

Attaining Environmental Justice through Alternative Dispute Resolution

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Attaining Environmental Justice through Alternative Dispute Resolution

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Abstract

The paper critically interrogates the role of Alternative Dispute Resolution (ADR) mechanisms in promoting Environmental Justice. It asserts that ADR mechanisms can be a viable option in attaining Environmental Justice. The paper examines various ADR processes and highlights their key features and advantages. It further explores practical ways through which these mechanisms can aid in the realization of Environmental Justice. The paper further discusses some of the problems associated with ADR mechanisms and suggests the way forward towards attaining Environmental Justice through Alternative Dispute Resolution.

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1.0 Introduction

It has been observed that human-induced climate change is causing weather and climate extremes across the globe, putting pressure on already strained food systems, and causing mass displacement¹. Human action, and consequently human inaction, have resulted in a triple planetary crisis of climate change, pollution, and biodiversity loss². These actions have hindered the attainment of human rights including the right of access to adequate food, right to a clean, healthy and sustainable environment, right to clean water and sanitation, right to education, right to housing, right of access to clean and affordable energy, right to development, and right to life among others³. Further, such actions have widened social and gender inequality and led to violence and marginalization⁴.

Environmental challenges including climate change, pollution and biodiversity loss have had disproportional effects⁵. It has been asserted that developing and least developed countries are the most affected by these problems, despite contributing the least⁶. Further, disadvantaged and marginalized groups are severely impacted by environmental problems with less ability to adapt to the consequences⁷. Environmental Justice seeks to address these concerns eliminating environmental and structural inequalities and poverty which affect the most vulnerable people in the society⁸.

Environmental Justice has been defined as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws,

¹ Pickup. F., 'Five Steps to Environmental Justice.' Available at <https://www.undp.org/blog/five-steps-environmental-justice> (Accessed on 26/07/2023)

² Ibid

³ Gonzalez. C., 'Environmental Justice, Human Rights, and the Global South.' *Santa Clara Journal of International Law*, No. 151 of 2015

⁴ Ibid

⁵ Pickup. F., 'Five Steps to Environmental Justice.' Op Cit

⁶ Sultana. F., 'Critical Climate Justice' Available at <https://www.farhanasultana.com/wpcontent/uploads/Sultana-Critical-climate-justice.pdf> (Accessed on 26/07/2023)

⁷ Ibid

⁸ Pickup. F., 'Five Steps to Environmental Justice.' Op Cit

regulations, and policies⁹. 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 process to have a healthy environment¹⁰. Environmental Justice thus seeks to address distributive inequity, lack of recognition, disenfranchisement and exclusion in environmental matters¹¹.

The concept of Environmental Justice 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 development¹². Environmental Justice is thus a key pillar of Sustainable Development¹³. The United Nations 2030 Agenda for Sustainable Development envisages the attainment of goals such as ending poverty, achieving food security, ensuring availability and sustainable management of water and sanitation for all, ensuring access to affordable, reliable, sustainable and modern energy for all, conservation and sustainable use of oceans, seas and marine resources and protecting, restoring and promoting sustainable use of terrestrial ecosystems and forests within the framework of environmental protection and conservation including climate change mitigation and adaptation¹⁴.

Various approaches have been used to foster Environmental Justice. Such approaches include global acceleration of environmental rule of law, formulation of strong national legal frameworks on environmental governance, enhancing access to justice in

⁹United States Environmental Protection Agency; 'Environmental Justice.' Available at <https://www.epa.gov/environmentaljustice> (Accessed on 26/07/2023)

¹⁰ Ibid

¹¹Schlosberg, D & Collins, L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' *WIREs Clim Change*, 2014

¹² Muigua, K., Wamukoya, D., & Kariuki, F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

¹³ United States Environmental Protection Agency; 'Environmental Justice.' Op Cit

¹⁴ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 26/07/2023)

environmental matters and promoting gender equality in environmental governance¹⁵. However, despite this progress, environmental challenges such as climate change, pollution and biodiversity loss are still prevalent across the globe resulting in environmental injustices such as lack of access to clean water as a result of pollution, food insecurity due to soil pollution, drought and desertification due to climate change and loss of life in some instances among others¹⁶. In addition, litigation as a tool of realizing Environmental Justice is riddled with challenges such as high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow¹⁷. These problems call for the use of other mechanisms to foster Environmental Justice.

The paper critically interrogates the role of Alternative Dispute Resolution (ADR) mechanisms in promoting Environmental Justice. It asserts that ADR mechanisms can be a viable option in attaining Environmental Justice. The paper examines various ADR processes and highlights their key features and advantages. It further explores practical ways through which these mechanisms can aid in the realization of Environmental Justice. The paper further discusses some of the problems associated with ADR mechanisms and suggests the way forward towards attaining Environmental Justice through Alternative Dispute Resolution.

¹⁵ Pickup. F., 'Five Steps to Environmental Justice.' Op Cit

¹⁶ Crump. B., 'What Causes Environmental Injustice?' Available at <https://bencrump.com/environmental-justice-lawyer/what-causes-environmental-injustice/> (Accessed on 26/07/2023)

¹⁷ 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

2.0 Conceptualizing Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) refers to a process of managing disputes without resort to courts¹⁸. The term 'ADR' covers a scope of mechanisms including negotiation, mediation, arbitration, adjudication, neutral evaluation, enquiry, expert determination and conciliation¹⁹. ADR mechanisms are recognized under the Charter of the United Nations which enjoins parties to an international dispute, to first seek a solution to their dispute by *negotiation, enquiry, mediation, conciliation, arbitration*, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice²⁰. The Charter thus provides a legal basis for the use of ADR in dispute resolution at the international level. ADR mechanisms have also been enshrined under the Constitution in Kenya. The Constitution of Kenya mandates courts and tribunals to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms²¹.

ADR mechanisms may be categorized into facilitative, evaluative and determinative processes²². Facilitative processes include mediation wherein parties to a dispute are assisted in identifying issues in dispute and in coming to an agreement about the dispute²³. 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 outcomes²⁴. Determinative processes include arbitration and expert determination wherein a third party makes a determination after parties have presented their arguments and evidence in relation to a dispute²⁵. However, it has been

¹⁸ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

¹⁹ Block. M. J., 'The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes.' *Rutgers Law Record.*, Volume 44, 2016-2017

²⁰ Charter of the United Nations, 24 October 1945, 1 UNTS XVI., Article 33.1

²¹ Constitution of Kenya, 2010, Article 159 (2) (c)

²² Xie Z, 'The Facilitative, Evaluative and Determinative Processes in ADR,' 2011-10-12, available at <http://www.xwqlaw.com/info/c47f5ff15b464882ad5c9a7f97338652> (Accessed on 26/07/2023)

²³ Ibid

²⁴ 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-KenyaRevised-version-of-20.10.14.pdf> (Accessed on 26/07/2023)

²⁵ Ibid

observed that classification of ADR processes into facilitative, evaluative and determinative systems 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 party²⁶.

It has been argued that ADR mechanisms can enhance the right of access to justice²⁷. This right is recognized under the Constitution of Kenya which stipulates that the state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice²⁸. However, despite its Constitutional recognition, the right of access to justice in Kenya is faced with several challenges which hinder its attainment. These include high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow²⁹. Access to Justice is a fundamental principle of Environmental Justice³⁰. Thus, the challenges hindering access to justice in Kenya can also affect the realization of Environmental Justice.

ADR mechanisms can address the challenges of access to justice in Kenya³¹. ADR prides itself for being a simple, quick, flexible and accessible dispute resolution system compared to litigation³². ADR mechanisms further possess key attributes including informality, privacy, confidentiality, flexibility and fostering party autonomy³³. Most ADR mechanisms emphasize win-win outcomes towards fostering parties' relationships and also address all the underlying issues in dispute thus preventing the likelihood of

²⁶ Ibid

²⁷ Muigua. K., 'ADR: The Road to Justice in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/PAPER-ON-ADR-THE-ROAD-TO-JUSTICE-IN-KENYA-CIArb-Conference-Presentation.pdf> (Accessed on 26/07/2023)

²⁸ Constitution of Kenya, 2010, Article 48

²⁹ ²⁹ Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Op Cit

³⁰ 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), Principle 10

³¹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

³² Ibid

³³ Ibid

disputes reemerging in future³⁴. ADR mechanisms can thus foster efficient, expeditious and cost-effective management of disputes making them a viable tool of enhancing access to justice³⁵.

It has been posited that ADR mechanisms can promote effective management of environmental and natural resource disputes towards attaining Environmental Justice³⁶. The paper critically discusses the role of ADR mechanisms in enhancing Environmental Justice.

3.0 Attaining Environmental Justice through ADR: Prospects and Challenges

ADR mechanisms can foster Environmental Justice and realization if its principles such as access to information, public participation, access to justice and access to effective remedies in environmental matters³⁷. For example, in cases of pollution, the polluter can use ADR techniques such as negotiation and mediation with those affected by the acts of pollution in order to reach an amicable resolution of the dispute through mutually derived and acceptable outcomes³⁸. The polluter and those affected by acts of pollution can use ADR processes including negotiation and mediation to foster Environmental Justice by agreeing on issues such as compensation arising from the acts of pollution, stopping the acts of pollution or cleaning up the environment³⁹. This prevents such

³⁴ S. Mishra, 'Justice Dispensation through Alternate Dispute Resolution System In India' Available at <http://www.legalindia.in/justice-dispensation-through-alternate-dispute-resolution-system-in-indiab> (Accessed on 26/07/2023)

³⁵ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

³⁶ Ansari. A et al., 'Alternative Dispute Resolution in Environmental and Natural Resource Disputes.' Journal of the Indian Law Institute, Volume 59, No.1, 2017

³⁷ Environmental Health Programme., 'A Community Guide to Using Alternative Dispute Resolution to Secure Environmental Justice.' Available at <https://www.eli.org/environmentalgovernance/community-guide-using-alternative-dispute-resolution-secure-1> (Accessed on 26/07/2023)

³⁸ Ibid

³⁹ Ibid

disputes from escalating to courts which may result in unreasonable costs and delays thus perpetuating the Environmental Justice problems⁴⁰.

Further, ADR mechanisms allow parties to design creative solutions to their problems⁴¹. Thus, in case of Environmental Justice, issues such as disputes over design and implementation of environmental projects, ADR mechanisms as negotiation and mediation allow parties to come up with better solutions unlike remedies available in litigation⁴². Through negotiation and mediation parties can agree to invite experts to suggest innovative ideas and solutions on specific environmental challenges⁴³. ADR mechanisms can also foster Environmental Justice by aiding parties to environmental dispute, such as those involving the implementation of environmental projects, to come up with creative remedies over and above traditional remedies available in litigation⁴⁴. For example, instead of cancelling projects, parties through ADR processes such as negotiation and mediation can agree and come up with mutually acceptable solutions such as effective mitigation measures taking into account their respective needs and concerns⁴⁵. This will promote Environmental Justice.

In addition, realization of Environmental Justice principles such as public participation involves the use of ADR processes such as negotiation⁴⁶. The concept of public participation in environmental governance generally requires project proponents to

⁴⁰ Ibid

⁴¹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁴² 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 27/07/2023)

⁴³ Ibid

⁴⁴ Higgs. S., 'The Potential for Mediation to Resolve Environmental and Natural Resources Disputes.' Available at https://www.acctm.org/docs/The%20Potential%20For%20Mediation%20to%20Resolve%20Environmental%20_CONNOR-Higgs_.pdf (Accessed on 27/07/2023)

⁴⁵ Shmueli. D & Kaufman. S., 'Environmental Mediation.' *The Center for Environmental Policy Studies Series*, No. 24

⁴⁶ Grad. F., 'Alternative Dispute Resolution in Environmental Law.' *Columbia Journal of Environmental Law*, Volume: 14 Issue: 1

involve all concerned citizens at the relevant level before such projects can be approved⁴⁷. This has been succinctly captured under the Environmental Management and Co-ordination Act in Kenya which requires participation of the public during the preparation of an Environmental Impact Assessment Study report before an Environmental Impact Assessment licence can be granted authorizing such project⁴⁸. Public participation can be realized through dialogue and consensus efforts with local communities⁴⁹. Thus, a project proponent can use ADR mechanisms such as negotiation with concerned citizens to foster public participation and approval of intended projects⁵⁰. This will foster Environmental Justice.

In addition, ADR mechanisms such as mediation can enhance Environmental Justice by fostering access to justice through participatory conflict management.* Mediation can foster community involvement in the conflict management process peace committees, Non-Governmental Organisations, religious bodies, among other bodies within the communities⁵¹. This process can facilitate effective management of conflicts by addressing the root causes of such conflicts⁵². Thus, in case of environmental disputes, mediation affords parties an opportunity to sustain or improve their relationships⁵³. This is important especially in cases of environmental projects such as those related to energy, water and infrastructure whose completion may be for the larger good⁵⁴. Disputes concerning such projects may result in their non-completion thus hindering the

⁴⁷ 'Rio Declaration on Environment and Development.' Op Cit, Principle 10

⁴⁸ Environmental Management and C-ordination Act, No. 8 of 1999, Part VI

⁴⁹ Davies. C., 'Environmental ADR and Public Participation.' *Valparaiso University Law Review*, Volume 34, p 389-401

⁵⁰ Ibid

⁵¹ Muigua. K., 'Natural Resource Conflicts: Addressing Inter-Ethnic Strife through Environmental Justice in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2019/09/Natural-Resource-Conflicts-Addressing-Inter-Ethnic-Strife-Through-Environmental-Justice-in-kenya-Kariuki-Muigua-7th-September-2019.pdf> (Accessed on 26/07/2023)

⁵² Ibid

⁵³ Ansari. A et al., 'Alternative Dispute Resolution in Environmental and Natural Resource Disputes.' Op Cit

⁵⁴ Higgs. S., 'The Potential for Mediation to Resolve Environmental and Natural Resources Disputes.' Op Cit

Sustainable Development agenda⁵⁵. However, ADR mechanisms such as mediation ensures that such disputes are managed amicably thus allowing environmental projects to be completed.

In addition, ADR mechanisms such as arbitration can enhance the attainment of Environmental Justice by providing an avenue for the effective and efficient management of complex environmental disputes including those related to Environmental, Social and Governance concerns among them climate change⁵⁶. Arbitration allows parties to select a third party with requisite knowledge and experience on such matters in order to promote effective management of their dispute⁵⁷. This is integral in attaining environmental justice.

ADR mechanisms such as arbitration and mediation can also foster Environmental Justice due to their transnational applicability⁵⁸. It has been observed that environmental disputes may involve parties from different nationalities since the effects of issues such as pollution and climate change may spread across different states⁵⁹. Such disputes cannot be managed by national courts due to jurisdictional concerns⁶⁰. ADR mechanisms such as arbitration and mediation are able to promote management of such disputes since they have apply across multiple jurisdictions and further guarantee enforcement of decisions⁶¹. A classic example of the use of ADR in management of transnational

⁵⁵ Ibid

⁵⁶ Muigua. K., 'The Viability of Arbitration in management of Climate Change Related Disputes in Kenya' Available at <http://kmco.co.ke/wp-content/uploads/2022/04/The-Viability-of-Arbitration-in-management-of-Climate-Change-Related-Disputes-in-Kenya-11th-April-2022.pdf> (Accessed on 27/07/2023)

⁵⁷ Ibid

⁵⁸ Higgs. S., 'The Potential for Mediation to Resolve Environmental and Natural Resources Disputes.' Op Cit

⁵⁹ Elborough. L., 'International Climate Change Litigation: Limitations and Possibilities for International Adjudication and Arbitration in Addressing the Challenge of Climate Change.' Available at <http://www.nzlii.org/nz/journals/NZJIEEnvLaw/2017/5.pdf> (Accessed on 27/07/2023)

⁶⁰ Ibid

⁶¹ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) provides a harmonized legal framework for the enforcement of arbitral awards across different jurisdictions. In the context of mediation, the United Nations Convention on International Settlement Agreements Resulting from Mediation (The Singapore Convention) establishes a framework for enforcement of decisions in international mediation.

environmental disputes is the *Trail Smelter Case*⁶² that involved the United States of America (USA) and Canada. The case involved a Canadian company which carried out smelting operations within the territory of Canada whose activities resulted in pollution through toxic smoke which caused damage to forests and crops within Canada and across the neighbouring country of USA⁶³. This resulted in a dispute with farmers in the USA who had been affected by the acts of pollution demanding compensation⁶⁴. The dispute was eventually managed through arbitration with the affected farmers being awarded monetary compensation⁶⁵. The arbitral award in the Trail Smelter case has been hailed for establishing the principle of state responsibility for transboundary air pollution and upholding the no-harm rule which is to the effect that a state is duty-bound to prevent, reduce and control the risk of environmental harm to other states⁶⁶. ADR mechanisms can thus foster Environmental Justice in cases of transboundary environmental disputes.

The foregoing discussion has demonstrated ADR mechanisms can enhance the attainment of Environmental Justice. However, several challenges may hinder the efficacy of these mechanisms in promoting Environmental Justice. One of the key concerns relates to the nature of Environmental Justice problems such as pollution. For example, acts of pollution may result in environmental crimes which draw criminal sanctions⁶⁷. In Kenya, the Environmental Management and Co-ordination Act makes it a criminal offence to engage in acts of pollution for example water pollution and discharge

⁶² Trail smelter case (United States, Canada), 3 UNRIAA, p. 1905, 1952

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Bratspies. R & Miller. R., 'Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration.' Available at https://www.researchgate.net/profile/RebeccaBratspies/publication/228159291_Transboundary_Harm_in_International_Law_Lessons_from_the_Trail_Smelter_Arbitration/links/09e4150bf88aa70df9000000/Transboundary-Harm-in-International-Law-Lessons-from-the-Trail-Smelter-Arbitration.pdf (Accessed on 27/07/2023)

⁶⁷ Faure. M., 'Environmental Crimes.' Available at https://www.researchgate.net/profile/Michael-Faure/publication/228169074_Environmental_Crimes/links/55cc8d9408aea2d9bdce452b/Environmental-Crimes.pdf (Accessed on 27/07/2023)

of hazardous substances into the environment⁶⁸. Thus, while ADR mechanisms such as mediation, negotiation and mediation may be effective in securing civil remedies such as damages, they lack prosecutorial powers needed to enforce criminal sanctions in cases of violation of the law in instances such as pollution⁶⁹. This can hinder the efficacy of ADR mechanisms in promoting Environmental Justice. It has been asserted that criminal sanctions can be vital in cases of acts which massively pollute or destroy the environment and result in grave concerns such as loss of lives⁷⁰.

It has also been observed that ADR mechanisms such as mediation and negotiation can result in power imbalances with one party having a higher bargaining power than the other⁷¹. Thus, in the field of Environmental Justice, a project proponent such as a Multinational Corporation or a state entity may have a higher bargaining power than local communities when designing and implementing environmental projects. This is often reflected by acts such as failure to uphold meaningful public participation in development projects⁷². In addition, the voluntary and non-binding nature of ADR mechanisms such as negotiation and in some cases mediation could result in non-compliance with their outcomes thus affecting the attainment of Environmental Justice⁷³. It has also been contended that ADR mechanisms including negotiation and mediation may not be suitable when a party needs urgent protection like an injunction⁷⁴. This may

⁶⁸ Environmental Management and Co-Ordination Act, No. 8 of 1999, S 70 & 93

⁶⁹ Higgs. S., 'The Potential for Mediation to Resolve Environmental and Natural Resources Disputes.' Op Cit

⁷⁰ Sina. S., 'Criminal and other Sanctions in Environmental Law.' Available at <https://www.ecologic.eu/17665> (Accessed on 27/07/2023)

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

⁷² Muigua. K., 'Upholding Human Rights and Meaningful Public Participation in Development Projects.' Available at <http://kmco.co.ke/wp-content/uploads/2021/05/Upholding-Human-Rights-and-Meaningful-Public-Participation-in-Development-Projects-AutoRecovered-Kariuki-Muigua-24th-May-2021.pdf> (Accessed on 27/07/2023)

⁷³ Alkhayer. J., 'Role of ADR Methods in Environmental Conflicts in the light of Sustainable Development.' *Earth & Environmental Science*, 1084 (2022) 012057

⁷⁴ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

hinder their efficacy in the enhancing Environmental Justice since there may be need for urgent protection such as stopping acts of pollution.

Arbitration as a tool of attaining Environmental Justice also suffers from several drawbacks. The use of arbitration in conflict management could potentially result in delays and expenses due the adversarial nature of arbitration and instances of court interference⁷⁵. Further, arbitration is a settlement mechanism which may not effectively resolve underling issues in a dispute and foster parties' relationship⁷⁶. This may hinder its efficacy in realizing Environmental Justice due to the need for efficient, expeditious and cost effective management of environmental disputes in a manner that fosters relationships in order to promote public participation and completion of projects⁷⁷.

It is thus evident that ADR mechanisms face several challenges that may hinder their appropriateness in attaining Environmental Justice. There is need to address these problems in order to enhance the viability of ADR mechanisms in realizing Environmental Justice.

4.0 Way Forward

ADR mechanisms can foster the attainment of Environmental Justice. These mechanisms allow parties to enjoy autonomy over the process and outcome and have the ability to foster expeditious, cost-effective, flexible and non-complex management of disputes⁷⁸. They also allow parties to design creative remedies in response to the problem at hand⁷⁹. To enhance environmental justice there is need to move beyond the law by adopting approaches that give communities greater avenues for protecting their rights and

⁷⁵ Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers Limited, 4th Edition, 2022

⁷⁶ Ibid

⁷⁷ Ansari. A et al., 'Alternative Dispute Resolution in Environmental and Natural Resource Disputes.' Op Cit

⁷⁸ Muigua. K. & Kariuki. F., 'Towards Environmental Justice in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Towards-Environmental-Justice-in-Kenya-January-2015.pdf> (Accessed on 27/07/2023)

⁷⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

benefiting from the use of natural resources⁸⁰. ADR mechanisms can foster Environmental Justice through measures such as dialogues and consensus efforts with local communities⁸¹. Public participation in environmental matters such as the design and implementation of environmental projects can be realized through the use of ADR mechanisms such as negotiation, conciliation and mediation⁸². It is thus imperative for stakeholders including the government, the private sector and the public to embrace ADR mechanisms in environmental governance in order to foster Environmental Justice. Promoting public awareness on the role of ADR in enhancing environmental justice is also vital⁸³.

While determining Environmental Justice disputes, there is need for ADR practitioners such as arbitrators and mediators to foster Sustainable Development⁸⁴. ADR practitioners should uphold sound environmental governance and human rights including the right to a clean, healthy and sustainable environment⁸⁵. This will be vital in fostering Sustainable Development. In addition, ADR practitioners should seek needed technical expertise and neutral process assistance when dealing with complex Environmental Justice issues such as those involving climate change⁸⁶.

The suitability of ADR mechanisms in fostering Environmental Justice can also be enhanced by addressing the inadequacies inherent in some ADR mechanisms such as lack of formal recognition and enforcement of outcomes⁸⁷. It has been contended that

⁸⁰ Muigua. K. & Kariuki. F., 'Towards Environmental Justice in Kenya.' Op Cit

⁸¹ Davies. C., 'Environmental ADR and Public Participation.' *Valparaiso University Law Review*, Volume 34, p 389-401

⁸² Muigua. K., 'Reflections on ADR and Environmental Justice in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Reflections-on-ADR-and-Environmental-Justice-in-Kenya.pdf> (Accessed on 27/07/2023)

⁸³ Ibid

⁸⁴ Alkhayer. J., 'Role of ADR Methods in Environmental Conflicts in the light of Sustainable Development.' Op Cit

⁸⁵ Ibid

⁸⁶ The Consensus Building Institute., 'Using Dispute Resolution Techniques to Address Environmental Justice Concerns.' Available at https://www.epa.gov/sites/default/files/2015-09/documents/case-study-report_adr_in_ej.pdf (Accessed on 27/07/2023)

⁸⁷ Ansari. A et al., 'Alternative Dispute Resolution in Environmental and Natural Resource Disputes.' Op Cit

there is a need for enactment of a sound legal and policy framework for effective utilization of ADR to ensure full access to justice for Kenyans⁸⁸. This will promote legitimization of ADR mechanisms thus enabling their advantages to be realized across different sectors including environmental governance⁸⁹. Through such measures, the role of ADR mechanisms in promoting Environmental Justice will be enhanced.

5.0 Conclusion

Environmental Justice is an important concept that seeks to achieve the ideal of participation, access to information, access to justice and access to remedies in environmental matters⁹⁰. ADR mechanisms can foster Environmental Justice by promoting consensus building, participation and expeditious, flexible and cost effective management of environmental disputes⁹¹. However, concerns such as lack of criminal sanctions, the non-binding nature of some ADR mechanisms, power imbalances, lack of urgent protection measures such as injunctions can potentially hinder the viability of ADR mechanisms in enhancing Environmental Justice⁹². There is need to embrace ADR mechanisms, address the inadequacies inherent in some ADR mechanisms and foster Sustainable Development in order to make these mechanisms more suitable in the quest towards Environmental Justice⁹³. Attaining Environmental Justice through Alternative Dispute Resolution realizable.

⁸⁸ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISING-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf> (Accessed on 27/06/2023)

⁸⁹ Ibid

⁹⁰ Pickup. F., 'Five Steps to Environmental Justice.' Op Cit

⁹¹ Higgs. S., 'The Potential for Mediation to Resolve Environmental and Natural Resources Disputes.' Op Cit

⁹² Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁹³ Alkhayer. J., 'Role of ADR Methods in Environmental Conflicts in the light of Sustainable Development.' Op Cit

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

Bratspies. R & Miller. R., 'Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration.' Available at https://www.researchgate.net/profile/RebeccaBratspies/publication/228159291_Transboundary_Harm_in_International_Law_Lessons_from_the_Trail_Smelter_Arbitration/links/09e4150bf88aa70df9000000/Transboundary-Harm-in-International-Law-Lessons-from-the-Trail-Smelter-Arbitration.pdf

Charter of the United Nations, 24 October 1945, 1 UNTS XVI., Article 33.1

Constitution of Kenya, 2010, Government Printer, Nairobi

Crump. B., 'What Causes Environmental Injustice?' Available at <https://bencrump.com/environmental-justice-lawyer/what-causes-environmental-injustice/> (Accessed on 26/07/2023)

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