⁰¹. Natural resources and environmental factors including climate change are also fueling conflicts in Africa¹⁰². These conflicts undermine peace, stability and development in

⁹⁷ Akinola. A., & Uzodike. U., 'Ubuntu and the Quest for Conflict Resolution in Africa' Op Cit

⁹⁸ Ibid

⁹⁹ Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Available at https://www.researchgate.net/publication/228182138_Alternative_Dispute_Resolution_ADR_in_Sub-Saharan_Africa_The_Role_of_Customary_Systems_of_Conflict_Resolution_CSCR (Accessed on 28/01/2025)

¹⁰⁰ Olaosebikan. A., 'Conflicts in Africa: Meaning, Causes, Impact and Solution.' Op Cit

¹⁰¹ Annan. N., 'Violent Conflicts and Civil Strife in West Africa: Causes, Challenges and Prospects' Op Cit

¹⁰² International Institute for Sustainable Development., 'Climate change and conflict: Lessons from Community Conservancies in Northern Kenya' Op Cit

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Africa¹⁰³. Effective management of conflicts is therefore necessary in order to spur Sustainable Development in Africa.

Collaboration, harmony, and *Ubuntu* are key tenets that can enhance effective management of conflicts in the African context. These values are well-entrenched in the traditions, customs, norms and taboos of the African people¹⁰⁴. They are part and parcel of the African culture and fit well within the concept of conflict management in Africa and its core values including consensus, facilitating reconciliation, fostering peace and cohesion and giving prominence to communal needs over individual needs¹⁰⁵. It is therefore necessary to foster collaboration, harmony and *Ubuntu* for effective conflict management in Africa. These values can be effectively harnessed by fostering compassion, understanding, reconciliation, forgiveness, and respect towards each other¹⁰⁶. By embracing collaboration, harmony and *Ubuntu*, it is possible to prevent conflicts while also ensuring that conflicts are managed effectively in manner that promotes reconciliation and fosters social cohesion¹⁰⁷. Through collaboration, harmony and *Ubuntu*, it is possible to build a more just and equitable society for all¹⁰⁸. These values including *Ubuntu* promote peaceful coexistence, tolerance and cooperation serving as a moral compass in interpersonal relationships and community engagements¹⁰⁹. Fostering collaboration, harmony and *Ubuntu* is therefore vital for peaceful co-existence in Africa.

¹⁰³ United Nations., 'Promotion of Durable Peace and Sustainable Development in Africa.' Op Cit

¹⁰⁴ Ademowo. A., 'Conflict Management in Traditional African Society.' Op Cit

¹⁰⁵ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

¹⁰⁶ Ubuntu Philosophy and Nelson Mandela: A Connection., Available at <https://medium.com/@ubuntusoul/ubuntu-philosophy-and-nelson-mandela-a-connection-3483acb57a17#:~:text=In%20his%20autobiography%2C%20Long%20Walk,we%20share%20a%20common%20humanity.%E2%80%9D> (Accessed on 28/01/2025)

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ What is the Spirit of Ubuntu? A Journey Into African Philosophy., Available at <https://www.communication-generation.com/what-is-the-spirit-of-ubuntu-a-journey-into-african-philosophy/#:~:text=Introduction-,%E2%80%9CUbuntu%E2%80%9D%20is%20not%20just%20a%20word%3B%20it's%20a%20deeply,interconnectedness%20of%20all%20human%20beings.> (Accessed on 28/01/2025)

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Further, it is imperative to embrace effective conflict management strategies including the use of Alternative Dispute Resolution (ADR) processes such as mediation and negotiation. It has been noted that conflict resolution in the traditional African societies involves the use of mechanisms such as mediation, adjudication, reconciliation, arbitration and negotiation¹¹⁰. These techniques fit comfortably within traditional concepts of African justice, particularly its core value of reconciliation¹¹¹. These processes especially negotiation and mediation provide opportunities for dialogue, collaboration, cooperation towards mutually satisfactory and long-lasting outcomes¹¹². They are therefore suitable in fostering effective management of conflicts through collaboration, harmony and *Ubuntu*¹¹³.

Africa has an opportunity to foster effective management of conflicts for peace and prosperity. It is therefore necessary to explore collaboration, harmony and *Ubuntu* for effective management of conflicts in the African context.

¹¹⁰ Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society.' Op Cit

¹¹¹ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

¹¹² Saaida. M., 'Peace Studies: Conflict Resolution and Mediation Strategies' Available at

https://www.researchgate.net/publication/372289839_Peace_Studies_Conflict_Resolution_and_Mediation_Strategies (Accessed on 28/01/2025)

¹¹³ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

Integrating Alternative Dispute Resolution in Tribunals' Case Management: Best Practices

Abstract

This paper critically discusses best practices towards integrating ADR in tribunals' case management in Kenya. The paper argues that tribunals play a pivotal role in promoting access to justice in Kenya including through reducing pressure on courts. The paper further posits that by embracing ADR, tribunals can enhance their role in delivering justice to Kenyans. It examines the progress made by tribunals in Kenya towards fostering ADR and challenges thereof. The paper further suggests best practices towards integrating ADR in tribunals' case management for enhanced access to justice in Kenya.

1.0 Introduction

Alternative Dispute Resolution (ADR) has been described as an umbrella term for processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them¹. However, in some ADR processes such as negotiation, parties meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party². According to the United Nations, ADR (sometimes also referred to as "Appropriate Dispute Resolution") is a general term, used to define a set of approaches and techniques aimed at resolving disputes in a non-confrontational manner³. The United Nations notes that ADR covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party imposes a solution⁴. In addition, it points out that somewhere

¹ Nairobi Centre for International Arbitration., 'A Manual for Developing a Dispute Management Plan for Government Ministries, Departments & Agencies (MDA)' Available at <https://ncia.or.ke/wp-content/uploads/2024/01/NCIA-Dispute-Management-Plan.pdf> (Accessed on 12/11/2024)

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

³ United Nations., 'Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building' Available at https://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_backgroud_paper.pdf (Accessed on 12/11/2024)

⁴ Ibid

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along the axis of ADR approaches, between these two extremes, lies mediation, a process by which a third party aids the disputants to reach a mutually agreed solution⁵.

The term ADR therefore covers a set of mechanisms that are applied in managing disputes that may be linked to but function outside formal court litigation processes⁶. These processes include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others⁷. These techniques are being widely embraced in managing disputes at both the global and national levels. It has been noted that the growth of ADR as an ideal avenue for accessing justice has been spurred to a large extent by a rising dissatisfaction with litigation which is often expensive, time-consuming, and presents uncertainties over the outcomes⁸. ADR mechanisms are characterized by certain attributes which include informality, flexibility, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost-effective management of disputes⁹. These features make ADR processes viable in enhancing access to justice while also addressing the challenges that bedevil formal court processes.

ADR techniques have been recognized at the global level under the *Charter of the United Nations*¹⁰. The Charter provides that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice*¹¹ (Emphasis added). Due to this recognition, ADR processes are being widely utilized to manage disputes at the international level. ADR techniques such as international commercial

⁵ Ibid

⁶ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

⁷ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁸ World Intellectual Property Organization., 'WIPO Guide on Alternative Dispute Resolution (ADR) Options for Intellectual Property Offices and Courts' Available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_guide_adr.pdf (Accessed on 12/11/2024)

⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

¹⁰ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

¹¹ Ibid, article 33 (1)

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arbitration and international commercial mediation have emerged as the preferable mode of managing commercial disputes involving parties from different nationalities¹². The United Nations also often employs ADR techniques including diplomacy and mediation in managing conflicts and fostering international peace and security¹³.

Progress has also been made towards embracing ADR in Kenya with courts and tribunals increasingly embracing ADR processes in delivering justice to Kenyans¹⁴. The *Constitution of Kenya*¹⁵ mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and Traditional Dispute Resolution mechanisms (TDRMs)¹⁶. Consequently, the Judiciary has developed the *Alternative Justice Systems Framework Policy*¹⁷. The Policy seeks to ensure affective and efficient access to justice in Kenya through respecting, protecting and transformation of Alternative Justice Systems (AJS) mechanisms in Kenya¹⁸. It also seeks to mainstream AJS in Kenya through the formal recognition of AJS; identification of the kinds of cases that can be handled through AJS; strengthening the process for selection, election, appointment and removal of AJS practitioners; and development of

¹² World Bank Group., 'Arbitrating and Mediating Disputes : Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment (English)' Available at <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/554271468340163221/arbitrating-and-mediating-disputes-benchmarking-arbitration-and-mediation-regimes-for-commercial-disputes-related-to-foreign-direct-investment> (Accessed on 12/11/2024)

¹³ United Nations., 'Maintain International Peace and Security' Available at <https://www.un.org/en/our-work/maintain-international-peace-and-security#:~:text=The%20United%20Nations%20plays%20an,political%20missions%20in%20the%20field>. (Accessed on 12/11/2024)

¹⁴ Muigua. K., 'Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management' Available at <https://kmco.co.ke/wp-content/uploads/2019/05/Presentation-Tribunals-within-the-Justice-System-in-Kenya-Integrating-Alternative-Dispute-Resolution-in-Conflict-Management-Kariuki-Muigua-23rd-May-2019.pdf> (Accessed on 12/11/2024)

¹⁵ Constitution of Kenya., 2010., Government Printer, Nairobi

¹⁶ Ibid, article 159 (2) (c)

¹⁷ The Judiciary of Kenya., 'Alternative Justice Systems Framework Policy.' Available at https://www.unodc.org/documents/easternafrika/Criminal%20Justice/AJS_Policy_Framework_2020_Kenya.pdf (Accessed on 24/07/2024)

¹⁸ Ibid

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procedures and customary law jurisprudence for AJS among other interventions¹⁹. The *National Alternative Dispute Resolution Policy*²⁰ of Kenya also seeks to enhance the practice of ADR in Kenya including through providing definitions for key ADR terms, and outlining the scope of ADR; strengthening the legal and institutional frameworks supporting the ADR sector; and increasing harmony and efficiency in the sector by enhancing coordination, collaboration and linkage within the sector, and between ADR actors and the formal justice system²¹. The landscape of ADR in Kenya is therefore growing. Integrating ADR in the justice system in Kenya can enhance access to justice for all Kenyans.

This paper critically discusses best practices towards integrating ADR in tribunals' case management in Kenya. The paper argues that tribunals play a pivotal role in promoting access to justice in Kenya including through reducing pressure on courts. The paper further posits that by embracing ADR, tribunals can enhance their role in delivering justice to Kenyans. It examines the progress made by tribunals in Kenya towards fostering ADR and challenges thereof. The paper further suggests best practices towards integrating ADR in tribunals' case management for enhanced access to justice in Kenya.

2.0 Tribunals and Alternative Dispute Resolution in Kenya: Progress and Challenges

Tribunals are a key component of the justice system in Kenya. The Constitution provides that judicial authority in the Republic of Kenya shall be exercised by courts and tribunals established by or under the Constitution²². It classifies tribunals as part of subordinate courts in Kenya alongside Magistrates courts, Kadhis' courts, and Courts Martial²³. The Constitution of Kenya therefore recognises tribunals as important players in the administration of justice and places them under the Judiciary.

¹⁹ Ibid

²⁰ Republic of Kenya., Office of the Attorney-General and Department of Justice 'Sessional Paper No. 4 of 2024 on *The National Alternative Dispute Resolution Policy*'

²¹ Ibid

²² Constitution of Kenya., 2010, article 159 (1)

²³ Ibid, 169 (1)(d)

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It has been noted that out of the over 50 tribunals in Kenya, more than 20 have been transitioned to the Judiciary in compliance with the Constitution²⁴. Tribunals include the National Environment Tribunal, Rent Restriction Tribunal, Business Premises Rent Tribunal, Political Parties Disputes Tribunal, Sports Disputes Tribunal, Tax Appeals Tribunal, Energy Tribunal, Standards Tribunal, Educations Appeals Tribunal and Competition Tribunal among others²⁵. The purpose of transitioning tribunals is to ensure they are delinked from the executive and integrated in the court system in line with the doctrine of separation of powers²⁶. Some tribunals in Kenya are coordinated through the office of Registrar Tribunals established by the Judicial Service Commission as provided by the Constitution²⁷.

Tribunals in Kenya play a key role in enhancing access to justice. According to the Judiciary, tribunals are specialised bodies clothed with judicial power to determine disputes between litigating parties on various specialised sectors as provided in their establishing statutes²⁸. Tribunals in Kenya exercise judicial and quasi-judicial functions²⁹. They provide an expeditious and affordable forum for resolution of disputes in specialised areas such as tax, civil aviation, environment, energy, and copyright among others³⁰. The *State of the Judiciary and the Administration of Justice Annual Report 2022/2023* notes that during the period under review, all the tribunals processed a significant caseload, with 8,190 new cases being filed and 9,373 cases successfully resolved³¹. The Report further indicates that there has been a consistent upward trend observed in both filed and resolved cases by tribunals in Kenya³². According to the Report, this trend signifies a growing reliance on the tribunals to handle legal disputes,

²⁴ The National Council for Law Reporting., 'Know Your Tribunals' Available at <https://kenyalaw.org/kl/index.php?id=9050> (Accessed on 13/11/2024)

²⁵ Ibid

²⁶ Muigua. K., 'Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management' Op Cit

²⁷ The National Council for Law Reporting., 'Know Your Tribunals' Op Cit

²⁸ The Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice: Annual Report 2022/2023' Available at <https://judiciary.go.ke/wp-content/uploads/2023/11/SOJAR-2022-2023-1.pdf> (Accessed on 13/11/2024)

²⁹ Ibid

³⁰ Ibid

³¹ Ibid

³² Ibid

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and it is a testament to their effectiveness in managing and adjudicating cases in Kenya³³.

There has been progress towards embracing ADR in tribunals in Kenya. For instance, the *Political Parties Disputes Tribunal (Procedure) Regulations*³⁴ mandate the Political Parties Dispute Tribunal to utilise ADR mechanisms including reconciliation, mediation, and arbitration in managing disputes involving political parties³⁵. Further, the *Sports Act*³⁶ empowers the Sports Disputes Tribunal in determining disputes to apply ADR methods for sports disputes and provide expertise and assistance regarding ADR to the parties to a dispute³⁷. In addition, the *Legal Education Appeals (Practice and Procedure) Rules*³⁸ require the Legal Education Appeals Tribunal to consider the possibility of ADR among parties to a dispute after close of pleadings³⁹. ADR is therefore being embraced in enhancing access to justice through tribunals in Kenya. However, it has been argued that tribunals also require case management lest they find themselves under the case backlog challenge that is currently facing courts in Kenya⁴⁰. The challenge of backlog is already crawling into tribunals in Kenya. For instance, the *State of the Judiciary and the Administration of Justice Annual Report 2022/2023* notes that there are nearly 22,557 cases pending before tribunals with 16,576 of the pending cases being over one year old, signifying a persistent issue of prolonged litigation within tribunals⁴¹. In light of this challenge, it is imperative for tribunals in Kenya to upscale the use of ADR for efficient, expeditious, and cost-effective access to justice. Integrating ADR in tribunals' case management is therefore necessary in enhancing access to justice in Kenya.

³³ Ibid

³⁴ Political Parties Disputes Tribunal (Procedure) Regulations, 2017

³⁵ Ibid, regulation 4 (2) (c)

³⁶ The Sports Act, Cap 223, Government Printer, Nairobi

³⁷ Ibid, s 59

³⁸ Legal Education Appeals (Practice and Procedure) Rules, 2021

³⁹ Ibid, rule 15 (1)

⁴⁰ Muigua. K., 'Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management' Op Cit

⁴¹ The Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice: Annual Report 2022/2023' Op Cit

3.0 Integrating Alternative Dispute Resolution in Tribunals' Case Management

It is necessary to enhance the uptake of ADR mechanisms by tribunals in Kenya in order to enhance access to justice. The Constitution of Kenya mandates tribunals to promote ADR processes including reconciliation, mediation, arbitration and TDRMs⁴². Tribunals should therefore strive to foster processes in applicable cases.

Case management is a judicial process that fosters effective, efficient and purposeful judicial management of a case toward timely and qualitative disposal of disputes⁴³. Case management involves early identification of disputed issues of fact and law, establishment of procedural timelines for a case, and exploring the possibility of resolution of disputes out of court⁴⁴. It has been noted that case management allows courts and litigants to make the best use of the available judicial and administrative resources including the court's time⁴⁵. Effective case management is therefore key for expeditious and judicious determination of cases⁴⁶.

Integrating ADR in tribunals' case management is pivotal in fostering timely and effective disposal of disputes. This involves identification of cases that can be managed through ADR processes after close of pleadings before tribunals⁴⁷. It has been noted that ADR is applicable to wide range of disputes in Kenya some of which fall within the jurisdiction of tribunals including commercial disputes, energy disputes, tax disputes, environment disputes, and sports disputes⁴⁸. In such cases, tribunals should consider referring these disputes to ADR including proving for ADR as a forum of first instance for appropriate

⁴² Constitution of Kenya 2010., article 159 (2) (c)

⁴³ Bhatt. N., 'Case Management- A Modern Concept' Available at <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2023/01/2023010673.pdf> (Accessed on 14/11/2024)

⁴⁴ Ibid

⁴⁵ The Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice: Annual Report 2022/2023' Op Cit

⁴⁶ Ibid

⁴⁷ Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy' Op Cit

⁴⁸ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

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cases⁴⁹. Tribunals should also provide expertise and assistance regarding ADR to the parties to a dispute⁵⁰. This includes appointing ADR practitioners including mediators and arbitrators in appropriate cases.

Effective case management can also be achieved through establishing a clear system of referral of cases between tribunals and the ADR sector⁵¹. Tribunals should put in place effective tools and communication strategies streamline the process of referral and avoid unnecessary delays, track cases that have been referred to ADR, and gather essential data and feedback in relation to the outcome of disputes referred to ADR⁵². This will enhance transparency and efficiency in relation to use of ADR within tribunals.

It is also imperative to strengthen the legal and policy framework on the application of ADR in Kenya. Some tribunals including the Political Parties Dispute Tribunal, and the Sports Disputes Tribunal have made progress towards embracing ADR through their rules and regulations⁵³. It may be necessary to consider revising the rules and regulations of key tribunals in Kenya to provide for the application of ADR in managing disputes. Implementing the ADR Policy in Kenya can also enhance the application of ADR in the country including through tribunals⁵⁴. The Policy sets out key interventions towards strengthening systems of referrals between courts, tribunals and ADR, promoting ADR as a forum of first instance in appropriate cases, establishment of systems to facilitate appropriate cooperation between the courts, tribunals and ADR, and development and adoption of ADR user guidelines for all stakeholders⁵⁵. Implementing the ADR Policy is therefore necessary in enhancing the uptake of ADR in all sectors including tribunals. It is also necessary to foster public awareness on ADR mechanisms in order to

⁴⁹ Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy' Op Cit

⁵⁰ The Sports Act, s 59

⁵¹ The Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice: Annual Report 2022/2023' Op Cit

⁵² Ibid

⁵³ Political Parties Disputes Tribunal (Procedure) Regulations, 2017; The Sports Act, s 59

⁵⁴ Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy' Op Cit

⁵⁵ Ibid

encourage the people of Kenya to embrace ADR towards actualizing the right of access to justice.

4.0 Conclusion

Tribunals are key players in the administration of justice in Kenya. They provide an expeditious and affordable forum for resolution of disputes in specialised areas including environment, tax, sports, energy, copyright, and civil aviation⁵⁶. Despite their key role in enhancing access to justice in Kenya, the challenge of backlog is already crawling into tribunals. Consequently, it is necessary for tribunals to upscale the use of ADR for efficient, expeditious, and cost-effective access to justice⁵⁷. While carrying out their administrative or quasi-judicial functions, tribunals should strive to encourage parties to make more use of ADR mechanisms⁵⁸. Tribunals should also effectively integrate ADR in their case management practices for timely and judicious disposal of disputes.

⁵⁶ The Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice: Annual Report 2022/2023' Op Cit

⁵⁷ Muigua. K., 'Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management' Op Cit

⁵⁸ Ibid

Protecting Human Rights in Arbitration and Alternative Dispute Resolution

Abstract

This paper critically discusses the place of human rights in arbitration and Alternative Dispute Resolution (ADR). The paper posits that human rights are vital in arbitration and ADR. It argues that arbitration and ADR can foster the realization of key human rights. The paper further asserts that the conduct of arbitration and ADR proceedings have to comply with international human rights standards. The paper examines some of the key human rights concerns in arbitration and ADR. It further suggests measures towards protecting human rights in arbitration and ADR.

1.0 Introduction

Human rights are standards that recognize and protect the dignity of all human beings¹. According to the United Nations, human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status². It has been noted that human rights are rights we have simply because we exist as human beings; these rights are not granted by any state³. They range from the most fundamental rights including the right to life to those that make life worth living, such as the rights to food, education, work, health, and liberty⁴. Every person is entitled to human rights without discrimination⁵.

Human rights are based on certain fundamental principles. These principles include universality and inalienability, indivisibility, interdependence and interrelatedness, equality and non-discrimination, participation and inclusion,

¹ UNICEF., 'What are Human Rights?' Available at <https://www.unicef.org/child-rights-convention/what-are-human-rights> (Accessed on 17/06/2024)

² United Nations., 'Human Rights' Available at <https://www.un.org/en/global-issues/human-rights> (Accessed on 17/06/2024)

³ Office of the United Nations High Commissioner for Human Rights., 'What are Human Rights' Available at <https://www.ohchr.org/en/what-are-human-rights#:~:text=Universal%20and%20inalienable&text=This%20means%20that%20we%20are,conventions%2C%20declarations%2C%20and%20resolutions>. (Accessed on 17/06/2024)

⁴ Ibid

⁵ United Nations., 'Human Rights' Op Cit

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and accountability and rule of law⁶. The principle of universality means that we are all equally entitled to our human rights⁷. The principle of inalienability means that human rights should not be taken away, except in specific situations and according to due process⁸. Interdependence and indivisibility means that one set of human rights cannot be enjoyed fully without the other⁹. According to the principle of equality and non-discrimination, all individuals are equal as human beings and by virtue of the inherent dignity of each human person¹⁰. Therefore, no one should suffer discrimination on the basis of factors such as race, colour, ethnicity, gender, age, language, sexual orientation, religion, political or other opinion, national, social or geographical origin, disability, property, birth or other status as set out by human rights standards¹¹. The principle of accountability and rule of law means that states and other duty-bearers are answerable for the observance of human rights¹². As a result, they have to comply with the legal norms and standards enshrined in international human rights instruments¹³.

The idea of human rights governs how individual human beings live in society and with each other, as well as their relationship with the State and the obligations that the State have towards them¹⁴. Human rights also oblige states to do some things, and prevents them from doing others¹⁵. States have obligations and duties under international law to respect, protect and fulfill human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights¹⁶. In addition, the obligation to protect requires States to protect individuals and groups against

⁶ United Nations Population Fund., 'Human Rights Principles' Available at <https://www.unfpa.org/resources/human-rights-principles> (Accessed on 17/06/2024)

⁷ Office of the United Nations High Commissioner for Human Rights., 'What are Human Rights' Op Cit

⁸ Ibid

⁹ Ibid

¹⁰ United Nations Population Fund., Op Cit

¹¹ Ibid

¹² Ibid

¹³ Ibid

¹⁴ UNICEF., 'What are Human Rights?' Op Cit

¹⁵ Ibid

¹⁶ Office of the United Nations High Commissioner for Human Rights., 'What are Human Rights'

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human rights abuses¹⁷. Further, the obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights¹⁸. These obligations have been laid down in key international human rights instruments such as the *Universal Declaration of Human Rights*¹⁹, the *International Covenant on Economic, Social and Cultural Rights*²⁰, and the *International Covenant on Civil and Political Rights*²¹. Further, it has been noted that individuals also have responsibilities in safeguarding human rights²². In using their human rights, they must respect the rights of others²³.

It has been noted that in many countries around the world, domestic human rights and anti-discrimination law provides for Alternative Dispute Resolution (ADR) as a central component of the process by which alleged human rights breaches can be addressed²⁴. For example, in Kenya, the Constitution provides for the application of ADR mechanisms including arbitration, mediation, and Traditional Dispute Resolution Mechanisms (TDRMs) in realizing the right of access to justice²⁵. It has been posited that arbitration alongside other ADR mechanisms can foster attainment of the right of access to justice in Kenya²⁶. In addition, human rights are fundamental in arbitration and ADR in a number of ways such as prescribing procedural safeguards, obligation of arbitration

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Universal Declaration of Human Rights., Available at <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf> (Accessed on 17/06/2024)

²⁰United Nations., 'International Covenant on Economic, Social and Cultural Rights.' Available at https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch_iv_03.pdf (Accessed on 17/06/2024)

²¹ United Nations., 'International Covenant on Civil and Political Rights.' Available at https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf (Accessed on 17/06/2024)

²² UNICEF., 'What are Human Rights?' Op Cit

²³ Ibid

²⁴ Australian Human Rights Commission., 'ADR: An Essential Tool for Human Rights' Available at <https://humanrights.gov.au/about/news/speeches/adr-essential-tool-human-rights> (Accessed on 17/06/2024)

²⁵ Constitution of Kenya, 2010., Article 159 (2) (c)., Government Printer, Nairobi

²⁶ Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-KenyaSTRATHMORE-CONFERENCE-PRESENTATION.pdf> (Accessed on 17/06/2024)

and ADR to respect human rights, and providing an avenue to safeguard and enforce human rights²⁷.

This paper critically discusses the place of human rights in arbitration and ADR. The paper posits that human rights are vital in arbitration and ADR. It argues that arbitration and ADR can foster the realization of key human rights. The paper further asserts that the conduct of arbitration and ADR proceedings have to comply with international human rights standards. The paper examines some of the key human rights concerns in arbitration and ADR. It further suggests measures towards protecting human rights in arbitration and ADR.

2.0 Overview of Arbitration and Alternative Dispute Resolution

ADR has been defined as a spectrum of less costly and more expeditious alternatives to litigation, where a neutral party assists the disputing parties in reaching resolution²⁸. ADR involves the use of several mechanisms that are applied in managing disputes that may be linked to but function outside formal court litigation processes²⁹. The idea of ADR therefore entails a set of processes that are applied to manage disputes without resort to adversarial litigation³⁰. These processes include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and TDRMs among others³¹.

Arbitration alongside other ADR processes have been recognized at both the global and national levels. At the global level, ADR mechanisms are recognized under the *Charter of the United Nations*³². The Charter provides that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation,*

²⁷ Global Arbitration Review., 'Human Rights in International Arbitration' Available at <https://globalarbitrationreview.com/review/the-european-arbitration-review/2023/article/human-rights-in-international-arbitration> (Accessed on 17/06/2024)

²⁸ JAMS., 'What is ADR? Defining the Alternative Dispute Resolution Spectrum' Available at <https://www.jamsadr.com/adr-spectrum/> (Accessed on 17/06/2024)

²⁹ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

³⁰ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

³¹ Ibid

³² United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

*conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice*³³ (Emphasis added). At a national level, the Constitution of Kenya mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and TDRMs³⁴.

ADR processes have been hailed as being ideal in enhancing access to justice which is a fundamental human right³⁵. ADR allows for more creative and collaborative solutions than traditional litigation³⁶. Most ADR mechanisms possess key attributes including informality, privacy, confidentiality, flexibility and the ability to promote expeditious and cost-effective management of disputes which makes them a viable tool of enhancing access to justice³⁷.

3.0 The place of Human Rights in Arbitration and ADR

Human rights are fundamental in arbitration and ADR. It has been noted that despite arbitration and most other ADR proceedings being a private form of justice, the conduct of such proceedings should meet expectations under international human rights law on due process, procedural fairness and the right to a fair trial³⁸. Human rights-based procedural safeguards are therefore relevant in arbitration and other ADR proceedings³⁹. It has been noted that human rights standards guide arbitral proceedings in international arbitration by prescribing procedural safeguards including fairness, due process, transparency, disclosure, and participation⁴⁰.

Further, it has been noted that mediators and other ADR practitioners can make use of human rights to enhance the quality and effectiveness of mediation efforts, including by opening space for political negotiations,

³³ Ibid, article 33 (1)

³⁴ Constitution of Kenya, 2010., article 159 (2) (c)

³⁵ Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-developmentinKenyaRevised-version-of-20.10.14.pdf> (Accessed on 17/06/2024)

³⁶ JAMS., 'What is ADR? Defining the Alternative Dispute Resolution Spectrum' Op Cit

³⁷ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

³⁸ Global Arbitration Review., 'Human Rights in International Arbitration' Op Cit

³⁹ Ibid

⁴⁰ Ibid

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strengthening ongoing peace processes and reinvigorating stalled efforts⁴¹. Human rights can set the ground for facilitated negotiations, for example, by establishing channels of communication⁴²; improving the negotiations context⁴³; allowing parties to test conflict resolution efforts⁴⁴; incentivizing parties to initiate negotiations on sensitive issues⁴⁵; providing entry points for conflict prevention and de-escalation⁴⁶; and building confidence between parties⁴⁷. In addition, it has been noted that once mediation efforts begin, human rights can further contribute by providing principles and standards within which to frame agenda issues; leveraging the power of economic, social and cultural rights; improving the inclusivity of processes, such as by enhancing the participation in peace talks of women, victims and survivors, Indigenous Peoples, minorities and other marginalized groups⁴⁸.

Arbitration and other ADR processes are also appropriate processes in managing disputes involving human rights⁴⁹. For example, arbitration is increasingly being embraced to manage human rights impacts or failures to respect human rights in the global supply chain in the form of business and human rights arbitration⁵⁰. In addition human rights are often invoked in arbitration between states and foreign investors, through allegations of either state or investor infringements of such rights in investor-state arbitration⁵¹. The idea of investor-state arbitration may involve allegations of state or investor

⁴¹ Office of the United Nations High Commissioner for Human Rights., 'Enhancing the Quality and Effectiveness of Mediation Efforts through Human Rights: DPPA-OHCHR Practice Note' Available at <https://peacemaker.un.org/sites/peacemaker.un.org/files/DPPA-OHCHR-Joint-Practice-Note.pdf> (Accessed on 18/06/2024)

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Muigua. K., 'Reflections on Human Rights in Arbitration' Available at <https://kmco.co.ke/wp-content/uploads/2023/06/Reflections-on-Human-Rights-in-Arbitration.pdf> (Accessed on 18/06/2024)

⁵⁰ Agius. M., 'Human Rights in International Arbitration' Available at <https://globalarbitrationreview.com/review/the-european-arbitrationreview/2023/article/humanrights-in-international-arbitration> (Accessed on 18/06/2024)

⁵¹ Ibid

human rights abuse⁵². It has been observed that rights to health, to water, to a healthy and safe environment, and to be free from torture, forced labor and arbitrary detention are among the human rights affected by the circumstances that give rise to investment disputes⁵³. Abuse of human rights, or failure to protect human rights, may factually underlie an investment dispute in investor-state arbitration⁵⁴. For example, an alleged failure by foreign investors to respect the rights of Indigenous peoples, environmental rights, or labor rights may lead to a dispute with a local population that escalates into an international investment dispute under the auspices of investor-state arbitration⁵⁵.

Other ADR processes such as mediation can also be used to foster human rights. It has been pointed out that for effective mediation processes, preventing further human rights abuses is crucial to securing a lasting peace while simultaneously addressing the root causes of conflicts and violence⁵⁶. Protecting human rights in a mediation processes can therefore end conflict, prevent further human rights violations and lay the groundwork for sustainable peace and human development⁵⁷.

Arbitration and other ADR processes offer several advantages in addressing human rights disputes. It has been noted that due to the diversity of human rights disputes, the flexibility of arbitration and other ADR processes is potentially applicable across a broader range of disputes⁵⁸. Further, the transnational nature of some ADR processes such as international arbitration

⁵² Ibid

⁵³ Feldman. J., 'Human Rights and International Investment Arbitration: A snapshot' Available at <https://www.nortonrosefulbright.com/en/knowledge/publications/11a8c614/human-rights-and-international-investment-arbitration-a-snapshot> (Accessed on 18/06/2024)

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ O' Neill. W., 'Mediation and Human Rights' Available at <https://www.hdcentre.org/wp-content/uploads/2016/07/MediationandHumanRights-July-2005.pdf> (Accessed on 18/06/2024)

⁵⁷ Ibid

⁵⁸ Arbitration, Business, and Human Rights., Available at <https://www.herbertsmithfreehills.com/notes/publicinternationallaw/2021-07/arbitration-business-and-human-rights> (Accessed on 18/06/2024)

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and international mediation makes them viable in managing cross border human rights disputes⁵⁹. This feature is also key where there are concerns about the neutrality or capacity of the relevant domestic judicial systems⁶⁰. Another key advantage of arbitration is the capacity to select an arbitrator with specific expertise in human rights and the enforceability of arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)⁶¹.

The *United Nations Guiding Principles on Business and Human Rights*⁶² provide a framework for the utilization of arbitration to manage human rights disputes. They are grounded on the recognition of states' existing obligations to respect, protect and fulfil human rights and fundamental freedoms⁶³; the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights⁶⁴; and the need for rights and obligations to be matched to appropriate and effective remedies when breached⁶⁵.

The *Hague Rules on Business and Human Rights Arbitration*⁶⁶ flow from the United Nations Guiding Principles on Business and Human Rights and provide a framework through which business entities can be compelled to comply with human rights. The Rules stipulate that the arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expenses and to provide a fair, efficient, culturally appropriate and rights-compatible process for resolving the parties' dispute, including in particular by giving due regard to the urgency of addressing the alleged human rights impacts⁶⁷. The Rules recognize the need for proper and

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Ibid

⁶² United Nations Guiding Principles on Business and Human Rights., Available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (Accessed on 18/06/2024)

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ The Hague Rules on Business and Human Rights Arbitration., Available at https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-andHumanRights-Arbitration_CILC-digital-version.pdf (Accessed on 18/06/2024)

⁶⁷ Ibid

informed consent as the cornerstone of business and human rights arbitration⁶⁸. The Hague Rules are therefore vital in fostering human rights through arbitration.

From the foregoing, it emerges that arbitration and ADR are viable options in managing human rights disputes. However, arbitration and ADR can also raise some human rights concerns. It has been noted that the purpose of ADR processes such as international commercial arbitration and international commercial mediation is to enhance expediency and privacy in management of disputes to enable parties preserve their commercial interests⁶⁹. Therefore if human rights goals such as transparency, disclosure and victim participation become too dominating in arbitration, they might threaten the priorities of parties by delaying the management of disputes and further exposing them to the public space since human rights are most often a public concern⁷⁰. The transnational nature of arbitration may also hinder effective application of human rights standards due to differences in approaches towards human rights across different jurisdictions⁷¹.

Another major challenge in utilizing arbitration in human rights disputes is the likelihood of inequality of arms between victims of human rights abuses and businesses⁷². It has been noted that arbitration has the potential to privilege the powerful and well-resourced over the less well-equipped parties⁷³. For example, it may be difficult for an employee who has been subjected to abusive working conditions to arbitrate such claims unless there is an explicit agreement to that effect between the employee and the employer⁷⁴. However, on the other hand, businesses such as large multinational corporations may find it comparatively easy to include an arbitration provision in their business affairs meaning that they can easily arbitrate their disputes⁷⁵. This inequality

⁶⁸ Ibid

⁶⁹ Moses, 'The Principles and Practice of International Commercial Arbitration' 2 nd Edition, 2017, Cambridge University Press

⁷⁰ Stanaro. K., 'The Evolving Role of Human Rights in International Arbitration.' Available at <https://aria.law.columbia.edu/the-evolving-role-of-human-rights-in-international-arbitration/?cnreloaded=1> (Accessed on 18/06/2024)

⁷¹ Besson. S., 'Arbitration and Human Rights.' *ASA Bulletin*, Volume 24, Issue 3 (2006)

⁷² Arbitration, Business, and Human Rights., Op Cit

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

of arms is therefore a key challenge in utilizing arbitration in human rights disputes.

It has also been asserted that commercial arbitration may be a problematic forum for resolving human rights-related disputes⁷⁶. This results from the various features of commercial arbitration, including its confidentiality, lack of transparency and participation by affected stakeholders, and the lack of human rights expertise of commercial arbitrators⁷⁷. It is imperative to address these concerns in order protect human rights in arbitration and ADR.

4.0 Conclusion

Human rights are vital in arbitration and ADR. Human rights standards guide proceedings in international arbitration and other ADR processes such as international mediation by prescribing procedural safeguards⁷⁸. Arbitration and ADR processes such as mediation can also be effectively utilized in managing human rights disputes⁷⁹. The practice of arbitration and ADR also raises certain concerns such as inequality of arms between parties which could potentially affect human rights⁸⁰. It is therefore necessary to protect human rights in arbitration and ADR.

In order to realize this goal, it is imperative to align the laws and rules governing arbitration and other ADR processes with human rights standards⁸¹. It is important to ensure that both procedural and substantive rules on arbitration and ADR uphold human rights standards including fairness, equality, non-discrimination, access to justice, and access to effective legal remedies in case of human rights violations⁸². Arbitral institutions have a key role to play in aligning arbitral rules with human rights standards⁸³. ADR

⁷⁶ Yeum. J., 'Aligning Human Rights in Business with International Commercial Arbitral Rules' Available at <https://arbitrationblog.kluwerarbitration.com/2021/10/09/aligning-human-rights-in-business-with-international-commercial-arbitral-rules/> (Accessed on 18/06/2024)

⁷⁷ Ibid

⁷⁸ Global Arbitration Review., 'Human Rights in International Arbitration' Op Cit

⁷⁹ Ibid

⁸⁰ Arbitration, Business, and Human Rights., Op Cit

⁸¹ Yeum. J., 'Aligning Human Rights in Business with International Commercial Arbitral Rules' Op Cit

⁸² Ibid

⁸³ Ibid

Protecting Human Rights in Arbitration and Alternative Dispute Resolution

practitioners including arbitrators and mediators should also ensure that the conduct of ADR proceedings adheres to procedural human rights standards including due process, procedural fairness and the right to a fair trial⁸⁴. They should also uphold human rights standards in their decisions especially in business and human rights arbitration and investor-state arbitration⁸⁵.

It is also necessary to embrace the arbitrability of human rights disputes⁸⁶. Adopting the *Hague Rules on Business and Human Rights Arbitration* is a key step towards enhancing the role of arbitration in managing human rights disputes⁸⁷. It is also imperative to continue refining investment treaty arbitration in order to promote arbitration of human rights disputes emanating from investment activities that result in challenges such as pollution, environmental degradation, land injustices, and violation of labour rights⁸⁸.

Human rights are vital in arbitration and ADR. Protecting human rights in arbitration and ADR is therefore a key priority in realizing access to justice and human development.

⁸⁴ Global Arbitration Review., 'Human Rights in International Arbitration' Op Cit

⁸⁵ Ibid

⁸⁶ Muigua. K., 'Reflections on Human Rights in Arbitration' Op Cit

⁸⁷The Hague Rules on Business and Human Rights Arbitration., Op Cit

⁸⁸ Franck. S., 'Development and Outcomes of Investment Treaty Arbitration.' *Harvard International Law Journal.*, Volume 50, No. 2. (2009)

Utilising Negotiation and Mediation in Conflict Management

Abstract

This paper critically discusses the suitability of negotiation and mediation in conflict management. The paper argues that negotiation and mediation are appropriate techniques that can foster effective conflict management. The paper conceptualizes conflict management. Further, it explores the key features of negotiation and mediation which make these processes ideal in conflict management. The paper also highlights some of the challenges facing negotiation and mediation and offers reforms towards utilising negotiation and mediation for effective conflict management.

1.0 Introduction

Conflicts are a common phenomenon in human relationships and interactions¹. They have been described as a process of social interaction involving a struggle over claims to resources, power and status, beliefs, and other preferences and desires². Conflicts usually arise due to disagreement between actors on the basis of perceived incompatible goals³. Conflicts can also occur due to misalignment of goals, actions or motivations which can be real or only perceived to exist⁴. Conflicts can occur in various levels including intrapersonal (within an individual), interpersonal (between individuals), intragroup (within a group), intergroup (involving two or more groups), and intraorganizational (within organizations)⁵.

¹ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at <https://kmco.co.ke/wpcontent/uploads/2023/06/Reframing-Conflict-Management-in-the-EastAfrican-CommunityMoving-from-Alternative-to-Appropriate-Dispute-Resolution> (Accessed on 06/12/2024)

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

³ Herbert. S., 'Conflict Analysis: Definitions and Concepts' Available at <https://gsdrc.org/topic-guides/conflict-analysis/definitions-and-concepts/> (Accesses on 06/12/2024)

⁴ Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

⁵ Conflict Management., Available at https://healthnet.org.np/downloads/manual/Conflict_management.pdf (Accessed on 06/12/2024)

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It has been noted that conflict is not entirely a negative phenomenon⁶. For example, non-violent conflicts can be an essential component of social change and development, and are a necessary component of human interaction⁷. According to the United Nations, non-violent resolution of conflict is possible when individuals and groups have trust in their governing structures, society and institutions to manage incompatible interests⁸. However, violent conflicts are an undesirable occurrence since they affect peace, sustainability and development⁹. It has been pointed out that conflicts become problematic when societal mechanisms and institutions for managing and resolving them break down, giving way to violence¹⁰. Societies that are characterized by weak institutions, fragile political systems and divisive social relations can be drawn into endless cycles of conflict and violence threatening peace and development¹¹. Effective, efficient and expeditious conflict management is therefore a desirable ideal in order to spur peace, development and sustainability¹².

This paper critically discusses the suitability of negotiation and mediation in conflict management. The paper argues that negotiation and mediation are appropriate techniques that can foster effective conflict management. The paper conceptualizes conflict management. Further, it explores the key features of negotiation and mediation which make these processes ideal in conflict management. The paper also highlights some of the challenges facing negotiation and mediation and offers reforms towards utilising negotiation and mediation for effective conflict management.

⁶ United Nations., 'Land and Conflict' Available at https://www.un.org/en/land-natural-resources-conflict/pdfs/GN_ExeS_Land%20and%20Conflict.pdf (Accessed on 06/12/2024)

⁷ Ibid

⁸ Ibid

⁹ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

¹⁰ United Nations., 'Land and Conflict' Op Cit

¹¹ Ibid

¹² Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-developmentinKenyaRevised-version-of-20.10.14.pdf> (Accessed on 06/12/2024)

2.0 Defining Conflict Management

Conflict management has been defined as an ongoing process by which conflicts are identified and handled, fairly and efficiently¹³. Conflict management encompasses the processes and techniques adopted towards stopping or preventing conflicts and aiding the parties involved to reach a durable and peaceful solution to their differences¹⁴. Conflict management has also been defined as the process of using preferred strategies to handle a conflict with goals of limiting negative impacts and enhancing positive impacts of conflicts¹⁵.

It has been noted that various approaches and techniques can be adopted towards managing conflicts 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 procedure¹⁶. Conflict management takes various styles including *avoidance* where some or all people involved in a conflict simply avoid the situation or ignore its existence¹⁷; *competing* which involves one party winning, and one party losing in relation to the issues in dispute¹⁸; *compromise* which involves parties sacrificing their positions in order to aid a resolution¹⁹; and *collaborating* wherein all parties involved are brought together for a resolution through active listening and respectful communication²⁰. The goal of conflict management is to minimise the potential negative impact that can arise from disagreements and encourage agreement and positive outcomes²¹. Further, it has been noted that conflict management aims to affect the entire structure of a conflict so as to contain the destructive components in the conflict process

¹³ Institute of Directors., 'Conflict Management' Available at <https://www.iod.com/resources/business-advice/conflict-management/> (Accessed on 06/12/2024)

¹⁴ Leeds. C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners.' *International Journal of Peace Studies*, Volume 2, No. 2, 1997

¹⁵ Wang. Q., 'Conflict Management' Available at <https://centerforinterculturaldialogue.org/wp-content/uploads/2015/02/key-concept-conflict-management.pdf> (Accessed on 06/12/2024)

¹⁶ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

¹⁷ Ronquillo. Y et al., 'Conflict Management' Available at <https://www.ncbi.nlm.nih.gov/books/NBK470432/> (Accessed on 06/12/2024)

¹⁸ Ibid

¹⁹ Ibid

²⁰ Ibid

²¹ Institute of Directors., 'Conflict Management' Op Cit

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(such as hostility and use of violence) and help the parties possessing incompatible goals to find some consensus in respect of their conflict²².

It has been argued that conflict management can either result in *settlement* or *resolution* in respect of the underlying issues²³. Settlement involves an agreement over the issues in a conflict which often entails a compromise²⁴. It seeks to mitigate a conflict without discovering or rectifying the underlying causes²⁵. Settlement utilises mechanisms such as litigation and arbitration which are highly coercive, power based and involve a lot of compromise in addressing conflicts²⁶. Settlement may therefore be suitable in providing immediate solution to a conflict but fails to address underlying issues leaving the likelihood of conflicts reemerging in future²⁷. Resolution on the other hand refers to a process whereby parties to a conflict cooperate in order to redefine their conflict and relationships towards mutually satisfactory outcomes²⁸. It involves the use of voluntary, non-coercive, non-power based processes which focus on the needs and interest of parties including Alternative Dispute Resolution (ADR) processes such as mediation, negotiation and facilitation²⁹. These processes result in mutually satisfying outcomes that address the root causes of conflicts therefore ensuring long lasting outcomes³⁰. As a result, they are preferable in fostering effective conflict management.

3.0 Suitability of Negotiation and Mediation in Conflict Management

Negotiation and mediation are among the techniques that are widely referred to as ADR³¹. The term ADR denotes a wide range of mechanisms that are

²² Bercovitch. J., 'Conflict and Conflict Management in Organizations: A Framework for Analysis.' Available at <https://ocd.lcwu.edu.pk/cfiles/International%20Relations/EC/IR403/Conflict.ConflictManagementinOrganizations.pdf> (Accessed on 06/12/2024)

²³ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

²⁴ Bloomfield. D., 'Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland,' *Journal of Peace Research*

²⁵ Ibid

²⁶ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

²⁷ Mwangi. M., 'Conflict in Africa: Theory, Processes and Institutions of Management, Centre for Conflict Research, Nairobi 2006

²⁸ Bloomfield. D., 'Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland,' Op Cit

²⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

³⁰ Ibid

³¹ Ibid

applied to manage disputes without resort to adversarial litigation³². ADR has also been defined as a spectrum of less costly and more expeditious alternatives to litigation, where a neutral party assists the disputing parties in reaching resolution³³. However, in some ADR processes such as negotiation, parties meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party³⁴. The United Nations notes that ADR, (sometimes also referred to as “Appropriate Dispute Resolution”) is a general term, used to define a set of approaches and techniques aimed at resolving disputes in a non-confrontational manner³⁵. The term ADR covers various mechanisms key among them being negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs)³⁶. It has been noted that ADR techniques may be linked to but operate outside formal court litigation processes³⁷.

ADR processes are viewed as ideal in conflict management. Most ADR techniques contain key attributes such as privacy, confidentiality, flexibility, informality, efficiency, party autonomy and the ability to foster expeditious and cost effective management of disputes and conflicts³⁸. Further, it has been noted that ADR allows for more creative and collaborative solutions than those available in traditional litigation³⁹. Due to their advantages, ADR processes are being widely embraced in conflict management at both global and national levels. At the global level, the *Charter of the United Nations*⁴⁰ requires parties to a dispute to seek a solution by *negotiation, enquiry, mediation, conciliation,*

³² Ibid

³³ JAMS ADR., ‘What is ADR? Defining the Alternative Dispute Resolution Spectrum’ Available at <https://www.jamsadr.com/adr-spectrum/> (Accessed on 07/12/2024)

³⁴ Muigua. K., ‘Alternative Dispute Resolution and Access to Justice in Kenya.’ Op Cit

³⁵ United Nations., ‘Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building’ Available at

https://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_background_paper.pdf (Accessed on 07/12/2024)

³⁶ Muigua. K., ‘Alternative Dispute Resolution and Access to Justice in Kenya.’ Op Cit

³⁷ Uwazie. E., ‘Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.’ *Africa Security Brief*, No. 16 of 2011

³⁸ Muigua. K., ‘Alternative Dispute Resolution and Access to Justice in Kenya.’ Op Cit

³⁹ JAMS ADR., ‘What is ADR? Defining the Alternative Dispute Resolution Spectrum’ Op Cit

⁴⁰ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI

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arbitration, judicial settlement, resort to regional agencies or arrangements, or other *peaceful means* of their own choice⁴¹ (Emphasis added). Further, at a national level, the *Constitution of Kenya*⁴² mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and TDRMs⁴³.

Negotiation and mediation are key ADR processes that can foster effective conflict management. Negotiation has been described as a dynamic process aimed at resolving disputes, differences, or disagreements between parties by finding common ground and reaching mutually acceptable solutions⁴⁴. It is a strategic form of communication where conflicting parties engage in discussions to address their respective needs, interests, and concerns⁴⁵. Negotiation has also been described as an informal process that involves parties to a conflict meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party⁴⁶. Negotiation therefore involves parties to a conflict reaching an agreement⁴⁷.

Mediation involves the intervention of a third person known as a mediator who assists parties to a conflict in negotiating jointly acceptable resolution of issues in conflict⁴⁸. The United Nations defines mediation as a process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreements⁴⁹. It has been noted that mediation is usually a continuation of the negotiation process since it arises where parties to a conflict have attempted

⁴¹ Ibid, article 33 (1)

⁴² Constitution of Kenya., 2010., Government Printer, Nairobi

⁴³ Ibid, article 159 (2) (c)

⁴⁴ The Role of Negotiation in Conflict Resolution Strategies., Available at <https://www.karrass.com/blog/conflict-resolution-strategies> (Accessed on 07/12/2024)

⁴⁵ Ibid

⁴⁶ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁴⁷ United Nations., 'Negotiation' Available at <https://www.un.org/en/model-united-nations/negotiation#:~:text=One%20of%20the%20most%20important,outcome%20that%20serves%20your%20objectives.> (Accessed on 07/12/2024)

⁴⁸ What is Mediation?., Available at <https://www.commerce.gov/cr/reports-and-resources/eo-mediation-guide/what-mediation> (Accessed on 07/12/2024)

⁴⁹ United Nations., 'Guidance for Effective Mediation' Available at https://unrcca.unmissions.org/sites/default/files/dpa_msu_guidance_english_web.pdf (Accessed on 07/12/2024)

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negotiations, but have reached a deadlock⁵⁰. As a result, parties involve a third party known as a mediator to assist them continue with the negotiations and ultimately break the deadlock⁵¹. A mediator does not have power to impose an outcome upon parties but rather acts as a catalyst between opposing interests attempting to bring them together by defining issues and eliminating obstacles to communication, while moderating and guiding the process to avoid confrontation and ill will⁵².

Negotiation and mediation are suitable in fostering effective management of conflicts. For instance, it has been noted that utilising negotiation in conflict management is ideal since parties seek to achieve a solution that respects each side's perspectives while minimizing the negative impact of conflicts⁵³. Negotiation often involves open dialogue, active listening, compromise, and sometimes concessions among parties to a conflict⁵⁴. Through this, it is possible for parties to achieve win-win outcomes and design an agreement which reflects their interests⁵⁵. Further, it has been noted that negotiation may preserve and in some cases even enhance the relationship between the parties once an agreement has been reached between them⁵⁶. By opting for negotiation, parties may also reduce costs and delays associated with litigation⁵⁷.

Mediation is also a vital technique in conflict management, serving as a key tool for facilitating dialogue and negotiation between conflicting parties⁵⁸. It

⁵⁰ Bercovitch, J., 'Mediation Success or Failure: A Search for the Elusive Criteria.' *Cardozo Journal of Conflict Resolution*, Vol. 7, p 289

⁵¹ Ibid

⁵² JAMS ADR., 'Mediation Defined: What is Mediation?' Available at <https://www.jamsadr.com/mediation-defined/> (Accessed on 07/12/2024)

⁵³ The Role of Negotiation in Conflict Resolution Strategies., Op Cit

⁵⁴ Ibid

⁵⁵ Negotiation., Available at <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/03.html#:~:text=Negotiations%20allow%20the%20parties%20to,the%20form%20of%20an%20agreement> (Accessed on 07/12/2024)

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Saaida, M., 'Peace Studies: Conflict Resolution and Mediation Strategies' Available at https://www.researchgate.net/publication/372289839_Peace_Studies_Conflict_Resolution_and_Mediation_Strategies (Accessed on 07/12/2024)

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also has the potential to foster understanding and empathy among parties to a conflict⁵⁹. It has been pointed out that mediation encourages active listening while also promoting open and respectful communication therefore helping break down barriers including cultural barriers and building trust among parties⁶⁰. Through these attributes, mediation has the ability to preserve relationships and also provides parties with a wide range of solutions than those available through litigation⁶¹. According to the United Nations, the premise of mediation is that in the right environment, parties to a conflict can improve their relationships and move towards cooperation⁶².

Negotiation and mediation are therefore suitable in enhancing effective conflict management. These processes focus on collaboration and cooperation among parties and are therefore suitable in preserving relationships, building trust, and promoting long term and sustainable solutions⁶³. Negotiation and mediation provide a pathway to unlock collaboration and transform conflicts into opportunities for growth and understanding⁶⁴. By enhancing collaboration, negotiation and mediation emphasize on voluntary participation of the parties, confidentiality, and the flexibility to tailor the outcomes to the specific needs of the parties involved⁶⁵.

Negotiation and mediation are therefore suitable in ensuring effective management of conflicts. However, it has been noted that these processes have been underutilized despite their potential to ensure effective management of conflicts in various contexts⁶⁶. It is therefore necessary widely utilise negotiation and mediation in conflict management.

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition., 2017

⁶² United Nations., 'Guidance for Effective Mediation' Op Cit

⁶³ Miroslavov. M., 'Mastering the Collaborating Conflict Style In 2024' Available at <https://www.officernd.com/blog/collaboratingconflictstyle/#:~:text=It's%20one%20of%20the%20strategies,their%20underlying%20needs%20and%20interests> (Accessed on 07/12//2024)

⁶⁴ Unlocking Collaboration: The Power of Mediation., Op Cit

⁶⁵ Mediation: The Art of Collaborative Conflict Resolution., Available at <https://legalservicesdubai.com/mediation-the-art-of-collaborative-conflict-resolution-understanding-its-processes-and-advantages/> (Accessed on 13/09/2024)

⁶⁶ United Nations., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched' Available at <https://www.unep.org/news-and-stories/press->

4.0 Conclusion

Negotiation and mediation are suitable approaches in conflict management. These processes enhance collaboration and cooperation among parties and are therefore suitable in preserving relationships, building trust, and promoting long-term and sustainable solutions⁶⁷. It is therefore necessary to widely embrace negotiation and mediation for effective management of conflicts. It is imperative for all countries to put in place appropriate legal, policy, and institutional frameworks to support the uptake of negotiation and mediation among other ADR techniques⁶⁸. It is also necessary for key stakeholders including the Judiciary to spread awareness on the importance of negotiation and mediation while also linking ADR techniques to formal justice systems in order to enhance their effectiveness⁶⁹. While linking these processes to formal justice systems, it is necessary to ensure that their key attributes such as flexibility, informality, privacy and confidentiality are preserved⁷⁰. There is also need to build the capacity of ADR practitioners including mediators through education, training, and empowerment in order to ensure that ADR techniques are effectively utilized⁷¹.

Negotiation and mediation provide numerous benefits in conflict management. It is therefore necessary to effectively harness and utilise negotiation and mediation in conflict management for peace and development.

[release/mediation-can-prevent-resolve-natural-resources-disputes-new-un](#) (Accessed on 07/12/2024)

⁶⁷ Miroslavov. M., 'Mastering the Collaborating Conflict Style in 2024' Op Cit

⁶⁸ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

⁶⁹ The Judiciary of Kenya., 'Judiciary Supporting Alternative Dispute Resolution Mechanisms' Available at <https://judiciary.go.ke/judiciary-supporting-alternative-dispute-resolution-mechanism/> (Accessed on 07/12/2024)

⁷⁰ Muigua. K., 'Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Available at <http://kmco.co.ke/wp-content/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-Dispute-Resolution-in-Kenya-Prospects-and-Challenges.pdf> (Accessed on 07/12/2024)

⁷¹ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

Securing Justice for Nature and People Globally through Pluralistic Legal Systems

Abstract

This paper critically examines the need to secure justice for nature and people globally through pluralistic legal systems. The paper explores the concept of pluralistic legal systems and gives examples thereof. It posits that pluralistic legal systems are suitable in protecting the planet and people especially vulnerable populations such as indigenous and local communities in light of mounting environmental challenges such as climate change, pollution, and biodiversity loss. The paper discusses ways through which pluralistic legal systems can safeguard people and the planet. In addition, the paper offers approaches towards securing justice for nature and people through pluralistic legal systems.

1.0 Introduction

Nature refers to the phenomena of the physical world collectively, including plants, animals, the landscape, and other features and products of the earth, as opposed to humans or human creations¹. The term nature therefore refers to the natural environment². It has been noted that nature underpins the functions and health of the planet and thereby the existence and health of humankind³. Nature has been described as humanity's lifeline⁴. For instance human-beings rely on nature for provision of critical resources including food, water, and energy⁵. Further, human health, economies and well-being all depend on nature⁶. Nature and especially natural resources play a fundamental economic, social, and cultural roles in the life of human beings⁷. For example, natural resources provide raw materials for many industries and are also a source of

¹ Ducarme, F., & Couvet, D., 'What Does 'Nature' Mean.' *Humanities & Social Sciences Communications*, No. 14 (2020)

² Ibid

³ United Nations Environment Programme., 'About Nature Action' Available at <https://www.unep.org/explore-topics/ecosystems-and-biodiversity/about-nature-action> (Accessed on 17/12/2024))

⁴ United Nations Environment Programme., 'Spotlight on Nature and Biodiversity' Available at <https://www.unep.org/news-and-stories/news/spotlight-nature-and-biodiversity> (Accessed on 17/12/2024)

⁵ Ibid

⁶ Ibid

⁷ Muigua, K., Wamukoya, D & Kariuki, F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

livelihoods for many individuals and are this vital for economic development⁸. Socially, natural resources such as forests, water bodies, and mountains play a recreational role amongst others and also contribute to the improvement of the quality of life of individuals⁹. From a cultural perspective, communities all over the world especially indigenous and local communities attach importance to some natural resources such as forests and mountains that may be revered as shrines, dwelling places for ancestors and sacred sites where rites of passage and other cultural celebrations take place¹⁰.

Despite the vital role that nature plays in ensuring human well-being, the planet is witnessing unprecedented levels of human impact on the environment and natural resources. Human activities are fueling interlinked environmental challenges including the climate change crisis, pollution, biodiversity loss and the extinction of species, deforestation, land degradation, and increased incidents of environmental disasters¹¹. As a result of human activities, it has been noted that the planet is experiencing a dangerous decline in nature¹². This decline in nature has far-reaching consequences exacerbating environmental challenges such as biodiversity loss and climate change, undermining food and water security and putting people and communities at risk¹³. People and communities that heavily rely on nature especially indigenous peoples, women, and local communities are the most affected by the nature crisis since they majorly depend on the environment and natural resources for their livelihoods¹⁴. Consequently, it has become an urgent priority at all levels to safeguard the planet and protect vulnerable communities.

This paper critically examines the need to secure justice for nature and people globally through pluralistic legal systems. The paper explores the concept of pluralistic legal systems and gives examples thereof. It posits that pluralistic

⁸ Ibid

⁹ Ibid

¹⁰ Ibid

¹¹ United Nations Development Programme., 'Triple Planetary Crisis' Available at <https://www.undp.org/sites/g/files/zskgke326/files/2022-11/UNDP-Triple-Planetary-Crisis-Infographic.pdf> (Accessed on 17/12/2024)

¹² United Nations Environment Programme., 'Facts about the Nature Crisis' Available at <https://www.unep.org/facts-about-nature-crisis> (Accessed on 17/12/2024)

¹³ Ibid

¹⁴ Ibid

legal systems are suitable in protecting the planet and people especially vulnerable populations such as indigenous and local communities in light of mounting environmental challenges such as climate change, pollution, and biodiversity loss. The paper discusses ways through which pluralistic legal systems can safeguard people and the planet. In addition, the paper offers approaches towards securing justice for nature and people through pluralistic legal systems.

2.0 Examining Pluralistic Legal Systems

Pluralistic legal systems stem from the concept of legal pluralism¹⁵. The idea of legal pluralism envisages two or more legal systems co-existing in the same social field¹⁶. Legal pluralism has also been defined as a situation where two or more legal frameworks co-exist in a given social-situation¹⁷. Legal frameworks encompass sets of laws that include formal written policies, decisions, orders and rules as well as informal, unwritten customary rules, all of which in principle share sanctions if they are broken¹⁸. Legal pluralism therefore connotes the existence of two or more legal systems in a given state¹⁹. It can be understood as the existence of multiple sources of law (both state and non-state) within the same geographical location²⁰. Legal pluralism reflects the complexity of law in a world where a single act or actor is potentially subject to multiple legal or quasi-legal regimes imposed at different levels including the state, sub-state, transnational, international, non-state, and community levels²¹.

¹⁵ Swenson. G., 'Legal Pluralism in Theory and Practice' *International Studies Review.*, Volume 20, Issue 3 (2018) pp 438-462

¹⁶ Ibid

¹⁷ Legal Pluralism and Policies Supporting Pluralism., Available at <https://www.jstor.org/stable/resrep02047.7?seq=1> (Accessed on 17/12/2024)

¹⁸ Ibid

¹⁹ Okeke. A., 'Egalitarian Legal Pluralism and Decolonization of Justice' Available at https://www.pass.va/en/publications/studia-selecta/studia_selecta_10_pass/okeke.html (Accessed on 17/12/2024)

²⁰ Ibid

²¹ Li. X., 'Legal Pluralism' Available at <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0258.xml> (Accessed on 17/12/2024)

According to the United Nations, legal pluralism occurs in three forms²². These include non-state legal orders which exist in every country and operate in parallel with the state system²³. These legal orders are not necessarily formally recognised or state-sanctioned²⁴. It also occurs in the form of formal legal pluralism where different matters are governed under different laws including customary, religious, civil or common law systems all which are formally recognised²⁵. Legal pluralism also occurs in the form of quasi-state legal orders or state incorporation of non-state legal orders²⁶. Legal pluralism therefore produces hybrid or mixed legal environments where state, local and non-state actors are linked and all play important roles in delivering justice to citizens²⁷. It has been noted that in pluralistic legal systems, legitimacy is often determined by several factors including the degree of authority granted by the state²⁸. In addition, it has been pointed out that under most pluralistic legal systems, there are certain functional linkages, where state law provides for official forms of collaboration among the different legal frameworks including through appeal procedures, referrals, division of labour, advice, and assistance²⁹. Linkages in pluralistic legal systems may also be negative, with competition over jurisdiction stretching to opposition or hostility among the various legal systems³⁰.

The concept of legal pluralism therefore acknowledges that state-based law exists alongside other normative and institutional orders³¹. It has been argued that legal pluralism is inherently not about deciding which law to use, but rather helping people to see laws in new ways, where no one legal system is

²² United Nations., 'Progress of the World's Women: In Pursuit of Justice' Available at <https://www.unwomen.org/en/digital-library/publications/2011/7/progress-of-the-world-s-women-in-pursuit-of-justice> (Accessed on 17/12/2024)

²³ Ibid

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

²⁷ Bakrania. S., & Haider. H., 'Legal Pluralism' Available at <https://gsdrc.org/topic-guides/safety-security-and-justice/themes/legal-pluralism/> (Accessed on 17/12/2024)

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

³¹ Fisher. A. D., 'Legal Pluralism and Human Rights in the Idea of Climate Justice' Available at <https://www.idunn.no/doi/10.5617/oslaw2766> (Accessed on 17/12/2024)

dominant, or helping people develop an understanding of diverse legal frameworks in which all laws are judged to be equally valid³². Legal pluralism acknowledges that custom, tradition, religion, family lineage, powers not sanctioned by law (such as those of criminal enterprises or powerful commercial interests), and a host of other sources of law may have equal or even greater influence than state-sanctioned law³³. Pluralistic legal systems therefore challenge the state's claim to a monopoly on legitimate resolution of legal disputes as well as the ideal of uniform application of the law³⁴. They enable citizens to select dispute resolution forums based on factors such as accessibility, efficiency, expeditiousness, legitimacy, jurisdiction, cost-effectiveness, as well as the state and non-state systems' respective abilities to make binding decisions and sanction individuals that choose other systems³⁵. Due to the availability of options for citizens to select appropriate dispute resolution forums, pluralistic legal systems are normally characterized by sustained struggle between state and non-state justice actors for legitimacy, resources, and authority.

Legal pluralism has been identified as the dominant feature of most legal orders worldwide³⁶. Pluralistic legal systems are therefore prevalent throughout the world. For example, in Africa state-sanctioned legal systems operate alongside traditional, customary and informal justice systems that have been practiced by indigenous and local communities for many centuries³⁷. In Kenya for instance, the different communities that existed before colonial occupation and rule had their own systems and mechanisms of justice³⁸. The colonial administration introduced the formal legal system in Kenya which now operates alongside customary and traditional systems that have been retained by local communities³⁹. The *Constitution of Kenya*⁴⁰ creates a pluralistic legal system and reaffirms the importance of African Customary Law as well

³² Legal Pluralism and Policies Supporting Pluralism., Op Cit

³³ Swenson. G., 'Legal Pluralism in Theory and Practice' Op Cit

³⁴ Ibid

³⁵ Ibid

³⁶ Swenson. G., 'Legal Pluralism in Theory and Practice' Op Cit

³⁷ United Nations., 'Progress of the World's Women: In Pursuit of Justice' Op Cit

³⁸ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy' Available at https://www.unodc.org/documents/easternafrika//Criminal%20Justice/AJS_Baseline_Policy_2020_Kenya.pdf (Accessed on 17/12/2024)

³⁹ Ibid

⁴⁰ Constitution of Kenya., 2010., Government Printer, Nairobi

as traditional systems and mechanisms of dispute resolution in the legal order. It also urges courts and tribunals to promote Alternative Dispute Resolution (ADR) mechanisms including reconciliation, mediation, and arbitration⁴¹.

It has been noted that ADR processes have been part and parcel of conflict management by indigenous communities in Kenya since time immemorial⁴². Conflict management in African societies took the form of informal negotiation, mediation, reconciliation and arbitration among other techniques which were administered by institutions such as the council of elders⁴³. These techniques fitted comfortably within traditional concepts of African justice, particularly its core value of reconciliation⁴⁴. Recognition of these processes under the Constitution therefore creates a pluralistic legal system and enable citizens to select dispute resolution processes that are more efficient, affordable, accessible, expeditious, and cost-effective⁴⁵.

Pluralistic legal systems are therefore prevalent all over the world. It has been noted that legal pluralism thrives in many countries through ADR mechanisms and international treaty obligations⁴⁶. In the developing world, most disputes are handled outside of the state justice system including through customary and traditional justice systems and ADR processes⁴⁷. It has been noted that the role of legal pluralism is particularly vital in conflict and post-conflict settings, as they tend to have weak state institutions and contested governing authority⁴⁸. In such settings, state-sanctioned laws and institutions are weak and difficult to implement and as a result the presence of pluralistic legal systems enables the use of other legal systems including customary and traditional systems in peacebuilding efforts⁴⁹. Legal pluralism can therefore

⁴¹ Ibid, article 159 (2) (c)

⁴² Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf> (Accessed on 17/12/2024)

⁴³ Ibid

⁴⁴ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

⁴⁵ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy' Op Cit

⁴⁶ Swenson. G., 'Legal Pluralism in Theory and Practice' Op Cit

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Ibid

help to advance the rule of law and enhance peacebuilding efforts in conflict and post-conflict settings⁵⁰.

3.0 Role of Pluralistic Legal Systems in Securing Justice for Nature and People

Pluralistic legal systems have the potential to secure justice for nature and people globally. For example, pluralistic legal systems are suitable in securing Environmental Justice for both nature and people⁵¹. The ideal of Environmental Justice refers to the equitable treatment and involvement of people of all races, cultures, nations, and socioeconomic backgrounds in the development, implementation, and enforcement of environmental programs, laws and policies⁵². It encompasses the right to have access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and involvement in decision-making⁵³. This ideal provides a framework for addressing environmental inequities, disparate impact of environmental crises, and unequal protection in environmental matters⁵⁴. It has been noted that the challenges related to addressing environmental justice, including climate justice, require equitable solutions and the respect, protection and fulfillment of human rights in the context of climate change mitigation and adaptation, biodiversity conservation and pollution control efforts among

⁵⁰ Tamanaha. B., 'The Rule of Law and Legal Pluralism in Development' Available at <https://www.cambridge.org/core/books/abs/legal-pluralism-and-development/rule-of-law-and-legal-pluralism-in-development/F7110531A954CC9B408F7691FF172C12> (Accessed on 17/12/2024)

⁵¹ United Nations Development Programme., 'Environmental Justice: Securing Our Right to a Clean, Healthy and Sustainable Environment' Available at <https://www.undp.org/publications/environmental-justice-securing-our-right-clean-healthy-and-sustainable-environment> (Accessed on 18/12/2024)

⁵² Ibid

⁵³ Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience' Available at <https://www.elgaronline.com/display/edcoll/9781848446793/9781848446793.00011.xml> (Accessed on 18/12/2024)

⁵⁴ Ekhatior. E., & Agbaitoro. G., 'The Role of Environmental Justice in Promoting the Rule of Law in Natural Resource Conflict Resolution in Africa: A Case Study of Nigeria' Available at https://www.researchgate.net/publication/366640118_The_Role_of_Environmental_Justice_in_Promoting_the_Rule_of_Law_in_Natural_Resource_Conflict_Resolution_in_Africa_A_Case_Study_of_Nigeria (Accessed on 18/12/2024)

others⁵⁵. These include the protection of land and tenure rights of indigenous peoples, fostering the rights of youth, children and future generations in relation to the impacts of climate change, ensuring public participation and access to information for all in society with regard to climate change policy and decision making, and fostering access to justice for human rights violations occasioned by climate change and environmental degradation⁵⁶. Pluralistic legal systems are well designed towards addressing these challenges.

Pluralistic legal systems are able to secure indigenous environmental rights towards upholding Environmental Justice⁵⁷. It has been noted that the rights of indigenous peoples are closely related to the right to a clean, healthy and sustainable environment⁵⁸. They often hold a special link with their land and territory as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival⁵⁹. It has been pointed out that for indigenous peoples, land is not merely a matter of possession and production but a material and spiritual element which they must fully enjoy in order to preserve their cultural legacy and pass it to future generations⁶⁰. However, indigenous peoples all over the world continue to suffer from human rights violations including insecure land rights, and utilization of their ancestral lands without their Free, Prior and Informed Consent (FPIC)⁶¹. Further, it has been noted that the promotion of new technologies including improved seeds, chemical fertilizers and pesticides, the introduction of cash-crop cultivation and large plantation schemes have caused environmental degradation and destroyed self-sustaining eco-systems, affecting many indigenous peoples and

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Eichler. J., & Navarro. F.V., 'Proceduralising Indigenous Peoples' Demands: Indigenous Environmental Rights and Legal Pluralism in Contemporary Jurisprudence' Available at <https://www.tandfonline.com/doi/full/10.1080/27706869.2023.2194846#abstract> (Accessed on 18/12/2024)

⁵⁸ Rights of Indigenous Peoples., Available at <https://environment-rights.org/rights/rights-of-indigenous-peoples/#:~:text=Respecting%20and%20protecting%20their%20traditional,their%20lands%2C%20territories%20or%20resources>' (Accessed on 18/12/2024)

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ United Nations., 'UNPFII Mandated Areas - Environment' Available at <https://social.desa.un.org/issues/indigenous-peoples/unpfii-mandated-areas-environment> (Accessed on 18/12/2024)

communities to the point of forcing them to resettle elsewhere⁶². Due to their close dependence on the environment, indigenous peoples are also highly vulnerable to climate change and biodiversity loss among other environmental challenges⁶³. Pluralistic legal systems have been identified as key in securing justice for both indigenous peoples and the nature they depend on for their survival and livelihoods⁶⁴.

Pluralistic legal systems are key in harnessing and protecting indigenous legal systems including indigenous peoples' traditional knowledge and knowledge systems for Sustainable Development⁶⁵. It has been noted that respecting and promoting the collective rights of indigenous peoples to their lands, self-determination, and consent is vital to strengthening their role as custodians of nature and agents of change⁶⁶. For instance, indigenous peoples hold unique knowledge systems and practices for the sustainable management of natural resources and as a result, they have been at the heart of environmental conservation for many centuries⁶⁷. Indigenous peoples have a special relationship with the environment including land and natural resources⁶⁸. Pluralistic legal systems that acknowledge the place of customary and indigenous laws and practices are therefore key in preserving indigenous knowledge for sound environmental conservation towards securing justice for nature and people⁶⁹. The *United Nations Declaration on the Rights of Indigenous Peoples*⁷⁰ recognises the importance of pluralistic legal systems which give due recognition to indigenous peoples' laws, traditions, customs and land tenure

⁶² Ibid

⁶³ Ibid

⁶⁴ Eichler. J., & Navarro. F.V., 'Proceduralising Indigenous Peoples' Demands: Indigenous Environmental Rights and Legal Pluralism in Contemporary Jurisprudence' Op Cit

⁶⁵ Ibid

⁶⁶ International Institute for Sustainable Development., 'Indigenous Peoples: Defending an Environment for All' Available at <https://www.iisd.org/articles/deep-dive/indigenous-peoples-defending-environment-all> (Accessed on 18/12/2024)

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Eichler. J., & Navarro. F.V., 'Proceduralising Indigenous Peoples' Demands: Indigenous Environmental Rights and Legal Pluralism in Contemporary Jurisprudence' Op Cit

⁷⁰ United Nations Declaration on the Rights of Indigenous Peoples., Available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (Accessed on 18/12/2024)

systems as vital in securing justice for nature and people for Sustainable Development. In addition, the *Indigenous and Tribal Peoples Convention*⁷¹ adopted by the International Labour Organization (ILO), also acknowledges the need for pluralistic legal systems that recognize the customary laws of indigenous peoples for Sustainable Development. The Convention requires all contracting states to take into account the customs or customary laws of indigenous and tribal peoples while applying national laws and regulations⁷². Embracing pluralistic legal systems is thus key in securing justice for nature and people including indigenous peoples.

Pluralistic legal systems are also important in securing justice for nature including through protecting the rights of nature⁷³. It has been argued that in order to effectively secure justice for nature and uphold sound environmental conservation, it is necessary to create a system of jurisprudence that sees and treats nature as a fundamental, rights bearing entity and not as mere property to be exploited at will by humanity⁷⁴. Securing the rights of nature involves creating legal frameworks that recognizes the intrinsic rights of nature, including ecosystems and species, and holding them to the same standards of protection granted to natural and juristic persons⁷⁵. This ideal acknowledges that nature has an independent and inalienable right to exist and flourish⁷⁶. Upholding the rights of nature is therefore vital in fostering legal recognition

⁷¹ International Labour Organization., *Indigenous and Tribal Peoples Convention*, 1989 (No. 169), Available at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.16_Indigenous%20and%20Tribal%20Peoples%20Convention.pdf (Accessed on 18/12/2024)

⁷² Ibid

⁷³ Dancer. H., 'Harmony with Nature: Towards a New Deep Legal Pluralism' Available at <https://www.tandfonline.com/doi/full/10.1080/07329113.2020.1845503#abstract> (Accessed on 18/12/2024)

⁷⁴ Global Alliance for the Rights of Nature., 'What are the Rights of Nature?' Available at <https://www.garn.org/rights-of-nature/> (Accessed on 18/12/2024)

⁷⁵ Sartika. P., 'Recognizing the Rights of Nature (RoN)' Available at <https://greennetwork.asia/featured/recognizing-the-rights-of-nature-ron/#:~:text=Instead%20of%20becoming%20property%2C%20the,rights%20on%20be%20half%20of%20ecosystems> (Accessed on 18/12/2024)

⁷⁶ International Joint Commission., 'Rights of Nature' Available at <https://www.ijc.org/system/files/commentfiles/2019-10-Nicolette%20Slagle/FAQ.pdf> (Accessed on 18/12/2024)

and protection for ecosystems, and other natural entities such as rivers and forests, through a similar approach to human rights⁷⁷.

Pluralistic legal systems are able to secure justice for nature by recognising nature as a right-bearing entity in alongside natural and juristic persons⁷⁸. Through legal pluralism, it is possible to uphold nature laws alongside human laws towards fostering harmony between nature and humanity⁷⁹. Pluralistic legal systems are key in recognizing the fundamental legal rights of ecosystems and species to exist, thrive and regenerate⁸⁰. It has been noted that the rights of nature are not in opposition to human rights since human rights are intrinsically tied to nature⁸¹. For instance, the human rights to life, food, health, clean water and sanitation, energy, and shelter are all tied to nature⁸². Therefore recognizing and protecting the rights of nature is also key in upholding human rights. It has been noted that there has been a global trend towards recognizing the rights of nature including through recognizing the rights of domestic animals in national Constitutions, and the recognition of the rights of natural entities such as rivers and trees which has largely been shaped by global legal pluralism⁸³. Pluralistic legal systems are therefore suitable in securing justice for nature including through recognizing and upholding the rights of nature.

Pluralistic legal systems are also vital in securing justice for nature and people globally by enhancing access to justice⁸⁴. For instance, it has been noted that legal pluralism enhances access to justice and reduces impunity since non-state legal frameworks including customary and traditional dispute settlement

⁷⁷ Peluso. C., 'What are the Rights of Nature?' Available at <https://www.populationmedia.org/the-latest/what-are-the-rights-of-nature> (Accessed on 18/12/2024)

⁷⁸ Dancer. H., 'Harmony with Nature: Towards a New Deep Legal Pluralism' Op Cit

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ Ibid

⁸² Ibid

⁸³ Rights of Nature, Globalization and Legal Pluralism International Academy of Comparative Law General Congress - Asunción 2022., Available at https://www.mpipriv.de/1493052/english_questionnaire_-_rights_of_nature.pdf (Accessed on 18/12/2024)

⁸⁴ Heibling. J., Kalin. W., & Nobirabo. P., 'Access to Justice, Impunity and Legal Pluralism in Kenya' Available at https://www.cve-kenya.org/media/library/Access_to_justice_impunity_and_legal_pluralism_in_Kenya.pdf (Accessed on 18/12/2024)

mechanisms can be operative where state institutions fail⁸⁵. Access to justice through formal state processes such as courts is hindered by several unfavourable factors including high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow⁸⁶. On the other hand, Customary Law as well as traditional systems and mechanisms of dispute resolution have been identified as crucial in enhancing access to justice⁸⁷. For instance, in Kenya, it has been noted that a majority of disputes are resolved through informal and non-State-based means outside the confines of Courts including ADR processes and Alternative Justice Systems⁸⁸. These processes provide several advantages including ensuring a form of restorative justice unlike the adversarial system which prevails in courts, fostering more social inclusion since they are participatory in nature, enhancing accessibility and affordability of dispute resolution, limiting formalities and technicalities by focusing on substantive justice, promoting quick resolution of disputes, and enabling participants to come up with creative remedies⁸⁹.

Pluralistic legal systems that recognise ADR, customary law and traditional systems and mechanisms of dispute resolution including Alternative Justice Systems are therefore able to secure justice for nature and people globally. For example, ADR processes are suitable in protecting nature and people globally by enhancing Environmental Justice⁹⁰. ADR processes such as mediation can enhance meaningful participation in environmental decision-making while also allowing parties to come up with collaborative and creative remedies toward achieving Environmental Justice⁹¹. ADR processes such as arbitration and mediation are also suitable in enhancing access to justice in environmental matters thus suitable in fostering Environmental Justice⁹². Indigenous

⁸⁵ Ibid

⁸⁶ 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

⁸⁷ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy' Op Cit

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ ⁹⁰ Environmental Law Institute., 'A Community Guide to Using Alternative Dispute Resolution to Secure Environmental Justice' Available at <https://www.eli.org/environmental-governance/community-guide-using-alternative-dispute-resolution-secure-1> (Accessed on 18/12/2024)

⁹¹ Ibid

⁹² Ibid

customary laws are also vital in securing Environmental Justice by protecting the environmental rights of indigenous peoples and local communities and upholding the role of indigenous and traditional knowledge in addressing environmental challenges including climate change and biodiversity loss⁹³. Pluralistic legal systems that recognise indigenous customary laws are therefore ideal in securing justice for nature and people globally.

4.0 Conclusion

Pluralistic legal systems that are vital in securing justice for nature and people globally. They are able to protect the rights of nature, advance human rights including the right to a clean, healthy and sustainable environment for all people including indigenous peoples, and enhance access to justice towards achieving Environmental Justice for people and the planet⁹⁴. In the wake of mounting environmental challenges including climate change, biodiversity loss, and pollution, it is imperative to embrace legal pluralism towards ensuring harmony between humanity and nature⁹⁵. There is need for greater recognition of non-state legal orders including ADR processes, customary laws and traditional methods of dispute resolution including Alternative Justice Systems in order to effectively secure justice for nature and people globally.

Ensuring that national, regional, and international law is inclusive and pluralistic is therefore critical in securing justice for nature and people globally.

⁹³ McGregor. D., Whitaker. S., & Sritharan. M., 'Indigenous Environmental Justice and Sustainability' Available at <https://www.sciencedirect.com/science/article/pii/S1877343520300075> (Accessed on 18/12/2024)

⁹⁴ Dancer. H., 'Harmony with Nature: Towards a New Deep Legal Pluralism' Op Cit

⁹⁵ Ibid

Achieving Environmental Justice through Alternative Dispute Resolution and the Court Process

Abstract

This paper critically examines the need to achieve Environmental Justice. The paper posits that realizing Environmental Justice is a global ideal in the wake of environmental challenges being faced at the global, regional, and national levels including the triple planetary crisis of climate change, biodiversity loss, and pollution. The paper defines Environmental Justice and explores its core tenets. It further argues that Alternative Dispute Resolution (ADR) techniques and court processes are suitable in promoting Environmental Justice. The paper interrogates the progress made towards fostering Environmental Justice through ADR and court processes and challenges thereof. It also offers recommendations towards achieving Environmental Justice through ADR and court processes.

1.0 Introduction

Sound environmental conservation has emerged as global ideal towards Sustainable Development¹. Environmental conservation is vital in maintaining the diversity and integrity of ecosystems, as well as the services they provide to both humanity and nature². According to the United Nations Environment Programme (UNEP), appropriate environmental management entails making the best use of natural resources to meet basic human needs without destroying the sustaining and regenerative capacity of natural systems³.

The United Nations 2030 *Agenda for Sustainable Development*⁴ sets out the global blueprint towards sustainability including the need for effective

¹ Muigua. K., 'Embracing Sound Environmental Governance in Africa' Available at <https://kmco.co.ke/wp-content/uploads/2024/01/Embracing-Sound-Environmental-Governance-in-Africa-1.pdf> (Accessed on 14/09/2024)

² Ibid

³ United Nations Environment Programme., 'Environmentally Sound Technologies' Available at <https://www.unep.org/regions/asia-and-pacific/regional-initiatives/supporting-resource-efficiency/environmentally-sound#:~:text=Rational%20environmental%20management%20means%20making,regenerative%20capacity%20of%20natural%20systems>. (Accessed on 14/09/2024)

⁴ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 14/09/2024)

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environmental governance. In order to achieve the ideal of sound environmental governance, the Agenda seeks to protect the planet from degradation including through sustainable consumption and production, sustainably managing its natural resources, and taking urgent action to confront climate change so that the planet can support the needs of the present and future generations⁵. The Agenda sets out 17 Sustainable Development Goals (SDGs) that seeks to integrate environmental conservation, economic development, and social progress towards sustainability⁶.

Despite the global ideal of sustainability including the need for effective environmental governance and conservation, the planet is facing mounting problems including environmental challenges such as climate change, pollution, and loss of biodiversity⁷. Environmental problems facing the planet including the triple planetary crisis of climate change, biodiversity and ecosystem loss, and pollution undermine the enjoyment and protection of human rights and exacerbate environmental injustices, disproportionately affecting the most vulnerable, marginalized and excluded people and communities including the poor, women, children, indigenous peoples, and persons with disabilities⁸. It has been noted that current environmental crises are intertwined with the crisis of inequality and are inextricably linked to the protection and fulfilment of human rights and Sustainable Development⁹. In order to effectively respond to ongoing environmental challenges and their impacts on human rights especially for the vulnerable and marginalized people and communities, it imperative to achieve Environmental Justice towards increasing accountability and protection of environmental rights for current and future generations¹⁰.

⁵ Ibid

⁶ Ibid

⁷ Giovannoni. E., & Fabietti. G., 'What Is Sustainability? A Review of the Concept and Its Applications.' In: Busco, C., Frigo, M., Riccaboni, A., Quattrone, P. (eds) Integrated Reporting. Springer, Cham. Available at https://doi.org/10.1007/978-3-319-02168-3_2 (Accessed on 14/09/2024)

⁸ United Nations Development Programme., 'Environmental Justice' Available at <https://www.undp.org/rollhr/justice/environmental-justice> (Accessed on 14/09/2024)

⁹ Ibid

¹⁰ Ibid

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This paper critically examines the need to achieve Environmental Justice. The paper posits that realizing Environmental Justice is a global ideal in the wake of environmental challenges being faced at the global, regional, and national levels including the triple planetary crisis of climate change, biodiversity loss, and pollution. The paper defines Environmental Justice and explores its core tenets. It further argues that Alternative Dispute Resolution (ADR) techniques and court processes are suitable in promoting Environmental Justice. The paper interrogates the progress made towards fostering Environmental Justice through ADR and court processes and challenges thereof. It also offers recommendations towards achieving Environmental Justice through ADR and court processes.

2.0 Environmental Justice: Definition and Elements

Justice is a key theme under the 2030 Agenda for Sustainable Development¹¹. SDG 16 seeks to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels¹². The concept of justice has been described as multi-faceted¹³. It has been pointed out that in a world increasingly threatened by environmental challenges, including the triple planetary crisis of climate change, biodiversity loss and pollution, the concept of justice increasingly embraces environmental justice¹⁴.

Environmental Justice has been described as a concept that continues to evolve and expand in the context of the planetary crisis¹⁵. Historically, Environmental Justice sought to address the concern that environmental risks and hazards disproportionately affected societal groups in the most vulnerable and less

¹¹ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, Op Cit

¹² Ibid

¹³ The Role of the Courts in Delivering Environmental Justice., Available at https://lec.nsw.gov.au/documents/speeches-and-papers/Preston_CJ_-_The_Role_of_the_Courts_in_Delivering_Environmental_Justice.pdf (Accessed on 14/09/2024)

¹⁴ Ibid

¹⁵ United Nations Development Programme., 'Environmental Justice: Securing our Right to a Clean, Healthy and Sustainable Environment' Available at <https://www.undp.org/sites/g/files/zskgke326/files/2022-06/Environmental-Justice-Technical-Report.pdf> (Accessed on 14/09/2024)

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empowered contexts and countries¹⁶. The idea of Environmental Justice in this context therefore sought to ensure accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs related to the impacts of ecological change on the poor and vulnerable in society¹⁷. The concept of Environmental Justice has however expanded its scope to focus on social inequalities, such as disparities between environmental conditions experienced by the richest and poorest sectors of societies¹⁸.

Environmental Justice can therefore be conceptualized as the equitable treatment and involvement of people of all races, cultures, nations, and socioeconomic backgrounds in the development, implementation, and enforcement of environmental programs, laws and policies¹⁹. Environmental Justice has also been defined as the right to have access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and involvement in decision-making²⁰. Environmental Justice is attained when every person enjoys the same degree of protection from environmental and health hazards and has access to the decision-making processes to have a clean, healthy, and sustainable environment²¹.

The idea of Environmental Justice therefore highlights the plight of vulnerable people and communities who bear the most burden when it comes to environmental damage and seeks to give them a voice through access to environmental information and participation in environmental decision making in order to ensure sustainable and equitable development²². This

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Ibid

²⁰ Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience' Available at <https://www.elgaronline.com/display/edcoll/9781848446793/9781848446793.00011.xml> (Accessed on 14/09/2024)

²¹ United States Environmental Protection Agency; 'Environmental Justice.' Available at <https://www.epa.gov/environmentaljustice> (Accessed on 14/09/2024)

²² Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

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concept involves at least three types of justice: distributive justice, procedural justice and recognition justice²³. Distributive justice entails the substantive distribution of environmental benefits and burdens²⁴. Procedural justice involves ensuring participation, access to information, and providing access to justice for all in environmental matters²⁵. Recognition justice is based on the understanding that failure to acknowledge the circumstances those affected by environmental problems devalues individuals and communities, thereby allowing injustices to persist²⁶. Environmental justice also seeks to foster intra and intergenerational equity in the environmental context, including the realization that environmental problems have been mostly led by industrialized countries, and their impacts more acutely experienced by developing countries which contribute least to such problems²⁷. It also seeks to address environmental problems including climate change, biodiversity loss, and pollution in order protect and safeguard the environment for the benefit of both present and future generations towards intergenerational equity²⁸.

Environmental Justice therefore seeks to address distributive inequity, lack of recognition, disenfranchisement and exclusion in environmental matters and decision-making processes²⁹. It is a concept that seeks to achieve the ideal of access, participation and procedural justice in environmental decision making³⁰. The fundamental principle of environmental justice is that all stakeholders should have meaningful and informed participation in all aspects

²³ Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' *WIREs Clim Change* 2014

²⁴ Ibid

²⁵ Ibid

²⁶ Eisenhauer. E et al., 'New Directions in Environmental Justice Research at the U.S. Environmental Protection Agency: Incorporating Recognition and Capabilities Justice Through Health Impact Assessments' Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8884111/> (Accessed on 14/09/2024)

²⁷ United Nations Development Programme., 'Environmental Justice: Securing our Right to a Clean, Healthy and Sustainable Environment' Op Cit

²⁸ Ibid

²⁹ United States Environmental Protection Agency; 'Environmental Justice.' Op Cit

³⁰ Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' Op Cit

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of environmental decision-making that could affect their community³¹. Therefore, in order to attain Environmental Justice, affected communities must have the ability to effectively collect data and other information in order to be informed and active participants in environmental decision-making processes³². It has been argued that addressing environmental injustices requires a human-rights based, multi-disciplinary approach that tackles both immediate environmental justice needs and the structural inequalities that cause and perpetuate environmental injustices³³. Environmental Justice is therefore anchored in human rights and is a key tool towards actualizing the human right to a clean, healthy, and sustainable environment³⁴.

3.0 Achieving Environmental Justice through Alternative Dispute Resolution

ADR is an umbrella term that covers a range of tools and skills that can be utilized to manage conflicts and disputes without resort to courts³⁵. ADR has also been defined as a spectrum of less costly and more expeditious alternatives to litigation, where a neutral party assists the disputing parties in reaching resolution³⁶. However, in some ADR processes such as negotiation, parties to a conflict meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party³⁷. According to the United Nations, ADR (sometimes also referred to as “Appropriate Dispute Resolution”) is a general term, used to define a set of approaches and

³¹ United States Department of Energy., ‘Environmental Justice Strategy’ Available at https://www.energy.gov/sites/prod/files/EJ_Strategy_FINAL.pdf (Accessed on 14/09/2024)

³² Ibid

³³ United Nations Development Programme., ‘Environmental Justice and the Right to a Clean, Healthy, and Sustainable Environment’ Available at <https://www.undp.org/rolhr/human-rights/environmental-justice> (Accessed on 14/09/2024)

³⁴ Ibid

³⁵ Environmental Law Institute., ‘A Community Guide to Using Alternative Dispute Resolution to Secure Environmental Justice’ Available at <https://www.eli.org/environmental-governance/community-guide-using-alternative-dispute-resolution-secure-1> (Accessed on 15/09/2024)

³⁶ JAMS ADR., ‘What is ADR’ Available at <https://www.jamsadr.com/adr-spectrum/> (Accessed on 15/09/2024)

³⁷ Muigua. K., ‘Alternative Dispute Resolution and Access to Justice in Kenya.’ Glenwood Publishers Limited, 2015

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techniques aimed at resolving disputes in a nonconfrontational way³⁸. ADR encompasses a set of processes including negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others³⁹.

ADR is a suitable forum for achieving environmental justice⁴⁰. In the quest towards environmental justice, ADR has been identified as a tool for individuals and communities to give their own voices, to share in decision-making, and to promote innovative solutions in respect of environmental problems⁴¹. For example, instead of going to court, a community that is affected by environmental challenges such as pollution can use ADR techniques such as negotiation and mediation with the party most able to resolve the problem, such as the company causing harmful pollution in order to effectively and expeditiously address such problems⁴².

One of the key ways through which ADR process can promote Environmental Justice is by ensuring meaningful public participation in environmental decision-making⁴³. Public participation is a key pillar in the Environmental Justice debate⁴⁴. When effectively implemented, public participation improves the quality of decisions about the environment⁴⁵. In addition, public participation increases the legitimacy of environmental decisions in the eyes of those affected by them, which makes it more likely that the decisions will be

³⁸ United Nations., 'Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building' Available at https://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_backgroud_paper.pdf (Accessed on 15/09/2024)

³⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁴⁰ Environmental Law Institute., 'A Community Guide to Using Alternative Dispute Resolution to Secure Environmental Justice' Op Cit

⁴¹ Ibid

⁴² Ibid

⁴³ United States Commission on Civil Rights., 'Alternative Dispute Resolution and Meaningful Public Participation' Available at <https://www.usccr.gov/files/pubs/envjust/ch5.htm> (Accessed on 15/09/2024)

⁴⁴ United States Environmental Protection Agency., 'Benefits of Public Participation' Available at <https://www.epa.gov/international-cooperation/public-participation-guide-internet-resources-public-participation> (Accessed on 15/09/2024)

⁴⁵ Ibid

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implemented effectively⁴⁶. Effective public participation is a mechanism for integrating public concerns and knowledge into public policy decisions affecting the environment towards achieving Environmental Justice⁴⁷. It has been pointed out that informed and effective public participation at early stages of environmental decision-making helps to forestall future socioenvironmental conflicts⁴⁸. Ensuring effective and meaningful public participation is therefore vital in achieving environmental justice.

ADR mechanisms can ensure greater and more effective public participation in environmental matters therefore fostering Environmental Justice⁴⁹. The informality, voluntariness, and flexibility of ADR processes makes ADR a suitable platform for ensuring the participation of all stakeholders including marginalized groups and individuals in environmental decision making⁵⁰. ADR mechanisms such negotiation and mediation can be effectively harnessed to ensure the participation of all stakeholders including local communities in environmental decision making towards realizing Environmental Justice⁵¹.

In addition, ADR techniques are ideal in achieving Environmental Justice by ensuring access to justice in environmental matters⁵². Access to justice is vital in the quest towards Environmental Justice⁵³. Access to justice has been identified as an essential element of safeguarding environmental rule of law,

⁴⁶ Ibid

⁴⁷ United Nations Economic Commission for Latin America and the Caribbean., 'Access to Information, Participation, and Justice in Environmental Matters in Latin America and the Caribbean' Available at <https://repositorio.cepal.org/server/api/core/bitstreams/df4bbf15-d052-4247-a17a-b56acc77a3d/content> (Accessed on 15/09/2024)

⁴⁸ Ibid

⁴⁹ United States Commission on Civil Rights., 'Alternative Dispute Resolution and Meaningful Public Participation' Op Cit

⁵⁰ Ibid

⁵¹ Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution' Available at <https://kmco.co.ke/wp-content/uploads/2023/07/Attaining-Environmental-Justice-through-Alternative-Dispute-Resolution.pdf> (Accessed on 15/09/2024)

⁵² Ibid

⁵³ United Nations Economic Commission for Europe., 'Enhancing Access to Justice to Tackle Climate Change and Pollution and Protect Biodiversity' Available at https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/SEE_Access2Justice_Study_Final_logos.pdf (Accessed on 15/09/2024)

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protecting the environment, fostering Sustainable Development and protecting human health and well-being⁵⁴. It has been noted that members of the public are increasingly seeking access to justice to reduce exposure to pollution, ensure climate action, or minimize environmental impacts of unsustainable energy-related decision-making⁵⁵. Ensuring access to justice is therefore important in achieving Environmental Justice by tackling environmental problems including climate change, pollution, and biodiversity loss⁵⁶.

ADR processes are suitable in enhancing access to justice since they allow for more creative and collaborative solutions than that of traditional litigation⁵⁷. In environmental matters, ADR provides an opportunity for community members to reach creative, and custom-made solutions therefore fostering Environmental Justice⁵⁸. It has been argued that since the goal of ADR is to find solutions that satisfy everyone involved, communities can avoid the risk of an 'all-or-nothing' result, which often happens with litigation⁵⁹. By ensuring that every person works together to shape an agreement that addresses the concerns and interests of all participants, ADR can also improve relationships between parties in conflict therefore ensuring access to justice⁶⁰. ADR processes therefore provide a suitable platform for managing environmental disputes including those concerning climate change and pollution thus ensuring access to justice towards achieving Environmental Justice⁶¹.

It is imperative to utilize ADR processes in order to achieve Environmental Justice.

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ JAMS ADR., 'What is ADR' Op Cit

⁵⁸ Environmental Law Institute., 'A Community Guide to Using Alternative Dispute Resolution to Secure Environmental Justice' Op Cit

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution' Op Cit

4.0 Achieving Environmental Justice through the Court Process

Courts play a fundamental role in delivering Environmental Justice⁶². For example, through the adjudication of environmental disputes, courts play a role in explaining and upholding the values underpinning Environmental Justice⁶³. In addition, courts are crucial in achieving Environmental Justice by implementing the purposes of environmental legislation⁶⁴. It has been noted that the purposes of environmental laws and policies may include distributive justice (by providing for more equitable distribution of environmental benefits and burdens); procedural justice (by providing for access to environmental information, public participation in environmental decision-making, and access to the courts); and recognition justice (giving recognition to and overcoming misrecognition of marginalised people, groups or communities in environmental matters)⁶⁵. Therefore, by upholding such legislative purposes when resolving environmental disputes, courts facilitate the realization of Environmental Justice.

Litigation is therefore an appropriate forum for achieving Environmental Justice. Through litigation, the jurisdiction of courts and tribunals can be utilized to enhance Environmental Justice⁶⁶. Litigation has emerged as a tool for environmental defenders seeking to prevent ecological destruction and ensure justice for affected communities all over the world⁶⁷. For example, in Kenya, the *Environment and Land Court Act*⁶⁸ establishes the Environment and Land Court to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources among other environmental matters⁶⁹. While exercising its jurisdiction, the Act

⁶² Muigua. K., 'Realizing Environmental Justice through Litigation' Available at <https://kmco.co.ke/wp-content/uploads/2023/07/Realizing-Environmental-Justice-through-Litigation.pdf> (Accessed on 15/09/2024)

⁶³ The Role of the Courts in Delivering Environmental Justice., Op Cit

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Muigua. K., 'Realizing Environmental Justice through Litigation' Op Cit

⁶⁷ Hope for Environmental Justice in Africa., Available at <https://dialogue.earth/en/justice/hope-for-environmental-justice-in-africa/> (Accessed on 16/09/2024)

⁶⁸ Environment and Land Court Act., No. 19 of 2011, Government Printer, Nairobi

⁶⁹ Ibid, s 13 (2) (a)

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mandates the Environment and Land Court to be guided by several tenets that are key in achieving Environmental Justice including the principles of Sustainable Development such as the principle of public participation; the polluter-pays principle and the pre-cautionary principle⁷⁰. The Environment and Land Court and other courts and tribunals including the National Environment Tribunal are therefore key in promoting Environmental Justice in Kenya⁷¹.

The principles of Environmental Justice were upheld in Kenya in the case of *KM & 9 others v Attorney General & 7 others*⁷². The Environment and Land Court decided that acts of pollution from a lead acid batteries recycling factory had resulted in violation of the Petitioner's rights to their personal life, the environment where they stayed and the water which they consumed⁷³. The Court proceeded to award the petitioners monetary compensation while also directing the Respondents to clean-up the soil, water and remove any wastes deposited within the Owino-Ohuru settlement⁷⁴. This decision is key in fostering Environmental Justice in Kenya since it upholds the concepts of access to justice and access to remedies including compensation in cases of environmental pollution⁷⁵. The decision has been described as a milestone for Environmental Justice and enforcement of the right to a clean, healthy, and sustainable environment in Kenya and Africa at large⁷⁶.

The principles of Environmental Justice were also reiterated by the Environment and Land Court in Kenya in the case of *Friends of Lake Turkana Trust vs Attorney General & 2 others*⁷⁷. The Court in the case decided that the petitioner's rights including access to information and public participation has been violated in respect of the proposed construction and operation of Gibe III dam between the Governments of Kenya and Ethiopia⁷⁸. The court decided

⁷⁰ Ibid, s 18 (a)

⁷¹ Muigua. K., 'Realizing Environmental Justice through Litigation' Op Cit

⁷² *KM & 9 others v Attorney General & 7 others*, Petition No. 1 of 2016 (2020) eKLR,

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Hope for Environmental Justice in Africa., Op Cit

⁷⁷ *Friends of Lake Turkana Trust vs Attorney General & 2 others.*, ELC Suit No. 825 of 2012, (2014) eKLR

⁷⁸ Ibid

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that the state is a custodian of the environment and natural resources of its people and is under certain duties and obligations including ensuring that there is public participation in the sustainable management, protection and conservation of the environment⁷⁹. It also decided that access to environmental information is a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities on the environment⁸⁰.

Courts in other African countries are also upholding the principles of Environmental Justice. The High Court of South Africa in the case of *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*⁸¹ set aside an exploration right, part-held by Shell, which would have enabled the company to undertake a seismic survey off South Africa's coastline, to explore for oil and gas reserves⁸². The Court set aside the exploration right on the basis of procedural unfairness; the failure to take into account relevant considerations; and the failure to comply with applicable legal standards⁸³. The High Court noted that the process leading to the grant of the exploration right failed to adequately consult with interested and affected communities⁸⁴. It further noted that the process ought to have invoked the precautionary principle (to the effect that where there is a risk of environmental harm, incomplete scientific knowledge should not be used as a reason to delay taking action to avoid the harm)⁸⁵. The Court noted that the process would have adverse impacts including harm to marine and bird life; the spiritual and cultural rights of the communities and their rights to livelihood; and climate change hence the need to take into account the precautionary principle⁸⁶. This decision is important in the quest towards Environmental Justice in Africa by reiterating the importance of meaningfully consulting with affected communities and respecting constitutional rights in

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others.*, (3491/2021) [2022] ZAECMKHC 55; 2022 (6) SA 589 (ECMk) (1 September 2022)

⁸² Ibid

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ Ibid

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cases of proposed exploration activities⁸⁷. Further, it has been pointed out that the decision represents the first time that Indigenous communities in South Africa specifically invoked their cultural rights in climate litigation and adds to a growing body of indigenous-oriented climate litigation cases around the world⁸⁸.

In addition, the East African Court of Justice in the case of *African Network for Animal Welfare v. The Attorney General of the United Republic of Tanzania*⁸⁹ held that the proposal to construct a bitumen road across the Serengeti National Park was unlawful and infringed articles 5(3)(c), 8(1)(c), 111(2) and 114(1) of the Treaty Establishing the East African Community requiring partner states to conserve, protect and co-operate in the management of natural resources and the environment within the East African Community⁹⁰. It decided that the proposed construction would cause devastating and irreversible damage to the Serengeti and neighboring parks like the Masai Mara in Kenya therefore threatening the right to a clean, healthy, and sustainable environment⁹¹. It granted a permanent injunction restraining the Government of Tanzania from constructing and maintaining the planned road across the Serengeti National Park⁹². This decision is key in fostering Environmental Justice and the right to a clean, healthy, and sustainable environment in Africa.

At the global level, the International Court of Justice (ICJ) provides a suitable platform for achieving Environmental Justice through the right of access to

⁸⁷ African Law Matters., 'The Shell Case: A Victory for Social and Ecological Justice in South Africa' Available at <https://www.africanlawmatters.com/blog/the-shell-case-a-victory-for-social-and-ecological-justice-in-south-africa> (Accessed on 16/09/2024)

⁸⁸ Du Toit. L., Soyapi. B., & Kotze. L., 'South African Communities vs Shell: High Court Victories show that Cultural Beliefs and Practices Count in Climate Cases' Available at <https://theconversation.com/south-african-communities-vs-shell-high-court-victories-show-that-cultural-beliefs-and-practices-count-in-climate-cases-228029> (Accessed on 16/09/2024)

⁸⁹ *African Network for Animal Welfare v. The Attorney General of the United Republic of Tanzania.*, 20 June 2014, EACJ First Instance Division, Ref. No. 9 of 2010

⁹⁰ Ibid

⁹¹ Ibid

⁹² Ibid

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justice and legal remedies in environmental matters⁹³. For example, in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*⁹⁴, ICJ emphasized the need for the two countries to continue their cooperation and devise the necessary means to promote the equitable utilization of the river, while protecting its environment. The ICJ also recently rendered its first decision on environmental damage and compensation in the case *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*⁹⁵ therefore enhancing Environmental Justice through access to legal remedies.

The court process at global, regional, and national level is therefore appropriate in promoting Environmental Justice.

5.0 Conclusion

Achieving Environmental Justice has become a vital agenda in light of mounting environmental problems that are prevalent all over the world including the triple planetary crisis of climate change, biodiversity loss, and pollution⁹⁶. Environmental Justice seeks to achieve the ideal of access to justice, participation and access to legal remedies in environmental matters⁹⁷. ADR is a suitable platform for achieving Environmental Justice. These processes can ensure the participation of all stakeholders while also allowing parties to come up with collaborative and creative remedies toward achieving Environmental Justice⁹⁸. However, the role of ADR processes in promoting Environmental Justice may be limited by power imbalances and enforceability challenges in mechanisms such as mediation, delays and costs in arbitration, and lack of criminal sanctions in cases of environmental crimes⁹⁹. It is therefore imperative

⁹³ The ICJ and Environmental Case Law., Available at <https://www.uio.no/studier/emner/jus/jus/JUS5520/h15/undervisningsmateriale/icj-andinternational-environmental-law.pdf> (Accessed on 16/09/2024)

⁹⁴ International Court of Justice., 'Pulp Mills on the River Uruguay (Argentina v. Uruguay).' Available at <https://www.icj-cij.org/case/135> (Accessed on 16/09/2024)

⁹⁵ International Court of Justice., 'Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua).' Available at <https://www.icj-cij.org/case/150> (Accessed on 16/09/2024)

⁹⁶ The Role of the Courts in Delivering Environmental Justice., Op Cit

⁹⁷ Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' Op Cit

⁹⁸ Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution' Op Cit

⁹⁹ Ibid

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to legitimize ADR processes through effective legal, policy, and institutional frameworks in order to enhance their role in access to justice including Environmental Justice¹⁰⁰. It is also vital to build capacity for ADR practitioners and institutions in environmental matters in order to effectively utilize ADR as a tool for achieving Environmental Justice¹⁰¹.

The Court process at the national, regional, and global levels is also suitable in promoting Environmental Justice. Courts have the power to pronounce binding judgments while also ensuring that such judgments are enforceable and are ideal in fostering Environmental Justice¹⁰². However, concerns in litigation such high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow can hinder the viability of the court process in enhancing Environmental Justice¹⁰³. It is imperative to address these challenges by enhancing the right of access to justice, ensuring expeditious management of disputes, addressing the issue of costs, and opening doors for public interest litigation in environmental matters in order to achieve Environmental Justice through the court process¹⁰⁴. It is also imperative to establish specialized environmental courts at national, regional, and global levels and build the capacity of judicial officers in order to achieve Environmental Justice through the court process¹⁰⁵.

Achieving Environmental Justice through ADR and the court process is therefore a practical and realizable endeavour towards Sustainable Development.

¹⁰⁰ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISINGALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf> (Accessed on 16/09/2024)

¹⁰¹ Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution' Op Cit

¹⁰² Muigua. K., 'Realizing Environmental Justice through Litigation' Op Cit

¹⁰³ 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

¹⁰⁴ United Nations Economic Commission for Europe., 'Access to Justice in Environmental Matters: Standing, Costs and Available Remedies.' Available at https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/SEE_Access2Justice_Study_Final_logos.pdf (Accessed on 16/09/2024)

¹⁰⁵ Ibid

Strengthening Climate Action in Conflict Situations for Development

Abstract

The negative effects of climate change are being felt – and will continue to be felt – in some of the most extreme ways by people living in places affected by armed conflict and other forms of violence. People, communities, and countries in conflict situations are often ill-equipped to cope with and adapt to climate change. They should therefore be ideally prioritized in climate action and finance. However, they are mostly neglected in climate action and finance therefore undermining development. This paper critically discusses the need to strengthen climate action in conflict situations for development. It argues that climate change is a major threat to development in conflict situations. The paper posits that people, communities, and countries in conflict situations often lack the capacity to effectively confront climate change. As a result, the paper notes that conflict may worsen the impacts of climate change and affect development. The paper suggests measures towards strengthening climate action in conflict situations for development.

1.0 Introduction

Climate change has been defined as an existential threat to humanity¹. It affects every aspect of people's lives, both creating and exacerbating humanitarian crises around the world². Warming of the atmosphere, ocean and land – driven by human activity – is causing climate variations and extremes all over the world, with over three billion people living in places that are highly vulnerable to climate change³. Climate change is an undesirable phenomenon that affects realization of the Sustainable Development agenda across the world by affecting the sustainability of the planet's ecosystems, the stability of the global economy and the future of humankind⁴. Its impacts including intense droughts, water scarcity, severe fires, rising sea levels, flooding, melting polar

¹ International Committee of the Red Cross., 'The ICRC's Call To Cop28: Urgent and Ambitious Action is Needed to Mitigate Climate Change and Strengthen Climate Action in Conflict Settings' Available at https://www.icrc.org/sites/default/files/topic/file_plus_list/the_icrcs_call_to_strengthen_climate_action_in_conflict_settings_ahead_of_cop28_1.pdf (Accessed on 17/04/2024)

² Ibid

³ Ibid

⁴ Climate Change., 'Meaning, Definition, Causes, Examples and Consequences.' Available at <https://youmatter.world/en/definition/climate-change-meaning-definition-causes-and-consequences/> (Accessed on 17/04/2024)

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ice, catastrophic storms and declining biodiversity are being witnessed across the world⁵.

Due to its adverse impacts, climate change has been described as the most defining problem facing humanity⁶. It is the main global challenge that is affecting both developed and developing countries in their quest towards achieving Sustainable Development⁷. Climate change has therefore risen to the top of the policy agenda, at local, national, and global levels⁸. Governments have been urged to strengthen climate action in their countries in order to respond to the threat of climate change and ensure that economies are climate resilient⁹. However, it has been noted that climate action taken to date by the international community has been insufficient to prevent or reverse the negative trends of climate change¹⁰. Urgent and transformative action is therefore required to combat climate change and promote Sustainable Development¹¹.

The United Nations *2030 Agenda for Sustainable Development*¹² seeks to strengthen climate action for development. It acknowledges that climate change is one of the greatest challenge of our time and its adverse impacts

⁵ United Nations., 'What is Climate Change?' Available at <https://www.un.org/en/climatechange/what-is-climate-change> (Accessed on 17/04/2024)

⁶ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

⁷ Ibid

⁸ United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at <https://www.un.org/en/desa/forum-climate-changeandscience-and-technology-innovation> (Accessed on 17/04/2024)

⁹ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

¹⁰ International Committee of the Red Cross., 'The ICRC's Call To Cop28: Urgent and Ambitious Action is Needed to Mitigate Climate Change and Strengthen Climate Action in Conflict Settings' Op Cit

¹¹ United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Available at <https://www.un.org/sustainabledevelopment/climate-change/> (Accessed on 17/04/2024)

¹² United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 17/04/2024)

undermine the ability of all countries to achieve Sustainable Development¹³. Sustainable Development Goal 13 urges states to take urgent action to combat climate change and its impacts¹⁴.

According to the International Committee of the Red Cross (ICRC), the negative effects of climate change are being felt – and will continue to be felt – in some of the most extreme ways by people living in places affected by armed conflict and other forms of violence¹⁵. People, communities, and countries in conflict situations are ill-equipped to cope with and adapt to climate change¹⁶. This vulnerability and severe capacity constraints of people, communities, and countries in conflict means that they should ideally be prioritized in climate action¹⁷. However, it has been noted that in practice, they are among the most neglected when it comes to climate action and finance¹⁸. It is therefore vital to strengthen climate action in conflict situations for development.

This paper critically discusses the need to strengthen to strengthen climate action in conflict situations for development. It argues that climate change is a major threat to development in conflict situations. The paper posits that people, communities, and countries in conflict situations often lack the capacity to effectively confront climate change. As a result, the paper notes that conflict may worsen the impacts of climate change and affect development. The paper suggests measures towards strengthening climate action in conflict situations for development.

2.0 The Climate Change and Conflict Nexus

People, communities and countries enduring conflict are among those most vulnerable to growing climate risks because of the devastating effects of conflicts on societies¹⁹. Conflicts threaten people’s lives, damage essential

¹³ Ibid

¹⁴ Ibid

¹⁵ International Committee of the Red Cross., ‘The ICRC’s Call To Cop28: Urgent and Ambitious Action is Needed to Mitigate Climate Change and Strengthen Climate Action in Conflict Settings’ Op Cit

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Grayson. C-L., & Khouzam. A., ‘Responding to Climate Risks in Conflict Settings: In Search of Solutions’ Available at <https://blogs.icrc.org/law-and->

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services, disrupt institutions, the economy, and community cohesion, and shrink the capacity of people, communities, and countries to cope with all types of risks²⁰. It has been observed that more than half of the countries considered most vulnerable and least ready to respond to climate change are countries enduring conflict, most of which are also among the world's least developed countries²¹. This vulnerability is not because climate change directly causes conflict²². Rather, the vulnerability arises since conflict increases the fragility of institutions, essential services, infrastructure, governance and other capacities that are critical to help people cope with and adapt to climate change²³.

Climate change also impacts development and social progress in conflict situations by hindering access to human needs including food, health, water, and energy²⁴. The nexus of hunger, conflict, and climate change has resulted in over 330 million people facing acute food insecurity²⁵. Climate and conflict have been identified as the main causes of acute food insecurity²⁶. The United Nations notes that where wars rage, hunger reigns as a result of displacement of people, destruction of agriculture and food systems, damage to infrastructure, disruption of supply chains, or deliberate policies of denial²⁷. It has further been noted that climate change, environmental degradation and biodiversity loss are exacerbating conflict, contributing to global food insecurity, and threatening international peace and security²⁸. In addition, it has been noted that climate change, insufficient access to water, and conflict

[policy/2023/11/23/responding-to-climate-risks-in-conflict-settings-in-search-of-solutions/](https://www.un.org/en/policy/2023/11/23/responding-to-climate-risks-in-conflict-settings-in-search-of-solutions/) (Accessed on 17/04/2024)

²⁰ Ibid

²¹ International Committee of the Red Cross., 'The ICRC's Call To Cop28: Urgent and Ambitious Action is Needed to Mitigate Climate Change and Strengthen Climate Action in Conflict Settings' Op Cit

²² Ibid

²³ Ibid

²⁴ Reliefweb., 'Climate Action Can Help Fight Hunger, Avoid Conflicts, Official Tells Security Council, Urging Greater Investment in Adaptation, Resilience, Clean Energy' Available at <https://reliefweb.int/report/world/climate-action-can-help-fight-hunger-avoid-conflicts-official-tells-security-council-urging-greater-investment-adaptation-resilience-clean-energy> (Accessed on 17/04/2024)

²⁵ Ibid

²⁶ United Nations., 'Climate Change and Conflict' Available at <https://press.un.org/en/2024/sc15589.doc.htm#:~:text=Climate%20and%20conflict%20were%20the,the%2014%20countries%20most%20at> (Accessed on 17/04/2024)

²⁷ Ibid

²⁸ Ibid

interact to harm local communities²⁹. Higher temperatures and evapotranspiration decrease availability of water resources for people's livelihoods and economic activities, leading to increased tension sometimes resulting in or worsening existing conflicts³⁰. Regions such as the Lake Chad Basin have been identified as being caught in a conflict-climate risk trap³¹. Political, social, and security stressors are overwhelming governments on one hand; while on the other hand, climate change impacting weather variability, including changes in rainfall patterns and greater uncertainty, increases the risk of conflict around natural resources³². Conflicts in such situations hinder water security and the ability of people to respond to climate risks including drought and unpredictable rainy seasons that often result in flooding³³.

Conflicts therefore hinder effective climate action. Violent clashes disrupt food production and security, administrative capacity, and access to markets and services that are vital in responding to climate change³⁴. In addition, conflict prone states are often plagued by poor governance, lethargic development, and a lack of social investment in key elements such as education, health and the rule of law, are also unlikely to be able to put in the necessary investment to protect the environment and respond to climate change³⁵. It has also been noted that conflict prone states are unlikely to be able to support preparedness and adaptation programmes, particularly for those on the margins of society³⁶. Strengthening climate action by adapting to, and mitigating the impacts of climate change can therefore play an important role in addressing many drivers of conflict and building peace³⁷.

²⁹ Trevino, J., & Davy, T., 'Water Security is the Way out of the Conflict-Climate Risk Trap in Lake Chad Basin' Available at <https://blogs.worldbank.org/en/water/water-security-way-out-conflict-climate-risk-trap-lake-chad-basin#:~:text=Banseka%20explained%20how%20climate%20change,tension%20some%20times%20resulting%20in%20conflict>. (Accessed on 17/04/2024)

³⁰ Ibid

³¹ Ibid

³² Ibid

³³ Ibid

³⁴ Toulmin, C., & Barrett, S., 'Climate Action and Conflict' Available at <https://www.iied.org/sites/default/files/pdfs/2023-11/22131g.pdf> (Accessed on 17/04/2024)

³⁵ United Nations Climate Change., 'Conflict and Climate' Available at <https://unfccc.int/news/conflict-and-climate> (Accessed on 17/04/2024)

³⁶ Ibid

³⁷ Ibid

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Further, according to the United Nations High Commissioner for Refugees (UNHCR), forcibly displaced people are often on the frontlines of the climate crisis³⁸. It notes that refugees and other forcibly displaced people, regardless of the reason for flight, often reside in places prone to hazardous weather events and in harsh environmental conditions³⁹. UNHCR further points out that climate-related shocks and stresses including floods, cyclones, wildfires and droughts pose significant risks to refugees and Internally Displaced People (IDPs)⁴⁰. Climate change also limits their access to livelihoods and work opportunities⁴¹. Climate change is therefore a major threat to development for refugees and IDPs. In addition, the strain on limited local natural resources, such as water or arable farming land as a result of climate change can contribute to tensions between displaced populations and host communities worsening conflicts and undermining development⁴². It is therefore necessary to ensure that refugees and IDPs and their host communities living in highly climate-vulnerable conditions can withstand, recover and be protected from new or worsening threats to their lives and livelihoods that climate change is fueling⁴³.

According to the Organisation for Economic Co-operation and Development (OECD), the impacts of climate change, biodiversity loss and environmental degradation place additional demands on fragile and conflict -affected contexts which are already struggling to cope with multiple pressures, crises and shocks⁴⁴. OECD notes that fragile and conflict-affected contexts harbour some of the world's biodiversity hotspots, which are critical to regulate the world's climate⁴⁵. Therefore, climate and human-induced disruptions affect the

³⁸ United Nations High Commissioner for Refugees., 'Strengthening Climate Adaptation and Resilience' Available at <https://www.unhcr.org/what-we-do/build-better-futures/climate-change-and-displacement/strengthening-climate-adaptation> (Accessed on 17/04/2024)

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

⁴³ Ibid

⁴⁴ Organisation for Economic Co-operation and Development., 'INCAF Common Position on Climate Change, Biodiversity and Environmental Fragility' Available at <https://www.oecd.org/dac/conflict-fragility-resilience/conflict-fragility/INCAF-Common-position-climate-change-biodiversity-environmental-fragility.pdf> (Accessed on 17/04/2024)

⁴⁵ Ibid

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root causes, drivers and risks factors of multidimensional fragility and conflict⁴⁶. Similarly, conflicts can cause extensive damage to the environment, cause biodiversity loss and amplify the effects and impacts of climate change with a consequent increase in fragility⁴⁷.

Climate change is therefore a key concern in conflict settings⁴⁸. It has been noted that the impacts of climate change have already increased the physical insecurity of vulnerable communities, particularly in fragile and conflict-affected settings where governance is limited or ineffective⁴⁹. In such contexts, the effects of climate change can adversely affect political stability, food security, economic growth, and human mobility⁵⁰. It has been noted that in conflict situations, climate change interacts with other political, social, and economic stresses to compound existing tensions, which could escalate into violence or disrupt fragile peace building processes⁵¹. In turn, violent conflict and political instability leaves people and communities poorer, less resilient, and ill-equipped to cope with the consequences of climate change⁵². Strengthening climate action in conflict situations is therefore necessary for development. ICRC notes that strong climate action in places affected by conflict, and the finance to support it, is critical to reduce humanitarian needs, preserve development gains, avoid systemic breakdowns and lasting fragility⁵³.

The need to strengthen climate action in conflict situations for development was recognized at COP 28 via the *Declaration on Climate, Relief, Recovery and*

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ United Nations Environment Programme., 'Addressing Climate-Related Security Risks' Available at https://wedocs.unep.org/bitstream/handle/20.500.11822/40330/security_risks_guidance.pdf?sequence=1&isAllowed=y (Accessed on 17/04/2024)

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Ibid

⁵² Ibid

⁵³ International Committee of the Red Cross., 'The ICRC's Call To Cop28: Urgent and Ambitious Action is Needed to Mitigate Climate Change and Strengthen Climate Action in Conflict Settings' Op Cit

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*Peace*⁵⁴. According to the Declaration, many of the people, communities, and countries threatened or affected by fragility or conflict, or facing severe humanitarian needs, are on the frontlines of the climate crisis, and are among the least resourced to cope with and adapt to associated shocks and stressors⁵⁵. It acknowledges that fragility and conflict increase people's vulnerability and exposure to climate hazards and impede coping capacity and adaptation options, and that, at the same time, climate change adversely affects lives, livelihoods, infrastructure, water, human capital, food, health, cultural identity, education, and human settlements, among other spheres, exacerbating humanitarian needs and constituting a significant and growing challenge to stability⁵⁶. The Declaration calls for bolder collective action to build climate resilience at the scale and speed required in highly vulnerable countries and communities, particularly those threatened or affected by fragility or conflict, or facing severe humanitarian needs, many of which are Least Developed Countries and Small Island Developing States⁵⁷. It recognizes that an ambitious, immediate scale up of enhanced support is urgently needed in such situations, including financial resources; technical and institutional capacities; local, national, regional partnerships; and data and information on the basis of complementarity and predictability⁵⁸. According to the COP 28 Declaration, strengthening climate action conflict settings is possible and if managed properly, can offer avenues for Sustainable Development, conflict prevention and inclusive peace building⁵⁹.

Actualizing the COP 28 Declaration on Climate, Relief, Recovery and Peace is vital in strengthening climate action in conflict situations for development. The COP 28 Declaration is a non-binding call to action outside the formal United Nations Framework Convention on Climate Change (UNFCCC) negotiations that reflects the concerns, common positions and solutions of countries and institutions from humanitarian, development, climate, and peace communities to urgently foster climate action and resilience in the most vulnerable and

⁵⁴ COP 28 Declaration on Climate, Relief, Recovery, and Peace., Available at <https://www.cop28.com/en/cop28-declaration-on-climate-relief-recovery-and-peace> (Accessed on 17/04/2024)

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

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conflict situations⁶⁰. It recognizes that climate action is urgently needed, possible and effective in these settings, and that inaction comes with high cost to human development and stability⁶¹. Implementing the COP 28 Declaration can galvanize support for accelerated climate action and resourcing in countries experiencing multifaceted crises including conflicts which makes them highly vulnerable to climate change⁶².

Despite the importance of climate action in conflict situations, it has been noted that national, regional, and global support to help people adapt to a changing climate is particularly weak in places enduring conflict because of the challenges associated with long-term programming in these settings⁶³. Similarly, the most fragile countries tend to receive the least funding for climate action⁶⁴. ICRC further notes that conflict-affected areas within a country – particularly when such areas are not under state control – are often excluded from climate finance to mitigate risks, thus excluding millions of people from receiving support⁶⁵. The COP 28 Declaration on Climate, Relief, Recovery and Peace also notes that global efforts to build climate resilience remain insufficiently tailored or targeted to the specific needs and challenges of people, communities and countries threatened or affected by fragility or conflict, or facing severe humanitarian needs, including due to real and perceived risks and barriers associated with working in such settings⁶⁶. It is therefore necessary to address these challenges in order to strengthen climate action in conflict situations for development.

⁶⁰ Yousuf. H., 'COP 28 Declaration on Climate, Relief, Recovery and Peace' Available at <https://www.linkedin.com/pulse/climate-warrior-pakistani-youths-clamor-transpires-200-yousuf-mmvtf/> (Accessed on 17/04/2024)

⁶¹ Ibid

⁶² Ibid

⁶³ International Committee of the Red Cross., 'The ICRC's Call To Cop28: Urgent and Ambitious Action is Needed to Mitigate Climate Change and Strengthen Climate Action in Conflict Settings' Op Cit

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ COP 28 Declaration on Climate, Relief, Recovery, and Peace., Op Cit

3.0 Way Forward

In order to strengthen climate action in conflict situations, there is need to achieve climate security⁶⁷. It has been acknowledged that in settings where conflict already exists, the impacts of climate change can aggravate or prolong it, making it more difficult to reach and sustain peace⁶⁸. Further, conflict can in turn disrupt or impede climate action, either through the active destruction of energy, water, and agricultural assets, or by delaying or blocking mitigation and adaptation interventions⁶⁹. Therefore, in order to achieve climate security in conflict situations, responses to climate change should align with conflict prevention and peacebuilding initiatives⁷⁰. It has been noted that investing in climate action is critical in fragile and conflict-affected settings and, if seized upon can be a valuable opportunity to strengthen cooperation, rebuild trust, and mend the social fabric therefore fostering peace, security, and development while confronting climate change⁷¹. Climate security enables the development of tailored analyses, response strategies, and programmes to the compounded challenges presented by the climate crisis on conflict-affected populations, communities, and countries⁷². It is therefore a key tool of conflict prevention, community stabilization and environmental peacebuilding⁷³. According to the United Nations Environment Programme (UNEP), climate security offers opportunities for promoting inclusive climate action, conflict prevention and peacebuilding⁷⁴. It is therefore vital to enhance climate security in order to strengthen climate action in conflict situations for development.

In addition, it is imperative to widely acknowledge the nexus between climate change and conflicts in order to develop adequate responses to these two

⁶⁷ United Nations Development Programme., 'What is Climate Security and Why is it Important?' Available at <https://climatepromise.undp.org/news-and-stories/what-climate-security-and-why-it-important> (Accessed on 17/04/2024)

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Ibid

⁷² International Organization for Migration., 'Climate, Peace and Security' Available at <https://environmentalmigration.iom.int/climate-and-security> (Accessed on 17/04/2024)

⁷³ Ibid

⁷⁴ United Nations Environment Programme., 'Climate Security Mechanism (CSM)' Available at <https://www.unep.org/topics/fresh-water/disasters-and-climate-change/climate-security-mechanism-csm> (Accessed on 17/04/2024)

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related challenges⁷⁵. Climate change has been described as a conflict multiplier, rather than as a major direct cause of conflict in itself. It may aggravate and extend the scope of existing conflicts, or trigger underlying and latent conflicts to break out into the open⁷⁶. Climate change may contribute or worsen conflicts in areas such as access to natural resources including land and water⁷⁷; food security as a result of reduced rainfall and rising sea levels which may lead to a decline in agricultural production and a substantial loss of arable land reducing yields and increasing domestic food prices a situation that may result in civil unrest, and competition over access to land⁷⁸; and migration and displacement as a result of scarcity of natural resources and climate disasters such as droughts and floods resulting in conflicts between host communities and displaced populations⁷⁹. Conflicts on the other hand cause extensive damage to the environment, cause biodiversity loss and amplify the effects and impacts of climate change with a consequent increase in fragility⁸⁰. Conflict hinders climate action as a result of breakdown of institutions and lack of access to critical climate services⁸¹. Therefore, the converging crises of conflict and climate change can be mutually reinforcing, with climate impacts potentially exacerbating the conflict cycle while conflict weakening the governance structures and institutions needed to build climate resilience⁸². As a result of these linkages, communities and countries in conflict situations are highly vulnerable to climate risks due to their limited adaptive capacity

⁷⁵ International Committee of the Red Cross., 'The ICRC's Call To Cop28: Urgent and Ambitious Action is Needed to Mitigate Climate Change and Strengthen Climate Action in Conflict Settings' Op Cit

⁷⁶ Ibid

⁷⁷ Danish Institute for International Studies., 'Addressing Climate Change and Conflict in Development Cooperation' Available at https://www.diiis.dk/files/media/publications/import/extra/rp2012-04-addressing-climate-change_web.jpg_1.pdf (Accessed on 17/04/2024)

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Organisation for Economic Co-operation and Development., 'INCAF Common Position on Climate Change, Biodiversity and Environmental Fragility' Op Cit

⁸¹ Ibid

⁸² International Institute for Sustainable Development., 'Building Peace and Climate Resilience: Aligning Peacebuilding and Climate Adaptation in Fragile States' Available at <https://www.iisd.org/articles/deep-dive/building-peace-and-climate-resilience-aligning-peacebuilding-and-climate> (Accessed on 17/04/2024)

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therefore being exposed to the worst impacts of climate change which could exacerbate underlying conflicts⁸³.

It has been noted that acknowledging and drawing attention to the high vulnerability to climate risks of countries and communities enduring conflict is essential to ensure adequate climate action in these settings⁸⁴. It can lead to better responses to both climate change and conflict by aligning peacebuilding, development, and climate change adaptation strategies in National Adaptation Plans⁸⁵. For fragile states and communities in conflict situations, National Adaptation Plans provide governments struggling with conflict, instability, and climate change the opportunity to align their peacebuilding, development, and adaptation agendas and lay the foundation for lasting peace⁸⁶. It is therefore necessary to acknowledge the interlinkages between climate change and conflict in order to integrate conflict dynamics into climate action for peacebuilding and development⁸⁷.

Further, it is imperative to foster effective conflict management by addressing the root causes of conflicts⁸⁸. It has been noted that in order to strengthen climate action in conflict situations, conflicts need to be addressed when planning climate actions⁸⁹. Effective conflict management strengthens climate action by reducing vulnerability, ensuring the availability of strong institutions and governance mechanisms, and allowing access to climate-sensitive areas for appropriate responses⁹⁰. Climate action cannot be effective in conflict situations as a result of breakdown of institutions and lack of access to critical climate services⁹¹. Effective conflict management is therefore necessary in order to strengthen climate action in conflict situations for development. It has

⁸³ International Committee of the Red Cross., 'The ICRC's Call To Cop28: Urgent and Ambitious Action is Needed to Mitigate Climate Change and Strengthen Climate Action in Conflict Settings' Op Cit

⁸⁴ Ibid

⁸⁵ International Institute for Sustainable Development., 'Building Peace and Climate Resilience: Aligning Peacebuilding and Climate Adaptation in Fragile States' Op Cit

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Toulmin. C., & Barrett. S., 'Climate Action and Conflict' Op Cit

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Organisation for Economic Co-operation and Development., 'INCAF Common Position on Climate Change, Biodiversity and Environmental Fragility' Op Cit

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been noted that for effective conflict management in such settings, interventions need to recognise past patterns of conflict and reconciliation by monitoring warning signs, defusing tensions and addressing grievances at the earliest⁹². This can be achieved by applying collaborative approaches towards conflict management⁹³. Collaborative conflict management refers to the use of a wide range of informal approaches where competing or opposing stakeholder groups work together to reach an agreement on a controversial issue⁹⁴. This style of conflict management encourages parties to conflicts to work through disagreements through empathy, listening, and mutually beneficial solutions⁹⁵. It has the potential to identify the root causes of conflicts, pinpoint the underlying needs of the parties involved, and come to a win-win outcome for everyone⁹⁶. Collaborative conflict management envisages the use of Alternative Dispute Resolution (ADR) processes such as mediation, negotiation and facilitation which are non-coercive, non-power based and focus on the needs and interest of parties⁹⁷. ADR processes are therefore ideal in strengthening climate action in conflict situations for development by promoting collaboration in the management of vital natural resources such as land and water while simultaneously ensuring conflict resolution and prevention⁹⁸. These mechanisms should therefore be embraced.

Finally, it is vital to unlock climate finance in conflict situations⁹⁹. It has been noted that international support in form of climate finance to help people adapt to a changing climate is particularly weak in places enduring conflict because

⁹² Toulmin. C., & Barrett. S., 'Climate Action and Conflict' Op Cit

⁹³ Muigua. K., 'Applying Collaborative Approaches towards Conflict Management' Available at <https://kmco.co.ke/wp-content/uploads/2024/03/Applying-Collaborative-Approaches-towards-Conflict-Management-.pdf> (Accessed on 17/04/2024)

⁹⁴ Food and Agriculture Organization., 'Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)' Available at <https://www.fao.org/3/i2604e/i2604e00.pdf> (Accessed on 17/04/2024)

⁹⁵ Ibid

⁹⁶ Ibid

⁹⁷ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

⁹⁸ Toulmin. C., & Barrett. S., 'Climate Action and Conflict' Op Cit

⁹⁹ International Committee of the Red Cross., 'The ICRC's Call To Cop28: Urgent and Ambitious Action is Needed to Mitigate Climate Change and Strengthen Climate Action in Conflict Settings' Op Cit

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of the challenges associated with long-term programming in such contexts¹⁰⁰. In addition, it has been observed that the most fragile countries tend to receive the least funding for climate action¹⁰¹. According to ICRC, conflict-affected regions are often excluded from climate finance to mitigate the impacts of climate change therefore excluding millions of people from receiving support¹⁰². In order to address this gap, it has been recommended that the criteria for accessing funding particularly for adaptation and loss and damage needs to be tailored to the specific challenges of places that are extremely fragile in order to enable affected populations to access climate finance that is key in strengthening climate action for development¹⁰³.

The COP 28 *Declaration on Climate, Relief, Recovery and Peace*¹⁰⁴ seeks to enhance financial support for climate adaptation and resilience in conflict situations through measures such as continuing to substantially scale-up financial resources for climate adaptation and resilience building in such situations, emphasizing the need for public and grant-based resources, as well as mobilizing a variety of financing sources, while recognizing the importance of environmental and social safeguards¹⁰⁵; improving access to all relevant financial resources, including by enhancing predictability, flexibility, disbursement, speed, and simplicity, and working to reducing transaction costs, including by streamlining application, accreditation, procurement, and monitoring and evaluation procedures¹⁰⁶; strengthening the technical and institutional capacity of national governments and local actors, to absorb, account for, report on, allocate, and leverage climate finance effectively; prioritizing local ownership, impact, and results where possible, including through channeling finance at the local level to respond to local needs and priorities and working with affected communities and both local government and non-government partners¹⁰⁷; and leveraging financial and technical support from the private sector and adopting tailored financial instruments to mobilize new sources of finance in support of national and local responses¹⁰⁸.

¹⁰⁰ Ibid

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ COP 28 Declaration on Climate, Relief, Recovery, and Peace., Op Cit

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Ibid

It is therefore necessary to implement this Declaration in order to unlock climate finance necessary for strengthening climate action in conflict situations for development. Climate finance plays a crucial role in strengthening climate action in conflict situations for development¹⁰⁹.

4.0 Conclusion

People, communities and countries enduring conflict are extremely vulnerable to the impacts of climate change as result of the devastating effects of conflicts on societies¹¹⁰. Conflicts increase the fragility of institutions, essential services, infrastructure, governance and other capacities that are critical to help people cope with and adapt to climate change¹¹¹. Conflicts therefore increases climate vulnerability and undermine development¹¹². As a result of the vulnerability and severe capacity constraints of people, communities, and countries in conflict situations, it is necessary to strengthen climate action in such contexts for development¹¹³. However, climate action in conflict situations is often undermined by limited climate funding, challenges associated with long-term programming in these settings, and real and perceived risks and barriers associated with working in such environments¹¹⁴. Strong climate action in places affected by conflict, and the finance to support it, is critical to reduce humanitarian needs, preserve development gains and avoid systemic breakdowns and lasting fragility¹¹⁵. This can be achieved through fostering climate security¹¹⁶; acknowledging the nexus between climate change and

¹⁰⁹ International Committee of the Red Cross., 'The ICRC's Call To Cop28: Urgent and Ambitious Action is Needed to Mitigate Climate Change and Strengthen Climate Action in Conflict Settings' Op Cit

¹¹⁰ Grayson. C-L., & Khouzam. A., 'Responding to Climate Risks in Conflict Settings: In Search of Solutions' Op Cit

¹¹¹ International Committee of the Red Cross., 'The ICRC's Call to Cop28: Urgent and Ambitious Action is Needed to Mitigate Climate Change and Strengthen Climate Action in Conflict Settings' Op Cit

¹¹² Ibid

¹¹³ Ibid

¹¹⁴ COP 28 Declaration on Climate, Relief, Recovery, and Peace., Op Cit

¹¹⁵ International Committee of the Red Cross., 'The ICRC's Call to Cop28: Urgent and Ambitious Action is Needed to Mitigate Climate Change and Strengthen Climate Action in Conflict Settings' Op Cit

¹¹⁶ United Nations Development Programme., 'What is Climate Security and Why is it Important?' Op Cit

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conflicts¹¹⁷; fostering effective conflict management by addressing the root causes of conflicts¹¹⁸; and unlocking climate finance in conflict situations¹¹⁹. Strengthening climate action in conflict situations for development is necessary and should be realized for peace and prosperity.

¹¹⁷ International Committee of the Red Cross., 'The ICRC's Call To Cop28: Urgent and Ambitious Action is Needed to Mitigate Climate Change and Strengthen Climate Action in Conflict Settings' Op Cit

¹¹⁸ Toulmin. C., & Barrett. S., 'Climate Action and Conflict' Op Cit

¹¹⁹ International Committee of the Red Cross., 'The ICRC's Call To Cop28: Urgent and Ambitious Action is Needed to Mitigate Climate Change and Strengthen Climate Action in Conflict Settings' Op Cit

Effective Justice for Kenyans: Is ADR Really Alternative

Abstract

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

This discourse posits that successful incorporation of ADR and Traditional Dispute Resolution Methods (TDRM) mechanisms in conflict management calls for a change in attitude towards the same. They ought to be treated as mechanisms that are the most appropriate in the effective resolution of certain kinds of conflicts. As such, ADR and TDRM mechanisms should be viewed as complementary to the court system; working together to ensure that access to justice is achieved for all through employment of the most appropriate mechanism for the particular dispute or conflict.

1.0 Introduction

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

This discourse posits that successful incorporation of ADR and Traditional Dispute Resolution Methods (TDRM) mechanisms in conflict management calls for a change in attitude towards the same. They ought to be treated as

mechanisms that are most the appropriate in the effective resolution of certain kinds of conflicts. As such, ADR and TDRM mechanisms should be viewed as complementary to the court system; working together to ensure that access to justice is achieved for all through employment of the most appropriate mechanism for the particular dispute or conflict. Indeed, it has been argued that these techniques are not necessarily mutually exclusive in any particular conflict, but can be used sequentially or in a customized combination with other adjudicative methods for resolving disputes.¹

2.0 Alternative Dispute Resolution (ADR) And Traditional Dispute Resolution Mechanisms (TDRM) In Pre-Colonial Era

Before the arrival of Colonialists in Africa, African communities had their own ways of dealing with day to day challenges of life. Africans led a communal way of living and this, naturally informed their approach to handling different issues of life.² A good example is the land tenure system which was communal with no single person claiming ownership of the land, apart from user rights and holding the same in trust for future generations.³ Any group of people living together is bound to have disagreements over various issues, and Africans were no different. Thus, they had mechanisms of resolving conflicts as they arose amongst them. They understood very well what approach was applicable to what kind of dispute or conflict.⁴

For instance, in the Kalahari Desert in Botswana and Namibia the Bushmen have lived traditional lives for many thousands of years, without sophistication in dispute resolution practices which have evolved without courts and a formal state system and are suited to the needs of a collective

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/Rapporteur%20Report%20%20ADR%20DEFINITION%20-%2019%20March.pdf> [Accessed on 16 May 2014].

² See generally J. Kenyatta, *Facing Mount Kenya, The Tribal Life of the Kikuyu* (Vintage Books Edition, October 1965).

³ *Ibid*, pp. 21-51.

⁴ See generally L.J. Myers and D. H. Shinn, (2010) *Appreciating Traditional Forms of Healing Conflict in Africa and the World*, available at scholarworks.iu.edu/journals/index.php/bdr/article/download/.../1220 [Accessed on 20 May 2014].

hunter-gatherer society.⁵ The Bushmen's disputes occur over food, land and mates. Those in conflict bring other members of the tribe together to hear out both sides and where passions rise, senior tribal members hide the disputants' poisoned hunting arrows to prevent resort to violence.⁶ If resolution is not reached in the small group the larger community is brought together where everyone is able to talk through every aspect of the dispute over a number of days until the dispute has been 'talked out'. Economic reality and social dependence preclude the easy resort to violence over individual problems.⁷

As such, these approaches to conflict resolution were aimed at ensuring continued co-existence of the communities and sought to ensure that the conflicts were fully addressed to prevent their re-emergence in future.⁸ The traditional approaches therefore effectively addressed the conflicts making them appropriate for the management of the particular problem. This presents a sharp contrast with the formal justice systems which seeks to settle the disputes without necessarily addressing the real cause of the conflict, thus creating a likelihood of re-emergence of the problem in future with even more severe consequences. The Missionaries and the colonial masters spread western ideas, customs, and religions to people in Africa.⁹ Africans were made to believe that unless they resorted to court, there was no other way of achieving justice. Even where they used the traditional conflict resolution mechanisms, their decisions could be appealed to the formal systems.¹⁰ This fallacy became so well entrenched in the system that Courts were elevated to a position that portrayed the TDRM and any other out of court approach to dispute management as either totally ineffective or simply undesirable. However, this is not to say that all disputes are capable of being addressed through the TDRM and any other out of court approach, especially in the wake of the human rights movement, but it is also not true to say that all disputes

⁵ L. Boule, *A History of Alternative Dispute Resolution*, ADR Bulletin: Vol. 7: No. 7, Article 3, 2005. p. 1. Available at: <http://epublications.bond.edu.au/adr/vol7/iss7/3> [Accessed on 16 May 2014].

⁶ *Ibid*, p. 2.

⁷ *Ibid*.

⁸ See M. Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006). pp. 36-45.

⁹ J. Kenyatta, *op cit* pp. 259-269.

¹⁰ Mars Group Kenya, *Historical Background of the Judiciary in Kenya*, available at http://judiciary.marsgroupkenya.org/index.php?option=com_content&view=article&id=45&Itemid=37 [Accessed on 20 March 2014].

are capable of being adequately and satisfactorily addressed through the formal court system.

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

3.0 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.¹¹ The idea that absolute private property was the best way to

¹¹ J. Brewer and S. Staves, "Introduction," in *Early Modern Conceptions of Property*, ed. Brewer and Staves, p. 18. [As quoted in O. U. Ince, 'John Locke and Colonial Capitalism', PhD Candidate, Department of Government, Cornell University, p. 16, available

at http://government.arts.cornell.edu/assets/psac/fa12/Ince_PSAC_Sep28.pdf

[Accessed on 17 March 2014]. See also H.W.O Okoth Ogendo, *Tenants of the crown: The Evolution of Agrarian Law and Institutions in Kenya* (Acts Press 1995); G. Hardin,

incentivize owners and maximize productivity was used not only to legitimate the enclosing of commons, but also, to legitimate the taking of land from foreign peoples with different systems of property.¹²

It has also been rightly pointed out that the Classical-Christian legalistic tradition in which disputes over colonial property were embedded dictated that land appropriations be legitimated by appeal to some pre-existing law, which was complicated by the fact that the lands in question were patently inhabited by peoples thought to be outside the civic history of the Old World.¹³

The foreigners sought to inculcate their way of life into Africans either openly or through subtle ways such as using Christianity to condemn the African cultural practices without due regard to the positive aspects of the same. The Africans, together with their ways of life, were considered barbaric, and the colonialists embarked on importing not only their notion of civilisation, but also all other aspects of their system including dispute management mechanisms namely formal courts of law. Civilisation was equated to the rule of law.¹⁴ They were bent on engendering and protecting the perceived exclusive right to property acquired in Africa by the colonialists. Capitalism and imperialism took root at the expense of the African way of doing things. It is arguable that the most damaging impact of imperial rule in Africa was not only economic and political, but was also psychological.¹⁵

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

The Tragedy of the Commons, Science, New Series, Vol. 162, No. 3859. (Dec. 13, 1968), pp. 1243-1248.

Available at <http://links.jstor.org/sici?sici=0036-8075%2819681213%293%3A162%3A3859%3C1243%3ATTOTC%3E2.0.CO%3B2-N>

[Accessed on 17 May 2014].

¹² *Ibid.*

¹³ A. Pagden, "The Struggle for Legitimacy and the Image of Empire in the Atlantic to c. 1700," in *OHBE* Vol. 1, ed. Canny, pp. 37-8 [As quoted in O.U. Ince, *op cit* p. 15].

¹⁴ See M. Mamdan, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press; 1st ed., April 1, 1996).

¹⁵ *Imperialism in Africa*, p. 1,

available at <http://www.ocs.cnyric.org/webpages/phyland/files/imperialism%20in%20africa.pdf> [Accessed on 17 May 2014]. ; See also M. Mamdan, *op.cit.*

'repugnancy clause'. Every customary law practice had to be subjected to this subjective test of repugnancy to morality or justice.¹⁶ It is important to note that the concepts of morality and justice were defined, not according to the African conception of the same, but according to the colonial masters' perception of what was moral or just. Africans had little if anything to say on what they considered morally right or just. African values and ways of doing things were so severely undermined that the Africans began to see themselves as inferior and conditioned to see Westerners and their culture as superior. Africans were expected, as a matter of law, to submit all their disputes to the newly introduced formal legal systems, without any recourse to use of their more familiar ways of addressing any disputes or conflicts. For as long as the Africans viewed everything through the prism of Western concepts, ideals, values and policies, anything African was regarded as either second class or an inferior alternative to the Western ways of doing things. It is not therefore difficult to see why traditional justice systems were regarded as capable of being only alternative to Court system even in the independent Africa, including Kenya. Unfortunately, this has continued to the present African countries' legal systems and particularly Kenya. It is only recently that there have been spirited efforts by a section of Kenyans to ensure legal recognition of what are now known as ADR and TDRM mechanisms. However, much still needs to be done to change people's perceptions instead of waiting for the courts to mandatorily refer people for ADR.

4.0 Place of Traditional Justice Systems in Kenyan Legal System

The Kenyan *Judicature Act*¹⁷ under Section 3(2) outlines the formal sources of law in the country. These are listed as follows: the Constitution; Statutory law or Acts of Parliament, including foreign laws named in the First Schedule of the *Judicature Act*; Subsidiary legislation; the substance of the common law, doctrines of equity, English Statutes of general application, and procedure and practice observed in courts in England until 12 August 1897; and African customary laws, including certain religious laws (Islamic and Hindu). However, section 3(2) of the *Judicature Act* provides that customary law will apply to the extent that it is not repugnant to justice and morality.

¹⁶ See Section 3(2), *Judicature Act*, Cap 8, laws of Kenya and Section 2, *Magistrate's Act*, Cap 10, Laws of Kenya.

¹⁷ Cap 8, Laws of Kenya.

Customary law is applicable in a numerous areas, including: Land held under customary tenure, marriage, divorce, maintenance of children, dowry, matters affecting the status of women, widows, guardianship, custody, adoption, legitimacy of children, and succession.¹⁸ The *Magistrates' Act*¹⁹ provides under section 17 thereof that a magistrate's court may call for and hear evidence of the African customary law applicable to any case before it.²⁰ Section 2 thereof also specifies the areas and matters upon which the court shall be guided by customary law. The Act provides that "claim under customary law" means a claim concerning any of the following matters under African customary law: land held under customary tenure; marriage, divorce, maintenance or dowry; seduction or pregnancy of an unmarried woman or girl; enticement of or adultery with a married woman; matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy; and intestate succession and administration of intestate estates, so far as not governed by any written law. This for a long time relegated customary law affecting its appreciation across other areas. For instance, in the case of *Kimani v Gikanga*²¹ the Court of Appeal for Eastern Africa was dealing with an action involving questions as to title of land and other rights in Kenya. The Respondents became the registered proprietors of land which under land consolidation replaced the land left by Gikanga, their father and the registration was originally done under the *Native Land Tenure Rules*, 1956. The Plaintiff claimed that he had lived and assisted Gikanga in his life, something that made him acquire 30 acres from the estate as well as becoming the *Muramati* (head of family in charge of land) upon the death of Gikanga. The issue was how the Court would establish customary laws as facts before it. The Court held that any person seeking to rely on customary law must prove the same in court. In other words, the Court will not take judicial notice of customary law and agreements as the one portrayed in the foregoing case would not just be recognised.

¹⁸ F.K, Gitonga, *Provisions Of The General Laws*, The International Journal of Not-for-Profit Law, Volume 12, Issue 2, February 2010, International Center for Not-for-Profit Law, available at http://www.icnl.org/research/journal/vol12iss2/special_3.htm [Accessed on 17 May 2014].

¹⁹ Cap 10, Laws of Kenya [Revised Edition 2012 [2010].

²⁰ Section 17, Cap 10.

²¹ Court of Appeal for Eastern Africa, [1965] E.A. 735.

It is noteworthy that the current Constitution of Kenya, 2010²² does not expressly refer to customary law as one of the sources of law in Kenya. This notwithstanding, it is apparent that the Constitution recognises customary law as a source of law in Kenya. It states under Article 2(4) that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. This is in line with the statutes that have made express reference to customary law.²³ Under Article 11, the Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and the nation. The state is mandated with promoting all forms of national and cultural expression through literature and other media. To this extent, customary law is applicable as a source of law in Kenya.

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

Regarding management of disputes and conflicts, the Constitution of Kenya has several provisions seeking to promote ADR as well as TDRM mechanisms in the resolution of conflicts and settlement of disputes. One of the principles of land Policy as provided for under the Constitution is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.²⁴ Further, the National Land Commission is tasked with *inter alia* encouraging the application of traditional dispute resolution mechanisms in land conflicts.²⁵ One of the guiding principles in the exercise of judicial authority by the courts and tribunals is the promotion of alternative forms of dispute resolution including *reconciliation*,

²² Government Printer, 2010, Nairobi.

²³ See Magistrates Act, Cap 10 and Judicature Act, Cap 8.

²⁴ Article 60(1) (g).

²⁵ Article 67(2) (f); See also sec. 5(1) (f), *National Land Commission Act*, No. 5 of 2012.

mediation, arbitration and traditional dispute resolution mechanisms [Emphasis ours], subject to repugnancy to morality or justice.²⁶ It is important to note that even under the current Constitution of Kenya, the repugnancy test for ADR and TDRM has been retained.²⁷ In relation to governance related disputes, Article 189(3) state that in any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation. Clause (4) therefore is to the effect that national legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. Where the two Houses of National Assembly fails to agree on a single version of a Bill, the Constitution allows the Speakers of both Houses to appoint a mediation committee consisting of equal numbers of members of each House to attempt to develop a version of the Bill that both Houses will pass.²⁸

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

5.0 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

²⁶ Article 159(2) (c).

²⁷ Article 159(3). This provision is to the effect that Traditional dispute resolution mechanisms shall not be used in a way that— contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law.

²⁸ See Article 112 and 113.

issues will be determined; the right to know the allegations in the matter and any other information that will be taken into account; the right of the person against whom the allegations have been made to respond to the allegations; the right to an appeal, and the right to an impartial decision which includes the right to impartiality in the investigation and the decision making phases; the right to an absence of bias in the decision maker.²⁹ Lord Hewart, in the English case of *Rex v Sussex Justices; Ex parte McCarthy* rightly held that "... it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."³⁰

Article 159 (1) of the Constitution provides that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and that it is administered without undue regard to procedural technicalities.³¹ It emphasises the right of all persons to have access to justice as guaranteed by Article 48 of the constitution. It also reflects the spirit of Article 27 (1) which provides that "*every person is equal before the law and has the right to equal protection and equal benefit of the law*" [Emphasis ours].³²

Article 159 can be construed as generally encouraging application of both formal court systems and ADR and TDRM in the pursuit of justice.³³ As already noted, ADR comprises several mechanisms which vary in their application and the advantages that go with each of them. Litigation is classified under dispute settlement mechanisms while ADR mechanisms are classified under the conflict resolution ones. Settlement is an agreement over the issue(s) of the conflict which often involves a compromise.³⁴ Litigation usually leaves broken

²⁹*Rex v Sussex Justices; Ex parte McCarthy*, ([1924] 1 KB 256, [1923] All ER Rep 233); See also Articles 47 and 50, Constitution of Kenya, 2010.

³⁰ ([1924] 1 KB 256, [1923] All ER Rep 233).

³¹ *Ibid*, Article 159(2) (d).

³² United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

³³ Article 159(2).

³⁴ D. Bloomfield, *Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland*, *Journal of Peace Research*, vol. 32 no. 2 May 1995, pp. 151-164.

relationships and there is a possibility of the problem recurring in future or even worse still the dissatisfied party may seek to personally administer 'justice' in ways they think was the most appropriate. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed. However, it is noteworthy that in matters of protection of human rights, litigation offers the best channel to ensure protection and enforcement of the same.³⁵ Further, where there is need for an injunction, litigation offers best solution. To this extent, litigation would be useful especially if there is no incentive for preserving relationships.

Resolution of conflicts gives rise to an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.³⁶ A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.³⁷ Resolution is based on the belief that the causes of conflicts in the society are needs of the parties which are non-negotiable and inherent to all human beings.³⁸

The ADR mechanisms are mainly intended for conflict resolution and have, as their major selling point, their attributes of flexibility, low cost, lack of complex

Available at <http://jpr.sagepub.com/content/32/2/151.short> [Accessed on 18 May 2014]; See also generally M. Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, *op cit* pp. 36-41.

³⁵ Article 22(1) of the Constitution of Kenya 2010 provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

³⁶ K. Cloke, *The Culture of Mediation: Settlement vs. Resolution*, The Conflict Resolution Information Source, Version IV, December 2005, *op.cit*; See also K. Muigua, 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010', p. 7,

available at <http://www.chuitech.com/kmco/attachments/article/111/Paper%FINAL.pdf> [Accessed on 17 May 2014].

³⁷M. Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006), *op.cit.* p. 42; See generally D. Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland," *op. cit.*, p. 153.

³⁸ J. Bercovitch, *Mediation Success or Failure: A Search for the Elusive Criteria*, *Cardozo Journal of Conflict Resolution*, Vol.7.289, p.296

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.³⁹

Conflict resolution mechanisms are usually preferred to settlement for their effectiveness in addressing the root causes of the conflict and negate the need for future conflict or conflict management.⁴⁰ They are suitable for certain types of conflicts especially those that involve intense emotions but at the same time require preservation of relationships. In such situations, settlement mechanisms such as litigation are inappropriate. It is only resolution mechanisms such as ADR that are capable of addressing such instances of conflicts. This therefore begs the question whether ADR would be an alternative to litigation in such a scenario or the more appropriate means of resolving the conflict. ADR is arguably more 'appropriate' than alternative in the management of some of the everyday disputes among the people of Kenya. Courts and the law makers in general seem to have recognised this fact. For instance, Statutes and courts have required disputants to employ ADR mechanisms in handling their disputes before going to courts. This is evident in provisions of various statutes.⁴¹ Indeed, in some instances, the Courts may send the parties away if it emerges that they did not make any attempts to resolve their disputes or conflicts through ADR mechanisms before approaching the Courts. This court practice takes us back to the question whether ADR mechanisms are really alternative to the Court process or complementary.

While it is to be acknowledged that in some jurisdictions such as the United Kingdom ADR is purely alternative to litigation, ADR mechanisms form an important part of conflict management mechanisms in Kenya and Africa in general. The actualization of Article 48 of the Constitution on the right of access to justice by all in Kenya requires various instruments and institutions. These include both formal and informal mechanisms of conflict management and access to justice. Article 48 is to the effect that the State shall ensure access to

³⁹ K. Muigua, *Resolving Conflicts through Mediation in Kenya*, p. 11, (Nairobi: Glenwood Publishers, 2012).

⁴⁰ *Ibid*

⁴¹ Such as *Environment and Land Court Act, 2011, National Land Commission Act, 2012 and Labour Relations Act, 2007.*

justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Despite these provisions, access to justice especially through litigation is usually hampered by some challenges as highlighted in the previous section.

To the ordinary *mwananchi*⁴² negotiation is usually the first port of call when there is a dispute. Negotiation, as an informal process of conflict resolution, offers parties maximum control over the process to identify and discuss their issues enabling them to reach a mutually acceptable solution without the help of a third party. Its focus is on common interests of the parties rather than their relative power or position. It is associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control, addressing root causes of the conflict, non-coerciveness and enduring outcomes. This makes it very applicable to everyday life disputes which would otherwise be aggravated by any attempts to litigate them. If parties in a negotiation hit a deadlock, then they invite a third party of choice to help them resolve their matter and this becomes mediation.⁴³ Mediation is associated with same advantages as negotiation. However, it suffers from its non-binding nature so that where compliance is required, one would have to resort to courts to obtain the same since mediation does not have enforcement mechanism but relies on parties' goodwill. Conciliation on the other hand involves a third party, called a conciliator, who restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions. Conciliation is useful in reducing tension, opening channels of communication and facilitating continued negotiations. It therefore follows that where there are already severed relationships which need restoration, conciliation would work best instead of litigation or any other mechanism such as arbitration which would exacerbate the situation. For instance, transitional justice is defined as 'that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'.⁴⁴ It entails two aspects of justice namely *retribution*

⁴² Mwananchi is the Swahili word for "Citizen" used to connote the people of Kenya.

⁴³ M. Mwangi, *op cit* p. 115.

⁴⁴ Kenya Human Rights Commission, (2010) *Transitional Justice in Kenya: A Toolkit for Training and Engagement*, p. 14. Available at www.khrc.or.ke/.../7-transitional-justic... [Accessed on 19 May 2014].

(punishment and corrective action for wrongdoings) and *restoration* (emphasizing the construction of relationships between the individuals and communities).⁴⁵ While formal justice system may effectively achieve retributive justice, restorative justice may arguably only be effectively achieved through ADR/TDRM mechanisms.

Traditional conflict resolution processes are said to be part of a well-structured, time-proven social system geared towards reconciliation, maintenance and improvement of social relationships since they are deeply rooted in the customs and traditions of peoples of Africa; they strive to restore a balance, to settle conflict and eliminate disputes.⁴⁶ Indeed, it is contended that conflicts must be understood in their social context, involving values and beliefs, fears and suspicions, interests and needs, attitudes and actions, relationships and networks in order to ensure that their root causes are addressed.⁴⁷ This is not always possible or necessary in all scenarios. However, it should be appreciated that where this is the case, then the most appropriate dispute management mechanisms should be used. In this case, it would be ADR as opposed to the formal justice system.⁴⁸ For example, it has been documented in a study of non-formal dispute resolution processes in a slum area in Nairobi that these processes operate in a wider socio-economic context and are integrated into the social and economic fabric of life. Thus, for instance, the mandate of the village committees extend beyond hearing disputes to other important aspects of community life such as security, environmental management, health and civic education.⁴⁹ This is a clear indication that the formal and informal justice systems are not antagonistic but are indeed capable of complimenting each other in promoting access to justice for all not only in Kenya but also across Africa.⁵⁰

From the foregoing, it is apparent that it is hard to dismiss ADR/TDRM mechanisms as merely alternative to litigation. They cannot be dispensed with

⁴⁵ *Ibid*

⁴⁶ K. Osei-Hwedie and J.R. Morena, Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, p.33, University of Botswana.

⁴⁷ *Ibid*, pp. 35-36.

⁴⁸ ADR mechanisms are also at times referred to as Alternative Justice Systems (AJS).

⁴⁹ W.W. Kamau, Law, Family and Dispute Resolution: Negotiating Justice in a Plural Legal Context, PhD Dissertation, York University, 2007, p. 5.

⁵⁰ Informal justice systems are also referred to as Alternative Justice Systems by some scholars.

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.

5.0 Conclusion

With adequate legal and policy framework on the application of ADR in Kenya, it is possible to create awareness on ADR mechanisms for everyone, including the poor who may be aware of their right of access to justice but with no means of realizing the same, as well as consolidating and harmonizing the various statutes relating to ADR including the Arbitration Act with the constitution to ensure access to justice by all becomes a reality. There is also a need for continued sensitization of the key players in the Government, the judiciary, legal practitioners, business community and the public at large so as to support ADR mechanisms in all possible aspects. It is apparent that ADR has not lost its relevance in the society and what it requires is mainstreaming without necessarily formalizing it in a way that takes away all the benefits that come with its application to a dispute. The answer to the question whether ADR is really alternative is not a straightforward one. However, it is clear that ADR can play a key role in the realisation of the right to access justice in society, which is a human right. If justice can be effectively realised through ADR, it can no longer be viewed solely as alternative. The time to debate the question whether ADR is really alternative is now ripe.

Resolving Multicultural Conflicts through Negotiation, Diplomacy and Mediation in Africa

Abstract

This paper critically examines the suitability of negotiation, diplomacy, and mediation in resolving multicultural conflicts in Africa. The paper posits that negotiation, diplomacy, and mediation are ideal processes in managing multicultural conflicts in Africa. It examines the relationships between culture and conflicts and argues that culture plays a pivotal role in conflict management. The paper discusses the influence of culture on conflicts in Africa and the nature of multicultural conflicts in the continent. In addition, the paper explores ways through which negotiation, diplomacy, and mediation can be effectively harnessed towards resolving multicultural conflicts in Africa.

1.0 Introduction

Negotiation, diplomacy, and mediation are key conflict management strategies. Negotiation involves direct discussions between parties to find a mutually acceptable solution¹. It has been described as an informal process that involves parties to a conflict meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party². Negotiation is one of the most fundamental methods of managing conflicts which offers parties maximum control over the process and outcome³. Negotiation can take place informally or through formal diplomatic channels⁴. According to the United Nations, negotiation is a way of coping with disagreement, with varying views and with different objectives through agreement⁵.

¹ Oba. A., 'Comprehensive Guide to Conflict Resolution: Traditional and Modern Methods in East Africa' Available at <https://remedialcorner.com/blog/comprehensive-guide-to-conflict-resolution-traditional-and-modern-methods-in-east-africa/> (Accessed on 01/10/2024)

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

³ Ibid

⁴ Oba. A., 'Comprehensive Guide to Conflict Resolution: Traditional and Modern Methods in East Africa' Op Cit

⁵ United Nations., 'Fundamental of Negotiation' Available at <https://www.un.org/en/model-united-nations/fundamentals-negotiation> (Accessed on 01/10/2024)

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Diplomacy has been defined as the art and practice of conducting negotiations and maintaining relationships among nations in order to address common concerns, settle disputes, and promote mutual interests without resorting to violence or coercion⁶. Diplomacy has also been described as the art and science of maintaining peaceful relationships between nations, groups, or individuals⁷. Diplomacy is the cornerstone of international relations providing a suitable and peaceful approach for nations to engage with one another⁸. Diplomacy provides critical strategies utilised by nations to navigate complex issues in the global landscape, often involving negotiations, alliances, and policies aimed at achieving national interests while maintaining international peace and security⁹. Diplomacy fosters friendly relations among nations through communication, negotiation, and cooperation therefore enabling them to resolve conflicts, establish economic partnerships, and promote cultural exchange¹⁰. Diplomacy therefore plays a pivotal role in shaping the world's geopolitical dynamics¹¹. It has been noted that diplomacy is not only about negotiations and treaties among nations but it also involves building trust and understanding between different cultures and governments¹².

Mediation is a process of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussions and the flow of information, and thus aiding in the process of reaching an agreement¹³. It has also been defined as a constructive

⁶ The Role of Diplomacy in Resolving Global Conflicts., Available at <https://medium.com/@tnnpub/the-role-of-diplomacy-in-resolving-global-conflicts-d3285871a2b9#:~:text=Preventive%20diplomacy%20is%20a%20vital,maintain%20international%20peace%20and%20security> (Accessed on 01/10/2024)

⁷ Diplomacy., Available at <https://education.nationalgeographic.org/resource/diplomacy/> (Accessed on 01/10/2024)

⁸ The Role of Diplomacy in Resolving Global Conflicts., Op Cit

⁹ Diplomatic Strategies., Available at <https://www.studysmarter.co.uk/explanations/spanish/spanish-social-issues/diplomatic-strategies/#:~:text=Diplomatic%20strategies%20are%20critical%20tools,interests%20while%20maintaining%20international%20peace> (Accessed on 01/10/2024)

¹⁰ Ibid

¹¹ Ibid

¹² The Role of Diplomacy in Resolving Global Conflicts., Op Cit

¹³ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition., 2017

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conversation between people in conflict facilitated by a neutral third person known as a mediator¹⁴. The United Nations defines mediation as a process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreements¹⁵. It further notes that the premise of mediation is that in the right environment, parties to a conflict can improve their relationships and move towards cooperation¹⁶. Mediation is usually a continuation of the negotiation process since it arises where parties to a conflict have attempted negotiations, but have reached a deadlock¹⁷. They therefore involve a neutral third party known as a mediator who facilitates communication, promotes understanding, focuses the parties on their interests, and uses creative problem-solving to enable the parties to reach their own agreement¹⁸. It has been noted that mediation provides participants an opportunity to collaboratively design creative solutions to conflict and repair or even strengthen their relationships¹⁹.

This paper critically examines the suitability of negotiation, diplomacy, and mediation in resolving multicultural conflicts in Africa. The paper posits that negotiation, diplomacy, and mediation are ideal processes in managing multicultural conflicts in Africa. It examines the relationships between culture and conflicts and argues that culture plays a pivotal role in conflict management. The paper discusses the influence of culture on conflicts in Africa and the nature of multicultural conflicts in the continent. In addition, the paper explores ways through which negotiation, diplomacy, and mediation can be effectively harnessed towards resolving multicultural conflicts in Africa.

¹⁴ What is Mediation?., Available at <https://www.nyc.gov/site/oath/conflict-resolution/what-is-mediation.page#:~:text=Mediation%20is%20a%20constructive%20conversation,conflict%20and%20repair%20professional%20relationships> (Accessed on 01/10/2024)

¹⁵ United Nations., 'Guidance for Effective Mediation' Available at https://unrcca.unmissions.org/sites/default/files/dpa_msu_guidance_english_web.pdf (Accessed on 01/10/2024)

¹⁶ Ibid

¹⁷ Bercovitch. J., 'Mediation Success or Failure: A Search for the Elusive Criteria.' *Cardozo Journal of Conflict Resolution*, Vol. 7, p 289

¹⁸ Ibid

¹⁹ What is Mediation?., Op Cit

2.0 Conflict Management and Culture

The term culture has been defined as a set of attitudes, values, beliefs, and behaviors shared by a group of people, but different for each individual, communicated from one generation to the next²⁰. Culture can also be viewed as a system of shared symbols (including language) that create meaning and a sense of belonging²¹. It has also been defined as a complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by human beings as members of a society²². The concept of culture can also be understood as the collective programming of the mind that distinguishes the members of one group or category of people from another²³.

Culture is an essential component of conflicts and the conflict management process²⁴. For example, culture shapes how human beings view the world²⁵. It affects perceptions, behaviour, and expectations²⁶. Differences in culture can be seen in instances such as how a particular society handles social inequalities resulting from wealth, fame and power; how individuals feel independent compared to being interdependent in a given society; the division of roles between men and women in a society; and whether a society is forward-

²⁰ Spencer-Oatey. H., 'What is Culture?.' Available at https://warwick.ac.uk/fac/soc/al/globalpadrip/openhouse/interculturalskills_old/core_concept_compilations/global_pad_-_what_is_culture.pdf (Accessed on 01/10/2024)

²¹ LeBaron. Michelle., *'Bridging Cultural Conflicts: A New Approach for a Changing World'*, Jossey-Bass, San Francisco, CA, 2003

²² Spencer-Oatey. H., 'What is Culture?.' Op Cit

²³ Sher. M., 'Embracing Cultural Diversity in Mediation' Available at <https://mediate.com/embracing-cultural-diversity-in-mediation/#:~:text=Cultural%20differences%20often%20result%20in,thereby%20hindering%20the%20mediation%20process> (Accessed on 01/10/2024)

²⁴ LeBaron. M., 'Culture and Conflict.' Available at https://www.beyondintractability.org/essay/culture_conflict (Accessed on 01/10/2024)

²⁵ Abala. A., 'Bridging Cultures in Mediation: Insights from a Multicultural Mediation Panel' Available at <https://mediationblog.kluwerarbitration.com/2024/07/15/bridging-cultures-in-mediation-insights-from-a-multicultural-mediation-panel/#:~:text=The%20panel%20shared%20that%20mediators,also%20go%20beyond%20cultural%20nuances> (Accessed on 01/10/2024)

²⁶ Ibid

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looking with long term objectives or focuses on the present²⁷. These differences in culture shape our understandings of relationships, and of how to deal with the conflict and harmony that are always present whenever two or more people interact²⁸. It has been noted that when individuals from different cultures interact with each other, misunderstandings and miscommunications are likely to arise often resulting in conflict development or conflict escalation²⁹.

It has been asserted that all conflicts entail interpersonal interactions that occur in the context of cultures³⁰. Culture shapes not only the possibilities for conflict resolution or transformation, but also the naming, interpretation, enactment and course of conflicts³¹. Culture therefore shapes our understanding of conflict by affecting the ways we name, frame, blame, and attempt to tame conflicts³². In addition, it has been noted that whether a conflict exists at all is a question of culture³³. Due to differences in attitudes, belief systems, religious practices, language, social set ups and economic practices among different cultures, conflicts may take different forms in each culture³⁴. Therefore, conflict may be emphasized in one culture and ignored in another³⁵.

Culture is therefore a key component of conflict and conflict management approaches. Differences in culture are often the grounds for conflict, and conflict resolution is largely determined by how different cultural groups adapt to each other³⁶. At an intragroup level, culture shapes the way

²⁷ Ibid

²⁸ LeBaron. M., 'Culture and Conflict.' Op Cit

²⁹ LeBaron. Michelle., 'Bridging Cultural Conflicts: A New Approach for a Changing World' Op Cit

³⁰ Weiss, A., 'Power and Difference: An Extended Model for the Conflict Potentials in the Negotiation of Intercultural Conflicts'. 2000, Berlin: Berghof Institute. Available at <http://www.berghof-center.org/> (Accessed on 01/10/2024)

³¹ LeBaron. M., 'Transforming Cultural Conflict in an Age of Complexity' Available at <https://researchers.allard.ubc.ca/ws/portalfiles/portal/39713135/Transforming%20Cultural%20Conflict%20in%20an%20Age%20of%20Complexity.pdf> (Accessed on 01/10/2024)

³² LeBaron. M., 'Culture and Conflict.' Op Cit

³³ Ibid

³⁴ Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579-603

³⁵ Ibid

³⁶ Worchel. S., 'Culture's Role in Conflict and Conflict Management: Some Suggestions, Many Questions' Available at

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individuals perceive a conflict and respond to it³⁷. Culture is thus inextricably linked to conflict. A person's cultural background therefore heavily influences every aspect of the conflict process, ranging from the goals that are considered incompatible, why they are seen as so, what one chooses to do about incompatibility of goals, and whether the outcome is considered to be satisfactory or not³⁸. In addition, the nature of conflict itself varies across cultures; where it may be emphasized in one culture, it may be ignored in another³⁹. Therefore, whenever disagreements arise in families, organizations, or communities, culture is always present, shaping perceptions, attitudes, behaviors, and outcomes⁴⁰.

An adequate response to conflict thus requires an understanding of the cultural dynamics in place⁴¹. It has been noted that culture hugely shapes conflict resolution styles, with individuals in a more supportive and cooperative culture employing more collaborative approaches to conflict resolution⁴². Some cultures especially in Western societies focus on the individual rather than the collective as the unit of social organization and public policy⁴³. Conflict management in such cultures often takes the form of confrontational approaches employing adversarial techniques due to focus on individuals' rights and interests⁴⁴. Other societies especially those in Africa operate in a cultural and political landscape that gives precedence to communal rights as

<https://www.sciencedirect.com/science/article/abs/pii/S0147176705001343#:~:text=These%20cultural%20differences%20are%20the,conflict%20and%20respond%20to%20it.> (Accessed on 01/10/2024)

³⁷ Ibid

³⁸ Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' Op Cit

³⁹ Ibid

⁴⁰ LeBaron. M., 'Culture and Conflict.' Op Cit

⁴¹ Ibid

⁴² Mohammed. U., White. G., & Prabhakar. G., 'Culture and Conflict Management Style of International Project Managers' *International Journal of Business and Management.*, Volume 3, No. 5 (2009)

⁴³ Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Available at https://www.researchgate.net/publication/228182138_Alternative_Dispute_Resolution_ADR_in_SubSaharan_Africa_The_Role_of_Customary_Systems_of_Conflict_Resolution_CSCR (Accessed on 01/10/2024)

⁴⁴ Ibid

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opposed to individual rights and interests⁴⁵. In such cultures, conflict management usually takes the form of customary conflict resolution which focuses on restorative justice in order to build lasting relationships among conflicting parties towards collective peace and harmony in the society⁴⁶.

It is therefore imperative to understand and recognize the influence of culture in conflicts for effective conflict management.

3.0 Resolving Multicultural Conflicts through Negotiation, Diplomacy and Mediation in Africa

Multicultural conflicts arise due to differences in values, norms, and behavior of people from different cultures⁴⁷. For example, when a person from a particular culture acts according to the values and norms of his or her culture; another person holding a different worldview might interpret his or her behavior from an opposite standpoint⁴⁸. Such a situation creates misunderstanding that can lead to conflicts. Multicultural conflicts are inevitable in a world of diversity and interconnectedness⁴⁹. Effective management of multicultural conflicts requires an understanding of cultural differences and building bridges across different cultures⁵⁰.

Africa has a rich history and culture which is diverse and varies not only from one country to another but also within regions and countries⁵¹. The continent is inhabited by various ethnic groups with their different languages, modes of dressing, eating, dancing and even greeting habits⁵². However, it has been

⁴⁵ Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' Op Cit

⁴⁶ Ibid

⁴⁷ Williams. A., 'Resolving Conflict in a Multicultural Environment' *MCS Conciliation Quarterly.*, 1994, pp 2-6

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' Op Cit

⁵¹ Africa Union., 'African Culture: Versatile Approach to Realize the Africa we Want.' Available at <https://www.africanunion-un.org/post/african-culture-versatile-approach-to-realize-the-africa-wewant> (Accessed on 02/10/2024)

⁵² Idang. G., 'African Culture and Values' Available at https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1561-40182015000200006 (Accessed on 02/10/2024)

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noted that despite the presence of diverse cultures in the continent, Africans do share some dominant traits in their belief systems and have similar values that mark them out from the rest of the world⁵³. Before colonialism, most African societies, if not all, were living communally and were organized along clan, village, tribal or ethnic lines⁵⁴. As a result, the spirit of collectivism permeates almost all African societies in that they live an inclusive as against exclusive lifestyle apparent in the western world⁵⁵.

Multicultural conflicts are a common phenomenon in Africa. For example, ethnic clashes are prevalent in the continent related to land ownership, resource scarcity, economic disparities, political exclusion, religious differences, and lack of effective conflict resolution mechanisms among other factors⁵⁶. It has been noted that many postcolonial African states have experienced violent intra state conflicts including those involving different cultural and ethnic groups prompting the quest for viable approaches to conflict resolution and peace-building⁵⁷. The desire by certain ethnic and cultural groups to control power and resources at the expense of others as has been witnessed in many African countries has fueled civil wars, armed insurrections, ethnic conflicts, genocide, xenophobia, and intracommunity and domestic conflict prevalent in the continent especially in countries that experienced prolonged foreign domination⁵⁸.

⁵³ Ibid

⁵⁴ Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elderssuccesseschallenges-and-opportunities-1.pdf> (Accessed on 02/10/2024)

⁵⁵ Oladipupo. S., 'Rethinking the African Spirit of Collectivism as a Tool for African Empowerment.' *Human Discourse.*, Volume 2, No. 1 (2022)

⁵⁶ Oba. A., 'Comprehensive Guide to Conflict Resolution: Traditional and Modern Methods in East Africa' Available at <https://remedialcorner.com/blog/comprehensive-guide-to-conflict-resolution-traditional-and-modern-methods-in-east-africa/> (Accessed on 02/10/2024)

⁵⁷ Akinola. A., & Uzodike. N., 'Ubuntu and the Quest for Conflict Resolution in Africa' Available at https://www.researchgate.net/publication/320693169_Ubuntu_and_the_Quest_for_Conflict_Resolution_in_Africa (Accessed on 02/10/2024)

⁵⁸ Ibid

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The prevalence of conflicts including multicultural conflicts is major threat to peace and development in Africa. Conflicts in Africa cause not only immense human suffering but also substantial economic losses⁵⁹. They place huge burdens on the social development of countries, by decreasing revenues, increasing defense expenditure, and diverting funds away from social and development initiatives⁶⁰. Africa continues to face a series of complex multi-layered political challenges including humanitarian crises, ethnic, political, religious, or territorial tensions, and climate shocks terrorism, and decades of armed conflict at both inter and intra state levels⁶¹. This often leads to displacements, loss of lives, destruction of infrastructure, social disruption, public health crises, collective and individual physical, and psychological trauma⁶². In order to address these challenges including the presence of multicultural conflicts and ethnic clashes in Africa, comprehensive approaches are needed, including effective conflict resolution mechanisms, good governance, economic development, equitable resource distribution, and efforts to promote interethnic dialogue and understanding.⁶³ Negotiation, diplomacy, and mediation are effective techniques in resolving multicultural conflicts in Africa.

African societies have for many centuries had in place institutional mechanisms as well as cultural sources to uphold the values of peace, tolerance, solidarity and respect for, and of, one another⁶⁴. It has been noted that these institutions and structures were responsible for peace education,

⁵⁹ United Nations Economic Commission for Africa., 'Socioeconomic Impact of Conflict in Africa' Available at <https://repository.uneca.org/handle/10855/50100#:~:text=Conflict%20causes%20not%20only%20immense,from%20social%20and%20development%20initiatives> (Accessed on 02/10/2024)

⁶⁰ Ibid

⁶¹ African Union., 'The Impact of Humanitarian Crises and Armed Conflict on Girls' and Women's Education in Africa' Available at <https://cieffa.au.int/en/blog/impact-humanitarian-crisis-and-armed-conflict-gwe-africa> (Accessed on 02/10/2024)

⁶² Ibid

⁶³ Oba. A., 'Comprehensive Guide to Conflict Resolution: Traditional and Modern Methods in East Africa' Op Cit

⁶⁴ Traditional Methods of Conflict Resolution., Available at <https://www.accord.org.za/conflict-trends/traditional-methods-of-conflict-resolution/#:~:text=The%20major%20sources%20of%20conflict,customs%20and%20traditions%2C%20were%20upheld> (Accessed on 02/10/2024)

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as an important aspect of leading a peaceful and prosperous life⁷⁴. Since *ubuntu* is based on culture, it is well fitted in the lives of the people of Africa and influenced all spheres of life including the resolution of conflicts⁷⁵. At the core of *ubuntu*, is the understanding that the collective, whether a community, society, or humanity, takes precedence over the individual⁷⁶. In the field of conflict management, *ubuntu* seeks to deter vengeance, confrontation and retribution by fostering dignity, compassion, humaneness, harmony and reconciliation⁷⁷. *Ubuntu* is therefore a key philosophy in addressing intragroup conflicts and enhancing peacebuilding efforts⁷⁸. It emphasises cooperation with one another for the common good as opposed to competition that could lead to grave instability within any community⁷⁹.

Negotiation, diplomacy, and mediation align with the African philosophy of *ubuntu* and can therefore be effectively harnessed towards resolving multicultural conflicts in Africa. These mechanisms focus on collaboration and cooperation among parties and are therefore suitable in preserving relationships, building trust, and promoting long term and sustainable solutions⁸⁰. For example, negotiation can promote inter-ethnic dialogue and understanding among parties from different cultures therefore mitigating ethnic and multicultural conflicts⁸¹. Negotiation can encourage open and

⁷⁴ Akinola. A., & Uzodike. N., 'Ubuntu and the Quest for Conflict Resolution in Africa' Op Cit

⁷⁵ Ibid

⁷⁶ Kurbalija. J., 'Ubuntu Ethos: African Insights for Ethical AI' Available at <https://www.diplomacy.edu/blog/ubuntu-ethos-african-insights-for-ethical-ai/> (Accessed on 02/10/2024)

⁷⁷ Mugumbate. J., & Nyanguru. A., 'Exploring African Philosophy: The Value of Ubuntu in Social Work.' Op Cit

⁷⁸ Johanses. L., 'African Solutions to African Intergroup Conflicts: Ubuntu and Humiliation' Available at <https://www.humiliationstudies.org/documents/JohansenProjectDescriptionUbuntu.pdf> (Accessed on 02/10/2024)

⁷⁹ Ibid

⁸⁰ Miroslavov. M., 'Mastering the Collaborating Conflict Style In 2024' Available at <https://www.officernd.com/blog/collaboratingconflictstyle/#:~:text=It's%20one%20of%20the%20strategies,their%20underlying%20needs%20and%20interests> (Accessed on 02/10/2024)

⁸¹ Oba. A., 'Comprehensive Guide to Conflict Resolution: Traditional and Modern Methods in East Africa' Op Cit

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respectful dialogue among different ethnic and cultural groups in Africa to address grievances, misunderstandings, and historical tensions⁸².

In addition, diplomacy can play a key role in resolving multicultural conflicts. For example, preventive diplomacy has been identified as a key approach that focuses on early intervention to address emerging conflicts and tensions before they escalate into violent crises⁸³. Preventive diplomacy has the capacity to prevent the loss of lives, minimize human suffering, and maintain international and regional peace and security⁸⁴. It involves measures aimed at preventing existing disputes from escalating into conflicts and at preventing conflicts, if they occur, from spreading⁸⁵. Through preventive diplomacy, it is possible to address the root causes of conflicts therefore effectively resolving such conflicts and preventing them from escalating⁸⁶. Diplomacy can therefore be effectively harnessed to resolve multicultural conflicts in Africa through proactive engagement involving negotiation, and mediation towards identifying and addressing the root causes of conflicts, fostering trust among parties, and mitigating the risk of conflicts spiraling out of control⁸⁷.

Mediation is also an ideal process towards resolving multicultural conflicts in Africa. Mediation is a vital technique in conflict resolution, serving as a key tool for facilitating dialogue and negotiation between conflicting parties⁸⁸. Mediation fosters understanding and empathy among parties to a conflict⁸⁹. By encouraging active listening and promoting open and respectful communication, mediation helps break down barriers including cultural

⁸² Ibid

⁸³ The Role of Diplomacy in Resolving Global Conflicts., Op Cit

⁸⁴ Ibid

⁸⁵ Preventative Diplomacy., Available at <https://www.exteriores.gob.es/en/PoliticaExterior/Paginas/DiplomaciaPreventiva.aspx#:~:text=Preventive%20diplomacy%20includes%20all%20measures,if%20they%20occur%2C%20from%20spreading> (Accessed on 02/10/2024)

⁸⁶ Ibid

⁸⁷ The Role of Diplomacy in Resolving Global Conflicts., Op Cit

⁸⁸ Saaida. M., 'Peace Studies: Conflict Resolution and Mediation Strategies' Available at

https://www.researchgate.net/publication/372289839_Peace_Studies_Conflict_Resolution_and_Mediation_Strategies (Accessed on 02/10/2024)

⁸⁹ Ibid

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barriers and build trust among the parties⁹⁰. Mediation also has the ability to preserve relationships and provides parties with a wide range of solutions than those available through litigation⁹¹. In multicultural conflicts, mediation can enhance participation and collaboration among all stakeholders towards identifying and addressing the root causes of conflicts through creative and sustainable outcomes⁹². Mediation has been identified as a common resolution tool used in traditional peacebuilding in Africa⁹³. It can therefore be effectively harnessed in resolving multicultural conflicts by facilitating dialogue, collaboration and compromise⁹⁴.

Negotiation, diplomacy, and mediation are therefore ideal processes in resolving multicultural conflicts in Africa.

4.0 Conclusion

Negotiation, diplomacy, and mediation are ideal processes in resolving multicultural conflicts in Africa. These techniques have been practices in Africa for many centuries and fit well within the traditional concepts of justice in Africa and its core values of harmony and reconciliation⁹⁵. Negotiation, diplomacy, and mediation can foster effective resolution of multicultural conflicts in Africa by bridging the cultural divide and fostering the African philosophy of *ubuntu* and its core principles including compassion, humaneness, harmony and reconciliation⁹⁶. It is therefore imperative to embrace and strengthen negotiation, diplomacy, and mediation for effective management of multicultural conflicts in Africa. This goal can be realized by utilizing negotiation, diplomacy, and mediation to foster peaceful coexistence within and among communities, respect, harmony, and reconciliation as

⁹⁰ Ibid

⁹¹ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

⁹² Saaïda. M., 'Peace Studies: Conflict Resolution and Mediation Strategies' Op Cit

⁹³ Ajayi. AT., & Buhari. LO., 'Methods of Conflict Resolution in African Traditional Society' Available at https://www.researchgate.net/publication/290233437_Methods_of_Conflict_Resolution_in_African_Traditional_Society (Accessed on 02/10/2024)

⁹⁴ Ibid

⁹⁵ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

⁹⁶ Mugumbate. J., & Nyanguru. A., 'Exploring African Philosophy: The Value of Ubuntu in Social Work.' Op Cit

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envisaged under the African philosophy of *ubuntu*⁹⁷. These approaches have deep roots among African communities, which still have a strong belief in the principles of common humanity, reciprocity and respect for one another and can therefore be effectively utilized in addressing multicultural conflicts⁹⁸. It is therefore necessary to strengthen traditional institutions of conflict management in Africa including elders and community organizations which play a pivotal role in resolving disputes at an interpersonal, community, and inter community level through negotiation, diplomacy, and mediation among other techniques⁹⁹.

It is also necessary to ensure that negotiation, diplomacy, and mediation techniques are appropriate and responsive in the context of multicultural conflicts. For example, in negotiation, it is imperative for parties to approach the negotiation process with an open mind, respect each other's cultural views and opinions, use interpreters to manage linguistic and cultural differences, and embrace compromise¹⁰⁰. It is also important to foster good relations among different communities and culture and strengthen the use of preventive tools in order to effectively utilise diplomacy in managing multicultural conflicts¹⁰¹. In addition, it is imperative to ensure that mediation processes are culturally sensitive and responsive¹⁰². It has been noted that in mediation processes, culture can affect an individual's negotiation style, whether it be collaborative or competitive¹⁰³. In order to bridge the cultural divide in mediation, mediators should foster open communication among the parties and create an atmosphere of trust, where despite cultural differences between parties, the

⁹⁷ Traditional Methods of Conflict Resolution., Op Cit

⁹⁸ Ibid

⁹⁹ Oba. A., 'Comprehensive Guide to Conflict Resolution: Traditional and Modern Methods in East Africa' Op Cit

¹⁰⁰ Guide to Culturally Appropriate Communication Techniques., Available at <https://au.indeed.com/career-advice/career-development/culturally-appropriate-communication-techniques#:~:text=Many%20strategies%20for%20cross%2Dcultural,aware%20of%20appropriate%20body%20language> (Accessed on 02/10/2024)

¹⁰¹ The Role of Diplomacy in Resolving Global Conflicts., Op Cit

¹⁰² Abala. A., 'Bridging Cultures in Mediation: Insights from a Multicultural Mediation Panel' Op Cit

¹⁰³ Ibid

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process can still lead to win-win outcomes¹⁰⁴. Embracing cultural diversity in mediation is therefore important in resolving multicultural conflicts¹⁰⁵.

Resolving multicultural conflicts through negotiation, diplomacy, and mediation is therefore possible for peace and prosperity.

¹⁰⁴ Ibid

¹⁰⁵ Sher. M., 'Embracing Cultural Diversity in Mediation' Op Cit

Resolving Climate Change Conflicts Globally through Mediation

Abstract

Climate change is a major threat to development both globally and in Africa. The United Nations 2030 Agenda for Sustainable Development acknowledges that climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve Sustainable Development. Climate change is also causing and fueling conflicts at all levels. These conflicts hinder effective climate action and the achievement of climate goals at the global, regional, and national levels. Effective management of climate change conflicts is therefore needed in order to strengthen the response towards climate change and deliver climate justice. This paper critically explores the need to resolve climate change conflicts globally through mediation. The paper posits that mediation is a suitable mechanism for effective management of climate change conflicts globally. The paper examines the nature and causes of climate change conflicts globally. It also analyses the key features of mediation that makes it an ideal process for effective management of climate change conflicts globally. The paper further examines some of the challenges in utilizing mediation in resolving climate change conflicts globally. It also proposes measures towards harnessing mediation for appropriate management of climate change conflicts globally.

1.0 Introduction

The world is facing a growing and daunting threat to global peace and stability in the form of climate change¹. It has been noted that climate change is no longer an abstract concern or a threat far off in the future². Climate change is a real and present danger to the lives of billions of people today and to everyone on the planet in the foreseeable future³. It has been described as the most defining challenge of our time⁴. Climate change is a major global concern that is affecting both developed and developing countries in their efforts towards Sustainable Development⁵.

¹ Grzybowski. A., & Hunnie. C., 'Mediating Peace with Climate Change' Available at <https://ecopeaceme.org/wp-content/uploads/2022/03/mediating-peace-with-climate-change.pdf> (Accessed on 22/08/2024)

² Ibid

³ Ibid

⁴ United Nations., 'What is Climate Change?' Available at <https://www.un.org/en/climatechange/what-is-climate-change> (Accessed on 22/08/2024)

⁵ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

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The impacts of climate change are being witnessed all over the world. These effects include intense droughts, water scarcity, severe fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity⁶. Climate change is also being manifested in Africa. Despite having the lowest greenhouse gas emissions, Africa faces exponential collateral damage as a result of climate change, posing systemic risks to its economies, infrastructure investments, water and food systems, public health, agriculture, and livelihoods, threatening to undo its modest development gains and slip into higher levels of extreme poverty⁷. Africa stands out disproportionately as the most vulnerable region in the world⁸. Climate change is having a devastating impact on the African continent creating food insecurity, stressing water resources, affecting human health, displacing populations and impeding socio-economic development⁹.

Climate change is therefore a threat to development both globally and in Africa. It is directly contributing to humanitarian emergencies from heatwaves, wildfires, floods, tropical storms and hurricanes which are increasing in scale, frequency and intensity¹⁰. It has been noted that if left unchecked, climate change will undo a lot of the development progress made over the past years and will also provoke mass migrations that will lead to instability and wars¹¹.

Climate change is also causing and fueling conflicts at all levels¹². The environmental effects of climate change, especially the depletion of natural

⁶ United Nations., 'What is Climate Change?' Op Cit

⁷ African Development Bank Group., 'Climate Change in Africa' Available at <https://www.afdb.org/en/cop25/climate-change-africa> (Accessed on 22/08/2024)

⁸ United Nations Environment Programme., 'Responding to Climate Change' Available at <https://www.unep.org/regions/africa/regional-initiatives/responding-climate-change> (Accessed on 22/08/2024)

⁹ Rao. V., & Yadav. P., 'Confronting Climate Change in Africa.' Available at <https://knowledge.insead.edu/responsibility/confronting-climate-change-africa> (Accessed on 22/08/2024)

¹⁰ World Health Organization., 'Climate Change' Available at <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health> (Accessed on 22/08/2024)

¹¹ United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Available at <https://www.un.org/sustainabledevelopment/climate-change/> (Accessed on 22/08/2024)

¹² International Institute for Sustainable Development., 'Climate change and conflict: Lessons from Community Conservancies in Northern Kenya' Available at

resources creates conditions that increase the risk of violent conflict¹³. Climate change conflicts affect the achievement of climate goals at levels¹⁴. Effective management of climate change conflicts is thus crucial in strengthening the response towards climate change and delivering climate justice¹⁵.

This paper critically explores the need to resolve climate change conflicts globally through mediation. The paper posits that mediation is a suitable mechanism for effective management of climate change conflicts globally. The paper examines the nature and causes of climate change conflicts globally. It also analyses the key features of mediation that makes it an ideal process for effective management of climate change conflicts globally. The paper further examines some of the challenges in utilizing mediation in resolving climate change conflicts globally. It also proposes measures towards harnessing mediation for appropriate management of climate change conflicts globally.

2.0 Climate Change and Conflicts

It has been pointed out that the adverse effects of climate change and environmental degradation extend far beyond the environmental realm and increasingly shape human activity by causing and worsening conflicts at the global, regional, national, and local levels¹⁶. For example, rising temperatures, more severe and frequent extreme weather events, and erratic rainfall patterns cause or exacerbate volatile food prices, insecure livelihoods, and large-scale displacement therefore posing the risk of conflicts¹⁷. In addition, sea level rise is an existential threat especially for small island states and raises questions regarding maritime boundaries and national identity¹⁸. The effects of climate

https://www.iisd.org/system/files/publications/climate_change_conflict_kenya.pdf (Accessed on 22/08/2024)

¹³ Ibid

¹⁴ United Nations Environment Programme., 'Climate Litigation More than Doubles in Five Years, now a Key Tool in Delivering Climate Justice' Available at <https://www.unep.org/news-and-stories/pressrelease/climate-litigation-more-doubles-five-years-now-key-tool-delivering> (Accessed on 22/08/2024)

¹⁵ Ibid

¹⁶ United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Available at <https://peacemaker.un.org/sites/peacemaker.un.org/files/DPPAPracticeNote-TheImplicationsofClimateChangeforMediationandPeaceProcesses.pdf> (Accessed on 22/08/2024)

¹⁷ Ibid

¹⁸ Ibid

change can therefore worsen existing fault lines and vulnerabilities, thereby fueling violence, insecurity, and conflicts¹⁹.

The environmental effects of climate change, especially the depletion of natural resources, create conditions that increase the risk of violent conflict²⁰. These impacts including water scarcity, crop failure, food insecurity, migration, and displacement of populations increase the risk of conflict and violence²¹. Climate change has also been identified as a threat multiplier which can increase human security issues such as food and water scarcity while also leading to (violent) conflicts in climate-vulnerable regions and countries²². For example, it has been observed that severe and prolonged drought due to climate change has had a devastating impact upon natural resources, especially pasture and water, in northern Kenya among other arid and semi-arid regions of the world²³. The resulting scarcity of natural resources especially water and pasture fuels competition over these resources resulting in an increased threat of violent conflict as a result of the impacts of climate change²⁴. It has been pointed out that in many of the countries that are most vulnerable to climate change, fragility and conflict have weakened coping mechanisms especially for people and communities who are dependent on natural resources²⁵.

Climate change contributes to increased conflict, but along indirect pathways²⁶. There are a variety of context factors including socioeconomic conditions, governance, and political factors that interact and play a key role in translating climate change into conflict risks²⁷. For example, it has been noted that the quality of governance and strength of institutions are frequently key

¹⁹ Ibid

²⁰ International Institute for Sustainable Development., 'Climate change and conflict: Lessons from Community Conservancies in Northern Kenya' Op Cit

²¹ Froese. R., & Janpeter. S, 'The Nexus of Climate Change, Land Use, and Conflicts' (2019)

²² Ibid

²³ Ibid

²⁴ Ibid

²⁵ United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Op Cit

²⁶ United Nations Climate Change., 'Conflict and Climate' Available at <https://unfccc.int/news/conflict-and-climate#:~:text=The%20evidence%20is%20clear%20that,climate%20change%20into%20conflict%20risks.> (Accessed on 22/08/2024)

²⁷ Ibid

determinants of how and to what extent climate change affects peace and conflict²⁸. The risk of climate change conflicts is most acute in those countries or regions which combine environmental fragility – be it low-lying land vulnerable to flooding or arid land vulnerable to drought – with fragile governance and security systems²⁹. For instance, in water-stressed regions with existing tensions between groups or states over a water source, the impacts of climate change on water resources might increase tensions, particularly in the absence of strong institutional capacity a situation that could spiral into conflicts³⁰. The impacts of climate change are particularly destabilizing in already fragile and disadvantaged regions and communities, such as least developed countries, small island developing states and dryland regions therefore increasing the likelihood of conflicts in such settings³¹. In addition, communities that are dependent on agriculture and coastal livelihoods are disproportionately affected due to climate change, and some indigenous communities also face higher risk when the natural world that underpins local livelihoods deteriorates³². The risk of conflicts in these settings is therefore high.

Due to its economic impacts, climate change can also affect the ability of governments to provide essential services³³. The impacts of climate change disrupts the natural, economic and social systems upon which humanity depends on³⁴. This disruption affects global food security, damage infrastructure and jobs, and harm human health³⁵. Climate change therefore has wide-ranging and serious impacts that represent huge economic and social risks³⁶. It has been noted that these factors increase the potential for conflict, political upheaval and mass displacement³⁷. The inability of governments to

²⁸ United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Op Cit

²⁹ International Institute for Sustainable Development., 'Climate change and conflict: Lessons from Community Conservancies in Northern Kenya' Op Cit

³⁰ United Nations Climate Change., 'Conflict and Climate' Op Cit

³¹ Grzybowski. A., & Hunnie. C., 'Mediating Peace with Climate Change' Op Cit

³² Ibid

³³ United Nations Climate Change., 'Conflict and Climate' Op Cit

³⁴ What are the Impacts of Climate Change?., Available at <https://www.imperial.ac.uk/grantham/publications/climate-change-faqs/what-are-the-impacts-of-climate-change/> (Accessed on 22/08/2024)

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

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meet their social contracts/obligations, to provide the most essential services to citizens as a result of the economic and social impacts of climate change could lead to the emergence of non-state actors such as militant groups as has been witnessed in several parts of the world thus fueling conflicts, insecurity, and instability³⁸.

It is therefore evident that climate change is no longer merely environmental in nature but it also has a direct impact on people, their livelihood and sustenance. There is a definite link between climate change and conflict since climate change compounds existing risk factors such as scarcity of natural resources and rise in geo-political tensions over their sharing of such resources³⁹. Further, since climate change concerns are not restricted to any one nation or continent, there is a huge risk of conflicts spiraling beyond national borders⁴⁰. Natural disasters such as drought, floods or earthquakes often result major migratory movement of climate refugees into the territories of other states resulting in major political and diplomatic concerns globally⁴¹. Climate change is therefore shaping and reshaping relations between and within countries and communities⁴². It increases the likelihood of conflicts and violence, for instance by fueling transboundary or community tensions over diminishing water supplies⁴³.

Climate change conflicts are a major threat to global, regional, and national peace and security⁴⁴. For example, climate change amplifies the risk of violent conflict in Africa threatening peace, security, and stability⁴⁵. Growing

³⁸ United Nations Climate Change., 'Conflict and Climate' Op Cit

³⁹ Thailand Arbitration Center., 'Resolving Climate Conflicts with Mediation: Redesigning Earth's Destiny' Available at <https://thac.or.th/conflicts-with-mediation/> (Accessed on 22/08/2024)

⁴⁰ Ibid

⁴¹ Ibid

⁴² European Institute for Peace., 'Making Peace with the Climate: Conflict Resolution in a Climate - Changing World' Available at <https://www.eip.org/publication/making-peace-with-the-climate-conflict-resolution-in-a-climate-changing-world/> (Accessed on 22/08/2024)

⁴³ Ibid

⁴⁴ United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Op Cit

⁴⁵ Stockholm Environment Institute., 'Climate Change Amplifies the Risks for Violent Conflicts in Africa' Available at <https://www.sei.org/perspectives/climate-change-amplifies-risks-violent-conflicts-africa/> (Accessed on 22/08/2024)

competition over natural resources due to climate change is increasing tensions in Africa which is a continent that is experiencing some of the world's most protracted conflicts⁴⁶. Effective management of climate change conflicts is thus crucial in strengthening the response towards climate change and delivering climate justice⁴⁷.

3.0 Utilizing Mediation to Resolve Climate Change Disputes Globally: Prospects and Challenges

Mediation is among the processes that are referred to as Alternative Dispute Resolution (ADR)⁴⁸. These are a set of processes that are applied to manage disputes without resort to adversarial litigation⁴⁹. ADR techniques may be linked to but function outside formal court litigation processes⁵⁰. They are viewed as ideal in enhancing access to justice due to their advantages which include privacy, confidentiality, flexibility, informality, efficiency, party autonomy and the ability to foster expeditious and cost effective management of disputes⁵¹. In addition, ADR techniques allow parties to come up with creative and collaborative solutions than those available in traditional litigation therefore fostering efficient management of disputes⁵². The role of ADR techniques in managing conflicts globally is recognized under the *Charter of the United Nations*⁵³. The Charter provides that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means* of their own choice (Emphasis added)⁵⁴.

The United Nations defines mediation as a process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a

⁴⁶ Ibid

⁴⁷ United Nations Environment Programme., 'Climate Litigation More than Doubles in Five Years, now a Key Tool in Delivering Climate Justice' Op Cit

⁴⁸ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

⁴⁹ Ibid

⁵⁰ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

⁵¹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁵² JAMS ADR., 'What is ADR? Defining the Alternative Dispute Resolution Spectrum' Available at <https://www.jamsadr.com/adr-spectrum/> (Accessed on 23/08/2024)

⁵³ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

⁵⁴ Ibid, article 33 (1)

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conflict by helping them to develop mutually acceptable agreements⁵⁵. Mediation has also been defined as an informal consensual process in which a neutral intermediary, the mediator, assists the parties in reaching a settlement of their dispute, based on the parties' respective interests⁵⁶. Mediation is usually a continuation of the negotiation process since it arises where parties to a conflict have attempted negotiations, but have reached a deadlock⁵⁷. Parties therefore involve a third party known as a mediator to assist them continue with the negotiations and ultimately break the deadlock⁵⁸. Mediation can therefore be understood as negotiation with the assistance of a neutral third party⁵⁹. A mediator cannot impose a solution upon the parties but rather facilitates communication, promotes understanding, focuses the parties on their interests, and uses creative problem solving to enable the parties to reach their own mutual acceptable agreement⁶⁰.

Mediation is an ideal processes in resolving climate change conflicts globally⁶¹. The attributes of mediation including informality, flexibility, efficiency, confidentiality, party autonomy and the ability to promote expeditious and cost- effective management of disputes makes it an ideal process for resolving a wide range of disputes including those concerning climate change⁶². Mediation also has the ability to preserve relationships and provides parties with a wide range of solutions than those available through litigation⁶³. Due to

⁵⁵ United Nations., 'Basics of Mediation: Concepts and Definitions.' Available at <https://peacemaker.un.org/sites/peacemaker.un.org/files/Basics%20of%20Mediation.pdf> (Accessed on 23/08/2024)

⁵⁶ World Intellectual Property Organization., 'Guide to WIPO Mediation' Available at <https://tind.wipo.int/record/29081?v=pdf> (Accessed on 23/08/2024)

⁵⁷ Bercovitch. J., 'Mediation Success or Failure: A Search for the Elusive Criteria.' *Cardozo Journal of Conflict Resolution*, Vol. 7, p 289

⁵⁸ Ibid

⁵⁹ Knaster. A., 'Resolving Conflicts Over Climate Change Solutions: Making the Case for Mediation' *Pepperdine Dispute Resolution Law Journal*, Volume 10, No. 3 (2010)

⁶⁰ Bercovitch. J., 'Mediation Success or Failure: A Search for the Elusive Criteria.' Op Cit

⁶¹ United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Op Cit

⁶² Muigua. K., 'Resolving Natural Resource-Based Conflicts in Africa through Negotiation and Mediation' Available at <https://kmco.co.ke/wp-content/uploads/2024/05/Resolving-Natural-Resource-Based-Conflicts-in-Africa-through-Negotiation-and-Mediation.pdf> (Accessed on 23/08/2024)

⁶³ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition., 2017

its attributes, mediation offers a pathway to unlock collaboration and transform conflicts into opportunities for growth and understanding⁶⁴. Collaboration is a key approach towards managing conflicts which allows competing or opposing stakeholder groups to work together to reach an agreement over issues in dispute⁶⁵. Collaboration has been identified as a powerful approach towards conflict resolution built on cooperation, open communication, and finding win-win outcomes⁶⁶. According to the United Nations, the premise of mediation is that in the right environment, conflict parties can improve their relationships and move towards cooperation⁶⁷.

In climate change conflicts, mediation can enable parties to move from a position of conflict towards collaboration⁶⁸. For example, since populations in conflict-affected contexts tend to rely on natural resources for their livelihoods, the impact of climate shocks on natural resources is often a compelling issue that could trigger competition and conflicts over scarce resources⁶⁹. In such contexts, mediation is a useful entry point in peace processes⁷⁰. Mediation can enhance collaboration by fostering the engagement of local parties and communities, while offering options for integrating their voices and expertise in the climate change discourse⁷¹. By focusing on collaboration and cooperation, mediation enables the integration of women, youth and marginalized groups, who face particular climate risks and Indigenous

⁶⁴ Unlocking Collaboration: The Power of Mediation., Available at <https://www.linkedin.com/pulse/unlocking-collaboration-power-mediation-jharna-jagtiani-g7kxc/> (Accessed on 23/08/2024)

⁶⁵ Food and Agriculture Organization., 'Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)' Available at <https://www.fao.org/3/i2604e/i2604e00.pdf> (Accessed on 23/08/2024)

⁶⁶ Miroslavov. M., 'Mastering the Collaborating Conflict Style In 2024' Available at <https://www.officernd.com/blog/collaboratingconflictstyle/#:~:text=It's%20one%20of%20the%20strategies,their%20underlying%20needs%20and%20interests.> (Accessed on 23/08/2024)

⁶⁷ United Nations., 'Guidance for Effective Mediation' Available at https://peacemaker.un.org/sites/peacemaker.un.org/files/GuidanceEffectiveMediation_UNDPA2012%28english%29_0.pdf (Accessed on 23/08/2024)

⁶⁸ United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Op Cit

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Ibid

peoples, whose expertise can help identify key issues, priorities, and solutions in climate change conflicts⁷².

Mediation is also key in resolving climate change conflicts globally by strengthening climate diplomacy⁷³. The idea of climate diplomacy has been described as the interface between national interest debates and international cooperation on climate action⁷⁴. Climate diplomacy ensures the accurate assessment of other countries' interests and intentions, and finds the space for agreement on climate change issues⁷⁵. Climate diplomacy involves the use of diplomatic channels and strategies to address global climate change and its impact on international relations⁷⁶. It involves negotiating and implementing climate related policies, treaties, and agreements at the regional and international level, as well as cooperation between countries and other stakeholders to reduce greenhouse gas emissions, adapt to the impacts of climate change, and promote Sustainable Development⁷⁷. Mediation can enhance climate diplomacy and the management of climate change conflicts globally by enabling diplomats from different countries to negotiate and come up with common positions and solutions on climate change⁷⁸. This approach is not only vital in confronting climate change but it can also enable countries to build and strengthen Inter-State relations⁷⁹. In climate change conflicts involving two states, mediation is key in promoting mutual cooperation among the nations where the party states are directly involved in resolving the issues, through their representatives or diplomats negotiating for the benefits of the public at large⁸⁰.

⁷² Ibid

⁷³ Thailand Arbitration Center., 'Resolving Climate Conflicts with Mediation: Redesigning Earth's Destiny' Op Cit

⁷⁴ UUDA-NEPAD., 'Climate Diplomacy in Africa' Available at <https://www.nepad.org/climate/publication/climate-diplomacy-africa> (Accessed on 23/08/2024)

⁷⁵ Ibid

⁷⁶ Dimitrov. R., 'Climate Diplomacy' Available at https://www.researchgate.net/profile/RadoslavDimitrov-4/publication/322404819_Climate_diplomacy/links/5c89597b299bf14e7e7acf9c/Climatediplomacy.pdf (Accessed on 23/08/2024)

⁷⁷ Ibid

⁷⁸ Thailand Arbitration Center., 'Resolving Climate Conflicts with Mediation: Redesigning Earth's Destiny' Op Cit

⁷⁹ Ibid

⁸⁰ Ibid

The transnational applicability of mediation also makes it suitable in resolving climate change conflicts globally⁸¹. In transboundary conflicts, mediation is ideal in promoting diplomacy across borders and initiating cooperation and strengthening of relations between nations⁸². For example, at international level, mediation has enabled the states of Israel and Jordan to enter into peace agreement on water-sharing as well as mutual protection of water quality through measures such as establishment of joint institutional bodies⁸³.

Mediation is therefore an ideal mechanism in resolving climate change conflicts globally. However, this suitability may be limited in certain circumstances. For example, win-win solutions are not always possible, especially in situations of absolute resource scarcity such as water due to the adverse impacts of climate change⁸⁴. Enforcement of outcomes may also be difficult especially in the cross border context⁸⁵. It is therefore necessary to effectively harness mediation in order to enhance its role in resolving climate change conflicts globally.

4.0 Conclusion

The impacts of climate change on conflict demands urgent and creative actions for effective conflict management⁸⁶. Violent storms, severe droughts, biodiversity loss and environmental degradation are displacing millions of

⁸¹ Muigua. K., 'Utilizing Alternative Dispute Resolution in Climate Change Disputes' Available at <https://kmco.co.ke/wp-content/uploads/2024/03/Utilizing-Alternative-Dispute-Resolution-in-Climate-Change-Disputes.pdf> (Accessed on 23/08/2024)

⁸² Girinarayanan. I., 'Can Climate Change Disputes be Resolved through Mediation?' Available at <https://www.voicesofyouth.org/blog/can-climate-change-disputes-be-resolved-through-mediation> (Accessed on 23/08/2024)

⁸³ Climate Diplomacy., 'Jordan and Israel: Tensions and Water Cooperation in the Middle-East' Available at <https://climate-diplomacy.org/case-studies/jordan-and-israel-tensions-and-water-cooperation-middle-east> (Accessed on 23/08/2024)

⁸⁴ United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners' Available at https://peacemaker.un.org/sites/peacemaker.un.org/files/NRCMediation_UNDP_AUNEP2015_0.pdf (Accessed on 23/08/2024)

⁸⁵ Ibid

⁸⁶ Climate Diplomacy., 'Four Climate Frontiers: How Mediators can Make Peace and Help Protect the Planet' Available at <https://climate-diplomacy.org/magazine/conflict/four-climate-frontiers-how-mediators-can-make-peace-and-help-protect-planet> (Accessed on 23/08/2024)

people all over the world and intensifying competition over scarce natural resources⁸⁷. This in turn fuels violence and threatens the effectiveness and sustainability of peacemaking efforts globally⁸⁸.

Mediation is a suitable approach in resolving climate change conflicts globally. It has been noted that mediation processes respond to the specificity of the conflict by taking into account the causes and dynamics of the conflict, the positions, interests and coherence of the parties, the needs of the broader society, as well as the regional and international environments⁸⁹. Mediation can enhance collaboration and cooperation in the management of climate change conflicts⁹⁰. It is suitable in fostering the participation of all stakeholders including women, youth, marginalized groups, and Indigenous peoples in conflict resolution⁹¹. In the local contexts, mediation enables stakeholders to focus on localized, tangible effects of climate change therefore ensuring effective conflict management⁹². Further, in the global context, mediation is key in promoting diplomacy, initiating cooperation and strengthening of relations between nations⁹³. It is therefore imperative to effectively harness mediation in order to effectively resolve climate change conflicts globally.

In order to effectively harness mediation to resolve climate change conflicts globally, it is imperative to build the capacity of mediators on climate change issues⁹⁴. It is also necessary to increase the familiarity of parties to conflicts on climate-related concerns, for example by raising their awareness of climate projections and environmental impact in advance of a negotiation process⁹⁵. In addition, it is vital for parties to embrace collaborative outcomes in climate change conflicts ranging from environment and climate-sensitive peace

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ United Nations., 'Guidance for Effective Mediation' Op Cit

⁹⁰ Food and Agriculture Organization., 'Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)' Op Cit

⁹¹ United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Op Cit

⁹² Ibid

⁹³ Girinarayanan. I., 'Can Climate Change Disputes be Resolved through Mediation?' Op Cit

⁹⁴ United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Op Cit

⁹⁵ Ibid

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agreements to cooperation on addressing the impact of climate change or environmental degradation in order to effectively manage such conflicts through mediation⁹⁶. At the global stage, it is imperative to embrace climate diplomacy in order to seek solutions to climate change concerns including conflicts through diplomatic mediation⁹⁷. In the context of shared resources, it is imperative for countries to establish joint institutions in order to effectively harness the power of mediation in addressing conflicts through cooperation⁹⁸.

Resolving climate change conflicts globally through mediation is thus viable and achievable.

⁹⁶ Climate Diplomacy., 'Four Climate Frontiers: How Mediators can Make Peace and Help Protect the Planet' Op Cit

⁹⁷ Thailand Arbitration Center., 'Resolving Climate Conflicts with Mediation: Redesigning Earth's Destiny' Op Cit

⁹⁸ Climate Diplomacy., 'Jordan and Israel: Tensions and Water Cooperation in the Middle-East'

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Abstract

This paper critically discusses the role of mediation and Alternative Justice Systems (AJS) in promoting justice and reconciliation. The paper argues that mediation and AJS are suitable processes in fostering justice and reconciliation. The paper critically explores the key features of mediation and AJS that make these mechanisms ideal in achieving justice and reconciliation. It also assesses the progress made towards embracing mediation and AJS towards justice and reconciliation and notes the challenges thereof. The paper offers proposals towards promoting justice and reconciliation through mediation and AJS.

1.0 Introduction

Conflicts are a common and inevitable occurrence in human relationships and interactions¹. Conflicts often arise in instances where two or more parties perceive that they possess mutually incompatible goals². According to the United Nations, conflicts arise when two or more groups believe their interests are incompatible³. It has been noted that conflicts are an inevitable part of living since they are related to situations of scarce resources, division of functions, power relations and role-differentiation⁴.

Some forms of conflict such as violent conflicts are undesirable since they affect peace, sustainability and development⁵. However, conflict is not in itself a

¹ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at <https://kmco.co.ke/wpcontent/uploads/2023/06/Reframing-Conflict-Management-in-the-EastAfricanCommunityMoving-from-Alternative-to-Appropriate-Dispute-Resolution> (Accessed on 11/09/2024)

² Demmers. J., 'Theories of Violent Conflict: An Introduction' (Routledge, New York, 2012)

³ United Nations., 'Land and Conflict' Available at https://www.un.org/en/land-natural-resources-conflict/pdfs/GN_ExeS_Land%20and%20Conflict.pdf (Accessed on 11/09/2024)

⁴ Bercovitch. J., 'Conflict and Conflict Management in Organizations: A Framework for Analysis.' Available at <https://ocd.lcwu.edu.pk/cfiles/International%20Relations/EC/IR403/Conflict.ConflictManagementinOrganizations.pdf> (Accessed on 11/09/2024)

⁵ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

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negative phenomenon⁶. For example, non-violent conflict can be an essential component of social change and development, and is a necessary component of human interaction⁷. It has been noted that non-violent resolution of conflict is possible when individuals and groups have trust in their governing structures, society and institutions to manage incompatible interests⁸. Effective, efficient and expeditious management of conflicts is a key goal towards promoting peace, development and sustainability⁹.

Justice and reconciliation are two vital objectives in conflict management¹⁰. It has been noted that the concepts of justice and reconciliation are related to the building of trust in the context of inclusive peace building especially after violent conflicts¹¹. Both justice and reconciliation seek to address the legacies of violence and human rights abuses to compensate for past wrongs and promote social healing towards peace, sustainability, and development¹². Justice in the legal sense entails a structure or system that guides the allocation of benefits or burdens when the law is applied to particular factual circumstances¹³. Justice can be divided into *distributive justice* which involves fair division of resources in the society; *retributive justice* which focuses on punishing crimes in a society; *restorative justice* that focuses on trying to repair the harm that has caused by criminal activities by involving those who have been affected; and *procedural justice* that focuses on making and implementing decisions according to fair processes that ensure fair treatment of every

⁶ United Nations., 'Land and Conflict' Op Cit

⁷ Ibid

⁸ Ibid

⁹ Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-anddevelopmentinKenyaRevised-version-of-20.10.14.pdf> (Accessed on 11/09/2024)

¹⁰ Lee. S., 'Multiple Doors to Justice in Kenya: Engaging Alternative Justice Systems' Available at <https://cic.nyu.edu/wp-content/uploads/2023/11/Multiple-Doors-to-Justice-in-Kenya-2023.pdf> (Accessed on 11/09/2024)

¹¹ SIDA., 'Transitional Justice and Reconciliation' Available at <https://cdn.sida.se/app/uploads/2020/12/01125338/transitional-justice-and-reconciliation.pdf> (Accessed on 11/09/2024)

¹² Ibid

¹³ Justice., Available at <https://www.law.cornell.edu/wex/justice> (Accessed on 11/09/2024)

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person¹⁴. Reconciliation on the other hand refers to the process of building or rebuilding relationships damaged by violent conflict, between individuals or groups within the society, or between the population and the state/institutions¹⁵. Reconciliation is a concept of justice since it focuses on restoring right relationship following wrongs¹⁶.

This paper critically discusses the role of mediation and Alternative Justice Systems (AJS) in promoting justice and reconciliation. The paper argues that mediation and AJS are suitable processes in fostering justice and reconciliation. The paper critically explores the key features of mediation and AJS that make these mechanisms ideal in achieving justice and reconciliation. It also assesses the progress made towards embracing mediation and AJS towards justice and reconciliation and notes the challenges thereof. The paper offers proposals towards promoting justice and reconciliation through mediation and AJS.

2.0 Overview of Mediation and Alternative Justice Systems

Mediation refers to a process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreements¹⁷. It has also been defined as a non-adversarial and collaborative process through which an impartial third party helps parties in a dispute reach a resolution through interest-based negotiations¹⁸. Mediation can also be understood as a process of conflict management where conflicting parties gather to seek solutions to the conflict,

¹⁴ Maiese. M., & Burgess. H., 'Types of Justice' Available at https://www.beyondintractability.org/essay/types_of_justice (Accessed on 11/09/2024)

¹⁵ SIDA., 'Transitional Justice and Reconciliation' Op Cit

¹⁶ Philpott, Daniel, 'Reconciliation as a Concept of Justice', *Just and Unjust Peace: An Ethic of Political Reconciliation*, Studies in Strategic Peacebuilding (New York, 2012; online edn, Oxford Academic, 20 Sept. 2012), <https://doi.org/10.1093/acprof:oso/9780199827565.003.0005> (Accessed on 11/09/2024)

¹⁷ United Nations., 'Basics of Mediation: Concepts and Definitions.' Available at <https://peacemaker.un.org/sites/peacemaker.un.org/files/Basics%20of%20Mediation.pdf> (Accessed on 12/09/2024)

¹⁸ United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners' Available at https://peacemaker.un.org/sites/peacemaker.un.org/files/NRCMediation_UNDP_AUNEP2015_0.pdf (Accessed on 12/09/2024)

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with the assistance of a third party who facilitates discussions and the flow of information therefore aiding parties in the process of reaching an agreement¹⁹. The basis of mediation is that in the right environment, parties to a conflict can improve their relationships and move towards cooperation²⁰. It has been noted that mediation outcomes can be limited in scope, dealing with a specific issue in order to contain or manage a conflict, or can tackle a broad range of issues in a comprehensive peace agreement²¹.

Mediation arises where the parties to a conflict have attempted negotiations, but have reached a deadlock²². Parties therefore agree to involve a third party to assist them continue with the negotiations and ultimately break the deadlock²³. Mediation is therefore usually a continuation of the negotiation process. In the mediation process, a mediator does not have the power to impose an outcome upon the parties but rather facilitates communication, promotes understanding, focuses the parties on their interests, and uses creative problem solving to enable the parties to reach their own mutually satisfactory agreement²⁴.

The *Charter of the United Nations*²⁵ identifies mediation as an important means for the peaceful settlement of disputes and conflicts²⁶. At a national level, the *Constitution of Kenya*²⁷ urges courts and tribunals to promote mediation among other Alternative Dispute Resolution processes²⁸. According to the United Nations, mediation has proven to be an effective instrument in addressing both inter-State and intra-State conflicts²⁹.

¹⁹ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition., 2017

²⁰ United Nations., 'Guidance for Effective Mediation' Available at <https://peacemaker.un.org/sites/default/files/document/files/2022/09/guidanceeffective-mediationundpa2012english0.pdf> (Accessed on 12/09/2024)

²¹ Ibid

²² Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

²³ Ibid

²⁴ Bercovitch. J., 'Mediation Success or Failure: A Search for the Elusive Criteria.' *Cardozo Journal of Conflict Resolution*, Vol. 7, p 289

²⁵ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

²⁶ Ibid, article 33 (1)

²⁷ Constitution of Kenya., 2010., Government Printer, Nairobi

²⁸ Ibid, article 159 (2) (c)

²⁹ United Nations., 'Guidance for Effective Mediation' Op Cit

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AJS has been defined as both a philosophical concept as well as a practice for accessing justice³⁰. As a philosophical concept, AJS is consistent with the human rights school of thought, and is based on the fundamental ideas of freedom, equality, non-discrimination, dignity, and equity³¹. Further, as a practice for accessing justice, AJS refers to initiatives that can be taken to attain equality and equity for all members of a particular cultural, political and social identity³². It has been noted that the term AJS covers various techniques including Customary and Informal Justice Systems (CIJ) and Traditional Dispute Resolution Mechanisms (TDRMs)³³. These phrases cover dispute resolution practices that are often embraced by indigenous communities in managing conflicts through institutions such as community paralegals, local authorities, and elders³⁴.

AJS have been practiced in Kenya and Africa at large for many centuries³⁵. It has been pointed out that in Kenya, the different communities that existed before colonial occupation and rule had their own systems and mechanisms of promoting justice³⁶. These systems are referred to as Customary or Traditional systems³⁷. For many years, customary and informal justice mechanisms were at the center of conflict management as communities thrived and its constituents expressed satisfaction at how justice was dispensed³⁸. However, AJS have to a certain extent been altered through the encounter with the colonial and post-colonial legal systems³⁹. During the colonial era, AJS were

³⁰ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Available at <https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/> (Accessed on 12/09/2024)

³¹ Ibid

³² Ibid

³³ Lee, S., 'Multiple Doors to Justice in Kenya: Engaging Alternative Justice Systems' Op Cit

³⁴ Ibid

³⁵ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

³⁶ Ibid

³⁷ Ibid

³⁸ The International Commission of Jurists., 'Alternative Justice System Solution To Backlog Of Cases' Available at <https://icj-kenya.org/news/alternative-justice-system-solution-to-backlog-of-cases/> (Accessed on 12/09/2024)

³⁹ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

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considered retrogressive, archaic and outdated with the colonial powers introducing their own justice systems that were favourable to white settlers and punitive to indigenous communities⁴⁰.

The Constitution of Kenya provides a basis for recognition and promotion of AJS by mandating courts and tribunals to promote TDRMs⁴¹. It has been noted that the Constitution does not establish AJS, but only recognises their existence and provides the basis for their promotion⁴². The Constitutional recognition of AJS is a key measure towards restoring customary law and culture to a place of prominence⁴³.

3.0 Efficacy of Mediation and Alternative Justice Systems in Promoting Justice and Reconciliation

Mediation is an ideal process that can promote justice and reconciliation⁴⁴. Mediation has certain advantages that makes it ideal in promoting justice and reconciliation including informality, expeditiousness, cost-effectiveness, flexibility, efficiency, and confidentiality⁴⁵. In addition, mediation usually results in mutually satisfying and long- lasting outcomes therefore creating a suitable environment for peace and reconciliation by eliminating the likelihood of conflicts reemerging in future⁴⁶. Mediation also has the potential to preserve and at times even enhance relationships therefore making it an ideal mechanism in achieving justice and reconciliation⁴⁷. It further allows parties to come up with creative solutions than those available in traditional litigation⁴⁸.

⁴⁰ The International Commission of Jurists., 'Alternative Justice System Solution To Backlog Of Cases' Op Cit

⁴¹ Constitution of Kenya, 2010., article 159 (2) (c)

⁴² Pamoja Trust., 'Alternative Justice Systems (AJS) Guidelines' Available at <https://www.trocaire.org/wp-content/uploads/2021/04/Alternative-Justice-Systems-regulations-final.pdf?type=policy> (Accessed on 12/09/2024)

⁴³ Lee. S., 'Multiple Doors to Justice in Kenya: Engaging Alternative Justice Systems' Op Cit

⁴⁴ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ World Intellectual Property Organization., 'What is Mediation?' Available at <https://www.wipo.int/amc/en/mediation/what-mediation.html> (Accessed on 13/09/2024)

⁴⁸ JAMS ADR., 'What is ADR? Defining the Alternative Dispute Resolution Spectrum' Available at <https://www.jamsadr.com/adr-spectrum/> (Accessed on 13/09/2024)

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Mediation can enhance justice and reconciliation due to its potential to unlock collaboration in managing conflicts⁴⁹. Collaboration is a key approach towards managing conflicts wherein parties work together to reach an agreement over issues in dispute⁵⁰. It has been identified as a powerful approach to conflict resolution built on cooperation, open communication, and finding win-win outcomes⁵¹. Collaboration aims to preserve relationships, build trust, and promote long-term positive change⁵². Mediation provides a pathway to unlock collaboration and transform conflicts into opportunities for growth and understanding⁵³. By enhancing collaboration, mediation emphasizes on voluntary participation of the parties, confidentiality, and the flexibility to tailor the outcomes to the specific needs of the parties involved⁵⁴.

Due to the foregoing advantages, mediation is ideal in promoting justice and reconciliation. The informality, flexibility, and cost-effectiveness of mediation makes it suitable in enhancing access to justice especially for the poor and marginalized individuals and groups⁵⁵. Through mediation, conflicts can be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system⁵⁶. It has been noted that mediation can bring justice closer to the people and make it more affordable⁵⁷. Further, mediation has the

⁴⁹ Unlocking Collaboration: The Power of Mediation., Available at <https://www.linkedin.com/pulse/unlocking-collaboration-power-mediation-jharna-jagtiani-g7kxc/> (Accessed on 13/09/2024)

⁵⁰ Food and Agriculture Organization., 'Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)' Available at <https://www.fao.org/3/i2604e/i2604e00.pdf> (Accessed on 13/09/2024)

⁵¹ Miroslavov. M., 'Mastering the Collaborating Conflict Style In 2024' Available at <https://www.officernd.com/blog/collaboratingconflictstyle/#:~:text=It's%20one%20of%20the%20strategies,their%20underlying%20needs%20and%20interests> (Accessed on 13/09/2024)

⁵² Ibid

⁵³ Unlocking Collaboration: The Power of Mediation., Op Cit

⁵⁴ Mediation: The Art of Collaborative Conflict Resolution., Available at <https://legalservicesdubai.com/mediation-the-art-of-collaborative-conflict-resolution-understanding-its-processes-and-advantages/> (Accessed on 13/09/2024)

⁵⁵ Muigua. K., 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/Reflections-on-the-Use-of-Mediation-for-Access-to-Justice-in-Kenya-Maximising-on-the-Benefits-of-Mediation-Kariuki-Muigua-14th-June-2018-1.pdf> (Accessed on 13/09/2024)

⁵⁶ Ibid

⁵⁷ Ibid

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potential to foster reconciliation by addressing the root causes of conflicts therefore leading to long lasting and sustainable outcomes and preventing the likelihood of conflicts reemerging in future⁵⁸. Mediation can also preserve and at times even enhance relationships therefore making it an ideal mechanism in promoting reconciliation⁵⁹. It has been noted that mediation relies heavily on principles of reconciliation to achieve long-lasting and meaningful outcomes⁶⁰. By fostering understanding, empathy, and communication, mediation can ultimately result in reconciliation between parties⁶¹. It is therefore necessary to harness the potential of mediation in order to promote justice and reconciliation.

AJS are also ideal in promoting justice and reconciliation⁶². In Kenya and Africa at large, AJS are deeply rooted in the culture and customs of the African people⁶³. Culture plays a prominent role in conflict management⁶⁴. Culture has been described as essential part of conflict and conflict resolution⁶⁵. It affects the ways we name, frame, blame, and attempt to tame conflicts⁶⁶. Differences in attitudes, belief systems, religious practices, language, social set ups and economic practices among different cultures means that conflicts may take different forms in each culture⁶⁷. Culture therefore plays an important role in conflict management and shapes the way in which individuals or groups frame and respond to conflicts⁶⁸.

⁵⁸ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

⁵⁹ World Intellectual Property Organization., 'What is Mediation?' Op Cit

⁶⁰ Dallago. D., 'How Reconciliation in Mediation Can Transform Conflict into Sustainable Harmony' Available at <https://imamediation.com/blog/how-reconciliation-in-mediation-can-transform-conflict-into-sustainable-harmony>

(Accessed on 13/09/2024)

⁶¹ Ibid

⁶² Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

⁶³ Ibid

⁶⁴ LeBaron. M., 'Culture and Conflict.' Available at https://www.beyondintractability.org/essay/culture_conflict (Accessed on 13/09/2024)

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579-603

⁶⁸ LeBaron. M., 'Culture and Conflict.' Op Cit

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Conflict management in African societies was well-entrenched in the traditions, customs, norms and taboos of the people⁶⁹. Conflicts in African communities were seen as threat to the social fabric that held the community together⁷⁰. African communities therefore developed and embraced conflict management strategies that were aimed towards effectively dealing with conflicts in order to ensure peaceful co-existence within the community⁷¹. Conflict management among African communities was aimed at creating consensus, facilitating reconciliation, fostering peace, harmony and cohesion and gave prominence to communal needs over individual needs⁷².

AJS are therefore able to promote justice and reconciliation. These techniques fit comfortably within traditional concepts of African justice, particularly its core value of reconciliation⁷³. In addition, informal justice systems, such as customary and traditional dispute resolution mechanisms, are often more accessible and affordable than formal justice systems therefore making them an appropriate tool in enhancing access to justice⁷⁴. Since most AJS processes are closely tied to the communities and are mostly non-institutionalized, these processes are cost-effective and more affordable when compared to formal systems⁷⁵.

⁶⁹ Ademowo. A., 'Conflict Management in Traditional African Society.' Available at https://www.researchgate.net/publication/281749510_Conflict_management_in_Traditional_African_Society (Accessed on 13/09/2024)

⁷⁰ Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elderssuccesseschallenges-and-opportunities-1.pdf> (Accessed on 13/09/2024)

⁷¹ Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).

⁷² Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

⁷³ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

⁷⁴ Judiciary of Kenya., 'Promoting Alternative Justice Systems (AJS)' Available at <https://judiciary.go.ke/promoting-alternative-justice-systems-ajs/> (Accessed on 13/09/2024)

⁷⁵ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

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In addition, the focus of AJS goes beyond resolution of disputes⁷⁶. AJS also focus on dispute prevention and ensuring minimal or non-recurrence of disputes⁷⁷. It has been noted that AJS include mechanisms that deal both with resolving legal disputes as well as those seeking everyday justice⁷⁸. This expansion moves AJS beyond the narrow conception of Alternative Dispute Resolution (ADR) that only captures mechanisms designed towards resolution of disputes⁷⁹. AJS are therefore suitable in promoting justice and reconciliation.

Despite their ability to promote justice and reconciliation, the efficacy of mediation and AJS may be limited by certain factors. For example, it has been noted that power is a major concern in mediation⁸⁰. Where there is a significant power difference, one party may dominate the process and the resulting outcome may largely reflect only that party's needs and interests therefore not promoting justice and reconciliation⁸¹. In addition, the non-binding nature of mediation may affect the continuation of mediation proceedings and the enforcement of outcomes thus limiting its suitability in promoting justice and reconciliation⁸². On the other hand, AJS often reflect patriarchal values and discriminate against women, children, and other marginalized groups⁸³. Therefore, a key concern in utilizing AJS is the potential for violation of human rights, particularly those of women and marginalized groups⁸⁴. For example, it has been noted that in some communities, women are not permitted to speak or even be present during proceedings, even if they are the victim, and must rely on male relatives to plead their case⁸⁵. In addition, there are concerns about procedural fairness in AJS and the ability to adhere to constitutional thresholds of access to justice⁸⁶.

⁷⁶ Pamoja Trust., 'Alternative Justice Systems (AJS) Guidelines' Op Cit

⁷⁷ Ibid

⁷⁸ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

⁷⁹ Ibid

⁸⁰ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

⁸¹ Ibid

⁸² Ibid

⁸³ Lee. S., 'Multiple Doors to Justice in Kenya: Engaging Alternative Justice Systems' Op Cit

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

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It is imperative to address these challenges in order to promote justice and reconciliation through mediation and AJS.

4.0 Conclusion

There is need to promote justice and reconciliation through mediation and AJS. Mediation is suitable in promoting justice and reconciliation due to its key features including informality, expeditiousness, cost-effectiveness, flexibility, efficiency, and confidentiality⁸⁷. Further, by focusing on collaboration, mediation is able to preserve and even enhance relationships therefore promoting justice and reconciliation⁸⁸. AJS are rooted in the culture and customs of the African people and are therefore suitable in upholding values that are held sacrosanct in African communities including peace, harmony, and cohesion⁸⁹. AJS therefore suit well within traditional concepts of African justice, particularly its core value of reconciliation⁹⁰.

It is imperative to institutionalise mediation and AJS in order to enhance their uptake towards promoting justice and reconciliation⁹¹. Institutionalising mediation and AJS is key in legitimizing these processes by providing elaborate legal and policy framework and guidelines for their application while also linking them to formal justice processes⁹². However, in legitimizing, mediation and AJS, it is vital to ensure that their key attributes including informality, voluntariness, confidentiality and party autonomy are preserved in order to ensure their suitability in promoting justice and reconciliation⁹³. There has been progress towards mainstreaming AJS in Kenya through the *Alternative Justice Systems Framework Policy*⁹⁴. The Policy notes that AJS is effective in promoting justice and reconciliation for the people of Kenya and

⁸⁷ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

⁸⁸ Ibid

⁸⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁹⁰ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

⁹¹ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISINGALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf> (Accessed on 13/09/2024)

⁹² Ibid

⁹³ Ibid

⁹⁴ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

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reducing backlog of cases in courts⁹⁵. The Policy sets out interventions towards mainstreaming AJS in Kenya including the formal recognition of AJS and identification of the kinds of cases that can be handled through AJS; strengthening the process for selection, election, appointment and removal of AJS practitioners; development of procedures and customary law jurisprudence; facilitation of effective intermediary interventions; and strengthened and sustainable resource allocation and mobilization towards AJS⁹⁶. It is imperative to implement this Policy in order to strengthen AJS in Kenya and address some of their key concerns including human rights violations and the potential to disregard procedural fairness⁹⁷.

The role of mediation and AJS in promoting justice and reconciliation can also be enhanced by raising public awareness on the suitability and benefits of these processes⁹⁸. It is also vital to build human and institutional capacity in order to have in place effective and efficient practitioners and institutions that can promote justice and reconciliation through mediation and AJS⁹⁹.

Promoting justice and reconciliation through mediation and AJS is an achievable reality for the people of Kenya and Africa at large. It is imperative to actualize this agenda for peace, prosperity, and development.

⁹⁵ Ibid

⁹⁶ Ibid

⁹⁸ Ibid

⁹⁹ Ibid

Towards Human Rights and Prosperity for All

Abstract

This paper examines the need to safeguard and protect human rights at all levels. The paper argues that upholding human rights is fundamental for peace, development, and prosperity. It conceptualizes the idea of human rights and explores its fundamental elements. In addition, the paper examines the progress made towards protecting human rights at the global, regional, and national levels. It also discusses some of the key challenges facing the realization of human rights. Further, the paper proposes interventions towards protecting human rights for peace and prosperity for all.

1.0 Introduction

Protecting and safeguarding human rights is a core ideal towards peace and prosperity¹. It has been correctly noted that human rights cement the bond between individuals and promote peaceful coexistence among individuals, communities, and nations, thereby making societies and the entire world more resilient². Respect for human rights within states is a prerequisite to lasting peace and prosperity at all levels³.

The *2030 Agenda for Sustainable Development*⁴ recognizes the role of human rights in fostering peace and prosperity. It envisages a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realization of human potential and contributing to shared prosperity⁵. Human rights are a necessary foundation

¹ International Peace Institute., 'Human Rights and Sustaining Peace' Available at https://www.ipinst.org/wp-content/uploads/2017/12/1712_Human-Rights-and-Sustaining-Peace.pdf (Accessed on 26/09/2024)

² Ibid

³ United States Department of State., 'Human Rights and Democracy as Pillars of Stability and Prosperity and Strengthening Democracy in the EU Neighborhood' Available at <https://www.state.gov/human-rights-and-democracy-as-pillars-of-stability-and-prosperity-and-strengthening-democracy-in-the-eu-neighborhood/> (Accessed on 26/09/2024)

⁴ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>

⁵ Ibid

for a peaceful, prosperous and sustainable world⁶. Safeguarding human rights is therefore integral in the Sustainable Development agenda.

This paper examines the need to safeguard and protect human rights at all levels. The paper argues that upholding human rights is fundamental for peace, development, and prosperity. It conceptualizes the idea of human rights and explores its fundamental elements. In addition, the paper examines the progress made towards protecting human rights at the global, regional, and national levels. It also discusses some of the key challenges facing the realization of human rights. Further, the paper proposes interventions towards protecting human rights for peace and prosperity for all.

2.0 Human Rights: Definition and Principles

Human rights are a set of principles that are concerned with equality and fairness⁷. They recognise our freedom to make choices about our lives and to develop our potential as human beings⁸. Human rights can also be described as standards that recognize and protect the dignity of all human beings⁹. Human rights are inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status¹⁰. It has been noted that human rights are inherent to all human beings by virtue of existence and are not granted by any state¹¹. Human rights range from the most fundamental including the right to life to those that make life worth living, such as the rights to food, shelter, education, work, health, and liberty¹².

⁶ United Nations Development Programme., 'Human Rights for Sustainable Development' Available at <https://www.undp.org/rolhr/publications/human-rights-sustainable-development> (Accessed on 26/09/2024)

⁷ Australian Human Rights Commission., 'An Introduction to Human Rights' Available at <https://humanrights.gov.au/our-work/education/introduction-human-rights> (Accessed on 27/09/2024)

⁸ Ibid

⁹ UNICEF., 'What are Human Rights?' Available at <https://www.unicef.org/child-rightsconvention/what-are-human-rights> (Accessed on 27/09/2024)

¹⁰ United Nations., 'Human Rights' Available at <https://www.un.org/en/global-issues/human-rights#:~:text=Human%20rights%20are%20rights%20inherent,and%20education%2C%20and%20many%20more.> (Accessed on 27/09/2024)

¹¹ Office of the United Nations High Commissioner for Human Rights., 'What are Human Rights' Available at <https://www.ohchr.org/en/what-are-human-rights> (Accessed on 27/09/2024)

¹² Ibid

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Human rights permeate virtually all aspects of life. They include *civil and political rights*¹³. These entail a person's rights to take part in the civil and political life of their community and state without discrimination or oppression¹⁴. This classification covers rights and freedoms such as the right to vote, the right to privacy, freedom of speech and expression, and freedom from torture, slavery, inhumane and degrading treatment¹⁵. Human rights also include *economic, social, and cultural rights*¹⁶. This category entails a person's rights to prosper and grow and to take part in social and cultural activities in their communities and states¹⁷. These rights include the rights to adequate food, to water and sanitation, to adequate housing, to education, to health, to social security, to take part in cultural life, and the rights to work¹⁸. In addition, human rights also include *group or collective rights*¹⁹. A group right is a right held by a group as a collective unit rather than by its members individually²⁰. Group rights arise out of the acknowledgement that some groups have been historically disadvantaged and marginalized and consequently need greater protection of their rights and freedoms²¹. They include the right of indigenous communities to ancestral lands²².

The idea of human rights is anchored by several key principles. The principle of *universality and inalienability* means that every person is equally entitled to human rights and that such rights cannot be taken away except in specific and defined situations in accordance with due process²³. The principle of *indivisibility and interdependence* means that all categories of human rights are

¹³ Australian Human Rights Commission., 'An Introduction to Human Rights' Op Cit

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Office of the United Nations High Commissioner for Human Rights., 'Economic, Social, and Cultural Rights' Available at <https://www.ohchr.org/en/human-rights/economic-social-cultural-rights#:~:text=Economic%20social%20and%20cultural%20rights,and%20sanitation%2C%20and%20to%20work>. (Accessed on 27/09/2024)

¹⁹ Group Rights., Available at <https://plato.stanford.edu/entries/rights-group/> (Accessed on 27/09/2024)

²⁰ Ibid

²¹ Australian Human Rights Commission., 'An Introduction to Human Rights' Op Cit

²² Ibid

²³ Office of the United Nations High Commissioner for Human Rights., 'What are Human Rights' Op Cit

mutually reinforcing and one set of rights cannot be fully enjoyed without the other. In addition, the principle of *equality and non-discrimination* cuts across all human rights and states that all human beings are equally entitled to human rights and that no person should suffer discrimination on the basis of factors such as race, colour, ethnicity, gender, age, language, sexual orientation, religion, political or other opinion, national, social or geographical origin, disability, property, birth or other status in realizing their rights²⁴. Further, the principle of *participation and inclusion* means that all human beings have the right to participate in and access information relating to the decision-making processes that affect their lives and well-being towards realizing their rights and freedoms²⁵(Emphasis added). It envisages the participation of every person including communities, civil society, the private sector, minorities, women, young people, and indigenous peoples towards realizing human rights at all levels²⁶.

States have a primary duty to respect, protect, and fulfil human rights²⁷. It has been noted that states have a primary obligation to respect and protect the human rights of all persons on their territory or under their jurisdiction, without discrimination²⁸. Therefore, the responsibility for protecting individuals' human rights lies in the positive (vertical) obligations of the state²⁹. However, there is an increasing recognition that non-state actors are in a position to greatly affect individuals' enjoyment of their human rights³⁰. For example, non-state entities carrying out public functions, having control over

²⁴ United Nations Population Fund., 'Human Rights Principles' Available at <https://www.unfpa.org/resources/human-rights-principles#:~:text=Human%20rights%20are%20universal%20and,religious%2C%20cultural%20or%20ethnic%20background>. (Accessed on 27/09/2024)

²⁵ Ibid

²⁶ Ibid

²⁷ International Organization for Migration., 'State Sovereignty and Human Rights' Available at <https://emm.iom.int/handbooks/human-rights-migrants-overview/state-sovereignty-and-human-rights#:~:text=Concerning%20human%20rights%2C%20States%20have,migrants%2C%20regardless%20of%20their%20status>. (Accessed on 27/09/2024)

²⁸ Ibid

²⁹ Lane. L., 'A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' *European Journal of Comparative Law and Governance*., Available at <https://brill.com/view/journals/ejcl/ejcl-overview.xml> (Accessed on 27/09/2024)

³⁰ Ibid

an area of territory or being in a position to direct states in the adoption and implementation of certain domestic laws and policies can greatly influence the enjoyment of human rights and freedoms³¹. In addition, some individuals may also be in a position of relative power over (for example) other family members, employees, or members of a different social class, placing them in a position to more easily affect another individual's rights³². As a result, the idea of horizontal application of human rights has emerged³³. This concept therefore governs the application of human rights in the private sphere³⁴. It has been described as an important safeguard in the protection of human rights especially socio-economic rights since most these rights are violated by private entities³⁵.

The need to protect human rights has been set out in various legal instruments at the global, regional, and national levels. At the global level, the *Charter of the United Nations*³⁶ urges the international community to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion³⁷. It also urges all states to embrace international cooperation in the economic, social, cultural, educational, and health fields in order to enhance realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion³⁸. The *Universal Declaration of Human Rights (UDHR)*³⁹ is a key instrument in safeguarding human rights. The UDHR represents the universal recognition that human rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that every person is born free and equal in dignity and rights⁴⁰. The UDHR stipulates

³¹ Ibid

³² Ibid

³³ Ibid

³⁴ The East African Centre for Human Rights., 'A compendium on economic and social rights cases under the Constitution of Kenya, 2010' available at https://eachrights.or.ke/wp-content/uploads/2020/07/A_Compendium_On_Economic_And_Social_Rights_Cases_Under_The_Constitution_Of_Kenya_2010.pdf (Accessed on 27/09/2024)

³⁵ Ibid

³⁶ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

³⁷ Ibid, article 1 (3)

³⁸ Ibid, article 13 (1) (b)

³⁹ United Nations General Assembly. The Universal Declaration of Human Rights (UDHR). New York: United Nations General Assembly, 1948.

⁴⁰ Ibid

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fundamental human rights and freedoms to be universally protected and common standards for achievement of these rights for all people in every nation⁴¹. It notes that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world⁴².

Since its adoption, the UDHR has inspired a rich body of legally binding international and regional human rights treaties. These include the *International Covenant on Civil and Political Rights (ICCPR)*⁴³ which was adopted in order to foster the realization of civil and political rights all over the world and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁴⁴ was adopted in order to enhance the protection and fulfillment of economic, social and cultural rights. It has been noted that the UDHR together with the ICCPR and the ICESCR alongside their protocols form the International Bill of Human Rights⁴⁵.

At a regional level, the *African Charter on Human and Peoples' Rights*⁴⁶ was adopted towards promoting and protecting human rights and fundamental freedoms for the people of Africa. The Charter is designed to reflect the history, values, traditions, and development of Africa⁴⁷. The Charter combines African values with international norms by not only promoting internationally recognized individual rights, but also by proclaiming collective rights and individual duties in the African context⁴⁸. The Charter urges African countries to recognize human rights and freedoms and adopt legislative among other measures towards actualizing them⁴⁹. It further sets out that every citizen in Africa is entitled to the enjoyment of human rights and freedoms without distinction of any kind including race, sex, language, religion, ethnic group,

⁴¹ Ibid

⁴² Ibid

⁴³ United Nations General Assembly, *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, vol. 999, p. 171, 16 December 1966

⁴⁴ United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, United Nations, Treaty Series, vol. 993, p. 3, 16 December 1966

⁴⁵ United Nations., 'Human Rights' Op Cit

⁴⁶ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Ibid, article 1

national and social origin, political or any other opinion, birth or any other status⁵⁰. Implementing the African Charter on Human and People's Rights is therefore vital towards safeguarding human rights for all the people of Africa for peace and prosperity.

Protecting human rights is also a fundamental ideal in Kenya. The *Constitution of Kenya*⁵¹ recognizes the aspirations of all Kenyans for a government based on the essential values of *human rights, equality, freedom, democracy, social justice and the rule of law*⁵². Chapter four of the Constitution contains the Bill of Rights which stipulates fundamental rights and freedoms which all Kenyans are entitled to. The Constitution further stipulates that the Bill of Rights applies to all and binds all state organs and all persons⁵³. It is imperative to give effect to the Bill of Rights in Kenya towards human rights and prosperity for all.

However, despite measures being put in place to recognize human rights at global, regional, and national levels, it has been noted that human rights violations are still prevalent throughout the world⁵⁴. Human rights violations can either be intentionally perpetrated by states or come as a result of the state failing to prevent the violation⁵⁵. For example, civil and political rights are often violated through genocide, torture, and arbitrary arrest⁵⁶. These violations especially happen during times of war and conflicts. In addition, conflict can also trigger violations of the right to freedom of expression and the right of peaceful assembly⁵⁷. Economic, cultural, and social rights are also often violated through mechanisms such as forcible eviction of people from their homes hindering the right to adequate housing, contamination of drinking water affecting the right to health and clean water and sanitation, failure to ensure a wage sufficient for a decent living affecting the right to work, denying

⁵⁰ Ibid, article 2

⁵¹ Constitution of Kenya., 2010., Government Printer, Nairobi

⁵² Ibid, Preamble

⁵³ Ibid, article 20 (1)

⁵⁴ United Nations., 'The Foundation of International Human Rights Law' Available at <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law> (Accessed on 27/09/2024)

⁵⁵ What are Human Rights Violations? Available at <https://www.humanrightscareers.com/issues/what-are-human-rights-violations/> (Accessed on 27/09/2024)

⁵⁶ Ibid

⁵⁷ Ibid

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citizens access to information and services related to their sexual and reproductive health undermining the right to health, and segregating children with disabilities from mainstream schools affecting the right to education⁵⁸.

Further economic crises including global recessions push countries to the brink where governments are unable to provide adequate health, education, water and sanitation services, social protection, and other human rights to its citizens, which impacts women and girls and other vulnerable and marginalised communities the most⁵⁹. In addition, it has been noted that most global, regional, and national economic and political systems do not adequately integrate human rights obligations and standards into budgetary and investment decisions therefore hindering effective realization of human rights⁶⁰.

There is need to address these among other challenges towards human right and prosperity for all.

3.0 Towards Human Rights and Prosperity for All

Fostering human rights is an integral agenda towards peace and prosperity⁶¹. It has been opined that safeguarding human rights is vital towards achieving peace, security, and development by not only containing the immediate consequences of conflict but also by preventing the outbreak of violence by addressing the root causes of conflict⁶². Violation of human rights and lack of accountability and prosecution for such violations are often drivers of conflict and insecurity⁶³. Upholding human rights is therefore vital in preventing destabilization of societies through conflicts and wars⁶⁴. Human rights are therefore intrinsically linked to building and sustaining peace, security, and

⁵⁸ Office of the United Nations High Commissioner for Human Rights., 'Economic, Social, and Cultural Rights' Op Cit

⁵⁹ Office of the United Nations High Commissioner for Human Rights., 'Building Economies that Place People's Human Rights at the Center' Available at <https://www.ohchr.org/en/stories/2023/04/building-economies-place-peoples-human-rights-center> (Accessed n 27/09/2024)

⁶⁰ Ibid

⁶¹ International Peace Institute., 'Human Rights and Sustaining Peace' Op Cit

⁶² Ibid

⁶³ Ibid

⁶⁴ Ibid

stability⁶⁵. For example, in conflict situations, upholding human rights can facilitate ceasefire and peace agreement negotiations⁶⁶. Further, it has been noted that once conflict breaks out, respect for international human rights and humanitarian law can diminish the damaging impact of conflict and foster trust between belligerents – whether state or non-State actors⁶⁷. The UDHR, acknowledges that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world⁶⁸.

It is therefore imperative to uphold human rights towards peace and prosperity. Peace is an essential element of development and prosperity. The 2030 Agenda for Sustainable Development recognizes that there can be no Sustainable Development without peace⁶⁹. The United Nations notes that peace is an enabler of development, in as much as it is a key outcome of global development efforts⁷⁰. Upholding human rights therefore creates a suitable environment for peace towards development and prosperity.

In addition, realising human rights especially socio-economic and cultural rights can enhance the right of all human beings to development towards prosperity⁷¹. Progress towards socio-economic rights including the right to food, the right to adequate housing, the right to education, the right to health, and the right to water and sanitation is vital for human well-being towards

⁶⁵ Office of the United Nations High Commissioner for Human Rights., 'The Future of Human Rights and Peace and Security' Available at <https://www.ohchr.org/sites/default/files/udhr/publishingimages/75udhr/HR75-high-level-event-Peace-Security-Think-Piece.pdf> (Accessed on 28/09/2024)

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ United Nations General Assembly. The Universal Declaration of Human Rights (UDHR). Op Cit

⁶⁹ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Op Cit

⁷⁰ United Nations., 'Peace for Prosperity and Sustainable Development' Available at <https://www.un.org/en/desa/peace-prosperity-and-sustainable-development> (Accessed on 28/09/2024)

⁷¹ United Nations., 'Human Rights Enhancing Economy' Available at <https://libraryresources.unog.ch/c.php?g=714166&p=5167185> (Accessed on 28/09/2024)

development and prosperity⁷². It has been noted that socio-economic rights provide protection for the dignity, freedom and well-being of all persons by guaranteeing state-supported entitlements to education, public health care, housing, a living wage, decent working conditions among other social goods⁷³. Actualizing socio-economic rights is key towards realizing the Sustainable Development agenda towards prosperity for all⁷⁴. The 2030 Agenda for Sustainable Development and its Sustainable Development Goals is anchored in the advancement of socio-economic rights including food security, good health and well-being, quality education, and clean water and sanitation⁷⁵. Actualizing socio-economic rights can therefore accelerate progress towards Sustainable Development and prosperity for all.

It is therefore necessary to foster human rights towards prosperity for all. This requires states to ensure that all citizens are protected from discrimination, torture, slavery, arbitrary detention, among other forms of oppression⁷⁶. Additionally, it includes the promotion of the right to education, healthcare, work, and participation in cultural and political life⁷⁷. Further, in order to fulfill economic, social, and cultural rights, states are encouraged to undertake measures towards progressive realisation of these rights⁷⁸. It has been noted that regardless of the availability of resources, states have an immediate obligation to take appropriate steps to ensure continuous and sustained

⁷² Office of the United Nations High Commissioner for Human Rights., 'Economic, Social, and Cultural Rights' Op Cit

⁷³ Ahmed. D., Bulmer. E., 'Social and Economic Rights' Available at <https://www.idea.int/sites/default/files/publications/social-and-economic-rights-primer.pdf> (Accessed on 28/09/2024)

⁷⁴ Muigua. K., 'Actualising Socio-Economic Rights for Sustainable Development in Kenya' Available at <https://kmco.co.ke/wp-content/uploads/2019/02/Actualising-Socio-Economic-Rights-for-Sustainable-Development-in-Kenya-Kariuki-Muigua-9-February-2019.pdf> (Accessed on 28/09/2024)

⁷⁵ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Op Cit

⁷⁶ Upholding Human Rights: Safeguarding Dignity and Freedom of Speech., Available at <https://defyhatenow.org/upholding-human-rights-safeguarding-dignity-and-freedom-of-speech/#:~:text=The%20mandate%20of%20human%20rights%20encompasses%20the%20protection%20of%20individuals,in%20cultural%20and%20political%20life.> (Accessed on 28/09/2024)

⁷⁷ Ibid

⁷⁸ Office of the United Nations High Commissioner for Human Rights., 'Economic, Social, and Cultural Rights' Op Cit

improvement in the enjoyment of social, economic, and cultural rights over time⁷⁹. These measures include enhancing access to employment, empowering citizens through access to quality education, realizing the right to health including through Universal Health Coverage (UHC), and ensuring all citizens have access to clean water and sanitation services⁸⁰. Further, while taking positive measures towards actualizing these rights, states are also obligated to refrain from taking actions that could undermine the achievement of social, economic, and cultural rights such as forcibly evicting people from their homes therefore hindering the right to adequate housing⁸¹.

Courts are also key in safeguarding all categories of human rights. It has been noted that the judiciary has a fundamental role in developing our understanding of human rights, in affording remedies in cases of human rights violations, and in providing decisions which can lead to systematic legal, policy, and institutional change to prevent future violations⁸². Though legal systems and judicial practices vary across countries and regions, the role of the courts in enforcement of human rights is fundamental⁸³. It is therefore imperative for courts to safeguard human rights and continue shaping the human rights discourse at national, regional, and global levels.

In addition to states, individuals also have a duty to play towards upholding human rights for prosperity⁸⁴. It has been noted that citizens have a negative duty to avoid infringing upon the rights of others and a positive duty to form social movements that actively support and lobby for human rights⁸⁵. Citizens have been urged to work closely with the state in actualising human rights

⁷⁹ Ibid

⁸⁰ Muigua. K., 'Actualising Socio-Economic Rights for Sustainable Development in Kenya' Op Cit

⁸¹ Office of the United Nations High Commissioner for Human Rights., 'Economic, Social, and Cultural Rights' Op Cit

⁸² Ibid

⁸³ Office of the United Nations High Commissioner for Human Rights., 'Guide for the Judiciary on Applying a Human Rights-Based Approach to Health' Available at <https://www.ohchr.org/sites/default/files/JudiciaryGuide.pdf> (Accessed on 28/09/2024)

⁸⁴ **Responsibility for Human Rights., Available at** <https://books.openedition.org/obp/3068?lang=en> (Accessed on 28/09/2024)

⁸⁵ Ibid

including socio-economic rights by cultivating their skills through education and training towards improving the quality of their lives⁸⁶.

4.0 Conclusion

Protecting human rights is a core ideal towards peace and prosperity⁸⁷. Human rights are intrinsically linked to building and sustaining peace, security, and stability⁸⁸. In addition, actualising socio-economic and cultural rights can enhance the right of all human beings to development towards prosperity⁸⁹. Despite the recognition of human rights at global, regional, and national levels, human rights violations are still prevalent undermining human well-being, development, and prosperity⁹⁰. It is therefore imperative to accelerate progress towards human rights and prosperity for all. It is necessary for states to uphold, protect, and fulfill human rights through measures such as progressive realisation of social, economic, and cultural rights⁹¹. Courts also have a key role to play in developing our understanding on human rights and ensuring access to remedies in cases of human rights violations⁹². Citizens also have a duty to play towards achieving human rights⁹³.

Protecting human rights is therefore a goal that requires involvement of all stakeholders including states, courts, and citizens. It is imperative for all stakeholders to play their role towards human rights and prosperity for all.

⁸⁶ Muigua. K., 'Actualising Socio-Economic Rights for Sustainable Development in Kenya' Op Cit

⁸⁷ International Peace Institute., 'Human Rights and Sustaining Peace' Op Cit

⁸⁸ Office of the United Nations High Commissioner for Human Rights., 'The Future of Human Rights and Peace and Security' Op Cit

⁸⁹ United Nations., 'Human Rights Enhancing Economy' Op Cit

⁹⁰ United Nations., 'The Foundation of International Human Rights Law' Op Cit

⁹¹ Muigua. K., 'Actualising Socio-Economic Rights for Sustainable Development in Kenya' Op Cit

⁹² Office of the United Nations High Commissioner for Human Rights., 'Economic, Social, and Cultural Rights' Op Cit

⁹³ Muigua. K., 'Actualising Socio-Economic Rights for Sustainable Development in Kenya' Op Cit

Defining and Strengthening the Role of Lawyers in Climate Change Conflicts

Abstract

In the wake of the worsening climate crisis, responding to climate change has become a matter of urgent global, regional, national, and local priority. Sustainable Development Goal 13 under the United Nations 2030 Agenda for Sustainable Development calls upon all countries to take urgent action towards combating climate change and its impacts. While confronting climate change, it is also imperative to address the nexus between climate change and conflicts. In addition to its adverse environmental, social, and economic effects, climate change is also fueling conflicts at all levels. Effective management of climate change conflicts is a key measure towards strengthening climate action and delivering climate justice. This paper critically explores the role of lawyers in climate change conflicts. The paper argues that lawyers are crucial agents in the effective management of climate change conflicts towards climate justice. The paper discusses the nature, causes, and effects of climate change conflicts. In addition, the paper highlights the opportunities and challenges for lawyers in climate change conflicts. It also proposes measures towards defining and strengthening the role of lawyers in climate change conflicts.

1.0 Introduction

The climate crisis is worsening with every person, in every country in every continent being impacted in some shape or form by climate change¹. According to the United Nations Environment Programme (UNEP), the world is in a climate emergency². UNEP points out that unless greenhouse gas emissions fall dramatically, global warming could pass 2.9°C this century, a situation that will have catastrophic consequences for life on the planet³. With rising greenhouse gas emissions, climate change is occurring at rates much faster than anticipated⁴. Its impacts can be devastating and include extreme and changing weather patterns and rising sea levels⁵. The climate crisis is disrupting national economies and affecting lives and livelihoods, especially

¹ United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts' Available at <https://www.un.org/sustainabledevelopment/climate-change/> (Accessed on 06/09/2024)

² United Nations Environment Programme., 'Climate Action' Available at <https://www.unep.org/topics/climate-action> (Accessed on 06/09/2024)

³ Ibid

⁴ United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts' Op Cit

⁵ Ibid

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for the most vulnerable⁶. Climate change is a major global challenge that is affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda⁷.

Responding to climate change has therefore become a matter of urgent global, regional, national, and local priority. According to the United Nations, if the climate crisis is left unchecked, it will undo a lot of the development progress made over the past years⁸. It further notes that if climate change is not addressed, it will also provoke mass migrations that will lead to instability and wars⁹. The United Nations *2030 Agenda for Sustainable Development*¹⁰ acknowledges that climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve Sustainable Development. Sustainable Development Goal 13 under the Agenda calls upon all countries to take urgent action towards combating climate change and its impacts¹¹. Urgent and transformative action and policies that cover entire economies, foster climate-resilient development, while outlining a clear path to achieve net-zero emissions are therefore needed to confront climate change¹².

It has been pointed out that while responding to climate change, it is imperative to address the nexus between climate change and conflicts¹³. In addition to its adverse environmental, social, and economic effects, climate

⁶ Ibid

⁷ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

⁸ United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts' Op Cit

⁹ Ibid

¹⁰ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 06/09/2024)

¹¹ Ibid

¹² United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts' Op Cit

¹³ International Institute for Sustainable Development., 'Climate change and conflict: Lessons from Community Conservancies in Northern Kenya' Available at https://www.iisd.org/system/files/publications/climate_change_conflict_kenya.pdf (Accessed on 06/09/2024)

change is also fueling conflicts at all levels¹⁴. Effective management of climate change conflicts has been identified as a key measure towards strengthening climate action and delivering climate justice¹⁵.

This paper critically explores the role of lawyers in climate change conflicts. The paper argues that lawyers are crucial agents in the effective management of climate change conflicts towards climate justice. The paper discusses the nature, causes, and effects of climate change conflicts. In addition, the paper highlights the opportunities and challenges for lawyers in climate change conflicts. It also proposes measures towards defining and strengthening the role of lawyers in climate change conflicts.

2.0 Climate Change and Conflicts

Climate change is fueling and contributing to increased conflict¹⁶. It has been noted that the environmental effects of climate change, especially the depletion of natural resources creates conditions that increase the risk of violent conflict¹⁷. For example, impacts such as rising temperatures, more severe and frequent extreme weather events such as droughts and extreme flooding, and erratic rainfall patterns cause or worsen volatile food prices, affect livelihoods, and result in large-scale displacement therefore posing the risk of conflicts¹⁸. The environmental impacts of climate change including water scarcity, crop

¹⁴ Ibid

¹⁵ United Nations Environment Programme., 'Climate Litigation More than Doubles in Five Years, now a Key Tool in Delivering Climate Justice' Available at <https://www.unep.org/news-andstories/pressrelease/climate-litigation-more-doubles-five-years-now-key-tool-delivering> (Accessed on 06/09/2024)

¹⁶ United Nations Climate Change., 'Conflict and Climate' Available at <https://unfccc.int/news/conflict-and-climate> (Accessed on 07/09/2024)

¹⁷ International Institute for Sustainable Development., 'Climate change and conflict: Lessons from Community Conservancies in Northern Kenya' Available at https://www.iisd.org/system/files/publications/climate_change_conflict_kenya.pdf (Accessed on 07/09/2024)

¹⁸ United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Available at <https://peacemaker.un.org/sites/peacemaker.un.org/files/DPPAPracticeNoteTheImplicationsofClimateChangeforMediationandPeaceProcesses.pdf> (Accessed on 07/09/2024)

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failure, food insecurity, migration, and displacement of populations increase the risk of conflict and violence¹⁹.

Climate change has been identified as a threat multiplier that is already increasing food insecurity, water scarcity and resource competition, while disrupting livelihoods and spurring migration²⁰. The effects of climate change are particularly destabilizing in already fragile and disadvantaged regions and communities, including least developed countries, small island developing states and dryland regions therefore increasing the likelihood of conflicts in such settings²¹. As the climate crisis intensifies in the coming years and decades in such settings, more people will be forced to leave their homes due to the impacts of climate change including desertification and rising sea levels²².

It has been noted that although climate change may not always be a direct cause of conflict, it can multiply and amplify existing risks to peace and development²³. For example, it can obstruct access to basic services including water, food, health and housing²⁴. Further, people who are already in vulnerable situations including those living in poverty or in situations of conflict may experience the impacts of climate change more acutely because they have less capacity for coping and fewer resources with which to build climate resilience²⁵. It has been noted that people enduring conflict are among

¹⁹ Froese. R., & Janpeter. S, 'The Nexus of Climate Change, Land Use, and Conflicts' (2019)

²⁰ International Crisis Group., 'Climate, Environment and Conflict' Available at <https://www.crisisgroup.org/future-conflict/climate-environment-and-conflict> (Accessed on 07/09/2024)

²¹ Grzybowski. A., & Hunnie. C., 'Mediating Peace with Climate Change' Available at <https://ecopeaceme.org/wp-content/uploads/2022/03/mediating-peace-with-climate-change.pdf> (Accessed on 07/09/2024)

²² United Nations Climate Change., 'Conflict and Climate' Op Cit

²³ United Nations Environment Programme., 'Climate Action Holds Key to Tackling Global Conflict' Available at <https://www.unep.org/news-and-stories/story/climate-action-holds-key-tackling-global-conflict> (Accessed on 07/09/2024)

²⁴ Ibid

²⁵ Ibid

the most vulnerable to the climate and environmental crises – and they are also among those most neglected by climate action²⁶.

Climate change can therefore cause and contribute to conflict. Its impacts including extreme flooding, severe droughts, desertification, biodiversity loss and environmental degradation are displacing millions of people all over the world and intensifying competition over scarce natural resources²⁷. This in turn fuels conflict, violence, human right violations and threatens the effectiveness and sustainability of peacemaking efforts globally²⁸. Effective management of climate change conflicts is therefore crucial in strengthening the response towards climate change and delivering climate justice²⁹.

3.0 The Role of Lawyers in Climate Change Conflicts

Lawyers have been described as crucial agents in mitigating the climate crisis³⁰. It has been argued that in order to remain competitive in today's market, legal professionals should leverage the influence they have in society through lobbying, litigation, and legislation in order to accelerate the green transition towards combating climate change³¹.

Lawyers can play a vital role in mitigating climate change conflicts by strengthening environmental rule of law³². The idea of environmental rule of law integrates environmental needs with the essential elements of the rule of

²⁶ International Committee of the Red Cross., 'Climate and Conflict' Available at <https://www.icrc.org/en/law-and-policy/climate-and-conflict> (Accessed on 07/09/2024)

²⁷ Climate Diplomacy., 'Four Climate Frontiers: How Mediators can Make Peace and Help Protect the Planet' Available at <https://climate-diplomacy.org/magazine/conflict/four-climate-frontiers-howmediators-can-make-peace-and-help-protect-planet> (Accessed on 07/09/2024)

²⁸ Ibid

²⁹ United Nations Environment Programme., 'Climate Litigation More than Doubles in Five Years, now a Key Tool in Delivering Climate Justice' Op Cit

³⁰ Sainani. M., 'The Role of Lawyers in the Green Transition: Six Ways of Making a Positive Impact' Available at https://www.legal500.com/global_green_guide/the-role-of-lawyers-in-the-green-transition-six-ways-of-making-a-positive-impact/ (Accessed on 08/09/2024)

³¹ Ibid

³² 9 Ways Lawyers are Addressing Climate Change through Environmental Law., Available at <https://www.bestlawyers.com/article/tackle-climate-change-environmental-law/5346> (Accessed on 08/09/2024)

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law, and provides the basis for improving environmental governance on issues such as climate change³³. Environmental rule of law highlights environmental sustainability by connecting it with fundamental rights and obligations³⁴. According to UNEP, environmental rule of law implicitly reflects universal moral values and ethical norms of behaviour, and it provides a foundation for environmental rights and obligations³⁵. Environmental rule of law therefore seeks to apply the tenets of the rule of law to environmental governance. It has been argued that laws and their implementation are the essential link between policies aimed at reaching the goals of the Sustainable Development agenda and the actual realization of that agenda³⁶. There is a growing awareness that sustainability and Environmental and Social Governance (ESG) are not only a matter of good practice, but the subject of binding and enforceable regulations³⁷.

Environmental rule of law is therefore central to achieving the goals of the Sustainable Development agenda including confronting climate change³⁸. Lawyers can play a pivotal role in addressing climate change conflicts by using environmental law as a tool to advocate for stronger laws and regulations, holding polluters accountable and promoting sustainable practices³⁹. They can also utilize environmental rule of law in addressing the impacts of climate change including conflicts by driving climate friendly policies⁴⁰. Lawyers have the necessary knowledge and power to influence policy and legislative changes by actively engaging in advocacy and lobbying to shape environmental and climate-related regulations⁴¹. Effective laws, regulations and justice systems

³³ United Nations Environment Programme., 'Environmental Rule of Law' Available at <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0> (Accessed on 08/09/2024)

³⁴ Ibid

³⁵ Ibid

³⁶ Stephens. C., 'An Evolving Role for Law and Lawyers in Development' Available at <https://blogs.worldbank.org/en/voices/evolving-role-law-and-lawyers-development> (Accessed on 08/09/2024)

³⁷ Ibid

³⁸ United Nations Environment Programme., 'Environmental Rule of Law' Op Cit

³⁹ 9 Ways Lawyers are Addressing Climate Change through Environmental Law., Op Cit

⁴⁰ Sainani. M., 'The Role of Lawyers in the Green Transition: Six Ways of Making a Positive Impact' Op Cit

⁴¹ Ibid

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based on the rule of law are key in confronting the effects of climate change by providing a basis for protecting environmental rights, increasing institutional capacity to enhance resilience to the effects of climate change, and empowering local communities to know and claim their rights⁴². Lawyers should therefore utilize environmental rule of law as a tool to address the impacts of climate change including conflicts.

Lawyers also have a key role to play in climate change conflicts by enhancing access to climate justice⁴³. The concept of climate justice acknowledges the unequal historical responsibility that countries and communities bear in relation to the climate crisis⁴⁴. Climate justice acknowledges that some nations and communities which due to an unfortunate mixture of economic and geographic vulnerability, continue to shoulder the brunt of the burdens of climate change despite their relative innocence in causing it⁴⁵. It has been noted that the people most vulnerable to the effects of climate change are those who already experience systematic exclusion and marginalization, and will be disproportionately affected⁴⁶. For example, people living in least-developed countries, fragile and conflict affected contexts are the most exposed, due to a combination of geographic factors, economic systems reliant on climate threatened sectors including agriculture and pastoralism, and limited institutional capacity to address climate risks⁴⁷. In addition, women and girls, youth and children, the elderly, indigenous peoples, climate migrants and

⁴² International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action' Available at https://www.idlo.int/sites/default/files/pdfs/publications/climate_justice_policy_paper_-_climate_action_-_final.pdf (Accessed on 08/09/2024)

⁴³ United Nations Development Programme., 'UNDP Launches "Climate Justice" Training for Young Lawyers' Available at <https://www.undp.org/turkiye/press-releases/undp-launches-climate-justicetraining-young-lawyers> (Accessed on 08/09/2024)

⁴⁴ United Nations Development Programme., 'Climate change is a Matter of Justice – Here's Why' Available at <https://climatepromise.undp.org/news-and-stories/climate-change-matter-justice-heres-why> (Accessed on 08/09/2024)

⁴⁵ Giles. M., 'The Principles of Climate Justice at CoP27.' Available at <https://earth.org/principles-ofclimatejustice/#:~:text=That%20response%20should%20be%20based,the%20consequences%20of%20climate%20change> (Accessed on 08/09/2024)

⁴⁶ International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action' Op Cit

⁴⁷ Ibid

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other excluded and marginalized communities bear the brunt of the impacts of climate justice⁴⁸. Lawyers have a key role to play in delivering Climate Justice to the vulnerable.

Achieving Climate Justice means putting equity and human rights at the core of decision-making and action on climate change⁴⁹. This entails linking human rights and development to tackle pre-existing vulnerabilities and inequalities contributing to and worsened by climate change⁵⁰; prioritizing the rights of the most climate-vulnerable to ensure that no one is left behind⁵¹; investing in people-centered laws and institutions⁵²; building effective justice systems that can resolve climate-related disputes, while protecting the environmental rights of people and communities⁵³; and ensuring fair and inclusive climate decision-making⁵⁴.

Lawyers can enhance Climate Justice by ensuring access to justice in climate related conflicts in order to protect the rights of the most vulnerable⁵⁵. Climate change threatens the effective enjoyment of a range of human rights including those to life, water and sanitation, food, health, housing, self-determination, culture and development, and the right to a clean, healthy, and sustainable environment especially for those in vulnerable situations⁵⁶. Lawyers can represent clients including those in vulnerable situations in litigation related to environmental damage, pollution, and breaches of environmental regulation, among others towards achieving Climate Justice⁵⁷. Climate litigation has been

⁴⁸ Ibid

⁴⁹ United Nations Development Programme., 'Climate change is a Matter of Justice – Here's Why' Op Cit

⁵⁰ International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action' Op Cit

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Muigua. K., 'Promoting Climate Litigation in Kenya for Sustainability' Available at <https://kmco.co.ke/wp-content/uploads/2023/08/Promoting-Climate-litigation-in-Kenya-forSustainability-Kariuki-Muigua-August-2023.pdf> (Accessed on 08/09/2024)

⁵⁶ Office of the United Nations High Commissioner for Human Rights., 'OHCHR and Climate Change' Available at <https://www.ohchr.org/en/climate-change> (Accessed on 08/09/2024)

⁵⁷ Sainani. M., 'The Role of Lawyers in the Green Transition: Six Ways of Making a Positive Impact' Op Cit

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identified as a frontier solution to change the dynamics of the fight against climate change⁵⁸. It has been noted that children and youth, women's groups, local communities, and indigenous peoples, among others, are taking a prominent role in bringing cases to courts and driving climate change governance reform in more and more countries around the world⁵⁹. Lawyers are therefore important in ensuring access to justice for these groups. Lawyers can also foster Climate Justice and help in protecting the rights of individuals and communities that are threatened by climate change by inducing governments and companies to adopt more climate-friendly policies and practices through lobbying and advocacy⁶⁰.

In addition, lawyers can foster Climate Justice by utilizing Alternative Dispute Resolution (ADR) processes to address climate change conflicts⁶¹. ADR processes including arbitration and mediation are ideal in managing climate change conflicts and delivering Climate Justice⁶². The advantages of ADR processes in climate change conflicts include allowing parties to select a third party with requisite knowledge and experience in climate change matters, providing a platform for collaborative problem -solving approaches, enhancing the participation of all stakeholders especially in mediation, and ensuring a neutral forum for managing cross border climate change conflicts⁶³. As a result, it has been pointed out that ADR mechanisms are suitable in managing environmental and sustainability conflicts and disputes such as those concerning access to natural resources including land and water, renewable energy, carbon reduction, waste management, electrification,

⁵⁸ United Nations Environment Programme., 'Global Climate Litigation Report: 2023 Status Review' Available at <https://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review> (Accessed on 08/09/2024)

⁵⁹ Ibid

⁶⁰United Nations Development Programme., 'UNDP Launches "Climate Justice" Training for Young Lawyers' Op Cit

⁶¹ Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution' Available at <https://kmco.co.ke/wp-content/uploads/2023/07/Attaining-Environmental-Justice-through-Alternative-Dispute-Resolution.pdf> (Accessed on 08/09/2024)

⁶² Muigua. K., 'Utilizing Alternative Dispute Resolution in Climate Change Disputes' Available at <https://kmco.co.ke/wp-content/uploads/2024/03/Utilizing-Alternative-Dispute-Resolution-in-Climate-Change-Disputes.pdf> (Accessed on 09/08/2024)

⁶³ Ibid

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sustainable transport and infrastructure among others⁶⁴. Lawyers should therefore advise their clients to embrace ADR for effective management of climate change conflicts while also representing them in arbitration and mediation proceedings.

Lawyers are therefore vital for effective management of climate change conflicts towards climate justice. It is therefore necessary to strengthen the role of lawyers in climate change conflicts.

4.0 Conclusion

Climate change is causing and worsening conflicts⁶⁵. These conflicts affect appropriate climate action while also contributing to inequalities within and among nations especially for most vulnerable including the youth, women, the elderly, persons with disabilities, and indigenous peoples⁶⁶. Effective management of climate change conflicts is therefore necessary in order to strengthen the response towards climate change and achieve climate justice⁶⁷.

Lawyers are important in addressing climate change conflicts. Lawyers hold immense influence in the society which can be leveraged through lobbying, litigation, and legislation in order to accelerate the green transition towards combating climate change⁶⁸. In order to strengthen their role in climate change conflicts, lawyers should continue shaping environmental rule of law and utilizing it as a tool to address the impacts of climate change including conflicts⁶⁹. They should enhance access to climate justice by utilizing avenues such as litigation and ADR to uphold the rights of those in vulnerable situations⁷⁰.

⁶⁴ United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Available at <https://peacemaker.un.org/sites/peacemaker.un.org/files/DPPAPracticeNoteTheImplicationsofClimateChangeforMediationandPeaceProcesses.pdf> (Accessed on 08/09/2024)

⁶⁵ United Nations Climate Change., 'Conflict and Climate' Op Cit

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Sainani. M., 'The Role of Lawyers in the Green Transition: Six Ways of Making a Positive Impact' Op Cit

⁶⁹ 9 Ways Lawyers are Addressing Climate Change through Environmental Law., Op Cit

⁷⁰ International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action' Op Cit

Defining and Strengthening the Role of Lawyers in Climate Change Conflicts

Lawyers can also contribute to climate change mitigation efforts by providing legal advice to clients on climate change compliance and disclosure requirements in order to avoid worsening the climate change crisis and minimize disputes⁷¹. Further, they can help in structuring sustainable contracts that incorporate climate clauses that promote eco-friendly operations in order to minimize potential conflicts especially those involving private developers and local communities⁷². Further, in addition to structuring sustainable contracts that enhance climate change mitigation, it has been pointed out that lawyers can go a step further and choose to assist clients who are working towards decarbonisation and increased sustainability instead of those who work against it⁷³. There is also need to adopt sustainable practices in the legal profession in order to reduce its carbon footprint⁷⁴. It is also necessary to foster continuous professional development, education, and training in climate change matters in order to strengthen the role of lawyers in climate change conflicts⁷⁵.

Effective management of climate change conflicts is therefore key in tackling climate change delivering climate justice. The role of lawyers in climate change conflicts should therefore be defined and strengthened in order to make them agents of Climate Justice.

⁷¹ Sainani. M., 'The Role of Lawyers in the Green Transition: Six Ways of Making a Positive Impact' Op Cit

⁷² Ibid

⁷³ Ibid

⁷⁴ International Bar Association., 'How the Climate Crisis is Changing the Legal Profession' Available at <https://www.ibanet.org/How-the-climate-crisis-is-changing-the-legal-profession> (Accessed on 08/09/2024)

⁷⁵ Muigua. K., 'Re-imagining the Role of Lawyers in Climate Justice' Available at <https://kmco.co.ke/wp-content/uploads/2023/07/Re-imagining-the-Role-of-Lawyers-in-Climate-Justice-Kariuki-Muigua-20th-July-2023.pdf> (Accessed on 08/09/2024)

Implementing the Alternative Dispute Resolution Policy in Kenya

Abstract

This paper critically examines the Alternative Dispute Resolution (ADR) Policy in Kenya. The paper argues that there is need to implement the Policy in order to enhance the framework on ADR in Kenya. The paper gives an overview of the ADR landscape in Kenya and highlights some of the challenges hindering effective utilization of ADR techniques in the country. It interrogates the salient features of the ADR Policy in Kenya and discusses how the Policy can promote ADR in Kenya. The paper posits that there is need to effectively implement the ADR Policy in Kenya in order to fully realize the potential of ADR mechanisms in the country.

1.0 Introduction

The phrase Alternative Dispute Resolution (ADR) refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others¹. ADR has also been defined as a spectrum of less costly and more expeditious alternatives to litigation, where a neutral party assists the disputing parties in reaching resolution². The term ADR can also be used to describe a set of mechanisms that are applied in managing disputes that may be linked to but function outside formal court litigation processes³.

The *Charter of the United Nations*⁴ provides the legal basis for the application of ADR techniques at the global level. The Charter provides that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means* of their own choice (Emphasis added)⁵. At a national level, the Constitution of Kenya mandates courts and tribunals to

¹ Muigua. K., 'Alternative Dispute Resolution and Article 159 of the Constitution' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf> (Accessed on 23/07/2024)

² JAMS ADR., 'What is ADR? Defining the Alternative Dispute Resolution Spectrum' Available at <https://www.jamsadr.com/adr-spectrum/> (Accessed on 23/07/2024)

³ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

⁴ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

⁵ Ibid, article 33 (1)

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promote ADR mechanisms including reconciliation, mediation, arbitration and Traditional Dispute Resolution mechanisms (TDRMs)⁶.

It has been argued that the term 'Alternative Dispute Resolution' is a misnomer since it may be understood to imply that these mechanisms are second-best to litigation which is not the case⁷. ADR techniques especially in the African context are considered as 'Appropriate' and not 'Alternative' in the justice discourse⁸. Conflict management amongst African communities has since time immemorial taken the form of informal negotiation, mediation, reconciliation and arbitration⁹. ADR techniques fit comfortably within traditional concepts of African justice, particularly its core values of reconciliation and restorative justice¹⁰. The aim of conflict management in African societies has for many centuries been based on creating consensus, facilitating reconciliation, fostering peace, harmony and cohesion and gave prominence to communal needs over individual needs¹¹. ADR mechanisms have always been the first point of call in conflict management in African societies¹².

As a result of their 'Appropriateness', ADR processes are now being increasingly embraced in fostering access to justice in Kenya¹³. ADR mechanisms are characterized by certain attributes which include informality, flexibility, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost-effective management of disputes¹⁴. These features make

⁶ Constitution of Kenya., 2010., article 159 (2) (c)

⁷ P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), pp. 50-52

⁸ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution' Available at <https://kmco.co.ke/wp-content/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Moving-from-Alternative-to-Appropriate-Dispute-Resolution-1.pdf> (Accessed on 23/07/2024)

⁹ Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successeschallenges-and-opportunities-1.pdf> (Accessed on 23/07/2024)

¹⁰ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

¹¹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

¹² Ibid

¹³ Ibid

¹⁴ Ibid

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ADR mechanisms viable in enhancing access to justice¹⁵. These traits also make ADR mechanisms ideal in addressing most of the challenges which clog formal justice processes. These challenges include high costs, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow¹⁶.

There have been calls to legitimize ADR in Kenya¹⁷. It has been argued that having in place appropriate legal, policy, and institutional measures will ensure that ADR mechanisms find their rightful place in the conventional judicial system and that the same are meaningfully and actively utilized in facilitating access to justice in Kenya¹⁸. In order to achieve this goal, the *National Alternative Dispute Resolution Policy*¹⁹ has been put in place in Kenya. The policy is expected to enhance the landscape of ADR in Kenya.

This paper critically examines the Alternative Dispute Resolution Policy in Kenya. The paper argues that there is need to implement the Policy in order to enhance the framework on ADR in Kenya. The paper gives an overview of the ADR landscape in Kenya and highlights some of the challenges hindering effective utilization of ADR techniques in the country. It interrogates the salient features of the ADR Policy in Kenya and discusses how the Policy can promote ADR in Kenya. The paper posits that there is need to effectively implement the ADR Policy in Kenya in order to fully realize the potential of ADR mechanisms in the country.

2.0 The ADR Landscape in Kenya

ADR mechanisms have been utilized in conflict management in Kenya and the rest of Africa for many centuries²⁰. These processes are firmly embedded in the

¹⁵ Ibid

¹⁶ 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

¹⁷ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISING-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf> (Accessed on 23/07/2024)

¹⁸ Ibid

¹⁹ Republic of Kenya., Office of the Attorney-General and Department of Justice 'Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy'

²⁰ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

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culture and customs of African communities²¹. It has been noted that culture plays a prominent role in conflict management²². Culture has been described as an essential part of conflict and conflict resolution²³. Culture influences conflicts and the conflict resolution process²⁴. It shapes our understandings of relationships, and of how to deal with the conflict and harmony that are always present whenever two or more people come together²⁵. Culture affects the ways we name, frame, blame, and attempt to tame conflicts²⁶. In addition, it has been noted that differences in attitudes, belief systems, religious practices, language, social set ups and economic practices among different cultures means that conflicts may take different forms in each culture²⁷. A person's cultural background can therefore influence every aspect of the conflict process, ranging from the goals that are considered incompatible, why they are seen as so, what one chooses to do about it, and whether the outcome is considered to be satisfactory or not²⁸. Culture is therefore inextricable from conflict, though it does not cause it²⁹. When differences surface between individuals and in families, organizations, or communities, culture is always present, shaping perceptions, attitudes, behaviors, and outcomes³⁰.

ADR processes have been part and parcel of African communities for many years since they were well-entrenched in the traditions, customs, norms and taboos of the African people³¹. These communities gave prominence to certain values including peace, harmony, truth, honesty, unity, cooperation,

²¹ Ibid

²² LeBaron. M., 'Culture and Conflict' Available at https://www.beyondintractability.org/essay/culture_conflict (Accessed on 24/07/2024)

²³ Ibid

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

²⁷ Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

²⁸ Ibid

²⁹ LeBaron. M., 'Culture and Conflict' Op Cit

³⁰ Ibid

³¹ Ademowo. A., 'Conflict Management in Traditional African Society.' Available at https://www.researchgate.net/publication/281749510_Conflict_management_in_Traditional_African_Society (Accessed on 24/07/2024)

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forgiveness, reconciliation, and respect³². In African communities, the philosophy of *Ubuntu/Utu* was essential in fostering social harmony and was effectively incorporated in conflict management³³. The purpose of conflict management in African communities was therefore creating consensus, facilitating reconciliation, fostering peace, harmony and cohesion and giving prominence to communal needs over individual needs³⁴. ADR techniques including traditional forms of mediation, adjudication, reconciliation, arbitration and negotiation were therefore utilized in conflict management since they suited comfortably within traditional concepts of African justice, particularly its core value of reconciliation³⁵. They were administered by institutions especially the council of elders which had legitimacy therefore ensuring compliance and enforcement of outcomes³⁶.

Despite the key role played by ADR processes among African communities, it has been noted that indigenous practices and institutions on conflict management were largely weakened and even destroyed in many African societies as a result of colonization³⁷. The colonial powers introduced formal justice processes such as law courts, which came to *pronounce judgments* rather than *resolve conflicts* according to the African concepts of justice³⁸. As a result of this approach, conflicts that were hitherto handled through traditional amicable settlements practices, with emphasis on *reconciliation* and the *restoration of social harmony*, were now being handled on the basis of *punishment* of the conflicting parties(Emphasis added)³⁹. ADR techniques were therefore disregarded in favour of western justice systems. In Kenya, the introduction of the 'repugnancy clause' meant that traditional justice systems could only be

³² Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa*, Volume 17, No.1, 2015

³³ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

³⁴ Ibid

³⁵ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

³⁶ Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

³⁷ Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2)

³⁸ Ibid

³⁹ Ibid

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applied in the country to the extent that they were not repugnant to the western conception of justice and morality⁴⁰.

There has been progress towards recapturing the spirit of ADR in Kenya. ADR techniques are recognized under the Constitution of Kenya. The Constitution of Kenya mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and TDRMs⁴¹. It has been noted that the Constitution of Kenya envisions a multifaceted, pluralistic judicial operative that recognizes the coexistence of ADR and alternative justice systems within and alongside the formal justice system⁴².

There has been progress towards operationalizing ADR in Kenya. For example, the Judiciary has been implementing mediation as an initiative to promote ADR since 2016 through the Court Annexed Mediation program⁴³. There are many success stories of families that have been reunited, contractual relations that have been restored and cases that had been in court for years settled within numbered mediation sessions under the Court Annexed Mediation program⁴⁴.

The Judiciary has also developed the *Alternative Justice Systems Framework Policy*⁴⁵. The Policy seeks to ensure affective and efficient access to justice in Kenya through respecting, protecting and transformation of Alternative Justice Systems (AJS) mechanisms in Kenya⁴⁶. It also seeks to mainstream AJS in Kenya through the formal recognition of AJS and identification of the kinds of cases that can be handled through AJS; strengthening the process for selection, election, appointment and removal of AJS practitioners; development of procedures and customary law jurisprudence; facilitation of effective

⁴⁰ Judicature Act, Cap. 8, Laws of Kenya, S 3 (2)

⁴¹ Constitution of Kenya., 2010., article 159 (2) (c)

⁴² International Development Law Organization., 'Enhancing Access to Justice through Alternative Dispute Resolution in Kenya' Available at <https://www.idlo.int/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya> (Accessed on 24/07/2024)

⁴³ The Judiciary of Kenya., 'Court Annexed Mediation' Available at <https://judiciary.go.ke/court-annexed-mediation/> (Accessed on 24/07/2024)

⁴⁴ Ibid

⁴⁵ The Judiciary of Kenya., 'Alternative Justice Systems Framework Policy.' Available at https://www.unodc.org/documents/easternafrika/Criminal%20Justice/AJS_Policy_Framework_2020_Kenya.pdf (Accessed on 24/07/2024)

⁴⁶ Ibid

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intermediary interventions; and strengthened and sustainable resource allocation and mobilization⁴⁷. The policy also aligns the operation of AJS with the principles and values of the Constitution of Kenya, 2010, and international human rights standards⁴⁸. In addition, the Policy also underscores the need for a pluralistic approach to justice that is sensitive to the cultural, socio-economic, and geographic diversity of the population⁴⁹. It has been noted that the implementation of the AJS Policy has had tangible impacts on access to justice in Kenya⁵⁰. It has facilitated the resolution of a significant number of disputes that would have otherwise burdened the formal courts⁵¹. It is imperative to effectively implement the AJS Policy in order to enhance access to justice in Kenya

The ADR landscape comprises of processes such as negotiation, mediation, arbitration, TDRMs, and conciliation among others⁵². If properly utilized these techniques can offer flexibility, confidentiality, and a more collaborative environment for conflict management⁵³. In addition, it has been noted that the use of ADR can reduce the time it takes to resolve disputes, particularly in tribunals and traditional and alternative justice systems, and diminish the backlog of cases experienced by the courts in Kenya⁵⁴. However, a lack of consistency and standardization of practices across ADR mechanisms can deter the uptake of these processes in Kenya⁵⁵. In addition, the practice of ADR in Kenya is hindered by several challenges including conceptual and definition problems, unclear scope of ADR, jurisdictional challenges, questions of justiciability, lack of sectoral framework legislation, and inadequate

⁴⁷ Ibid

⁴⁸ The Judiciary of Kenya., 'Promoting Alternative Justice Systems (AJS)' Available at <https://judiciary.go.ke/promoting-alternative-justice-systems-ajs/> (Accessed on 24/07/2024)

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Ibid

⁵² Nairobi Centre for International Arbitration., 'NCIA collaborates with LSK to sensitize members on the National ADR Policy' Available at <https://ncia.or.ke/ncia-management-pays-a-courtesy-call-to-the-solicitor-general-of-kenya-copy-copy/> (Accessed on 24/07/2024)

⁵³ Ibid

⁵⁴ International Development Law Organization., 'Enhancing Access to Justice through Alternative Dispute Resolution in Kenya' Op Cit

⁵⁵ Ibid

institutional development⁵⁶. In light of these challenges, the *ADR Policy*⁵⁷ has been put in place in order to enhance the landscape of ADR in Kenya.

3.0 The ADR Policy in Kenya: Prospects and Challenges

The National Alternative Dispute Resolution Policy of Kenya seeks to enhance the practice of ADR in Kenya. The Policy recognizes that through its reconciliatory and mostly non-adversarial approach, ADR is a catalyst to peace and cohesion in Kenya. The Policy notes that ADR is an essential pillar in access to justice since it serves a majority of the population. It acknowledges that ADR has been part and parcel of Kenyan communities for many centuries⁵⁸. The Policy notes that ADR and AJS predate conventional court adjudication of disputes in Kenya⁵⁹. It points out that in the pre-colonial era, societies had established systems of resolution of communal conflict⁶⁰. In colonial Kenya, these systems co-existed with the judicial system albeit viewed as inferior forums and often suppressed⁶¹. The Policy also notes that there is now a robustly developing ADR sector in Kenya catapulted by the promulgation of the 2010 Constitution⁶². It acknowledges that ADR is now being practiced in many sectors in the country including electoral; commercial; family; environmental; land; taxation; energy; construction; employment and labour; and in criminal justice, among others⁶³.

Development of the ADR Policy was necessitated by several factors that have hindered the effective utilization of ADR in the country. The Policy notes that despite legislative and institutional growth in the ADR sector, certain challenges, gaps and needs present dysfunctional conditions that undermine the full realization of the potential of ADR in Kenya and inhibit its further

⁵⁶ Judiciary of Kenya., 'Draft National ADR Policy Discussed.' Available at <https://judiciary.go.ke/draftnational-adr-policy-discussed/> (Accessed on 24/07/2024)

⁵⁷ Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy., Op Cit

⁵⁸ Ibid, Part 1.2

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid

⁶³ Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy., Op Cit

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development⁶⁴. These challenges include conceptual and definitional problems and unclear scope of ADR⁶⁵. It notes that conceptual issues in ADR have to do with the definitions of key ADR terms such as ADR itself, its component terms of 'Alternative'; 'Dispute' and 'Resolution' and key terminologies used in ADR. The Policy further acknowledges that there is also inadequate clarity as to what conceptions of justice are applied in ADR-whether it is the legal conception based on clearly stipulated rules, principles and individual rights, or other forms such as social and distributive justice which are based on distribution of wealth, opportunity and communal interests⁶⁶. On the challenge of unclear scope, the Policy notes that ADR is often narrowly viewed as consisting only of certain specific commonly known areas of practice such as arbitration and mediation⁶⁷. In addition, the Policy points out that ADR is also wrongly assumed to be a service mostly offered in civil matters, and mostly by lawyers⁶⁸. According to the Policy, these challenges undermine the understanding of ADR for users, potential users, policy makers, practitioners therefore limiting its utility towards the goal of access to justice⁶⁹.

In addition, the ADR Policy notes other challenges undermining the utility of ADR in access to justice in Kenya including lack of clarity on the jurisdictional limits of ADR; questions of justiciability of ADR; legal gaps and challenges including inadequate implementation of existing laws and lack of sectoral framework legislation; and inadequate institutional framework especially for TDRMs⁷⁰.

In terms of individual ADR processes, the Policy notes that challenges in arbitration include escalating costs of the service; increasing legal procedures which complicates the process; unethical behaviour amongst some practitioners where they deliberately slow down the process to their benefit; inefficient linkage of arbitration with court system for adoption and

⁶⁴ Ibid, Part 2

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy., Op Cit

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enforcement of awards resulting in long processes in the courts which compromises the efficiency gains of the arbitration process⁷¹. In mediation, the ADR Policy notes that development of the practice has been marked by the silo approach to institutional development with each of the key actors developing their own different rules, curricula, and training programs⁷². This has led to duplication, disparate standards, and a disjointed practice of mediation in Kenya⁷³. Further, there is an inadequate number of trained and training personnel and specialist mediation expertise in specialized dispute areas such as family and commercial sectors, among others⁷⁴. In addition, the Policy notes that negotiation is undermined by various challenges including lack of enforcement mechanisms; being prone to exploitation of some parties by others due to power and negotiation skills imbalance; being prone to deadlocks; and the possibility of degenerating into confrontation since there is no third party to moderate communication⁷⁵. TDRMs on the other hand are undermined by lack of clarity of the scope of their jurisdiction; lack of uniformity of guiding norms and procedures even amongst elders within the same community; absence of an oversight institution to manage governance and set and enforce standards in the practice area; absence of a code of conduct for practitioners; questions of morality and the constitution; and inadequate linkages with the formal justice systems and other ADR practice mechanisms⁷⁶. The Policy also acknowledges recognition and enforcement challenges inherent in all ADR processes⁷⁷.

In order to address the foregoing challenges and strengthen the practice of ADR in Kenya, the Policy aims to: provide definitions for key ADR terms, and to outline the scope of

ADR; strengthen the legal and institutional frameworks supporting the ADR sector; increase harmony and efficiency in the sector by enhancing coordination, collaboration and linkage within the sector, and between ADR actors and the formal justice system; strengthen sector governance, regulation, and capacity building; and strengthen different mechanisms of ADR⁷⁸.

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy., Op Cit

The Policy takes an inclusive approach to the scope of ADR, to encompass: civil matters; criminal matters guided by the various practices of ADR in criminal jurisdiction globally; private and public disputes; and new and innovative forms of ADR such as the Online

Dispute Resolution (ODR)⁷⁹. The Policy also seeks to strengthen the legal and institutional framework on ADR and also strengthen the linkages, coordination and harmonization in the ADR sector⁸⁰. Further, in order to enhance the quality and standards in ADR, the Policy advocates for training, accreditation, Continuous Professional Development (CPD), registration of institutional ADR providers, development of standard operating procedures, and timeframes for ADR processes⁸¹. It also seeks to enhance the recognition and enforcement of ADR outcomes⁸². It urges the Judiciary to develop a special ADR registry and depository for expeditious registration and depositing of ADR settlement agreements for parties who may wish to register and deposit their ADR agreements⁸³. The Policy also urges the Judiciary to establish special mechanisms for the express adoption of ADR awards and settlements that are provided for by law⁸⁴.

The ADR Policy is therefore key in the quest towards access to justice in Kenya. It seeks to increase the accessibility, availability, and uptake of ADR processes in Kenya. It is imperative to implement this Policy in order to enhance access to justice through ADR techniques in Kenya.

4.0 Conclusion

The ADR Policy is integral in enhancing access to justice in Kenya⁸⁵. The Policy sets out the vision of a harmonious and cohesive Country, where ADR is the primary and preferred mode of dispute resolution⁸⁶. It also seeks to promote public awareness of ADR, and the development of an efficient ADR sector that will offer quality, accessible and available ADR services⁸⁷. The Policy is

⁷⁹ Ibid, Part 4

⁸⁰ Ibid

⁸¹ Ibid

⁸² Ibid

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy., Op Cit

⁸⁶ Ibid

⁸⁷ Ibid

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therefore key in mainstreaming ADR techniques in Kenya. There have been calls to put in place appropriate legal, policy, institutional and administrative measures that will ensure that ADR, AJS and other informal justice systems find their rightful place in the conventional judicial system and that the same are meaningfully and actively utilized in facilitating access to justice especially for the marginalized, poor, uneducated and underprivileged in the society⁸⁸. Legitimizing ADR mechanisms is vital in bringing customary and traditional means of dispute resolution from the periphery into the mainstream and recognizing the legitimate place of alternative systems in contemporary administration of justice⁸⁹. It is also key in promoting a pluralistic approach to justice that is sensitive to the cultural, socioeconomic, and geographic diversity of the population⁹⁰. In addition, mainstreaming ADR techniques is also vital in strengthening links between formal and informal justice systems⁹¹. The ADR Policy is perfectly suited to fulfill these roles.

The Policy addresses some of the key challenges that have hindered the growth of ADR in the country⁹². It addresses conceptual and definition problems by defining key ADR terms⁹³. The Policy defines ADR to mean constitutionally compliant mechanisms, processes, and methods of dispute resolution, other than judicial determination⁹⁴. The Policy further notes that the term 'Alternative' as used in ADR is broad, and inclusive and may mean in different circumstances: other than a judicial determination; *assisted; additional; appropriate; primary; informal; rights-based; interest-based*; and among other similar terms (Emphasis added)⁹⁵. The Policy therefore does not view ADR processes as inferior to formal court processes but as a key part of the access to

⁸⁸ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' Op Cit

⁸⁹ United Nations Office on Drugs and Crime., 'Alternative Justice System as a Catalyst for Advancing Access to Justice in Kenya.' Available at <https://www.unodc.org/easternafrika/en/Stories/alternativejustice-system-as-a-catalyst-for-advancing-access-to-justice-inkenya.html#:~:text=Alternative%20justice%20processes%20reduce%20the,than%20replacing%20reliance%20on%20courts> (Accessed on 24/07/2024)

⁹⁰ The Judiciary of Kenya., 'Promoting Alternative Justice Systems (AJS)' Op Cit

⁹¹ Ibid

⁹² Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy., Op Cit

⁹³ Ibid

⁹⁴ Ibid

⁹⁵ Ibid

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justice agenda in Kenya⁹⁶. This key in enhancing the uptake of ADR mechanisms in the country. The Policy also expands the scope of ADR in Kenya to cover civil matters; criminal matters; private and public disputes; and new and innovative forms of ADR such as the Online Dispute Resolution (ODR)⁹⁷.

It also seeks to strengthen the institutional framework on ADR in Kenya and establishes institutions such as the National Dispute Resolution Council for the ADR sector that is mandated to promote ADR and also enhance and strengthen coordination, collaboration and linkage between ADR and the formal justice system⁹⁸. It also seeks to establish Practice Area Committees for ADR mechanisms of arbitration; mediation; adjudication and conciliation for coordinated development and growth of the sector⁹⁹. It also envisages establishment of ADR centres at the constituency levels. Further, the Policy is geared towards strengthening the quality and standards of practice in ADR through training, accreditation, and CPD programs among other measures¹⁰⁰. It also sets out the measures to enhance the recognition and enforcement of ADR outcomes¹⁰¹. These salient features are vital in enhancing the practice of ADR in Kenya¹⁰². It is therefore necessary to implement this Policy in order to enhance access to justice through ADR in Kenya.

Implementing the ADR Policy can be achieved through enactment of a comprehensive legislation on ADR; enhanced uptake of ADR processes in Kenya through measures such as inclusion of ADR clauses in contracts and agreements, embracing compulsory pre-court ADR in some matters; integrating ADR into the national school curriculum at all levels; and enhanced public awareness on ADR¹⁰³. It is also necessary for the Judiciary to alongside the proposed National Dispute Resolution Council for the ADR sector to establish clear systems of referral between ADR and the formal justice system. Some of the key interventions that have been proposed in order to achieve this goal include adopting policies which promote appropriate interactions

⁹⁶ Ibid

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ Ibid

¹⁰² Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy., Op Cit

¹⁰³ Ibid

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between the Judiciary and the various models of ADR and AJS in order to enhance their uptake in access to justice; promoting ADR and AJS as a forum of first instance for appropriate cases; formulating systems to facilitate appropriate cooperation between the Courts and ADR and AJS to enable co-references of cases between them; and developing and adopt ADR and AJS User guidelines for all stakeholders¹⁰⁴. Further, development of standards of ADR practitioners through training, education, and accreditation will ensure much greater accountability of practitioners and enhance the uptake of ADR in the country¹⁰⁵.

In actualizing the ADR Policy, it is also imperative to preserve the key features of ADR techniques including informality, voluntariness, confidentiality, flexibility, and party autonomy¹⁰⁶. These features are the hallmark of ADR mechanisms and losing them will hinder their effectiveness in fostering access to justice¹⁰⁷.

The ADR Policy can usher in a new dawn in the quest towards access justice in Kenya. It is vital to implement the Policy in order to bolster ADR processes and firmly entrench their place in the access to justice agenda in the country.

¹⁰⁴ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Available at <https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/> (Accessed on 24/07/2024)

¹⁰⁵ Muigua. K., 'Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/Regulating-ADR-Practice-in-Kenya-Kariuki-Muigua-June-2018.pdf> (Accessed on 24/07/2024)

¹⁰⁶ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' Op Cit

¹⁰⁷ Ibid

Enhancing the Role of the Permanent Court of Arbitration in Environmental, Social, and Governance Disputes

Abstract

This paper critically examines the role of the Permanent Court of Arbitration (PAC) in Environmental, Social and Governance (ESG) disputes. The paper explores ESG disputes. It posits that ESG disputes can be effectively managed through arbitration among other Alternative Dispute Resolution (ADR) processes. The paper further argues that PAC is a viable international forum for managing ESG disputes through arbitration alongside other ADR processes. It explores the progress made towards managing ESG disputes through the PAC and challenges thereof. The paper also suggests reforms towards enhancing the role of the PAC in ESG disputes.

1.0 Introduction

The Permanent Court of Arbitration (PAC) is an intergovernmental organization providing a variety of dispute resolution services to the international community¹. It was established by the *Convention for the Pacific Settlement of International Disputes*², concluded at The Hague in 1899 during the first Hague Peace Conference. Article 20 of the Convention formally establishes the PCA, and provides that:

‘With the object of facilitating an immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy, the signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention’

The Convention further stipulates that PAC shall be competent for all arbitration cases unless the parties agree to institute a special tribunal³. PCA provides arbitration services in international disputes involving states, state entities, international organizations and private parties⁴. However, the

¹ Permanent Court of Arbitration., Available at <https://pca-cpa.org/home/> (Accessed on 24/06/2024)

² Convention for the Pacific Settlement of International Disputes., Available at <https://docs.pca-cpa.org/2016/01/1899-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf> (Accessed on 24/06/2024)

³ Ibid, article 21

⁴ Permanent Court of Arbitration., Op Cit

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functions of PAC are not limited to international arbitration⁵. It also supports other forms of peaceful resolution of international disputes, including mediation, conciliation, and other forms of Alternative Dispute Resolution (ADR)⁶.

It has been noted that the PCA provides diverse dispute resolution services, providing administrative support in inter-state, investment and contractual international arbitrations through case administration, acting as the appointing authority, or designating another appointing authority⁷. In addition, its flexible mandate allows it to administer proceedings of different nature other than arbitration, including conciliations, expert determinations, and fact-finding commissions⁸. PCA has been hailed for its contribution to the continuous and steady growth of arbitration as a reliable dispute resolution mechanism for both investment and commercial cases⁹.

This paper critically examines the role of PAC in Environmental, Social and Governance (ESG) disputes. The paper explores ESG disputes. It posits that ESG disputes can be effectively managed through arbitration among other ADR processes. The paper further argues that PAC is a viable international forum for managing ESG disputes through arbitration alongside other ADR processes. It explores the progress made towards managing ESG disputes through the PAC and challenges thereof. The paper also suggests reforms towards enhancing the role of the PAC in ESG disputes.

2.0 Environmental, Social, and Governance Disputes

ESG refers to a set of standards used to measure the impact of an organization on the environment and society¹⁰. It has also been described as a framework

⁵ Ibid

⁶ Ibid

⁷ Moreno. M. B., 'From its Origins to Actuality: The Permanent Court of Arbitration' Available at <https://arbitrationblog.kluwerarbitration.com/2023/09/23/from-its-origins-to-actuality-the-permanent-court-of-arbitration/#:~:text=The%20PCA%20provides%20diverse%20dispute,or%20designating%20another%20appointing%20authority>. (Accessed on 24/06/2024)

⁸ Ibid

⁹ Ibid

¹⁰ IBM., 'What is Environmental, Social and Governance (ESG)?' Available at <https://www.ibm.com/topics/environmental-social-and-governance> (Accessed on 25/06/2024)

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that helps stakeholders understand how an organization is managing risks and opportunities related to environmental, social, and governance criteria¹¹. ESG takes the holistic view that sustainability extends beyond just environmental issues¹². Consequently, ESG seeks to integrate environmental factors including climate change concerns, energy efficiency, waste management, pollution control, biodiversity conservation; social factors including diversity, inclusivity, and human rights; and governance tenets such as sound board management practices and shareholder rights in order to achieve sustainability¹³.

ESG flows from responsible investment¹⁴. It is usually a standard and strategy used by investors to evaluate corporate behavior and future financial performance¹⁵. It has been noted that as an investment concept for evaluating the Sustainable Development of enterprises, the three basic factors of ESG are the key points to be considered in the process of investment analysis and decision making¹⁶. In addition, ESG tenets help to measure the sustainability and social impact of business activities¹⁷. ESG therefore seeks to achieve sustainable, responsible and ethical investment by incorporating Environmental, Social and Governance concerns in corporate decision making¹⁸. By integrating Environmental, Social and Governance factors in corporate activities, ESG also seeks to enhance the sustainability and social impact of businesses¹⁹.

The concept of ESG has grown in recent years with a growing number of institutions and organizations embracing ESG tenets in their corporate

¹¹ Peterdy. K., & Miller. N., 'ESG (Environmental, Social, & Governance)' Available at <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/> (Accessed on 25/06/2024)

¹² Ibid

¹³ IBM., 'What is Environmental, Social and Governance (ESG)?' Op Cit

¹⁴ Li. T. T et al., 'ESG: Research Progress and Future Prospects' Available at <https://pdfs.semanticscholar.org/0dd4/941e33330210daff5f37a1c8cdd0547d7.pdf> (Accessed on 25/06/2024)

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Stuart. L.G et al., 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance.' *Journal of Corporate Finance* 66 (2021): 101889.

¹⁹ Li. T. T et al., 'ESG: Research Progress and Future Prospects' Op Cit

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activities and investment decision making²⁰. The growth of ESG has resulted in improved financial performance for firms²¹. It has been noted that a strong ESG proposition helps companies tap new markets and expand into existing ones²². Further, ESG is associated with cost reductions such as low energy consumption and reduced water intake²³. It also boosts employee motivation and attracts talent to organizations through greater social credibility²⁴. ESG also enhances investment returns by better allocating capital for the long term²⁵.

However, the growth of ESG has also led to a rise in ESG related disputes. There has been significant growth in disputes related to environmental, social, and governance issues with companies, investors, and regulators seeking to hold each other accountable for their ESG commitments²⁶. For example, due to the growing concerns about climate change and environmental degradation, there has been a surge in disputes related to environmental damage, carbon emissions, and compliance with environmental regulations²⁷. Companies are facing claims from investors, communities and governments for failing to meet their environmental obligations²⁸. Further, there has been a rise in disputes under the S tenet of ESG with organizations being sued for violations of human rights in their supply chains, unfair labor practices, or negative impacts on local communities²⁹. Greenwashing claims have also been on the rise with investors and consumers accusing companies of misleading them about their ESG practices³⁰. In

²⁰ Organisation for Economic Co-operation and Development, 'Environmental Social and Governance (ESG) Investing' available at <https://www.oecd.org/finance/esg-investing.htm> (Accessed on 25/06/2024)

²¹ Henisz. W., Koller. T., & Nuttall. R., 'Five ways that ESG creates value' *McKinsey Quarterly*, November, 2019

²² Ibid

²³ Ibid

²⁴ Ibid

²⁵ Ibid

²⁶ Timken. N., 'ESG Considerations in International Arbitration' Available at <https://www.linkedin.com/pulse/esg-considerations-international-arbitration-nelson-ed-ward--pkeie/> (Accessed on 25/06/2024)

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

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addition, the inclusion of ESG clauses in commercial contracts not only points to the importance of ESG concerns to companies but it also serves as potential source of disputes where such considerations are not complied with³¹.

ESG is therefore a key source of disputes. ESG disputes can encompass conduct arising out of, for instance, a corporate governance dispute, to a labour matter involving the breach of a worker's human rights, to a mass tort claim arising out of an environmental damage among others³². Effective management of ESG disputes is key in fostering sustainability and preserving the reputation and profitability of businesses³³.

3.0 The Role of the Permanent Court of Arbitration in Environmental, Social, and Governance Disputes

ADR techniques including arbitration are viable in managing ESG disputes³⁴. The procedural flexibility, the high levels of specialization among arbitrators and the possibility of executing the awards in practically any country in the world under the New York Convention are some of the key attributes of arbitration that make it an attractive and effective method for managing ESG disputes³⁵. Arbitration allows parties to select arbitrators with relevant expertise on the dispute at hand and for the tailoring of the proceeding to the

³¹ The ALP Review., 'The Importance of ESG and its effect on International Arbitration' available at <https://www.alp.company/sites/default/files/ALP%20Review%20-%20The%20Importance%20of%20ESG%20and%20its%20effect%20on%20International%20Arbitration.pdf> (Accessed on 25/06/2024)

³² International Bar Association., 'Report on Use of ESG Contractual Obligations and Related Disputes' Available at <https://www.ibanet.org/document?id=report-on-use-of-ESG-contractual-obligations> (Accessed on 25/06/2024)

³³ Rathi. S., 'Cracking The ESG Conundrum: Is Arbitration The Key To Resolution Of ESG Disputes?' Available at <https://www.mondaq.com/india/arbitration--dispute-resolution/1375770/cracking-theesg-conundrum-is-arbitration-the-key-to-resolution-of-esgdisputes#:~:text=ESG%20issues%20usually%20involve%20multiple,arbitral%20awards%20across%20multiple%20jurisdictions> (Accessed on 25/06/2024)

³⁴ Muigua. K., 'Infusing Environmental, Social, and Governance Tenets into Arbitration and Alternative Dispute Resolution' Available at <https://kmco.co.ke/wp-content/uploads/2024/04/Infusing-Environmental-Social-and-Governance-Tenets-into-Arbitration-and-Alternative-Dispute-Resolution.pdf> (Accessed on 25/06/2024)

³⁵ The Role of Arbitration in ESG Disputes., Available at https://www.vonwobeser.com/index.php/publication?p_id=1650

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needs of each case³⁶. This is particularly relevant in ESG disputes, where the issues at stake, such as climate change, are often legally and technically complex therefore requiring a tribunal with requisite competence in such matters³⁷. In addition, it is common for ESG disputes to contain a strong international component³⁸. This is evident in cases of organizations which have supply chains operating across different countries³⁹. Managing such disputes requires an analysis of international law as well as the laws of different nations and localities⁴⁰. Arbitration is therefore suitable in managing such disputes due to its transnational applicability and ease of enforcement of decisions under the New York Convention⁴¹.

Consequently, arbitration is being utilized in a number of ESG disputes. For example, it has been noted that arbitration is the most utilized process to manage construction, engineering, and energy disputes⁴². These areas are, by their nature, crucial to national policies to combat climate change and to guarantee environmental protection and human rights, therefore confirming the natural existence of arbitration in ESG disputes⁴³.

Arbitration has also been embraced in managing climate change related disputes⁴⁴. It has been noted that arbitration has been utilized to determine climate change related disputes arising under the United Nations Framework Convention on Climate Change (UNFCCC's) Green Climate Fund and the Kyoto Protocol⁴⁵. A broad range of climate change related initiatives

³⁶ The Rise of ESG Disputes and the Role of Arbitration in Resolving them., Available at <https://www.financierworldwide.com/the-rise-of-esg-disputes-and-the-role-of-arbitration-in-resolving-them> (Accessed on 25/06/2024)

³⁷ Ibid

³⁸ Ibid

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Ibid

⁴² The Role of Arbitration in ESG Disputes., Op Cit

⁴³ Ibid

⁴⁴ Muigua. K., 'Utilizing Alternative Dispute Resolution in Climate Change Disputes' Available at <https://kmco.co.ke/wp-content/uploads/2024/03/Utilizing-Alternative-Dispute-Resolution-in-Climate-Change-Disputes.pdf> (Accessed on 25/06/2024)

⁴⁵ International Chamber of Commerce., 'Resolving Climate Change Related Disputes through Arbitration and ADR' Available at <https://iccwbo.org/wp->

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concerning renewable energy, climate change adaptation and mitigation, with diverse funding from international, domestic and business sources can be effectively managed through arbitration⁴⁶. Among the key benefits of arbitration in climate change disputes include neutrality of forum, cross border recognition and enforcement of awards, expertise, and flexibility of procedure⁴⁷. It has been noted that the international dimension of climate change and the likely presence of states or state entities as parties to climate change disputes make international arbitration a suitable forum for the resolution of a variety of such disputes⁴⁸.

Arbitration is also a viable mechanism in managing contractual disputes covering ESG tenets⁴⁹. There has been an increased adoption of ESG specific requirements in commercial contracts in recent years driven by reference to increasing legislation and regulation on ESG and voluntary ESG standards⁵⁰. The purpose of such clauses is not only to avoid harmful business practices, but also to improve stakeholder relationships, achieve wider reputational benefits and ensure regulatory compliance⁵¹. Disputes may arise over the interpretation and enforcement of these clauses, as parties seek to hold each other accountable for their ESG commitments⁵². This allows for the utilization of arbitration in managing such disputes

Arbitration is also ideal in managing investment treaty disputes⁵³. It has been observed that ESG considerations are also influencing investment treaty disputes⁵⁴. For example, investors may bring claims against host states for measures that negatively impact the environmental or social performance of

[content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf](https://www.icsid.org/icsid/Content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf) (Accessed on 25/06/2024)

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ International Bar Association., 'Report on use of ESG Contractual Obligations and Related Disputes' Available at <https://www.ibanet.org/document?id=report-on-use-of-ESG-contractual-obligations> (Accessed on 25/06/2024)

⁵⁰ Ibid

⁵¹ Ibid

⁵² Ibid

⁵³ Timken. N., 'ESG Considerations in International Arbitration' Op Cit

⁵⁴ Ibid

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their investments⁵⁵. On the other hand, states may defend their regulatory measures as necessary to protect the environment or promote social welfare⁵⁶. Such disputes can be effectively managed under the auspices of investment treaty arbitration⁵⁷.

Arbitration is therefore a viable process in managing ESG disputes. Other ADR processes such as mediation can also be effectively utilized in managing ESG disputes⁵⁸. Applying mediation in ESG related disputes can offer a quick, flexible, consensual, and win-win solution based on the mutually accepted interests of the parties therefore enhancing a sustainability-oriented business culture⁵⁹. Mediation is suitable in managing ESG disputes where there is need to preserve consumer and business relationships⁶⁰. Mediation plays a key role by offering an efficient and collaborative means to resolve disputes quickly and fairly⁶¹. It has been noted that by opting for mediation, companies can avoid protracted litigation, reduce legal costs, and preserve valuable business relationships⁶². Mediation also promotes transparency and accountability, two essential pillars under the Governance 'G' tenet of ESG⁶³. By resolving disputes in an open and transparent manner, companies demonstrate their commitment to good governance and accountability⁶⁴. Mediation can also foster environmental sustainability by allowing businesses to resolve disputes on issues such as land use and pollution in a collaborative manner by involving all stakeholders therefore finding solutions that protect the environment and

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Muigua. K., 'Infusing Environmental, Social, and Governance Tenets into Arbitration and Alternative Dispute Resolution' Op Cit

⁵⁹ Gramatidis. B & Emvalomenos. D., 'Sustainability in Dispute Resolution -Mediation as an ESG Practice.' Available at <https://www.bahagram.com/sustainability-in-dispute-resolution-mediation-as-anesgpractice/> (Accessed on 25/06/2024)

⁶⁰ Ibid

⁶¹ Maia. A., 'The Importance of Mediation in ESG: Promoting Sustainability in Corporations' Available at <https://mediationblog.kluwerarbitration.com/2024/03/08/the-importance-of-mediation-in-esg-promoting-sustainability-in-corporations/> (Accessed on 25/06/2024)

⁶² Ibid

⁶³ Ibid

⁶⁴ Ibid

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promote Sustainable Development⁶⁵. Further, by fostering collaboration, mediation allows companies to build stronger and long-term relationships with their stakeholders and to promote corporate social responsibility a key agenda under the G tenet of ESG⁶⁶.

ADR processes including arbitration and mediation are therefore ideal in managing ESG disputes. The suitability of ADR techniques in managing ESG disputes provides a platform for enhancing the role of the PAC in ESG disputes⁶⁷. The PCA has been identified as a suitable forum for managing environmental and climate change related disputes⁶⁸. It has been noted that PCA is an important forum in principle for the resolution of inter-state disputes on climate-related matters since it is best placed to develop international law⁶⁹. Further, it has been observed that many states have opted for arbitration in regard to environmental matters both between states and in cases involving investors, such as disputes over power generation and natural resource extraction⁷⁰. As a result, the PCA is an ideal venue for international environmental disputes involving states and investors⁷¹.

The PCA is associated with several advantages that can enhance its role in ESG disputes. For example, it is the oldest institution dedicated to settling inter-state disputes which currently has 122 member states and therefore enjoys a high degree of international recognition and acceptance⁷². The PCA is also open to a broad range of actors such as states, private parties and intergovernmental organisations and is therefore suitable in managing a broad

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Moreno. M. B., 'From its Origins to Actuality: The Permanent Court of Arbitration' Op Cit

⁶⁸ International Bar Association., 'Achieving Justice and Human Rights in an Era of Climate Disruption: International Bar Association Climate Change Justice and Human Rights Task Force Report' Available at <https://www.ibanet.org/MediaHandler?id=0f8cee12-ee56-4452-bf43-cfcab196cc04> (Accessed on 25/06/2024)

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Ibid

⁷² International Bar Association., 'Achieving Justice and Human Rights in an Era of Climate Disruption: International Bar Association Climate Change Justice and Human Rights Task Force Report' Op Cit

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range of ESG disputes involving different entities⁷³. It can also guarantee expertise in ESG disputes⁷⁴. Among other organs, the PCA is comprised of Members of the Court who are arbitrators appointed by contracting parties with known competency in questions of international law⁷⁵. Members of the Court possess expertise in various areas of international law and dispute resolution and can therefore guarantee expertise in managing ESG disputes⁷⁶.

The PCA has jurisdiction over various disputes some of which are ESG related⁷⁷. The jurisdiction of the PCA is based on founding documents like the *Convention for the Pacific Settlement of International Disputes*⁷⁸. It is also derived from bilateral and multilateral treaties giving authority to the PCA to manage ESG related disputes⁷⁹. For example, the *Energy Charter Treaty*⁸⁰ designates the PCA as an appointing authority in energy disputes⁸¹. Parties to energy disputes under the Energy Charter Treaty can therefore choose to have their disputes administered by the PAC. The PAC has also facilitated inter-state dispute resolution involving oceans and the law of the sea under the United Nations Convention on the Law of the Sea on ESG factors such as pollution at sea⁸². The PAC has adopted *arbitration rules*⁸³ which apply in arbitrating disputes involving at least one State, State-controlled entity, or intergovernmental

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Permanent Court of Arbitration., 'Members of the Court' Available at <https://pca-cpa.org/en/about/structure/members-of-the-court/> (Accessed on 25/06/2024)

⁷⁶ Ibid

⁷⁷ Marquez. G., 'The Perils of Intra-Corporate Arbitration for ESG Disputes' Available at <https://aria.law.columbia.edu/the-perils-of-intra-corporate-arbitration-for-esg-disputes/> (Accessed on 25/06/2024)

⁷⁸ Convention for the Pacific Settlement of International Disputes., Op Cit

⁷⁹ Marquez. G., 'The Perils of Intra-Corporate Arbitration for ESG Disputes' Op Cit

⁸⁰ Energy Charter Treaty., Available at <https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf> (Accessed on 25/06/2024)

⁸¹ Ibid, article 27 (3) (d)

⁸² Permanent Court of Arbitration., 'Contribution of the Permanent Court of Arbitration to the Report of the United Nations Secretary-General on Oceans and the Law of the Sea, as at 18 June 2021' Available at https://www.un.org/depts/los/general_assembly/contributions_2021/PCAEng.pdf (Accessed on 25/06/2024)

⁸³ Permanent Court of Arbitration, Arbitration Rules, 2012., Available at <https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf> (Accessed on 25/06/2024)

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organization. The rules emphasize flexibility and party autonomy and can therefore be embraced in managing ESG disputes⁸⁴. The Rules contain model clauses that parties may consider inserting in treaties, contracts, or other agreements to provide for arbitration of existing or future disputes⁸⁵. The model clauses can be tailored to specific disputes including contractual and treaty based disputes⁸⁶. Therefore, the model clauses can be embraced to manage ESG disputes relating to commercial contracts and investment treaties.

In addition, the PAC has developed *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or The Environment*⁸⁷. The Optional Rules are based on the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules with changes in order to reflect the particular characteristics of disputes having a natural resources, conservation, or environmental protection component⁸⁸. The Optional Rules envisage appointment of arbitrators from a list of persons considered to have expertise in environmental and natural resources matters⁸⁹. They also require the PAC to maintain a list of persons considered to have expertise in the scientific or technical matters related to the environment and natural resources in order to foster effective management of disputes relating to natural resources and/or the environment⁹⁰. The Optional Rules are therefore vital in enhancing the role of the PAC in ESG disputes especially under the Environmental 'E' pillar of ESG.

The PAC therefore has a key role to play in ESG disputes. Despite, its vital role in ESG disputes, it has been noted that the PAC has been underutilized in managing such disputes including those concerning climate change and human rights. As a result, there have been calls for an increased use of the PCA

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ Ibid

⁸⁷ Permanent Court of Arbitration., 'Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or The Environment' Available at https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf (Accessed on 25/06/2024)

⁸⁸ Ibid

⁸⁹ Ibid, article 8 (3)

⁹⁰ Ibid, article 27 (5)

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in ESG disputes especially in environmental dispute resolution⁹¹. Further, a recent *Resolution of the Congress of the Members of the Court*⁹² recognizes the PCA as a modern, multifaceted arbitral institution with a unique role in international dispute settlement, and encourages the Members of the Court to promote the PCA and its services. It is therefore necessary to enhance the role of the PAC in ESG disputes.

4.0 Conclusion

The PAC is a viable forum in managing ESG disputes. Its long history as a dedicated institution to settling inter-state disputes means that it enjoys a high degree of international recognition and acceptance and can therefore be utilized by parties in managing ESG disputes⁹³. It can also offer a platform for managing a broad range of ESG disputes involving multiple entities since it is available to a broad range of actors such as states, private parties and intergovernmental organisations⁹⁴. PAC can also guarantee expertise in ESG disputes since it comprises of Members of the Court with known competencies in international law and dispute resolution⁹⁵. The PAC Arbitration Rules emphasize flexibility and party autonomy and can therefore be embraced in managing ESG disputes⁹⁶. Further, the *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or The Environment* are also ideal in enhancing the role of the PAC in ESG disputes⁹⁷. It is therefore necessary for states, private parties, and intergovernmental organisations to utilize the PAC in order to foster effective management of ESG disputes. The PAC can also enhance its role in ESG disputes through the appropriate use of emerging technologies; and providing dispute resolution services in the fields of climate change,

⁹¹ International Bar Association., 'Achieving Justice and Human Rights in an Era of Climate Disruption: International Bar Association Climate Change Justice and Human Rights Task Force Report' Op Cit

⁹² Permanent Court of Arbitration., 'Resolution of the Congress of the Members of the Court' Available at <https://docs.pca-cpa.org/2024/06/e1a8ddc0-resolution-of-the-congress-of-the-members-of-the-court-eng-original.pdf> (Accessed on 25/06/2024)

⁹³ International Bar Association., 'Achieving Justice and Human Rights in an Era of Climate Disruption: International Bar Association Climate Change Justice and Human Rights Task Force Report' Op Cit

⁹⁴ Ibid

⁹⁵ Permanent Court of Arbitration., 'Members of the Court' Op Cit

⁹⁶ Permanent Court of Arbitration, Arbitration Rules, 2012., Op Cit

⁹⁷ Permanent Court of Arbitration., 'Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or The Environment' Op Cit

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environmental and natural resources, and business and human rights among other key themes in ESG⁹⁸. Members of the Court can also foster the role of the PAC in ESG by building their capacity in ESG matters. The *Resolution of the Congress of the Members of the Court*⁹⁹ urges Members of the Court to take all appropriate steps to make the role of the Permanent Court of Arbitration better known, both to the Contracting Parties who have appointed them and amongst a wider audience. Members of the Court should therefore heed this call and market the PAC as an ideal forum for managing ESG disputes.

It is imperative to enhance the role of the PAC in ESG disputes in order to ensure access to justice and foster sustainability.

⁹⁸ Permanent Court of Arbitration., 'Resolution of the Congress of the Members of the Court' Op Cit

⁹⁹ Ibid

Enhancing Africa's Competitiveness in the Global Alternative Dispute Resolution Arena

Abstract

Globalization has led to the growth of Alternative Dispute Resolution (ADR) as a viable forum for managing disputes involving parties from different nationalities. ADR processes in the global arena provide numerous benefits including neutrality of forum, enforcement of outcomes, and flexible procedures for managing disputes. ADR is therefore being embraced as the preferred method of conflict resolution in the international business world. This paper critically examines the need to enhance Africa's competitiveness in the global ADR arena. It argues that the potential of ADR is yet to be fully harnessed in Africa therefore limiting the continent's competitiveness in the global ADR arena. The paper critically explores the landscape of ADR in Africa. It argues that ADR has been practiced in Africa for many centuries therefore creating an ideal environment for the growth of these mechanisms in the continent. The paper also examines some of the factors hindering Africa's competitiveness in the global ADR arena. In addition, the paper suggests measures towards enhancing Africa's competitiveness in the global ADR arena.

1.0 Introduction

Globalization is shaping the function of international law and with it the mechanisms used to resolve international conflicts and disputes¹. It has been noted that collective global problems are driving the development of collaborative problem-solving approaches². The need to foster international peace and security has resulted in the global community embracing approaches aimed at pacific resolution of international disputes for both legal disputes as well as for those that arise from armed conflict³. The *Charter of the United Nations*⁴ stipulates that parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation,

¹ Spain. A., 'International Dispute Resolution in an Era of Globalization' Available at <https://lawweb.colorado.edu/profiles/pubpdfs/spain/IntlDispRes-EraGlobalization.pdf> (Accessed on 02/09/2024)

² Ibid

³ Ibid

⁴ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

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arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice⁵.

Alternative Dispute Resolution (ADR) entails a set of processes that are applied to manage disputes without resort to adversarial litigation⁶. ADR mechanisms may be linked to but function outside formal court litigation processes⁷. These techniques include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others⁸.

ADR processes are being widely embraced globally as a result of the increase in trade and commerce between parties from different nationalities which activities have also lead to disputes among parties from different nations⁹. ADR processes such as arbitration and mediation offer several advantages in the global arena such as neutrality of forum in the determination of disputes therefore addressing the differences that may arise as a result of multiple legal systems¹⁰. They also guarantee enforcement of outcomes across jurisdictions due to the presence of legal frameworks such as the *New York*¹¹ and *Singapore*¹² Conventions. Further, it has been noted that unlike national legal systems, ADR processes in the global arena including international arbitration and international mediation are less rigid and flexible therefore permitting the

⁵ Ibid, article 33 (1)

⁶ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

⁷ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

⁸ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁹ Spain. A., 'International Dispute Resolution in an Era of Globalization' Op Cit

¹⁰ Moses, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

¹¹ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), Available at www.newyorkconvention.org/english (Accessed on 02/09/2024)

¹² United Nations Convention on International Settlement Agreements Resulting from Mediation., Available at https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf (Accessed on 02/09/2024)

parties to adjust procedures to the particular demands of their dispute¹³. ADR processes have therefore emerged as a viable and effective forum for managing disputes in the global arena making ADR the preferred method of conflict resolution in the international business world¹⁴.

This paper critically examines the need to enhance Africa's competitiveness in the global ADR arena. It argues that the potential of ADR is yet to be fully harnessed in Africa therefore limiting the continent's competitiveness in the global ADR arena. The paper critically explores the landscape of ADR in Africa. It argues that ADR has been practiced in Africa for many centuries therefore creating an ideal environment for the growth of these mechanisms in the continent. The paper also examines some of the factors hindering Africa's competitiveness in the global ADR arena. In addition, the paper suggests measures towards enhancing Africa's competitiveness in the global ADR arena.

2.0 Alternative Dispute Resolution in Africa: Prospects and Challenges

ADR occupies a special place in Africa. It has been part and parcel of conflict management in Africa since time immemorial¹⁵. ADR mechanisms have been practiced in Africa for many centuries¹⁶. These techniques were firmly embedded in the culture and customs of African communities¹⁷. The idea of conflict management in Africa societies is guided by key values including peace, harmony, truth, honesty, unity, cooperation, forgiveness, reconciliation, and respect¹⁸. Conflict management in African societies was therefore aimed at creating consensus, facilitating reconciliation, fostering peace, harmony and cohesion and gave prominence to communal needs over individual needs¹⁹. In order to achieve these objectives, African societies had flexible dispute

¹³ Lominack. R., 'Examining Alternative Dispute Resolution in the International Business Domain' *South Carolina Journal of International Law and Business.*, Volume 1, Issue 1 (2003)

¹⁴ Ibid

¹⁵ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa*, Volume 17, No.1, 2015

¹⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

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resolution mechanisms that offered a speedy, inexpensive, and accessible just resolution that maintains and restores communal relations, especially in disputes involving family and the community at large²⁰. African societies therefore embraced traditional forms of mediation, adjudication, reconciliation, arbitration and negotiation since these techniques fitted comfortably within traditional concepts of African justice, particularly its core value of reconciliation²¹.

ADR in the African context is therefore generally seen as a return to traditional African conflict resolution methods and hence not a novelty²². It has been argued that ADR mechanisms can strengthen dispute settlement systems and bridge the gap between formal legal systems and traditional concepts of African justice²³. These techniques may have particular value in stabilization and statebuilding efforts especially when judicial institutions are weak and social tensions are high²⁴. It has been noted that despite numerous attempts at modernization, many African countries are still struggling to establish functional, timely, cost-effective and trusted judicial systems²⁵. Access to justice through formal justice processes in Africa is hindered by obstacles such as costs, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow²⁶. ADR techniques are suitable in addressing these challenges and enhancing access to justice in Africa²⁷. Embracing ADR in Africa can therefore contribute towards

²⁰ Ntuli. N., 'Africa: Alternative Dispute Resolution in a Comparative Perspective' Available at https://www.researchgate.net/publication/322638491_Africa_Alternative_Dispute_Resolution_in_a_Comparative_Perspective (Accessed on 05/09/2024)

²¹ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

²² Ntuli. N., 'Africa: Alternative Dispute Resolution in a Comparative Perspective' Op Cit

²³ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

²⁴ Ibid

²⁵ Ibid

²⁶ 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

²⁷ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

building effective dispute management systems and further bridge the gap between the formal legal system and traditional modes of African justice²⁸.

The landscape of ADR in Africa is growing. Africa's dispute resolution landscape has long been dominated by litigation, but the use of ADR processes such as arbitration and mediation is becoming more prevalent²⁹. For example, countries such as South Africa, Kenya, Nigeria, Egypt and Rwanda all have established arbitration centres, with Cairo and Johannesburg considered among the most popular arbitral seats on the continent³⁰. The formation of regional ADR centres in Africa including the Nairobi Centre for International Arbitration, the Kigali International Arbitration Centre, and the Cairo Regional Centre for International Commercial Arbitration is enhancing the uptake of ADR in Africa³¹. As a result, it has been noted that there is increasing confidence in selecting African laws to govern commercial contracts and African seats for domestic and international arbitrations³². Most African countries also have in place arbitration laws with others including Nigeria and Malawi recently reforming their laws to align with global standards including the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration³³.

Arbitration in Africa therefore enjoys a thriving present and a promising future³⁴. Arbitral institutions are playing an important role in developing

²⁸ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

²⁹ ALN Africa., 'Africa's Growing Dispute Resolution Landscape' Available at <https://aln.africa/wpcontent/uploads/2023/06/Africas-Growing-Dispute-Resolution-Landscape.pdf> (Accessed on 05/09/2024)

³⁰ Ibid

³¹ Ibid

³² Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Available at <https://hsfnotes.com/africa/2022/11/25/2022-soasarbitration-in-africa-survey-reveals-a-thriving-market-for-arbitration-on-the-continent/> (Accessed on 05/09/2024)

³³ Owa. I., '2023 Year in Review: A Transformative Expedition of Arbitration in Africa' Available at <https://arbitrationblog.kluwerarbitration.com/2024/01/24/2023-year-in-review-a-transformative-expedition-of-arbitration-in-africa/> (Accessed on 05/09/2024)

³⁴ Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Op Cit

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regional centres, which will be key to meeting the growing demand for dispute resolution services on the continent³⁵. For example, the implementation of the African Continental Free Trade Area (AfCFTA) is expected to boost Intra African trade and enhance cross-border investments in the continent³⁶. However, commercial and investment disputes may also arise in the course of implementation of the AfCFTA involving parties from different nationalities in Africa³⁷. Effective management of such disputes is therefore necessary in order to maintain commercial relationships and enhance trade and investments in Africa³⁸. The Protocol on Rules and Procedures on the Settlement of Disputes to the Agreement establishing the AfCFTA envisages the use of ADR processes including arbitration, conciliation, and mediation in managing disputes under the AfCFTA³⁹. It has been noted that the AfCFTA and its focus on fostering economic integration in Africa through trade will result in more intra-African disputes⁴⁰. This in turn provides opportunities to help the continent's arbitral institutions gain more experience, compel the continent to pay the required attention to supporting ADR infrastructure, and in turn increase the level of comfort with Africa as a seat for arbitration⁴¹. It is therefore imperative to develop ADR in Africa in order to meet the growing needs of dispute management under the AfCFTA.

Mediation is also gaining traction in Africa with countries such as Kenya introducing mandatory court-annexed mediation as part of the broader ADR framework⁴². This gives the courts discretionary powers to refer certain disputes to mediation towards reducing backlogs in the court system⁴³. It has

³⁵ Ibid

³⁶ Erasmus. G., 'The AfCFTA Dispute Settlement Mechanism as part of a continental Trade Regime' Available at <https://www.tralac.org/blog/article/15378-the-afcfta-dispute-settlement-mechanism-as-part-of-a-continental-trade-regime.html> (Accessed on 05/09/2024)

³⁷ Ibid

³⁸ Ibid

³⁹ African Union., 'Agreement Establishing the African Continental Free Trade Area' Available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (Accessed on 05/09/2024)

⁴⁰ ALN Africa., 'Africa's Growing Dispute Resolution Landscape' Op Cit

⁴¹ Ibid

⁴² The Judiciary of Kenya., 'Court Annexed Mediation' Available at <https://judiciary.go.ke/court-annexed-mediation/> (Accessed on 05/09/2024)

⁴³ Ibid

been noted that mediation is preferred in many cultures across the continent, as African philosophical and political thinking largely favours the approach of conciliation and mediation of disputes over the adversarial approach of Western cultures⁴⁴. Mediation may provide a greater scope for solutions which account for the context of the dispute, and can provide greater fairness (or perceived fairness) in outcomes⁴⁵. Mediation can also result in collaborative outcomes based on mutual problem solving⁴⁶. It is also vital in ensuring open communication, finding common ground, and creating a culture of trust⁴⁷. Mediation is therefore ideal when it is necessary to maintain all parties' relationships or when the solution itself will have a significant impact on a large group of people⁴⁸. As a result, there is room for significant growth in the adoption of mediation for commercial disputes in Africa⁴⁹.

Notwithstanding their benefits, ADR processes in Africa face key challenges, including inadequate political support, human resources, legal foundations, and sustainable financing⁵⁰. Further, the current practice of ADR in most African countries is largely based on the western notions of dispute resolution and access to justice and hence could defeat its purpose and limit its uptake by communities in the continent⁵¹. The colonial era in Africa resulted in the introduction of western justice systems with customary law being largely

⁴⁴ Ripley-Evans, J., & De Sousa, M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Op Cit

⁴⁵ Ibid

⁴⁶ Food and Agriculture Organization., 'Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)' Available at <https://www.fao.org/3/i2604e/i2604e00.pdf> (Accessed on 05/09/2024)

⁴⁷ Miroslavov, M., 'Mastering the Collaborating Conflict Style In 2024' Available at <https://www.officernd.com/blog/collaboratingconflictstyle/#:~:text=It's%20one%20of%20the%20strategies,their%20underlying%20needs%20and%20interests.> (Accessed on 05/09/2024)

⁴⁸ Isenhardt, M.W., & Spangle, M., 'Summary of "Collaborative Approaches to Resolving Conflict"' Available at <https://www.beyondintractability.org/bksum/isenhardt-collaborative> (Accessed on 05/09/2024)

⁴⁹ Ripley-Evans, J., & De Sousa, M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Op Cit

⁵⁰ Uwazie, E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

⁵¹ Ntuli, N., 'Africa: Alternative Dispute Resolution in a Comparative Perspective' Op Cit

ignored and marginalized⁵². The indigenous practices and institutions on conflict management were largely weakened and even destroyed in many African societies, since the colonial powers introduced formal justice processes such as law courts, which came to pronounce judgments rather than resolve conflicts according to the African concepts of justice⁵³. Further, it has been noted that the current practice of ADR originated and developed within specific cultural, ideological and political contexts inherent in the West and therefore, its application in non-Western societies especially Africa may turn out to be counter-productive since the latter exhibit markedly different social, historical and political conditions⁵⁴. ADR in the African context was a cultural specific process that made it possible for disputants to reach, understand and own the verdict or outcome of the resolution process⁵⁵. African societies developed flexible dispute resolution mechanisms that offered a speedy, inexpensive, and accessible just resolution that maintained and restored communal relations, especially in disputes involving family and the community at large⁵⁶. The current practice of ADR in Africa may not meet these objectives since the process has been largely formalized⁵⁷. Addressing these challenges requires ADR to be embraced from an African perspective⁵⁸.

⁵² Dieng. A., 'ADR in Sub-Saharan African Countries' Available at <https://www.ohada.com/uploads/actualite/1131/Dieng-Chapter%2028-ADR-in-Business-II.pdf> (Accessed on 06/09/2024)

⁵³ Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2)

⁵⁴ Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612865 (Accessed on 06/09/2024)

⁵⁵ Ntuli. N., 'Africa: Alternative Dispute Resolution in a Comparative Perspective' Op Cit

⁵⁶ Ibid

⁵⁷ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISINGALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf> (Accessed on 06/09/2024)

⁵⁸ Muigua. K., 'Preparing for the Future: ADR and Arbitration from an African Perspective' Available at <https://kmco.co.ke/wp-content/uploads/2023/10/Preparing-for-the-Future-ADR-and-Arbitration-from-an-African-Perspective.pdf> (Accessed on 06/09/2024)

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Africa is also yet to fully entrench its place in the global ADR arena⁵⁹. For example, most commercial and investment disputes arising in Africa often end up being contested outside Africa, with London being the most popular seat for mining related arbitration⁶⁰. Further, it has been noted that even when disputes involve two parties from Africa, the cases tend to be subject to either the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA) rules, with the arbitration proceedings taking place in centres such as Paris, London and Singapore⁶¹.

Africa's effectiveness in the global ADR arena is hindered by several factors including bias and perception of corruption⁶². The governance challenges that are prevalent in some African countries portray the continent in a negative image to the global community with parties doubting the ability to attain justice in Africa⁶³. There are also concerns of inadequate legal enforcement, with parties often concerned that arbitral awards may not be effectively enforced in the continent⁶⁴. Court interference in arbitration in Africa is also a key concern that limits Africa's competitiveness in the global ADR arena⁶⁵. Lack of clarity and uniformity on the limits of court intervention in arbitration portrays Africa as a continent that is not arbitration- friendly⁶⁶. Defining and limiting the extent of court intervention in arbitration is therefore key in enhancing Africa's competitiveness in the global ADR arena⁶⁷.

⁵⁹ ALN Africa., 'Africa's Growing Dispute Resolution Landscape' Op Cit

⁶⁰ Ibid

⁶¹ Ibid

⁶² Amazu A. Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*, University Press, Cambridge, 2001. PP. 5-6 Available at <http://catdir.loc.gov/catdir/samples/cam031/2001018482.pdf> (Accessed on 05/09/2024)

⁶³ Ibid

⁶⁴ ALN Africa., 'Africa's Growing Dispute Resolution Landscape' Op Cit

⁶⁵ Muigua. K., 'Promoting International Commercial Arbitration in Africa' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA-EAIA-Conference-Presentation.pdf> (Accessed on 05/09/2024)

⁶⁶ Ibid

⁶⁷ Ibid

It is imperative to address the foregoing challenges in order to enhance Africa's competitiveness in the global ADR arena.

3.0 Conclusion

In order to enhance Africa's competitiveness in the global ADR arena, it is imperative to market the continent⁶⁸. It is imperative for stakeholders including ADR practitioners and ADR institutions to use marketing tools such as ADR conferences and collaborations with institutions in other continents in order to enhance their visibility in the global ADR spectrum and showcase the continent's capacity in ADR⁶⁹. In addition, ADR practitioners including arbitrators and mediators can also tap into marketing tools such as publications, websites and social media in order to portray their skills and qualifications and promote confidence to the global community in relation to Africa's capacity in ADR⁷⁰.

Governments also have a key role to play in enhancing Africa's competitiveness in the global ADR arena. Among the key challenges facing ADR in Africa include inadequate political support, human resources, legal foundations, and sustainable financing⁷¹. In order to address these challenges, it is imperative to enact robust ADR legislations throughout Africa⁷². It has been noted that legislation is key in elevating the status of ADR in the continent, building public confidence, and further increasing ADR utilization⁷³. Legislation would also provide a framework for reference, review, and reform as well as institutionalize much needed education and professional training in ADR⁷⁴. Governments should also support capacity building efforts through establishing national and regional ADR centres and financing ADR programmes in the continent⁷⁵.

It is also imperative for ADR practitioners and institutions to build their capacity in order to enhance Africa's competitiveness in the global ADR

⁶⁸ Muigua. K., 'Promoting International Commercial Arbitration in Africa' Op Cit

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

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arena⁷⁶. Education, training and mentorship are vital in enhancing the capacity of ADR practitioners in Africa⁷⁷. Further, ADR practitioners should enhance their knowledge and capacity in relation to emerging global issues in ADR including climate change disputes⁷⁸. It is also vital to set up more ADR institutions to facilitate training in ADR mechanisms such as arbitration, mediation and conciliation in addition to the existing institutions⁷⁹. ADR institutions in Africa should also develop rules and/or expertise specific to the resolution of climate change disputes among other emerging areas in order to enhance Africa's competitiveness in the global ADR arena⁸⁰. Further, closer collaboration among regional ADR centres in Africa is essential in raising the continent's capacity in the global ADR arena and increasing appointment opportunities for African arbitrators and mediators in global disputes⁸¹.

Finally, there is also need to define and limit the extent of court intervention in ADR⁸². Unnecessary interference by courts in ADR mechanisms especially arbitration can hinder Africa's competitiveness in the global ADR arena⁸³. Due to unnecessary intervention, delays, and uncertainty on issues such enforcement of awards, the global community may shun away from Africa in favour of arbitration- friendly jurisdictions⁸⁴. It has been noted that investors want to be certain that courts in Africa respect arbitration agreements, and have a reputation for providing the needed and timely support for arbitration proceedings including enforcement of arbitral awards⁸⁵. Adopting an

⁷⁶ Muigua. K., 'Nurturing International Commercial Arbitration in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2021/10/Nurturing-International-Commercial-Arbitration-inKenya.pdf> (Accessed on 06/09/2024)

⁷⁷ Ibid

⁷⁸ International Chamber of Commerce., 'Resolving Climate Change Related Disputes through Arbitration and ADR' Available at <https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adrcommission-report-on-resolving-climate-change-related-disputes-english-version.pdf> (Accessed on 06/09/2024)

⁷⁹ Muigua. K., 'Nurturing International Commercial Arbitration in Kenya.' Op Cit

⁸⁰ International Chamber of Commerce., 'Resolving Climate Change Related Disputes through Arbitration and ADR' Op Cit

⁸¹ ALN Africa., 'Africa's Growing Dispute Resolution Landscape' Op Cit

⁸² Muigua. K., 'Promoting International Commercial Arbitration in Africa' Op Cit

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ ALN Africa., 'Africa's Growing Dispute Resolution Landscape' Op Cit

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arbitration friendly approach by courts is therefore key in enhancing Africa's competitiveness in the global ADR arena⁸⁶.

Enhancing Africa's competitiveness in the global ADR arena is therefore necessary and achievable.

⁸⁶ Ibid

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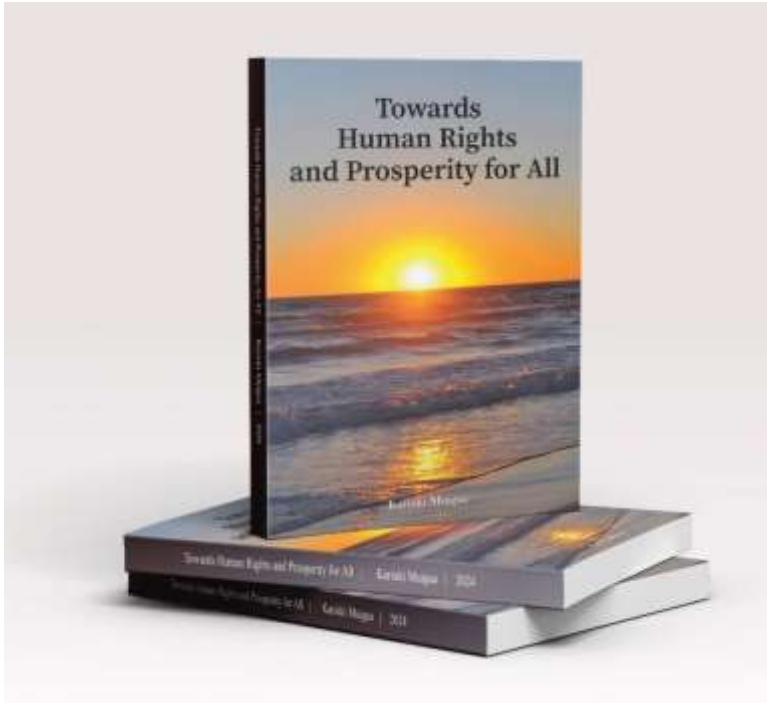
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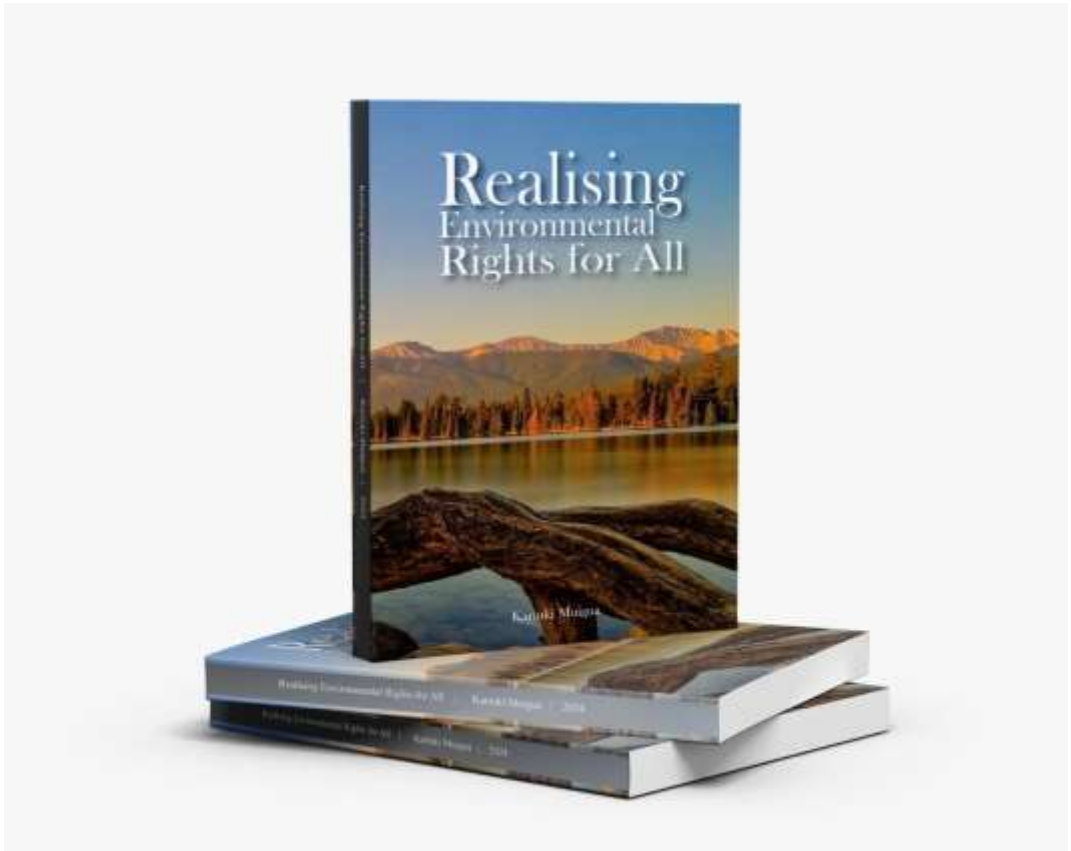
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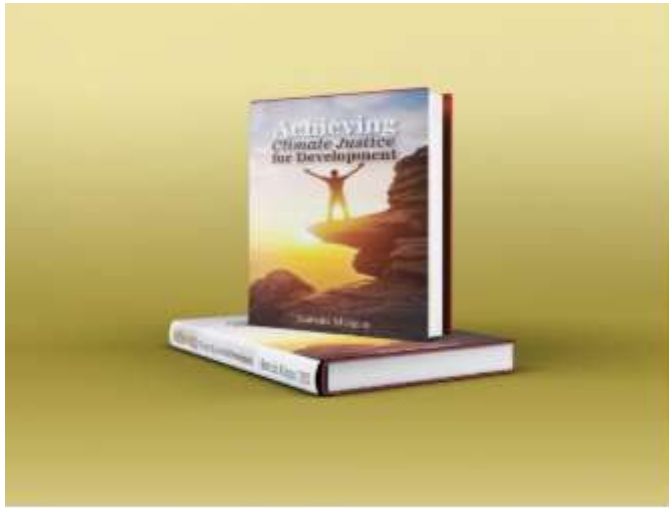
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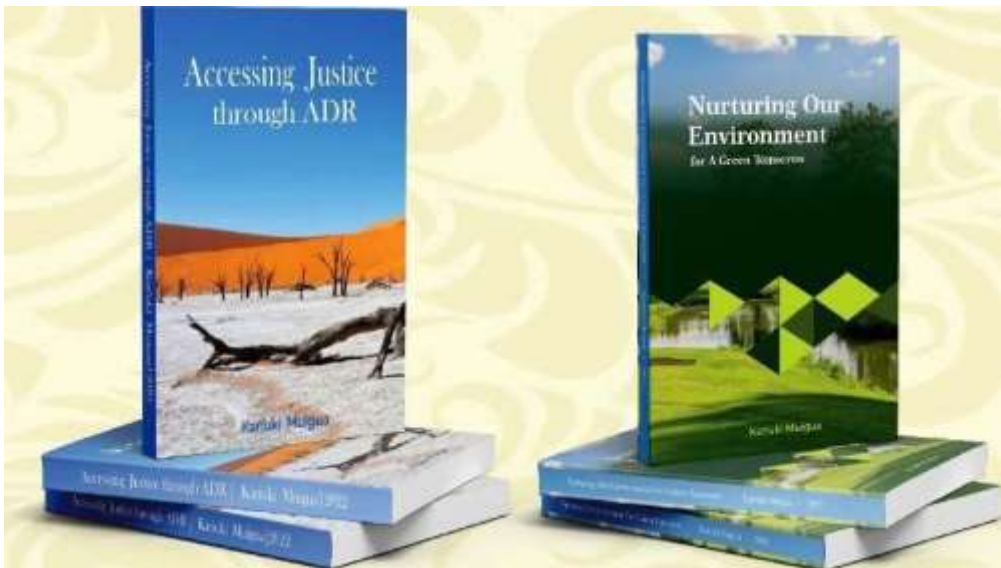
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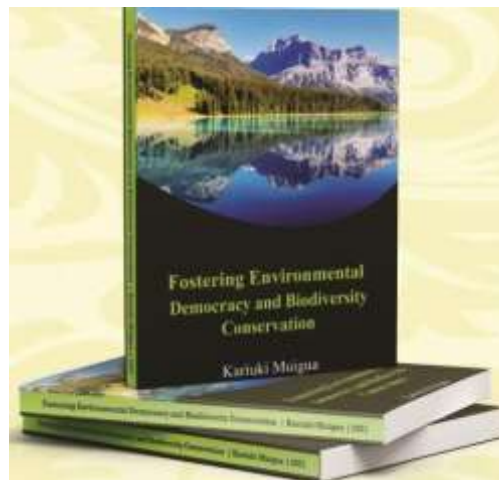
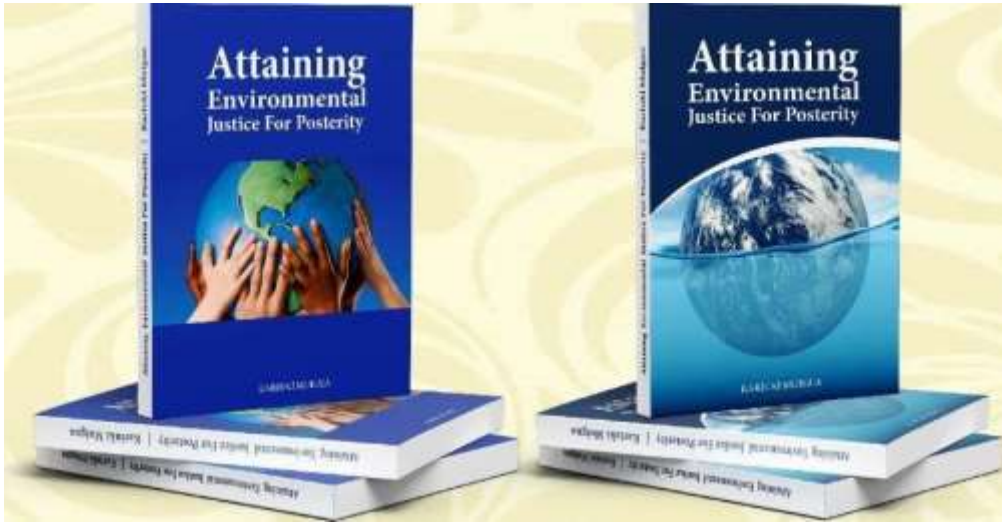
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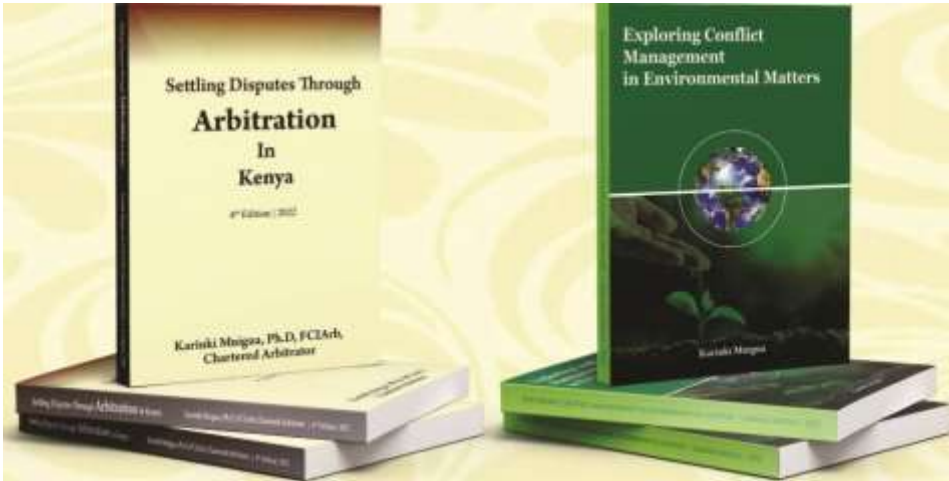
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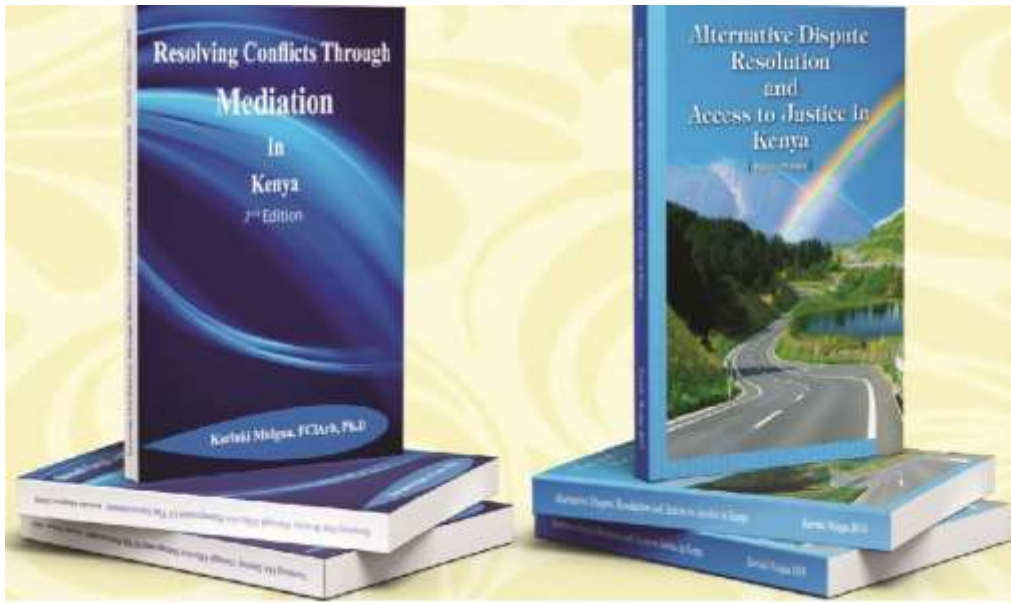
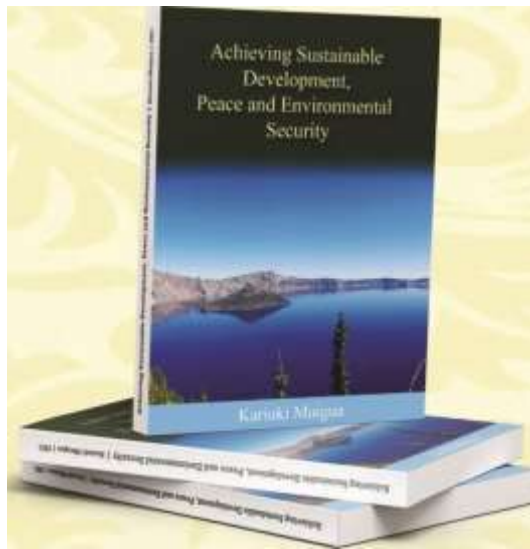


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Securing Lasting Peace and Justice in Africa through Appropriate Dispute Resolution takes the readers through a journey where we delve into the question of how to achieve lasting Peace and Justice in Africa.

The papers in this volume examine Alternative Dispute Resolution (ADR) and access to Justice in the African context. The author critically discusses whether ADR is indeed alternative.

Other themes covered in the volume include Human and Environmental Rights; Environmental Democracy; Conflict Management; Sustainable Development; Environmental Rule of Law; Justice for Nature; Climate Action; Climate Change; and Natural Resources.

The book is aimed at researchers, students, peacemakers, environmental defenders and the general reader.

Author's Bio-data

Hon. Prof. Kariuki Muigua Ph.D; FCIArb; OGW; C. Arb is a holder of a Doctor of Philosophy (Ph.D.) degree in law from the University of Nairobi attained in 2011. He also holds a Master of Laws (LL.M) degree attained in 2005 and Bachelor of Laws (LL.B) degree awarded in 1988 both from the University of Nairobi.

He is a Professor of Environmental Law and Conflict Management at the University of Nairobi Faculty of Law and the Centre for Advanced Studies in Environmental Law and Policy (CASELAP). He also teaches at the Wangari Maathai Institute for Peace and Environmental Studies. He is a Member of the Permanent Court of Arbitration (PCA) nominated by the Republic of Kenya and served as a Member of the National Environment Tribunal. He is a distinguished law scholar, Environmental Consultant, an accredited mediator and a Chartered arbitrator. He has widespread training and experience in both international and national commercial arbitration and mediation. He has received numerous awards and honours due to his exemplary work in academia and Alternative Dispute Resolution.

He was appointed as a member of the Protem Committee for the Asian International Arbitration Centre (Malaysia) (AIAC) Court of Arbitration. Chambers and Partners Global Guide 2024 ranked him in Band 1 of Dispute Resolution (Arbitrators), the ranking which recognizes the Top 6 Arbitrators in Kenya noting that he is "highly recommended as a leading lawyer". He was awarded the 'Academic Champion of ADR' at the inaugural Women in ADR Awards 2024. He was also awarded the Outstanding Mentor Award by his mentees in recognition of his guidance, care and support. He was recognized and awarded for his role as the Chartered Institute of Arbitrators (CIArb) Africa Trustee from 2019 to 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022. Chambers and Partners Global Guide 2023 ranked him in Band 1 of Dispute Resolution (Arbitrators), the ranking which recognizes the Top 6 Arbitrators in Kenya noting that he is "highly recommended as a leading lawyer". His book, *Settling Disputes through Arbitration in Kenya*, 4th Edition; Glenwood publishers 2022, was awarded the Publication of the Year Award 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022. He is the winner of ADR Practitioner of the Year Award at the AfAA Awards 2022. He is also the winner of the African Arbitrator of the Year 2022 award at the 3rd African Arbitration Awards held at Kigali Rwanda beating other competitors from Egypt, Mauritius, Ethiopia, Nigeria and Kenya. In 2022, Chambers and Partners ranked him in Band 1 of Dispute Resolution (Arbitrators) noting that "He has been involved in several ground-breaking arbitrations," "has an astute understanding of arbitration" and "is respected for litigation." He was awarded the Inaugural CIArb (Kenya Branch) ADR Lifetime Achievement Award 2021 as well as the ADR Publication of the Year Award 2021 by the Chartered Institute of Arbitrators (Kenya Branch). He also received the ADR Practitioner of the Year Award 2021 by the Law Society of Kenya, Nairobi Branch at the Nairobi Legal Awards. He is a recipient of the 8th C.B. Madan Prize of 2020 for commitment and outstanding scholarly contribution to constitutionalism and the rule of law in Kenya.

Hon. Prof. Muigua Ph.D. has on various occasions been appointed by leading arbitral institutions including the Chartered Institute of Arbitrators (CIArb-Kenya), the Nairobi Centre for International Arbitration (NCIA), the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) among other institutions, as both a sole arbitrator and a member of an arbitral tribunal in arbitrations involving commercial disputes.

He is a Fellow of Chartered Institute of Arbitrators (CIArb)-Kenya chapter. He is a member of the International Bar Association (IBA), the International Commission of Jurists, Human Rights Institute of the International Bar Association, the London Court of International Arbitration (LCIA), Chartered Institute of Arbitrators (UK) and Kenya Branch, Member of Commonwealth Lawyers Association and fellow of the Institute of Certified Public Secretaries of Kenya. He served as the Branch Chairman of CIArb-Kenya from 2012 to 2015. He was elected (opposed) to the Chartered Institute of Arbitrators (CIArb) Board of Trustees as the Regional Trustee for Africa, for the term beginning 1st January 2019 for a term of four years until 31st December 2022.

Hon. Prof. Muigua Ph.D. also serves as the Editor in Chief of three leading peer reviewed journals in East Africa, the *Alternative Dispute Resolution Journal*, the *Journal of Conflict Management and Sustainable Development* and *Journal of ADR & Sustainability*. The three journals have been hailed as leading publications in the fields of ADR, Conflict Management and Sustainable Development. The *Alternative Dispute Resolution Journal* was awarded the Arbitration Publication of the Year Award 2020 at the Africa Arbitration Awards.

He is an Advocate of the High Court of Kenya of over 35 years standing and practicing at Kariuki Muigua & Co. Advocates, a firm that specialises in environmental and commercial law litigation and Alternative Dispute Resolution. The firm is also listed as a leading Kenyan commercial law firm in the distinguished Martindale Hubble Directory.

He has authored the following books: *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015); *Resolving Conflicts through Mediation in Kenya*, (Glenwood Publishers, Nairobi, 2013); *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015); *Nurturing Our Environment for Sustainable Development*, (Glenwood Publishers, Nairobi, 2016); *Settling Disputes through Arbitration in Kenya* (Glenwood Publishers, Nairobi) 1st Edition (2012); 2nd Edition (2012); 3rd Edition (2017); and 4th Edition (2022).

His other works include *Securing Our Destiny through Effective Management of the Environment*, (Glenwood Publishers, Nairobi-2020); *Achieving Sustainable Development, Peace and Environmental Security* (Glenwood Publishers, Nairobi, 2021); *Fostering Environmental Democracy and Biodiversity Conservation*, (Glenwood Publishers 2021); *Exploring Conflict Management in Environmental Matters* (Glenwood Publishers 2022); *Attaining Environmental Justice for Posterity*: Volume 1 and 2, (Glenwood Publishers 2022); *Accessing Justice Through ADR*, (Glenwood Publishers 2022); *Nurturing our Environment for a Green Tomorrow*, (Glenwood Publishers 2023); *Realizing True Sustainable Development*, (Glenwood Publishers 2023); *Embracing Environmental Social and Governance (ESG) tenets for Sustainable Development*, (Glenwood Publishers 2023); *Combating Climate Change for Sustainability*, (Glenwood Publishers 2023); *Achieving Climate Justice for Development*, (Glenwood Publishers 2023); *Promoting The Rule of Law for Sustainable Development*, (Glenwood Publishers 2024); *Actualizing the Right to a Clean and Healthy Environment*, (Glenwood Publishers 2024); *Delivering Justice for Environmental Sustainability* (Glenwood Publishers 2024); *Realising Environmental Rights for All* (Glenwood Publishers 2024); *Towards Human Rights and Prosperity for All* (Glenwood Publishers 2024); and *Protecting People and the Planet through Environmental Rule of Law* (Glenwood Publishers 2024).

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