



# Alternative Dispute Resolution

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## ALTERNATIVE DISPUTE RESOLUTION

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For Marketing opportunities contact  
[marketing@ciarbkenya.org](mailto:marketing@ciarbkenya.org)

Chartered Institute of Arbitrators, Kenya  
Nicholson Drive, Off Ngong Road  
Between Bemuda Plaza and Central Church of Nazerene  
P.O. Box 50163-00200, Nairobi  
Tel: 2712481, 2722724, Fax: 2720912  
Mobile 0734-652205 or 0722-200496  
Email: [info@ciarbkenya.org](mailto:info@ciarbkenya.org)  
Website: [www.ciarbkenya.org](http://www.ciarbkenya.org)

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**EDITOR**

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# Alternative Dispute Resolution

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## Editor's Note

Welcome to the second Issue of the Alternative Dispute Resolution Journal of the Chartered Institute of Arbitrators-Kenya Branch (CIArb-K).

To celebrate 30 years of successful provision of Dispute Resolution services in Kenya and the growth of global access to justice through Alternative Dispute Resolution (ADR), the Chartered Institute of Arbitrators, Kenya organized a two day conference held on 7<sup>th</sup> & 8<sup>th</sup> August, 2014 at the Sarova Whitesands Hotel in Mombasa, Kenya.

The aim of the conference was to bring together the worldwide community of ADR practitioners and users to harness best practices, development and experience so as to build a firm and enhanced user platform.

The Conference theme was "Broadening Access to Justice through Alternative Dispute Resolution - 30 Years on" Deliberations focused on the ADR journey for Kenya and other countries that were represented, where we stand at present and the road map to the future of ADR as a more effective means, or the preferred means, of achieving justice by a majority of the population.

This second edition includes the speakers' presentations on the Conference theme. It consists of rich articles on ADR contributing to the theme of the Conference and it is therefore a good source of information, not only for ADR practitioners, but also for those who wish to familiarize themselves with ADR. The conference was a major success with delegates from the East African region, the larger African continent and the rest of the world. The President of the Chartered Institute of Arbitrators UK, Mr. Michael Stephens, also graced the Conference.

The Institute takes this opportunity to thank those who have made it possible to publish this journal. I wish you an enlightening reading.

**Dr. Kariuki Muigua, Ph.D, FCIArb**  
**Chairman,**  
**Chartered Institute of Arbitrators (Kenya)**  
**Nairobi, August 2014.**

**OPENING ADDRESS**

*by* **HON. PROF. GITHU MUIGAI\***

**1.0 INTRODUCTORY REMARKS**

Mr President, distinguished guests, arbitrators, advocates, ladies and gentlemen:

I take this opportunity to congratulate the Chartered Institute of Arbitrators (Kenya Branch) on its 30 years anniversary.

I also pay tribute to the pioneers who spent their time and resources in starting the Branch in 1984.

The Branch has come a long way. The fact that it is named as the arbitrator appointing authority in many government and private contracts is proof of its success.

The Branch has over 600 members and is now one of the largest branches worldwide. It offers training of arbitrators and mediators to a very high standard. I am proud to be associated with it.

**2.0 THE CHALLENGES**

The great milestone we are marking today must be accompanied by a reality check and a road map into the future. Some of the concerns about ADR in this country are:

- a) Article 159 (2) (c) of the Constitution of Kenya 2010 remains largely unimplemented.
- b) The need to popularise ADR for the resolution of land, family, succession, political and general commercial disputes.
- c) The shortage of accredited mediators.
- d) The apparent marginalisation of women and non-lawyers in the arbitration field.

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\*Ph.D, FCI Arb, Attorney General of The Republic of Kenya; Address at the CI Arb (Kenya Branch) International Arbitration Conference titled "Broadening Access to Justice Through ADR-30 Years On" to mark 30 Years Anniversary Celebrations, at the Whitesands Hotel, Mombasa, Kenya on 7<sup>th</sup> - 8<sup>th</sup> August, 2014.



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e) A robust and local mechanism for disciplining errant arbitrators.  
The Branch should take a lead in finding solutions to these challenges.

### **3.0 ADVOCATES**

I understand that many of you here are advocates in Kenya or elsewhere.

Advocates have a special place in ADR because of several reasons. They draft the contracts. Many of them are managers and directors in various organisations. They are the first port of call when disputes arise.

I would remind them what Mahatma Gandhi, the father of the Indian nation, said:

*"I had learnt the true practice of law.... I realised that the true function of a lawyer was to unite parties riven as under. The lesson was so indelibly burnt unto me that the large part of my time, during the twenty years of my practice as a lawyer, was occupied in bringing about private compromises of hundreds of cases. I lost nothing, thereby not even money, certainly not my soul."*

I associate myself with the Mahatma's remarks. Speaking as both an arbitrator and advocate, I can assure you that with arbitration your fees come in much faster.

I urge advocates to embrace Arbitration and other ADR procedures.

### **4.0 CENTRE FOR ALTERNATIVE DISPUTE RESOLUTION (CADR)**

Members of the CADR Council visited me earlier this week. I was impressed by their enthusiasm and vision. They have the noble task of:

- a) Articulating ADR issues locally.
- b) Filling the training gaps by putting local content in existing courses.
- c) Developing new courses.
- d) Encouraging non-lawyers to practice ADR.
- e) Extending ADR training to County and grassroot levels.

I understand that CADR is planning a conference on Dispute Boards in Nairobi in February 2015.

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I wish them every success in their endeavours.

## **5.0 KENYA'S ROLE OF RECONCILIATION IN AFRICA**

Kenya has been a centre for resolving political disputes for many decades. It played a reconciliatory role in Angola, Uganda, South Sudan, Somalia and elsewhere. I laud the great Kenyan men and women who spent months and years reconciling our brothers and sisters on the continent.

I challenge the “professional” arbitrators and mediators to roll up their sleeves and join in the reconciliation initiatives which are taking place on the continent.

Meanwhile, they should build on Kenya's expertise in that field and take it to greater height.

## **6.0 NAIROBI CENTRE FOR INTERNATIONAL ARBITRATION (NCIA)**

I am proud to say that the Board is now in place. It is working hard behind the scenes to lay a firm foundation for the Centre, which I expect to be fully operational within a few months.

## **7.0 CLOSING REMARKS**

I have looked at the programme and can assure you that you will all be wiser at the end of this conference.

Please take full advantage of the excellent networking opportunities which are available in this conference.

My office will be fully represented throughout the conference. I will attend some of the sessions and will, however, read all the papers presented here as they are in a flash disk. Thank God for IT.

With those few remarks, I wish you all fruitful deliberations and now declare this International Arbitration Conference officially open.

Thank you.

*Opening Address: By Hon. Prof. Githu Muigai*

**Prof. Githu Muigai, Ph.D, FCIArb**  
**Attorney General, Republic of Kenya**

## POSITIONING ADR IN THE GLOBAL JUSTICE SYSTEM

by MICHAEL STEPHENS\*

Let me begin by expressing my thanks to the Branch for this invitation to speak at this significant event. It is a significant event, drawing together as it does, leading practitioners in this region, to meet in these stimulating surroundings. That so many of us, from different jurisdictions and backgrounds, are here today only serves to highlight the international context in which we meet. It also, when I think about it, serves to underline part of the challenge thrown up by the topic that I will seek to address in a moment.

It has been my honour and privilege to serve as President of this Institute this year. I have had the opportunity to travel far and wide on behalf of the membership. My journeys have taken me from one side of the world to the other. But wherever I have been in the course of the past few months, I have always found the reputation of this Institute to be held in the highest regard. You may tell me that, as a member, you are not in the least surprised. However, we must not rest on our laurels. The success of this Institute will only continue whilst its membership is active and influential in the world of dispute resolution. We have, as I shall seek to suggest to you, a role to play in the promotion of alternative dispute resolution, whatever its form, throughout the world. I believe that, because of the high standing enjoyed by the Institute and its members, our voice can be influential, if not persuasive, in spreading the word.

May I just take a moment before I address the main topic to review the position of the Institute as it stands at the present time? We are a membership organisation numbering over 13,000 members spread throughout 127 countries of the world. We have 36 branches and 37 local chapters. Aside from the executive officers, the governance and management of the Institute is overseen by the Board of Trustees and the Board of Management. I know that you will be aware that a senior and valued member of the Board of Trustees is our friend Chief Bayo Ojo. I am delighted to tell you how well he fulfils his responsibilities.

It is easy to forget against the international background that the Institute is essentially a registered charity under UK law and has to satisfy the public benefit

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\*FCI Arb, President of the Chartered Institute of Arbitrators, England; CI Arb President's Address at the CI Arb (Kenya Branch) International Arbitration Conference titled "Broadening Access to Justice Through ADR-30 Years On" to mark 30 Years Anniversary Celebrations, at the Whitesands Hotel, Mombasa, Kenya on 7<sup>th</sup> - 8<sup>th</sup> August 2014.

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requirements set out in the Charities Act 2011. This it does by providing dispute resolution opportunities to the public generally, both in the United Kingdom and worldwide. This is achieved by the training of dispute resolvers and by the general promotion of the benefits of international and domestic arbitration and alternative dispute resolution procedures such as mediation and adjudication as genuine alternatives to litigation in the courts. We have developed what we have called "The Golden Thread". Essentially, this is the image we have of a theme running through the activities of the Institute to achieve and comply with the mandate set out in our Charter and to provide benefit to our members. It comprises three strands:

- a) the delivery of education, training and qualifications;
- b) the development of the Learned Society; and
- c) the facilitation of ADR.

The Book of Ecclesiastes speaks of the threefold cord not being easily broken. Whilst that was not at the forefront of our minds in the promotion of the theme, the idea of these three strands interweaving and supporting each other is very much at the heart of the intention.

The Institute is a thriving business when one looks at it. We deliver education, training and qualifications. Last year 122 courses were run by the Institute. Of these, 51 courses took place in London and the rest were either in the UK or run by international branches. 2,343 candidates attended CIArb Pathways courses around the world. We organised our first courses in Brazil and Sierra Leone. The first arbitration course in Spanish was delivered at the start of the year in conjunction with the University Of San Pedro Madrid. The International Commercial Arbitration Diploma courses were held not only in Oxford but also in Malaysia. We continue to review and update our training materials. In October 2013, post the adoption of the image of the Golden Thread, the first Tutors' Symposium was held to discuss the future of education and training. This was a very successful event with considerable contribution being made by the participants, all experienced tutors, who will help shape how we deliver education in the future. In furtherance of that aim, we have appointed Professor Janet Walker of Osgoode Hall, Canada as our academic adviser.

In the course of the year 322 candidates were elevated to the status of Fellow of the Institute; they originated, between them, from 41 different countries. The membership of the Presidential Panel also increased with 15 candidates passing the interview to be included.

The Institute has continued to develop its role as a learned society. As members, you will be in receipt of "Arbitration", our International Journal, which is published on a quarterly basis as well as the "Resolver" magazine and the online

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newsletter "E-Solver". I hope that you will agree that all these publications provide a breadth of learning on a variety of topics relevant to your interests in arbitration and alternative dispute resolution. We have organised a considerable number of successful public events which include – but are not limited to - the major international conferences which took place in Penang, Malaysia and in Beirut, each of which attracted several hundred delegates from all over the world, a conference for younger members held in Istanbul, learned lectures in London, our highly regarded annual mediation symposium and the initial fully subscribed DAS convention which was addressed by the leading English Court of Appeal judge who had been responsible for a fundamental review of English civil procedure.

We are conscious that the membership is entitled to expect the Institute to ensure that its profile is kept as visible as possible in all ways. We have kept under review and regularly updated our website. We have actively engaged with social media, using the LinkedIn network, Twitter, Facebook and YouTube to promote not only the Institute but also the Dispute Appointments Service that we provide. We have been involved in sponsorship of activities throughout the world including the IBA Annual Conference in Dublin, the Vis Moot in Vienna, the ICCA Conference in Miami and even the Lord Mayor's Show in London, an event which arguably attracted the most attendance and the greatest global audience thanks to television and the Internet.

The other aspect of our success relates to our aim to facilitate alternative dispute resolution. The Disputes Appointment Service dealt with 144 new cases during the course of 2013. As I speak to you today, I have already dealt with some 90 appointments this year (including 2 appointments made whilst here last night). If that trend continues - as I hope it will - the prospective total for the year will exceed that for 2013. Aside from appointing dispute resolvers we have available excellent facilities at Bloomsbury Square for arbitrations, mediations or other meetings. There has been much investment in technology and premises to ensure that our facilities are of the highest standard and pre-eminent in a competitive market place.

I am pleased to tell you that the financial position of the Institute is strong. I will not weary you with figures now but simply say that the overall position is one of continuing growth reflected in increased turnover, surplus and consolidation of our financial base supported by a strong portfolio of property and investment.

It is against that background that I repeat what an honour and privilege it has been for me to serve as your President this year.

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However, could I just sound a note of restraint? It is my view that, having told you of our success, we should be mindful of a responsibility that goes with it. "The secret of success is constancy of purpose" said Benjamin Disraeli. You can be assured that the executive of the Institute is well aware of that. We as members should not forget it. The responsibility that I have in mind is not just constancy of purpose but, as I see it, an obligation to adhere to the highest professional standards when taking part in arbitration or any form of alternative dispute resolution, because not only personal but also institutional reputation depends upon it. I feel that you are saying to yourselves: "well, that's obvious isn't it? Don't we do that all the time?" When I look around the room I have little doubt that you do so act. But there are some of our colleagues in international dispute resolution who do not set the bar as high as we do, who depart from the norms, who may bring the practice into disrepute. These people are not necessarily acting in an underhand way. That is not to say that there are not those who adopt what have been called guerrilla tactics. The challenge that we face in international dispute resolution today is widely recognised and has been commented on by many before me. It is the challenge of ensuring that the processes continue to thrive because they are seen as fair, transparent and efficient, underpinned by a recognisable ethical foundation.

So how do we position ADR in the global justice system?

You will appreciate straightaway that we do not have a single jurisprudence that governs the global economy. We are a world made up of common lawyers and civil lawyers. We exist in a commercial landscape where, thanks to technology, education and the dominance of two or three languages, it is commonplace for complicated, valuable business to be transacted between individuals or corporations from one side of the world to the other. Just as "the course of true love never did run smooth" so there are rocks and stones sometimes to be found along the trading way. To pursue the image, ADR should be the smooth track that runs alongside.

In the absence of a single jurisprudence, how are the disputes that might arise between traders of different jurisdictions to be resolved effectively, efficiently and at a proportionate cost? Contracts for the export of horticultural products, textiles, tea, coffee, tobacco and many other commodities are, you may tell me, central to the well-being of the economy of this country. I anticipate that, from time to time, disputes arise out of those contracts and lawyers' advice is sought; what is the best way to resolve the problem?

One clear answer is by international arbitration. However, much as all of us here would support that technique, it is not always the best one to be adopted. The growth of mediation and similar forms of dispute resolution provide us, the

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dispute resolvers, and, more importantly, our clients with a number of options to meet the situation. "Which one is best for me?" asks the client. "Well" you say to the client, "the best process to use on this occasion is ...." and you proceed to give your advice.

It seems to me that there are a number of features which use of any ADR process would demand as a bare minimum. In trying to identify those features, I have borne in mind the notion of them being of "global" application rather than regional or parochial.

It is very easy for those of us involved in dispute resolution on a daily basis to think entirely about what we would like to get out of the process. You won't be surprised to know that financial reward and the satisfaction of winning (or sometimes avoiding defeat) in an intellectual contest are matters close to the heart of any dispute resolver. I suspect that sometimes it is our clients who are the least of our considerations. That is obviously a short sighted way of proceeding because the clients are the lifeblood of the process and, indeed, provide the very lubrication of cash flow for any practitioner. So let us put ourselves into the minds of the client and ask what it is that the client would like to get out of the process.

Let me make these suggestions to you. They are made against a background that, on many occasions, there is no one factor that matters above all others to a client. However, the client has many concerns about the process and I will put it to you that, in no particular order, what I'm about to say reflects the ones most likely to be expressed.

The client wants a process that is accessible. The client may be an individual; the client may be a multinational Corporation; or something in between. Whichever method of alternative dispute resolution is to be adopted, central to its success is that it is a process that the client can understand and in which it can be involved. We could describe ADR as a toolkit for the maintenance and sometimes running repair of modern business relationships. That toolkit might include model clauses to be used in its contracts. It might include a mechanism that seeks to prevent the escalation of disputes or, where that cannot be avoided, for a series of measures to be tried before litigation rears its ugly head. And where the client cannot use the toolkit, it needs to understand how someone else is using it. So the process is not simply a user-friendly one but also one that is readily understood, transparent and ethical.

Although business may be conducted in a public way, there are not many who would want their disputes to be broadcast to the world in the same fashion. There can be a great sensitivity amongst commercial people and, whatever the rights or wrongs of the dispute, the fact that two or more parties are seen by their peers to be arguing does nothing to enhance reputations. Confidentiality is, I



suggest, therefore one of the key attractions of any form of dispute resolution. Litigation is the least confidential. The forensic arena is open to all spectators. Arbitration and mediation are closed shops in comparison.

Now, whilst the client thinks it is excellent that the dispute will not be a matter of public knowledge, what the client does also want is to be assured that the tribunal that oversees or makes decisions about the dispute is authoritative. Not just that it has the authority to make a decision but it has the relevant expertise and carries the confidence of the parties. So in arbitration or expert determination, where technical issues fall to be decided or there are key local features that need to be understood, we can ensure that we seek to appoint a suitable person. The same considerations apply just as much to mediation or early neutral evaluation or a mini-trial or other form of non-stipulative procedure. We can better position ADR in the global justice system if we can demonstrate that the processes are underpinned by expertise and hallmarked by conviction and enforceability.

We have undergone a sea change in the English jurisdiction in the last couple of years. There was a perception that costs of litigation were too high, that court cases took too long and that the court's power to manage its workload was no longer as effective. The outcome of the fundamental review of litigation that was conducted by a senior judge has had a very sobering effect on the legal profession. In essence, there will be no indulgence by the Court to the parties in respect of breaches of court orders or procedural timetables. English lawyers are still trembling about these effects 12 months or more after their introduction. That is because we view this new inflexibility on the part of the Court as incompatible with the concept of the parties being able to obtain justice. The Court of Appeal, in a series of decisions about the new procedural rules, has made it clear that "justice" is no longer a consideration. It is compliance with the rules that is paramount. In essence, procedure is no longer the handmaiden of the law but its mistress.

What is the likely effect of such an approach? Many English lawyers think that it will not be so much better discipline by litigants but more recourse to ADR where the procedures are less hidebound and notions of being able to obtain "justice" still prevail. So what clients want universally, I suggest, is flexibility. That is because not only is business today not a rigid exercise but also because there is a greater demand for party autonomy, for the ability to be able to determine how, when, where and over what period parties wish to resolve their disputes. Some matters are of urgency and need to be sorted out in days; other arguments need to be addressed over a period of time, perhaps because they are complicated, perhaps because that is the approach informed by the cultures of

the disputants. Having suggested that world trade is effectively carried out in two or three languages – which I appreciate is not quite the case – a party from Europe and a party from Asia may not want to have their dispute adjudicated upon in London. Issues of language, the place and nature of any breach of contract or where it was to be performed will have a considerable bearing on how the parties will seek to resolve their differences. If we are to serve our clients' interests we have to be flexible in outlook ourselves. The key to solving the problem can lie in that cliché: thinking outside the box.

I come back to what I think is a critical issue for the client. That is the issue of confidence in the process, whatever it is. I would argue that what underpins confidence in ADR is the knowledge that the tribunal is ultimately a neutral one. There may be party appointments but the chair will be a person favoured by both sides.

The junior members of my chambers say to me that “you need to have grey hairs to be an arbitrator” or “I’m too young to be appointed as a mediator”. Whilst that may seem a logical observation, it is a trite one and not necessarily a true one. I know that Oliver Wendell Holmes wrote that “the life of the law has not been logic: it has been experience” but I cannot help but think that, in today’s legal landscape, he might have been minded to observe something along the lines of “experience is no more needed than the ability to act fairly”.

It is the perception of neutrality that allows the client to engage with the arbitrator or more critically the mediator. That informs the integrity that we demonstrate as dispute resolvers, through our knowledge, our flexibility of thought, our expertise. It is not necessarily the same as experience but earns the respect of not just businesses but also governments, judges, our fellow lawyers and academics.

That in turn gives authority to our processes. It emphasizes credibility; it underlines skills; and it enhances reputation. Age becomes a secondary consideration where the dispute resolvers can demonstrate the ability to be neutral, fair and even handed. Parties are looking for predictability in the reference – not necessarily to the extent of a guaranteed success – but to the extent of participating in an exercise where the costs and time expended are in proportion to what is in issue and where there are recognizable procedures.

Ah yes: recognition. That is arguably the biggest challenge in positioning ADR in the global justice system. I have spoken from the background of a white, English commercial lawyer who takes for granted the availability of ADR procedures in his home jurisdiction and probably thinks that it is the same the world over. But it is not. There are societies where our modern techniques are unknown, whether because of state dominance of the legal system or because the

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only form of alternative dispute resolution is resort to traditional forms, which may not be user friendly or consistent.

Is it possible to achieve global practice? I think that the simple answer is “no” but perhaps a more truthful response is to say that we can go a long way towards it. I concentrate on the Chartered Institute again for a moment. That is because, as I mentioned to you earlier, we are a global membership and we have aspirations to be – if we have not already achieved it – the leading dispute resolution organisation in the world. I have told you about the breadth of our membership. I have told you about our courses. The ambitions that we have are not limited by boundaries and in my opinion the Institute of the future is more than likely to have a physical presence in other leading commercial centres apart from London. Given the position of Africa as the latest and potentially the world’s greatest emerging market, surely we are right to be looking to establish a foothold here?

This week in Mombasa we celebrate together 30 successful years of the Kenyan branch of the Institute. This branch exemplifies all that is best about our organisation. It is a vibrant Branch; there are over 600 members; there are regular training courses; there are many other events; and soon there is to be a physical presence in Nairobi.

Next year, 2015, the Institute marks its centenary. There will be major conferences, gatherings and social events produced by the Branches. I know that this Branch will want to make a distinctive contribution to the calendar. But could I offer this suggestion for consideration by this audience?

Here, in Africa, we have branches in Kenya, Nigeria, Zambia, South Africa and Mauritius as well as Egypt. We have colleagues in Algeria, in Ethiopia, in the Gambia, in Mozambique, in Rwanda, in Sierra Leone, in Sudan, in Swaziland, in Tanzania, in Zimbabwe and maybe elsewhere that I have not yet ascertained. Between all of you, you are in the foremost position to promote all forms of ADR. I would think that ADR, with its informality and flexibility, would be a popular form of dispute resolution technique on this continent. As members of the Chartered Institute you are part of an organization that seeks to promote, to educate, to facilitate and to celebrate everything ADR. So I urge you to take part in what the Institute can offer to you, whether training courses, Branch events or a worldwide network of likeminded professionals. What you can do, armed with this knowledge, is to tell your clients that ADR is not a poor relation to arbitration or even litigation. A reference to ADR should not be a measure of last resort or a compulsory stop along the way to the courtroom. With all the positive features that it has, ADR is well placed to serve the business needs of this continent.

*Positioning ADR in the Global Justice System: Michael Stephens*

Go and spread the word about ADR. It is to the advantage of you and your clients that they know about it. It is part of your constitution. Anyone with ambitions, whether local or global, can benefit from it.

Africa can be a leading seat for dispute resolution in the 21<sup>st</sup> century. Look not just at what you have achieved here in Kenya but look at your neighbours in the Kigali International Arbitration Centre; look at the work being achieved in Mauritius through the LCIA-MIAC Arbitration Centre; you can find other examples in Egypt, Nigeria and Cote d'Ivoire. ICCA is coming to Africa in 2016. So arbitration has achieved a high profile. If that can be done, what is to stop you seeking to do the same with ADR?

You, on this continent, can position ADR very firmly in the global justice system. I hope that you will do so.

**Michael Stephens**

**FCI Arb, President of the Chartered Institute of Arbitrators 2014.**

*The Judiciary as Stewards of ADR: Hon. Dr. Willy Mutunga*  
**THE JUDICIARY AS STEWARDS OF ADR**

*by* HON. DR. WILLY MUTUNGA\*

LADIES AND GENTLEMEN,

Every time I speak about alternative justice systems, the media find a way of inserting witchcraft into my mouth. Nonetheless, justice is such an important subject that the derision is a small price I am willing to pay for the ultimate prize.

I am greatly honoured to join you at this conference as the Kenya branch of the Chartered Institute of Arbitrators celebrates its 30<sup>th</sup> anniversary. Let me begin by saluting the pioneers and visionaries who founded the Kenya Branch of this Institute in 1984 while also celebrating those who have nurtured it over time to its 500-strong membership.

The theme of the conference, “Broadening Access to Justice through ADR -- 30 years on” captures the journey the Institute has taken to promote and facilitate the determination of disputes through arbitration, mediation, adjudication and other forms of alternative dispute resolution.

As you know, Article 48 of the Constitution of Kenya, 2010, makes access to justice a right. The State is required to ensure access to justice for all persons. Justice must also be done to all irrespective of status. The self-same Constitution commands that justice be not delayed and be delivered without undue regard to technicalities.

As you are aware, barriers to access to justice have taken different forms. There are not enough (and there will probably never be enough) judges, magistrates or Kadhis courts. As the Judiciary battles to reduce the historical backlog of cases – once estimated at over a million but now just under half of that – new matters are being filed and litigated every day. Those seeking justice have to wait a long time for their day in court. The courts are physically far away from populations. An ambitious court construction programme has reduced geographical distances between the courts and court users but this barrier has not been overcome entirely. Thirdly, complex and technical procedures in the courts and tribunals are not always easy to navigate. They impede access to justice but

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\*D. Jur, SC, EGH, Chief Justice and President of the Supreme Court of Kenya; Address at the CI Arb (Kenya Branch) International Arbitration Conference titled “Broadening Access to Justice Through ADR-30 Years On” to mark 30 Years Anniversary Celebrations, at the Whitesands Hotel, Mombasa, Kenya on 7<sup>th</sup> - 8<sup>th</sup> August 2014.

### *The Judiciary as Stewards of ADR: Hon. Dr. Willy Mutunga*

also invariably require lawyers, which increases the cost burden for those seeking justice.

The Judiciary recognizes that there is no quick fix to these barriers that stand in the path to justice. Under the Judiciary Transformative Framework, 2012-2016, several multi-faceted strategies have been deployed with the aim to enhance access to justice. Some of the strategies for ensuring the expeditious delivery of justice include the construction of courts, the deployment of mobile courts, and the promotion and facilitation of alternative dispute resolution and traditional justice systems.

Article 159(2)(b) of the Constitution of Kenya, 2010 firmly roots and integrates ADR in the administration of justice by requiring that in the exercise of judicial authority, courts and tribunals must be guided by the principles of alternative dispute resolution. Alternative dispute resolution in Kenya is no longer “*merely a highly fashionable idea*” but “*a serious effort to design workable and fair alternatives to our traditional judicial system.*”<sup>2</sup>

It is incumbent on the Judiciary to find ways of promoting and mainstreaming Alternative Justice Systems as well as Alternative Dispute Resolution mechanisms. Disputes that would traditionally be filed in court have been delegated to private ADR forums through constitutional, legislative, judicial or contractual intervention.

Article 189(4) of the Constitution, for instance, envisages that ADR mechanisms will be employed in resolving intergovernmental disputes. Even before the promulgation of the Constitution of Kenya, 2010, there were many statutes that required certain cases to be referred to arbitration and other ADR mechanisms. For example, sections 59B and 59C of the Civil Procedure Act and Order 46 of the Civil Procedure Rules provide for disputes pending in the courts to be outsourced through judicial referral to ADR mechanisms. Similarly, commercial contracts, domestic as well as those involving cross-border transactions, invariably provide arbitration under the legal framework of the Arbitration Act.

These initiatives and provisions should broaden access to justice as alternative dispute resolution steadily gains currency. Already, the Judiciary has entered a partnership with the Chartered Institute of Arbitrators and other ADR providers, under the Mediation Accreditation Committee established under section 59B of the Civil Procedure Act, in order to provide a framework to enhance the just and swift resolution of disputes. This path keeps the expense on

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<sup>2</sup> Harry T. Edwards; *Alternative Dispute Resolution: Panacea or anathema?* Harvard Law Review, Volume 99 No. 3 (January 1986).

### *The Judiciary as Stewards of ADR: Hon. Dr. Willy Mutunga*

the search for justice reasonable while avoiding complex rules of procedure and delays.

Your membership is a veritable resource base of trained and knowledgeable arbiters experienced in a variety of alternative dispute resolution mechanisms.

Education and training in alternative dispute resolution, as well as the role of the Institute, will become increasingly critical as Kenya embraces the new values in the Constitution.

As you celebrate the achievements of the past 30 years, I invite you to ponder over the challenges and the opportunities for growth that lie ahead.

As alternative dispute resolution gains traction and wider currency in Kenya, there is need to elevate its stature and ensure that it meets the democratic ideals and enjoys the same public confidence the populace have in the public justice system as represented by the Judiciary. Like the public justice system, ADR should “reinforce and deepen the democratic experience” in order to gain public confidence<sup>3</sup> and in order for it to meet the *lofty goals*<sup>4</sup> of minimising cost and delays, reducing the caseloads in the courts and delivering enduring solutions.

We have seen an increase in the number of cases in our courts in which arbitrator’s awards are challenged on grounds of misconduct (corruption and bribery). There is also the public perception, that given the confidential nature of arbitration and the limited role of the courts in the process, it is not sufficiently transparent and might be inimical to the rule of law, prone to abuse and may even be used to sanitise corrupt deals and facilitate money laundering.

While appreciating that the Chartered Institute of Arbitrators has trained its members, and has a continuous development programme as well as a code of ethics, there is need to develop a systematic performance evaluation tool as well as an effective disciplinary mechanism. Indeed, the time is ripe for a national conversation on whether or not a legislative framework for ADR practitioners is desirable in Kenya to address matters relating to training, certification, code of ethics and discipline. Such measures will no doubt enhance public confidence in ADR mechanisms and will result in this system of justice gaining greater acceptance and wider currency. As Richard Reuben observes, the “integration of

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<sup>3</sup> See Richard C. Reuben “Public Justice: Towards a State Action Theory of Alternative Dispute Resolution” *California Law Review*, Vol 85 No. 3 May 1997.

<sup>4</sup> Robert S. Moog; *Democratization of Justice: The Indian Experiment with Consumer Forums*; Chapter 4 in *Beyond Common Knowledge (Empirical Approaches to the Rule of Law)* edited by Erik G. Jensen and Thomas C. Heller; Stanford University Press, California 2003.

*The Judiciary as Stewards of ADR: Hon. Dr. Willy Mutunga*

constitutional norms in ADR should enhance the popular legitimacy of those processes.”<sup>5</sup>

The other challenge that requires consideration as you endeavor to entrench the culture of ADR into the fabric of our society and in making it a real effective partner in the administration of justice in Kenya is raising awareness. Apart from the need to get the legal fraternity to buy into this endeavor, there is in my view a need for an aggressive civic education campaign to sensitise the public and raise awareness of ADR mechanisms.

I trust you will have occasion in this conference to deliberate and make recommendations on some of the issues I have flagged. With those few remarks, I wish you fruitful deliberations.

Thank you.

**Dr. Willy Mutunga, D. Jur, SC, EGH**  
**Chief Justice and President of the Supreme Cour**

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<sup>5</sup> *ibid*, at page 590



## KENYAN GOVERNMENT'S PERSPECTIVE ON ADR

*by* MUTHONI KIMANI\*

### 1.0 INTRODUCTION

In a previous Alternative Dispute Resolution (ADR) conference<sup>6</sup>, the Attorney General made his re-assurance of the government's support for arbitration and other effective dispute resolution mechanisms for resolution of disputes.

The country embarked on a development agenda with flagship projects commonly known as the Kenya Vision 2030 projects major infrastructure projects including roads LAPSET, SGR, Green field terminal, energy, oil, gas and coal, extractive industries, housing and information technology Konza city.

These projects require massive capital investments and complex transaction agreements and dispute resolution agreements.

The Office of the Attorney General is the principal legal advisor to the Government and undertakes civil litigation and dispute resolution, legal research, rendering legal advisory services, legislative drafting, negotiation and drafting of treaties, negotiation and drafting of government transaction documents (legal transaction advisors). The Attorney General is also in charge of the Public Trustee, the Advocates Complaints Commission, the Registrar General and the Department of Justice which departments deliver services to the public.

As the principle legal advisor, it is the Office of the Attorney General's role to promote the use of ADR a task the office has taken seriously. Notably, there has been active participation of the Office of the Attorney General in CIArb activities including sponsorship for trainings and seminars. In addition, the operationalization of the Nairobi Centre for International Arbitration has been achieved.

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\*Deputy Solicitor General

<sup>6</sup> East African International Arbitration Conference held at the Norfolk hotel on 28<sup>th</sup> and 29<sup>th</sup> July, 2014.

## **2.0 THE GOVERNMENT AS A CONSUMER**

There are approximately over 100 Arbitrations being handled by the Office of the Attorney General whose value is approximately 30 Billion Kenya Shillings.

The Government being the largest consumer of goods and services does not receive any preferential treatment in commercial transactions (road construction alone for the year 2014/15 has been allocated the sum 116 billion).

The Government therefore is very keen on ensuring that the Dispute resolution processes are effective, reliable and predictable and conform to international standards.

The Government being the largest consumer has taken a lead role in contributing to the development of international policies on ADR

The Government subscribes membership in various international institutions that promote ADR such as P.C.A, UNCITRAL, ICSID and AALCO.

The Government in developing an enabling environment for trade and commerce has undertaken promotional global, continental and regional trade fares to boost investor confidence and local products.

The Government also undertakes negotiation of Host Country Agreements with the PCA, formalising framework with AALCO as well as active participation in UNCITRAL's work.

In addition, the Working Group on Arbitration & Conciliation undertakes negotiation of the Convention on Transparency in Investor-State Arbitration.

There is also a Working Group on Online Dispute Resolution which has given a position statement from the perspective of developing nations.

## **3.0 EXPERIENCE OF THE GOVERNMENT**

The Government faces innumerable challenges in promoting and using ADR. Probity of Awards is a major concern for the government for instance the increasing number of challenges to Arbitral awards.

Public interest is a significant consideration in government arbitrations due to the need for accountability and integrity of the process to ensure transparency in the Arbitral process.

The Government institutions charged with ensuring accountability of government transactions routinely question the viability of ADR as a dispute resolution process. Repeat appointments of Arbitrators by various appointing bodies casts doubts on arbitration in particular.

## **4.0 GOVERNMENT'S VISION FOR ADR**

*Kenyan Government's Perspective on ADR: Muthoni Kimani*

The Government is committed to enlarging the scope and use of ADR. With the establishment of NCIA and the Mediation Accreditation Committee, the Office of the Attorney General is assured that there shall be an increase in the use of ADR processes.

Due to increase in demand for ADR, the Government would like to see an increase in transparency and accountability of ADR processes. The Office of the Attorney General as the principle legal advisor of the Government is keen on ensuring harmonisation of the laws to facilitate engagement with international organisations to conclude Host Country Agreements.

The Office of the Attorney General assures ADR stakeholders of its continued support to Initiatives that promote ADR such as the Mediation Accreditation Committee under Judiciary as well as the Nairobi Centre for International Arbitration

## EMERGING THREATS TO INTERNATIONAL COMMERCIAL ARBITRATION

*by* DUNCAN BAGSHAW<sup>7</sup>

### 1.0 INTRODUCTION

This outline paper discusses some current threats faced by international commercial arbitration which have the potential to reduce the popularity, effectiveness and perceived legitimacy of this dispute resolution mechanism.

But the real message of this presentation is not to say that these threats are inevitable and fatal, but rather to note their *potential* to harm the institution of arbitration, and to identify some ways in which the threats can be countered. Hopefully, discussing the subject will also encourage practitioners to consider these issues and how to address them.

### 2.0 THREATS

#### 2.1 THREAT FROM INTERNATIONAL COMMERCIAL COURTS

Particularly with the establishment of the Singapore International Commercial Court, it is legitimate to consider whether there is a threat from the tendency for courts to be formed which are internationally- staffed, apply English law or an international commercial law, and which are part of an autonomous legal regime.

### EXAMPLES

- a) Singapore International Commercial Court <sup>8</sup>
- b) *La Cour Commune de Justice et d'Arbitrage* in the OHADA Region (based in

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\*Registrar, LCIA-MIAC Arbitration Centre

<sup>8</sup> See the report of The Singapore International Commercial Court Committee, Published November 2013.

## *Emerging threats to International Commercial Arbitration: Duncan Bagshaw*

Abidjan)<sup>9</sup>

c) DIFC Court<sup>10</sup>

What are the characteristics of these courts?

- a) Special procedural rules to accommodate international matters.
- b) Permit international counsel to appear.
- c) Apply chosen law, not domestic law, to the substantive issues.
- d) International judges, not all nationals of the place of the court.

These courts try to be many things which arbitration already is, for instance;

- a) They are commercial and efficient
- b) Neutral, judges not tied to a particular state
- c) Applying internationally-recognised norms
- d) Cost effective

Why are these courts established?

- a) Self-awareness of some countries of dissatisfaction with their national courts e.g. Dubai.
- b) Attraction of investment to a system with predictable and reliable courts.
- c) Emulation of successful legal systems i.e. England and Wales.
- d) Draw on advantages of courts over arbitration (for example more power to join parties and consolidate cases).
- e) Recognition that one cannot guarantee to avoid courts altogether.
- f) To take advantage of judicial/legal talent not employed in courts elsewhere e.g. retired top judges, lawyers.

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<sup>9</sup> <http://www.ohada.org/ccja.html>.

<sup>10</sup> <http://www.difc.ae/difc-courts-0>

Some problems

- a. Limited number of judges on the roster.
- b. Cannot therefore have the breadth of expertise in fields and legal systems offered by arbitrators.
- c. Judges appointed sit as judges in courts. This could lead to complacency and drop in service standards?
- d. Judges are paid by court, not parties, suggesting they are not working for their next case each time.
- e. Neutrality of the institution is in doubt if it is part of the state structure.
- f. No application of the New York Convention in enforcement of decisions.
- g. If national courts are good enough (i.e. efficient, perceived as neutral) then even these can be selected over arbitration in international cases. It is not heard of for lawyers to say that they advise clients to choose London courts over arbitration.<sup>11</sup>

## **2.2 THREAT FROM EXCESSIVE COSTS**

In 2008, it was said<sup>12</sup> that the minimum claim value which a large law firm would consider it worthwhile to instruct them to pursue through

International arbitration was USD 7 Million. No doubt it has increased since.

This is a major threat because arbitration long ago lost the claim to be “cheaper” than litigation.

There is a very strong perception in Africa and across the developing world, that international arbitration involves excessive expense.

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<sup>11</sup> See for examples Sir Vivian Ramsey in his speech to the CIArb, London, 25/4/2012 “...experienced international parties do choose reputable local courts...”, and Hon Marilyn Warren AC (Chief Justice of Victoria, Australia): “The service offered by courts has reached the level where courts in some sectors are able to compete with the service offered by arbitration....”

<sup>12</sup> Quoted by an unnamed QC at a conference under the Chatham House Rule

### *Emerging threats to International Commercial Arbitration: Duncan Bagshaw*

This is a grave threat to international arbitration. Development requires international trade, not only huge transactions but also at a much smaller level. Proper dispute resolution mechanisms are needed for these.

Why is it happening?

- a) A tribunal of three arbitrators remains popular.
- b) Increased discovery, hearing lengths (common law) and technical preparation for hearings (civil law) join to increase costs.
- c) More creativity in types of court action alongside arbitration (anti-suit, multi-jurisdiction enforcement, etc) means more litigation and more cost.

What are the effects?

- a) Flight to courts
- b) Over-motivation to settle and avoid arbitration even when justified
- c) Further reinforces the negative attitude of developing world parties towards arbitration
- d) Classic limitation of access to justice and perception of an uneven playing field.

What can be done?

- a) Save money on administrative costs: Use alternative arbitration centres eg. LCIA-MIAC.
- b) Don't feel compelled to go for the big-name arbitrators at high cost.
- c) Use video hearings more frequently – procedurally when possible, and to hear evidence from witnesses who are not

key or short.

- d) Don't be afraid at keeping costs down provided no compromise on effort – it will be rewarded doubly in reputational benefits.
- e) Consider a fast track schedule with fixed deadlines
- f) Try to have a tribunal qualified in the law governing the contract to avoid expert evidence on law.

### **2.3 THREAT TO NEUTRALITY AND LEGITIMACY**

As international trade and investment becomes more global, the parties to transnational business become more diverse. Europe ceases to dominate; the developing world becomes more important.

But if the arbitrators and lawyers involved in international arbitrations, and the venues where arbitrations are held, do not change to reflect this, there is a serious risk of the disparity leading to a perception of lack of neutrality.

There is a significant danger, especially in relation to investment arbitration, that the dominance of the field by a small number of arbitrators will reinforce the impression of a lack of neutrality. 15 arbitrators are said to have captured the decision making in 55% of the total investment treaty cases known today. Out of those 15, the vast majority are male, and from Europe or North America<sup>13</sup>.

International Arbitration also has to cope with the problem that the attempts of some countries in the developing world to take radical action to redress problems specific to their country, arising from their history (often colonial) are on occasion rejected by international arbitration tribunals on the basis that they improperly interfere with the rights of investors. That does not mean that the decisions of arbitrators which condemn the actions of governments were wrong, but they are a powerful force which can create a perception of bias.

This is one of the reasons behind a tendency for some countries to legislate against international arbitration in implementing their policy on investment and trade. The obvious example in the region is South Africa, which has expressed an

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<sup>13</sup> Corporate Europe Observatory, report 27/11/2012



intention to terminate Bilateral Investment Treaties which incorporate provisions entitling investors to bring claims through international arbitration. The bill which purports to give protections to investors does not entitle them to bring claims through international arbitration, only arbitration in South Africa<sup>14</sup>.

Addressing this requires long-term, sustained investment in developing the expertise and experience of arbitration practitioners from Africa and the developing world.

### **3.0 WHAT IS LCIA-MIAC DOING?**

- i. Offering a centre in Africa which will be acceptable and credible. As Norton Rose has put it – emerging African centres for arbitration can help to “address African perceptions of Eurocentric international arbitration as inherently biased and costly...”
- ii. Widening the pool of arbitrators. LCIA-MIAC operates a supplementary database (in addition to the one held by the LCIA) which focusses upon arbitrators with experience and qualifications in African jurisdictions, and those based in Africa. In addition, LCIA-MIAC will always appoint the best arbitrator for the case, but it has the opportunity to increase the number of arbitrators appointed who are based in Africa, for practical reasons.
- iii. Supporting training, education and capacity building for practitioners across the continent. LCIA-MIAC supports training all over the continent, by organising conferences and participating in and supporting conferences organised by other groups.
- iv. Promoting the idea of arbitrating in Africa as a positive and progressive step for Western and Asian parties. LCIA-MIAC actively lobbies in favour of arbitration in Africa amongst lawyers in Europe, the US and Asia. Whilst the focus of LCIA-MIAC is upon Mauritius-seated arbitrations, the broader idea of arbitrating in an African venue forms the bedrock of the argument.

However, this will not work alone. Although LCIA-MIAC can play its part, there is a need to make it an intercontinental, cross- professional effort with

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<sup>14</sup> Draft Investment Promotion and Protection Bill, South Africa, published November 2013

political support.

#### **4.0 CONCLUSION**

International Arbitration faces significant threats which bring into question its legitimacy thereby threatening its future as the preeminent international dispute resolution mechanism.

Mauritius seeks to help to make sure that its own region of Africa, and the developing world more widely, has its say in the process and in its development. This will help international arbitration progressively to become part and parcel of the legal culture of developing countries and thereby give them a greater influence and participation in the process.

by **Dr. KARIUKI MUIGUA\***

### **ABSTRACT**

*This paper critically examines how the right of access to justice, a constitutionally guaranteed right, can be actualized through Alternative Dispute Resolution (ADR) mechanisms. The author argues that although the right of access to justice is internationally and nationally recognized, the existing legal and institutional framework is not efficient in facilitating the realization of this right by all persons.*

*The author looks at the philosophical underpinnings of justice and a conceptualization of justice, identifying various ingredients of justice that must be realized. The author evaluates litigation as well as ADR mechanisms and their effectiveness in actualizing the enjoyment of these aspects of justice, as conceived in this discourse. The discourse makes a case for ADR mechanisms as a viable option that can be explored as a complementary to litigation to facilitate full enjoyment of all the aspects of justice; Justice must demonstrate fairness, affordability and flexibility. ADR can provide the road to true justice in Kenya.*

### **1.0 INTRODUCTION**

This paper critically examines how the right of access to justice, a constitutionally guaranteed right, can be actualized through Alternative Dispute Resolution (ADR) mechanisms. The author argues that although the right of access to justice is internationally and nationally recognized, the existing legal and institutional framework is not efficient in facilitating the realization of this right by all persons. To ease the understanding of this right of access to justice, the author looks at the philosophical

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\* Ph.D in Law (Nrb), FCI Arb, LL.B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); MKIM; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/Implementer; Advocate of the High Court of Kenya; Lecturer at the Centre for Advanced Studies in Environmental Law & Policy (CASELAP), University of Nairobi and the Chairperson CI Arb (Kenya Branch).

The Author wishes to acknowledge Salome Karimi, LL.B (Hons) Nrb, and Ngararu Maina, LL.B (Hons) Moi, for research assistance extended in preparation of this paper. [March, 2014]

underpinnings as put forward by some of the most prominent theorists on

justice. The author evaluates litigation as well as ADR mechanisms and their effectiveness in actualizing the constitutionally guaranteed right of every person to access justice, as conceived in this discourse. The discussion revolves around which of the available channels is best suited to facilitate access to justice, while identifying the shortcomings of each of them.

The discourse makes a case for ADR mechanisms as a viable option that can be explored as a complementary to the existing legal frameworks on access to justice.

## 2.0 ACCESS TO JUSTICE

The right of access to justice is one of the internationally acclaimed human rights which are considered to be basic and inviolable. It is guaranteed under various human rights instruments. Justice has been conceptualized as existing in at least four forms namely: Distributive justice (economic justice), which is concerned with fairness in sharing; Procedural justice which entails the principle of fairness in the idea of fair play; Restorative justice (corrective justice); and Retributive justice.<sup>15</sup> This arises from the idea that justice does not apply in a blanket form and what is considered as justice to one person may be different from another.

The term 'access to justice' has been widely used to describe a situation where people in need of help, find effective solutions available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and a greater role for alternative dispute resolution.<sup>16</sup> It refers to judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue. It refers also to a fair and

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<sup>15</sup> 'Four Types of Justice' Available at [http://changingminds.org/explanations/trust/four\\_justice.htm](http://changingminds.org/explanations/trust/four_justice.htm) [8th March, 2014]

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

*ADR: The Road to Justice in Kenya: Dr. Kariuki Muigua*

equitable legal framework that protects human rights and ensures delivery of justice.<sup>17</sup>

Although the concept of access to justice does not have a single universally accepted definition, usually the term is used to refer to opening up the formal systems and structures of the law to disadvantaged groups in society and includes removing legal and financial barriers, but also social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.<sup>18</sup> Access to justice is said to have two dimensions to it namely: procedural access (fair hearing before an impartial tribunal) and substantive justice (fair and just remedy for a violation of one's rights).<sup>19</sup>

The concept of 'access to justice' involves three key elements namely: Equality of access to legal services, that is, ensuring that all persons, regardless of means, have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests; National equity, that is, ensuring that all persons enjoy, as nearly as possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy; and Equality before the law, that is, ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in all fields, use of community facilities and access to services.<sup>20</sup>

It has further been argued that in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.<sup>21</sup> It is noteworthy that access to justice is an

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<sup>17</sup> Ibid.

<sup>18</sup> Global Alliance Against Traffic in Women (GAATW), Available at <http://www.gaatw.org/atj/> [accessed on 9<sup>th</sup> March, 2014]

<sup>19</sup> Ibid.

<sup>20</sup> Access to Justice Advisory Committee, *Access to justice: an action plan*, AGPS, Canberra, 1994. See also Louis Schetzer, et. al., 'Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW', page 7, Background Paper, August 2002, Available at [www.lawfoundation.net.au/ljff/site/articleIDs/.../\\$file/bkgr1.pdf](http://www.lawfoundation.net.au/ljff/site/articleIDs/.../$file/bkgr1.pdf) [accessed on 10<sup>th</sup> March, 2014]

<sup>21</sup> United Nations Development Programme, 'Access to Justice and Rule of Law' Available at [http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus\\_areas/focus\\_justice\\_law/](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/) [accessed on 9<sup>th</sup> March, 2014]

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essential component of rule of law. Rule of law has been said to be the foundation for both justice and security.<sup>22</sup>The United Nations Secretary-General (A/59/2005)<sup>23</sup> has been quoted as saying: "The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability."<sup>24</sup>

A comprehensive rule of law is said to be inclusive in that all members of a society must have equal access to legal procedures based on a fair justice system applicable to all. It promotes equality before the law and it is believed that rule of law is measured against the international law in terms of standards of judicial protection.<sup>25</sup>Further, rule of law is said to encompass *inter alia*: a defined, publicly known and fair legal system protecting fundamental rights and the security of people and property; full access to justice for everyone based on equality before the law; and transparent procedures for law enactment and administration.<sup>26</sup>Therefore, without the rule of law, access to justice becomes a mirage. If the rule of law fails to promote the foregoing elements, then access to justice as a right is defeated.

Realization of the right of access to justice requires an effective legal and institutional framework not only internationally but also nationally. Access to justice can only be as effective as the available mechanisms to facilitate the same. It has been rightly noted that a right is not just the ability to do something that is among your important interests (whatever they are), but a guarantee or empowerment to actually do it, because it is the correct thing that you have this empowerment.<sup>27</sup>

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<sup>22</sup> Ibid.

<sup>23</sup> Report of the Secretary-General (A/59/2005)

<sup>24</sup> Ibid.

<sup>25</sup> Dag Hammarskjold Foundation, 'Rule of Law and Equal Access to Justice', page 1, Discussion Paper, January 2013. Available at [http://www.sida.se/PageFiles/89603/RoL\\_Policy-paper-layouted-final.pdf](http://www.sida.se/PageFiles/89603/RoL_Policy-paper-layouted-final.pdf) [9th March, 2014]

<sup>26</sup> Ibid.

<sup>27</sup> The Hendrick Hudson Lincoln-Douglas *Philosophical Handbook*, Version 4.0 (including a few Frenchmen), page 4, Available at <http://www.jimmenick.com/henhud/hhldph.pdf> [accessed on 13th March, 2014]

### 3.0 PHILOSOPHICAL UNDERPINNINGS OF JUSTICE

To understand the various dimensions of justice, it is important that we look at the philosophical foundations of the concept of justice, as discussed by various theorists.

#### 3.1 THE NATURALISTS' SCHOOL

The naturalists hold that there is a certain order in nature from which humans can derive standards of human conduct through reasoning.<sup>28</sup> Within natural law, humans have equal and unalienable rights which accrue to them by virtue of being human.<sup>29</sup> It has been asserted that justice and law derive their origin from what nature has given man, from what the human mind embraces, from the function of man and from what serves to unite humanity.<sup>30</sup> Traditional natural law theory argues for the existence of a higher law, elaborations of its content, and analyses of what consequences follow from the existence of a higher law (in particular, what response citizens should have to situations where the positive law – the law enacted within particular societies – conflicts with the “higher law”).<sup>31</sup>

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<sup>28</sup> Oxford Companion to the US Supreme Court: *Natural Law*, available at <http://www.answers.com/topic/natural-law> [accessed on 5th March, 2014] quoting Hadley Arkes, “Natural Law”, *Constitution* 4, no. 1 (Winter 1992): 13–20

<sup>29</sup> Hutchison, F., *Natural law versus social justice: The permanent conflict of modern democracy*, March 31, 2007, Available at <http://www.renewamerica.com/columns/hutchison/070331> [accessed on 15th March, 2014] Hutchinson observes that the natural law definition of equality involves a metaphysical equality of humanness, that is, equality in terms of what it means to be human. He observes that though people may differ in many aspects including material possessions, they are all equal in possessing a human nature and are entitled to equal justice under the law and equal moral and legal accountability for their conduct.

<sup>30</sup> Cicero, *De Legibus* bk.1 sec. 16 -17, as quoted in Zia Shah, ‘Shariah Law: Gods’ Law, Moral Law, the Natural Law or Man made Law?’ Available at <http://www.themuslimtimes.org/2012/10/law/shariah-law-gods-law-moral-law-the-natural-law-or-man-made-law> [accessed on 5th March, 2014]

<sup>31</sup> Patterson, D. (Ed.), ‘A Companion to Philosophy of Law and Legal Theory’ page 211, (2<sup>nd</sup> Ed., 2010, Blackwell Publishing Ltd), Available at <http://abookmedhin.files.wordpress.com/2010/10/a-companion-to-philosophy-of-law-and-legal-theory.pdf> [accessed on 10<sup>th</sup> March 2014]

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It has been asserted that “natural law” can be characterized as follows: “True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is not a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.”<sup>32</sup>

Positive law is believed to have derived from natural law, in that natural law dictates what the positive law should be: for example, natural law both requires that there be a prohibition of murder and settles what its content will be. At other times, natural law leaves room for human choice (based on local customs or policy choices).<sup>33</sup>

Positive laws that are just “have the power of binding in conscience.” A just law is one that is consistent with the requirements of natural law– that is, it is “ordered to the common good,” the lawgiver has not exceeded its authority, and the law’s burdens are imposed on citizens fairly.<sup>34</sup> Failure with respect to any of those three criteria, Aquinas asserts, makes a law unjust. He argues that there is no obligation to obey that an unjust law.<sup>35</sup>

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<sup>32</sup> Ibid, page 212, quoting from Cicero, 1928 , Republic III.xxii.33, at 211

<sup>33</sup> Ibid.

<sup>34</sup> Aquinas, 1993, Qu. 96, art. 4, corpus, pp. 324 – 26, quoted in Patterson, D. (Ed.), ‘A Companion to Philosophy of Law and Legal Theory’ op. cit.

<sup>35</sup> Stanford Encyclopedia of Philosophy, ‘Aquinas’ Moral, Political, and Legal Philosophy’, Fri Dec 2, 2005; substantive revision Mon Sep 19, 2011, Available at <http://plato.stanford.edu/entries/aquinas-moral-political/> [20<sup>th</sup> March, 2014]



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In general, the proponents of the existence of natural law – and, by extension, natural law theories – believe that natural law provides an objective reference that allows us to determine whether our decisions and actions are right or wrong.<sup>36</sup>The naturalists hold that there is a certain order in nature from which humans can derive standards of human conduct through reasoning.<sup>37</sup>They believe that there are natural law principles which are self-evident and do not require statutory validation. Within natural law, humans have equal and unalienable rights which accrue to them by virtue of being human.<sup>38</sup>

*3.1.1 Natural Law and Access to Justice*

It has been asserted that justice and law derive their origin from what nature has given man, from what the human mind embraces, from the function of man and from what serves to unite humanity.<sup>39</sup>

Natural rights theory is said to play an important role in the promotion of human rights. It identifies with and provides security for human freedom and equality, from which other human rights flow. It also provides properties of security and support for a human rights system, both domestically and internationally.<sup>40</sup>

Naturalists believe justice is fairness and this principle transcends natural justice and social justice. Natural justice requires adherence to due process. The rules of natural justice form the underlying principles in adjudication of dispute. For example, the right to be heard, rule against bias and justice should not only be done but should be seen to be done.<sup>41</sup>It has been observed that natural justice

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<sup>36</sup> Alex E. Wallin, 'John Finnis's Natural Law Theory and a Critique of the Incommensurable Nature of Basic Goods', *Campbell Law Review*, Vol. 35, Iss. 1[2012], Art. 2 page12, Available at <http://law.campbell.edu/lawreview/articles/35-1-59.pdf> [accessed on 19th March, 2014]

<sup>37</sup>EinarHimma,K., 'Natural Law', *Internet Encyclopedias of Philosophy*, Available at <http://www.iep.utm.edu/natlaw/> [accessed on 20<sup>th</sup> March, 2014]

<sup>38</sup> Ibid.

<sup>40</sup> Jerome J. Shestack, 'The Philosophic Foundations of Human Rights' *Human Rights Quarterly*, Vol. 20, No. 2 (May, 1998), pp. 201-234, page 208, The Johns Hopkins University Press, Available at <http://www.jstor.org/stable/762764> [accessed on 18th March,2014]

<sup>41</sup>Vikram Ramakrishnan, 'Natural Justice' Available at <http://www.answeringlaw.com/php/displayContent.php?linkId=563> [accessed on

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is part of political justice and good governance could be achieved through distributive and corrective justice.<sup>42</sup> Justice is believed to be a part of human virtue and the bond which joins human beings together in a state or society.<sup>43</sup>

Justice has been stated as the first virtue of social institutions, as truth is of systems of thought.<sup>44</sup> Justice is said to entail: maximization of liberty and respect of rights such as right to hold property and freedom of speech; equality for all through elimination of inequalities; and doing what is fair. The theory is founded on the naturalist belief that justice is a universal and absolute concept and exists independently from human interventions.<sup>45</sup> From this universal and absolute justice, persons, societies and institutions derive laws, principles, codes, conventions, charters and religious creeds.<sup>46</sup> However, the human stipulations of justice sometimes and often fail to codify the absolute justice.

It has been asserted that every person possesses an inviolability founded on justice that even the welfare of the society as a whole cannot override.<sup>47</sup> It has also

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5<sup>th</sup> March 2014].

<sup>42</sup> Ibid, Corrective justice is said to be objective as it does justice between parties without reference to the entire society. Distributive justice demands for a society in which goods should be distributed to people on the basis of their claims.

<sup>43</sup> D.R. Bhandari, 'Plato's Concept of Justice: An Analysis' *Ancient Philosophy*, Paideia, Available at <https://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm> [accessed on 5<sup>th</sup> March 2014].

<sup>44</sup> See Alyssa R. Bernstein, 'A Human Right to Democracy? Legitimacy and Intervention' page 3 Available at <http://www.philosophy.ohiou.edu/PDF/HRtoDemocracy08July20051.pdf> [accessed on 5<sup>th</sup> March, 2014]

<sup>45</sup> Reflected in the Preamble to the UDHR of 1948 which stipulates *inter alia* "whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...."

<sup>46</sup> See generally, The International Forum for Social Development, 'Social Justice in an Open World: The Role of the United Nations' ST/ESA/305, United Nations, New York, 2006, Available at <http://www.un.org/esa/socdev/documents/ifsd/SocialJustice.pdf> [accessed on 15<sup>th</sup> March 2014].

<sup>47</sup> John Rawls, *A Theory of Justice* (Revised Edn, Oxford: Oxford University Press, 1999), op. cit. p.1.

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been argued that justice anchors and safeguards rights of a person and the same are not politically or socially granted.<sup>48</sup> Thus, there is no political or social justification for the perpetration of injustice on a person.<sup>49</sup> A legal system that does not recognize basic principles such as justice is no different from the Nazi law.<sup>50</sup>

For effective safeguarding of a person's rights, it has been argued that the channels of seeking justice should be readily accessible. The state should not make the courts and other justice institutions bureaucratic and expensive. The legal framework should envisage provisions to facilitate access to justice.<sup>51</sup> Courts should be given discretion to ensure justice is served. Where courts are faced with hard cases,<sup>52</sup> the judges should look beyond the law on the fundamental principle given the facts.<sup>53</sup> In effect, where there is a gap in the law, it is not the end to justice; the courts should resort to underlying principles of justice.<sup>54</sup>

Enforcement of rights is fundamental to their protection. It has been contended that for justice to be served there should be institutions entrusted with the mandate of ensuring that basic rights of citizens are protected.<sup>55</sup> The overall objective of protection of basic rights of the people is the fundamental

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<sup>48</sup>Preamble to the UDHR of 1948, op. cit.

<sup>49</sup> Rawls bases his argument on social contract theory where a society is made up of individuals who have come together and agreed on minimum rules and standards to regulate their relations. In such a setting there is a collective ultimate goal greatest advantage to all and it is possible to see injustice being perpetrated on a few for the good of the greatest number.

<sup>50</sup>Ibid, P.3.

<sup>51</sup> John Rawls, *A Theory of Justice* op.cit.

<sup>52</sup> Defined in Ronald M. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) as cases in which there is no pre-existing rule that governs the situation on which a judge is called upon to adjudicate or where a pre-existing rule would produce a result that seems manifestly

<sup>53</sup> Ronald M. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977)

<sup>54</sup> See the US cases, *Riggs vs. Plamer* {115 NY 506, 22 NE (1889)} and *Henningsen vs. Bloomfield* {(1960)32 NJ 358.} as examples of hard cases.

<sup>55</sup> John Rawls, *A Theory of Justice* op.cit.

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consideration and that in light of the conception of justice as fairness, the various institutions that a community creates at the constitutional level are chosen in the spirit of perfect rather than procedural justice. They are chosen with eyes on the outcomes. The principles of justice establish the basic priorities and the question to be decided at the constitutional stage is an instrumental one: which scheme of institutions is best suited to protect those liberties?<sup>56</sup> Essentially, the argument is that an error in procedure should not defeat the fundamental goal of justice.

The legal framework of a country should promote both substantive and procedural justice. Indeed, it has been argued that the rule of law should limit the governments from perpetrating injustice on the citizens.<sup>57</sup> Further, justice is realized only from good laws.<sup>58</sup> Unjust laws are doomed to fail. Justice cannot be done until good laws have been made capturing the genuine aspirations of the people.<sup>59</sup>

From the foregoing, it is apparent that naturalists advocate for a just world where everyone is treated equally and they have equal protection by the law. Any law put in place should be for the promotion of the interests of all. If the existing legal framework does not achieve this, then it ought to be replaced or the better option adopted. The Constitution of Kenya 2010 adopts a naturalists' approach by guaranteeing the rights of all members of society, including the right of access

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<sup>56</sup> Ronald Dworkin, *Justice in Robes*, p.256 quoting John Rawls in *A Theory of Justice* op.cit.

<sup>57</sup> Coleen Murphy, 'Lon Fuller and the Moral Value of the Law' (Springer 2005: Law and Philosophy (2005) 24:239-262) p.1. Available at <http://faculty.las.illinois.edu/colleenm/Research/Murphy-%20Fuller%20and%20the%20Rule%20of%20Law.pdf> [accessed on 18<sup>th</sup> February, 2014].

<sup>58</sup> Lon Fuller, *Morality of the Law* (new haven: Yale University Press, rev.edn. (1969). Lon Fuller identifies the eight principles of a good legal system as follows: law should be general, specifying rules prohibiting or permitting behavior of certain kinds; law must be widely promulgated or publicly accessible; law should be prospective as opposed to retrospective; law must be clear; law should not be contradictory; law must not ask the impossible; law should be relatively constant; there should be congruency between written laws and how they are enforced.

<sup>59</sup> John Finnis also agrees to the importance of good law in pursuit of justice and by saying that good law should be founded on certain basic values and consists of requirements for practical reasonableness.

to justice by various groups such as persons with disabilities<sup>60</sup>, Minorities and marginalized groups<sup>61</sup>, amongst others.

### 3.2 THE POSITIVISTS' SCHOOL

Positivists contend *inter alia* that law is man-made and that there is nothing like natural law.<sup>62</sup> Utilitarians such as Jeremy Bentham and John Stuart Mills assert that justice has been overrated and that it is not as basic and important as thought to be. Justice is a derivative of other more basic notions such as rightness and consequentialism. Utilitarians hold that there is a nexus between justice and the greatest welfare principle such that what is just is that which produces the greatest happiness or welfare for the largest group which can best be achieved through legislature.<sup>63</sup>

The social contract theorists argue for social justice and hold that there is a social dimension in defining justice.<sup>64</sup> They maintain that justice is one of terms or rules of the social contract agreed upon through legislative enactments, judicial decisions or social customs.<sup>65</sup> As such, justice is derived from everyone concerned or from what they would agree to under hypothetical situation. It has been averred that principles of justice are found by moral reasoning and actual justice cannot be achieved except within a sovereign state.<sup>66</sup> Under social contract theory, justice is highly weighed on a fairness scale. When justice is served, the seeker of justice is happy and feels it was fairly done.<sup>67</sup> Thus, justice is fairness to

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<sup>60</sup> Article 54, Constitution of Kenya 2010

<sup>61</sup> Ibid, Article 56

<sup>62</sup> See generally Marmor, A., 'Legal Positivism: Still Descriptive And Morally Neutral', Available at <http://lawweb.usc.edu/users/amarmor/documents/DescriptivePositivismfinalms.pdf> [accessed on 17th March, 2014].

<sup>63</sup> Ronald Dworkin, *Justice in Robes*, criticizing the utilitarian concept of justice by Jeremy Bentham. The same belief was held by another utilitarian scholar Oliver Wendell Holmes.

<sup>64</sup> These include *inter alia* John Locke, Immanuel Kant and Rousseau.

<sup>65</sup> Leslie Green, "Legal Positivism" in the Stanford Encyclopedia of Jurisprudence.

<sup>66</sup> Thomas Hobbes, *Summa Theologica*.

<sup>67</sup> "Brain Reacts to Fairness as it Does to Money and Foods" UCLA Studies, 2008, available at <http://newsroom.ucla.edu/portal/ucla/brain-reacts-to-fairness-as-it->

everyone.<sup>68</sup> Modern analytical positivists advance the social contract approach to justice and argue that law and justice is a creation of man through consensus. In “theory of sources’ the argument is that there are no legal principles of law beyond the ‘sources’.<sup>69</sup>

### *3.2.1 Positive Law and Access to Justice*

It has been observed that the term ‘access to justice’ refers to judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue. It is also used to refer to a fair and equitable legal framework that protects human rights and ensures delivery of justice.<sup>70</sup> Without an effective and working legal framework, access to justice remains a mirage and subsequently, there is no legal protection of human rights. It is noteworthy that Article 48 of the Constitution of Kenya, 2010<sup>71</sup> places an obligation on the State to ensure access to justice by all persons. They have a positive duty to facilitate this and one can indeed compel them to do so.<sup>72</sup> Further, Article 47 thereof guarantees the right to fair administrative action while Article 50 guarantees the right of every person to fair hearing.

A report on the English civil justice system highlighted a number of principles which the justice system should meet in order to ensure access to justice and these are: be just in the result it delivers; fair treatment of litigants; appropriate procedures at a reasonable cost; deal with cases with reasonable

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[49042.aspx?link\\_page\\_rss=49042](#) [accessed on 17<sup>th</sup> February, 2014].

<sup>68</sup> However, there is a division with some saying that justice is created by all humans whereas others say it’s is a command of a dominant class. Closely tied to this theory is the belief that justice varies from one culture to another. Thus, just like culture is dynamic so is the concept of justice.

<sup>69</sup> H.L.A Hart, *‘The Concept of the Law’* (New York: Oxford University Press 2 edn, 1994) The ‘sources’ means materials or documents which serve as sources of law. He does not recognize an inherent sense of law.

<sup>70</sup> M.T. Ladan, ‘Access To Justice As A Human Right Under The Ecowas Community Law’ op. cit. page 3

<sup>71</sup> Government Printer, Nairobi

<sup>72</sup> Under Article 22, Constitution of Kenya, one can institute legal proceedings in Court to compel the State ensure enforcement and protection of rights.

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speed; understandable to those who use it; be responsive to the needs of those who use it; provide as much certainty as the nature of the particular case allows; and be effective, adequately resourced and organized.<sup>73</sup> Those principles of access to justice are believed to be of general application to all systems of justice, civil and criminal.<sup>74</sup> It has been rightly postulated that rule of law abiding societies should guarantee the rights embodied in the Universal Declaration of Human Rights including *inter alia* the right to equal treatment and the absence of discrimination and the right to the due process of the law.<sup>75</sup>

To wrap up this section, it is important to underscore that natural law and positive law are complementary when it comes to the field of human rights. This is because while the fundamental rights and freedoms are neither obtained, nor granted by any man-made law (positive law)<sup>76</sup>, they need a system or institutions charged with enforcing them. These rights derive from inherent dignity of human beings and are also inalienable.<sup>77</sup> The fundamental human rights and freedoms are not therefore related to the duly adopted legal norms, but adoption of the appropriate norms is postulated to protect human rights and to determine the ways of their realization. Legal norms (human rights law) do not establish fundamental rights and freedoms but only guarantee them.<sup>78</sup> Whether the two classes of theorists agree with each other or not is not of much importance to this discourse; it matters that the two inform the Constitution of Kenya 2010 and especially the Bill of Rights. We must therefore seek to work with the two without

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<sup>73</sup> *Access To Justice Final Report*, By The Right Honourable the Lord Woolf, Master of the Rolls, July 1996; Final Report to the Lord Chancellor on the civil justice system in England and Wales, Available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/sec3a.htm#c9> [Quoted in M.T. Ladan, 'Access To Justice As A Human Right Under The Ecowas Community Law' *op. cit.* page 3]

<sup>74</sup> *Ibid.*

<sup>75</sup> 'Fundamental Rights' The Just World Project, Available at <http://worldjusticeproject.org/factors/fundamental-rights>. [accessed on 20<sup>th</sup> March, 2014]

<sup>76</sup> Universal Declaration of Human Rights, 1948

<sup>77</sup> Article 19, Constitution of Kenya, 2010

<sup>78</sup> M.T. Ladan, 'Access To Justice As A Human Right Under The Ecowas Community Law' *op. cit.* page 6



discriminating as any meaningful realization and enjoyment of the right of access to justice for all in Kenya would rely on the two approaches.

### 3.3 EMERGING CONCEPTIONS OF JUSTICE

Over time, there have been emerging conceptions of justice which do not subscribe to either the positivists or naturalists schools. These include the realists' school and the feminist's theories. Unlike naturalists and positivists, realists take a different approach to law as they claim to be practical, pragmatic and real.<sup>79</sup> They claim that they look at law with open eyes. For this reason, realists say law is not rules but law is what judges say it is. Therefore law is not solely based on rules but on judge's mindset which can be influenced by other factors rather than rules. They argue that justice is with the judges and depends on illusive factors such as the mood, mindset or religious views of the judge hence the fallacy that justice depends on what the judge had for breakfast. Critics of the realists say that even the judges are bound by rules and cannot overlook them in decision making and if that happens, the decision can be challenged through appeal.<sup>80</sup>

Feminist scholars attribute justice to the manner in which power is shared between men and women in the society and argue that there is unjust power sharing in that men have been given more power than women.<sup>81</sup> Feminists contend that a just society is one with equal power relations between men and women. They call this social justice.<sup>82</sup>

Justice thus takes various forms but the underlying factor is that regardless of the various groups at which the same may be directed, justice requires equal treatment of all persons. It should not be dependent on the perceptions of particular judges but should instead be informed by the inherent dignity of all humans.

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<sup>79</sup> See John L. Dodd, et. al., 'The Case for Judicial Appointments' *Judicial Appointments White Paper Task Force*, January 1, 2003, available at <http://www.fed-soc.org/publications/detail/the-case-for-judicial-appointments>. [accessed on 19<sup>th</sup> March, 2014]

<sup>80</sup> Ibid

<sup>81</sup> Vijaya Mahajan, *Women Empowerment and Social Justice: A Socialist Feminist Social Work Approach* (2012 International Conference on Humanity, History and Society IPEDR vol.34 (2012, IACSIT Press, Singapore). Available at <http://www.ipedr.com/vol34/014-ICHHS2012-H10020.pdf> [accessed on 25<sup>th</sup> February 2014].

<sup>82</sup> Ibid.



### 3.4 CHOOSING A CONCEPTION OF JUSTICE

From the foregoing discussion, the naturalists' theory seems better suited in advancing realization of the right of access to justice in society for all as it seeks to treat all people equally regardless of any social stratification; humans have equal and unalienable rights which accrue to them by virtue of being human. Though technically positivist, the Constitution of Kenya 2010 takes the naturalists' position of promoting the rights of all persons. Article 48 of the Constitution of Kenya which guarantees the right of every person to access justice is anchored on this theory of natural law. Indeed, the Constitution goes ahead to specifically entrench the rights of various groups including women, children and persons with disabilities.<sup>83</sup>

From the foregoing discussion on the philosophical foundations of justice, it is important to highlight the major components of justice. Justice must demonstrate fairness, affordability and flexibility. Fairness includes both substantive and procedural fairness. Procedural fairness, also known as rules or principles of natural justice, is said to consist of two elements namely: The right to be heard which includes- the right to know the case against them; the right to know the way in which the issues will be determined; the right to know the allegations in the matter and any other information that will be taken into account; the right of the person against whom the allegations have been made to respond to the allegations; the right to an appeal, and the right to an impartial decision which includes-the right to impartiality in the investigation and the decision making phases; the right to an absence of bias in the decision maker.<sup>84</sup> 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."<sup>85</sup>

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<sup>83</sup> See Articles 53-57, Constitution of Kenya

<sup>84</sup> *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

<sup>85</sup> ([1924] 1 KB 256, [1923] All ER Rep 233) ; In the English case of *Ridge v. Baldwin*, [1964] AC 40, (1964) HL., it was held that: (i) Chief Constable dismissible only for cause prescribed by statute was impliedly entitled to prior notice of the charge against him and a proper opportunity of meeting it before being removed by the local police authority for misconduct, and that (ii) the duty to act in conformity with natural justice could in some situations simply be inferred from a duty to decide 'what the rights of an individual

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It is worth mentioning that whether or not the power being exercised is statutory, the rules of natural justice must be observed in exercising such power that could affect the rights, interests or legitimate expectations of individuals.<sup>86</sup> People's perceptions of outcome fairness are influenced by how

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should be'. In the Kenyan case of *David Onyango Oloo Vs The Attorney General [1987] K.L.R. 711*, In this case, the appellant had been convicted by a Magistrate's Court for the offence of Sedition under Section 57(1) and (2) of the Penal Code and sentenced to five years' imprisonment. Under the Prison's Act (Cap 90), S. 46(2), the appellant was entitled to remission. The Commissioner of Prisons later purporting to exercise the powers conferred upon him by Section 46(3A) (a) of the Prison's Act, ordered that the appellant be deprived of all remission granted to him under Section 46(1) of the Act. The appellant had indeed not committed any Prison offence, and he had not been informed what wrong he had done or given an opportunity to state why he should not be deprived of his remission. The High Court nonetheless found in favour of the Respondent hence prompting an appeal to the Court of Appeal. the Court of Appeal Judge, Nyarangi J.A. (as he then was) stated:

*"The Commissioner's decision was an administrative act. Nevertheless, rules of natural justice apply to the act in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release from prison some 20 months earlier that if he had to serve the full sentence of imprisonment....I would say that the principle of natural justice applies where ordinary people would reasonably expect those making decisions, which will affect others to act fairly. In this instant case, reasonable people would expect the Commissioner to act fairly in considering whether or not to deprive an inmate of his right of remission earned in accordance with the provisions of the Prisons Act. Reasonable people would expect the Commissioner to act on reports, containing information concerning the appellant. The reports will obviously have been prepared by the Officer – in – charge of the Kamiti Main Prison. .... in order to act fairly, the Commissioner is expected to hear the inmate on whatever reports he has on him. As was said in Fairmount Vs Environment Sec [1976] 1 WLR 1255 at page 1263, For it is to be implied unless the contrary appears, that parliament does not authorize .... the exercise of powers in breach of the principle of natural justice .... There is a presumption in the interpretation of statutes that the rules of natural justice will apply and therefore that in applying the material subsection the Commissioner is required to act fairly and so to apply the principles of natural justice."*

For a discussion on the recent Kenya's court practice on right to fair hearing, see generally Ongoya Z. Elisha & Wetang'ula S. Emanuel, 'From David Onyango oloo vs Attorney General To Charles Kanyingi Karina Vs The Transport Licensing Board: A Step In The Reverse?' Available at [http://www.kenyalaw.org/Downloads\\_Other/A%20Step%20in%20Reverse.pdf](http://www.kenyalaw.org/Downloads_Other/A%20Step%20in%20Reverse.pdf)

<sup>86</sup> *Natural Justice/Procedural Fairness*, Fact Series No. 14, page 1, NSW Ombudsman, August 2003, Available at [http://www.utas.edu.au/data/assets/pdf\\_file/0011/434486/FS\\_PublicSector\\_14\\_Natural\\_Justi](http://www.utas.edu.au/data/assets/pdf_file/0011/434486/FS_PublicSector_14_Natural_Justi)

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they felt they were treated during the resolution process.<sup>87</sup> It has been asserted that people who believe that they have been treated in a procedurally fair manner are more likely to conclude that the resulting outcome is substantively fair, whether favourable to them or not.<sup>88</sup> Further, it is argued that people's perceptions of decision maker's procedural fairness affect the respect and loyalty accorded to that decision maker and the institution that sponsored the decision-making process.<sup>89</sup> Since power is closely associated with the concept of fairness, for any process to satisfy the parties' sense of fairness, it must be deemed to have neutralized any power imbalances; giving the parties a feeling of autonomy over the process or at least being given a chance to fully state their case.<sup>90</sup>

The criteria for determining procedural fairness has been identified as: First, people are more likely to judge a process as fair if they are given a meaningful opportunity to tell their story (i.e., an opportunity for voice); second, people care about the consideration that they receive from the decision maker, that is, they receive assurance that the decision maker has listened to them and understood and cared about what they had to say; Third, people watch for signs that the decision maker is trying to treat them in an even-handed and fair manner; and finally, people value a process that accords them dignity and respect.<sup>91</sup>

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[ce1.pdf](#) [accessed on 14th March, 2014]; See also Articles 10, 20 and 159 of the Constitution of Kenya 2010

<sup>87</sup> Fairness: It Is All About Perception, PGP Mediation, Available at <http://www.pgpmmediation.com/blog/2013/02/fairness-it-is-all-about-perception.shtml> [accessed on 14th March, 2014]

<sup>88</sup> Nancy A. Welsh, 'Perceptions of Fairness in Negotiation', *Marquette Law Review*, Vol. 87, 2004, pp. 753-767, at pp. 761-762. Available at <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1196&context=mulr> [Accessed on 14th March, 2014]

<sup>89</sup> Ibid. at page 762; See also generally Brockner, J., *et.al*, 'Procedural fairness, outcome favorability, and judgments of an authority's responsibility'. (2007). *Journal of Applied Psychology*. , 92(6), 1657-1671. Research Collection Lee Kong Chian School of Business. Available at: <http> [accessed on 18th March, 2014]

<sup>90</sup> Ibid.

<sup>91</sup> Nancy A. Welsh, 'Perceptions of Fairness in Negotiation' *op. cit.* at pp.763-764.; See also generally Rottman, D. B., 'How to Enhance Public Perceptions of the Courts and Increase Community Collaboration' *NACM'S 2010-2015 NATIONAL AGENDA PRIORITIES*, Available at

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The principal constitutional provisions concerning to procedural claims within the administrative process are; Article 47 of the Constitution of Kenya 2010<sup>92</sup> which provides for an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; Article 48 which obligates the State to ensure access to justice for all persons and, if any fee is required, that it shall be reasonable and shall not impede access to justice; and Article 50(1) thereof which guarantees the right to a fair hearing by stating that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

It is against this background that this paper examines how this right of access to justice, as conceptualized herein, can be actualized for all persons, as access to justice is arguably strongly dependent on the effectiveness of the available legal framework. Indeed, it has been argued that people's evaluations of legal procedures, both formal and informal, are strongly shaped by issues of procedural justice, which issues are also central to the discussion on the rule of law. People evaluate both their own experience and views about the general operation of the legal system against a guide of fair procedures that involves neutrality, transparency, and respect for rights, issues that also form the basis forth rule of law.<sup>93</sup> Procedural justice in general legal language is used to refer to the fairness of a process by which a decision is reached. In contrast, procedural justice in psychology entails the *subjective* assessments by individuals of the fairness of a decision making process.<sup>94</sup>

The author in this discussion uses access to procedural justice in the context referred to in the psychological definition of the concept. Justice must demonstrate *inter alia* fairness, affordability, and flexibility, rule of law, and equality of opportunity, even-handedness, procedural efficacy, party satisfaction, non-discrimination and human dignity. Any process used in facilitating access to justice must be able to rise above parties' power imbalances to ensure that the

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<http://www.proceduralfairness.org/Resources/~media/Microsites/Files/proceduralfairness/Rottman%20from%20Fall%202011%20CourtExpress.ashx> [accessed on 18th March, 2014]

<sup>92</sup> Government Printer, Nairobi

<sup>93</sup> Rebecca Hollander-Blumoff and Tom R. Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', *Journal of Dispute Resolution*, Vol. 2011, Issue 1 [2011], Art. 2 ,page 3 Available at: <http://scholarship.law.missouri.edu/jdr/vol2011/iss1/2> [accessed on 14th March, 2014]

<sup>94</sup> Ibid at page 3.

right of access to justice is enjoyed by all and not dependent on the parties' social status.

#### **4.0 INTERNATIONAL LEGAL AND INSTITUTIONAL FRAMEWORK**

The concept of 'access to justice' features prominently in the international discourse and framework on human rights. Although there are also other legal instruments guaranteeing the right of access justice by women, children and groups with special needs, the scope of this paper will not highlight all of them but instead will focus on the main legal instruments on human rights that are applicable across the board.

##### *4.1 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS OF 1948 (UDHR)*

The *Universal Declaration of Human Rights of 1948* (UDHR) was a proclamation for the recognition, protection and promotion of human rights the world all over. In its Preamble, the Declaration captured important concepts that include *inter alia*: recognition of the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world; faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and determination to promote social progress and better standards of life in larger freedom; States co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms; and a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.<sup>95</sup> It is noteworthy that this Declaration recognized and indeed acknowledged that recognition of the equality of all people forms the foundation of justice, freedom and peace in the world. Thus, access to justice is not a mutually exclusive concept but it is one that is greatly dependent on the human rights law framework for its actualization. Article 7 is to the effect that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination. Article 8 stipulates that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 10 further states that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of

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<sup>95</sup> Preamble

any criminal charge against him. These provisions are designed to promote the right of all persons to access justice.

#### 4.2 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The *International Covenant on Civil and Political Rights*<sup>96</sup>, in its preamble, reiterates the contents of the preamble to the UDHR. This is also captured in the *International Covenant on Economic, Social and Cultural Rights*<sup>97</sup>, in its preamble.

#### 4.3 UNITED NATIONS PRINCIPLES ON ACCESS TO LEGAL AID IN CRIMINAL JUSTICE SYSTEMS

The *United Nations Principles on Access to Legal Aid in Criminal Justice Systems*<sup>98</sup> provides for Principles and Guidelines that are based on the recognition that States should undertake a series of measures that, even if not strictly related to legal aid, can maximize the positive impact that the establishment and/or reinforcement of a properly working legal aid system may have on the proper functioning of the criminal justice system and on access to justice.<sup>99</sup> The right of access to justice is not purely restricted to the criminal justice only and it is important to note that the foregoing UN principles on access to legal aid in the criminal justice system are important in creating avenues that can facilitate access to justice in all areas of law through facilitating access to legal knowledge and information by all. A society with information is empowered and can easily access justice without much of a problem since they are able to understand their rights. Legal aid has been broadly defined to include 'legal advice, assistance and representation for persons suspected, arrested, accused or charged with a

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<sup>96</sup>Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 23 March 1976, in accordance with Article 49

<sup>97</sup>Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 3 January 1976, in accordance with article 27

<sup>98</sup> Resolution A/RES/67/187, December 2012

<sup>99</sup> Ibid.

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criminal offence, detained and imprisoned and for victims and witnesses in the criminal justice process. The definition includes the concept of legal education and mechanisms for alternative dispute resolution and restorative justice processes.<sup>100</sup>

#### 4.4 THE AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS

The *African (Banjul) Charter on Human and Peoples' Rights*<sup>101</sup> provides in its preamble that it was adopted in consideration of the Charter of the Organization of African Unity, stipulation that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples".

One of the most outstanding features of all the foregoing legal instruments is their fundamental foundations of creating an environment in which all persons can access justice. However, it is noteworthy that they are just guidelines for the contracting States on putting in place frameworks to facilitate access to justice and other fundamental rights and freedoms.

#### 4.5 THE UNITED NATIONS CHARTER

To promote realization of access to justice by all in instances of dispute, the UN Charter recognizes various methods that can be used to deal with the same. Article 33 of the Charter of the United Nations<sup>102</sup> outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to.<sup>103</sup> It

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<sup>100</sup> Briefing on the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems' page 1, Available at <http://www.penalreform.org/wp-content/uploads/2013/05/PRI-Briefing-on-Legal-Aid-Guidelines-and-Principles-April-20131.pdf> [accessed on 10th March, 2014]

<sup>101</sup> Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

<sup>102</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI,

<sup>103</sup> See generally Eunice R. Oddiri, *Alternative Dispute Resolution*, paper presented by author at the Annual Delegates Conference of the Nigerian Bar Association, 22nd - 27th August 2004, Abuja, Nigeria. Available at <http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.htm> (accessed on 17 April, 2013); See 'The Role of Private International Law



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provides that *the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice*[Emphasis ours].<sup>104</sup>The use of ADR mechanisms in disputes between parties be they states or individuals is thus recognized as a viable means that will manage conflict between parties.

## **5.0 ACCESS TO JUSTICE IN KENYA**

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

Article 22(1) of the constitution of Kenya provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 22(3) thereof further provides that the Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy amongst others the criteria that: formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation; and the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.<sup>105</sup>Clause (4) provides that the absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

Further, Article 48 thereof is to the effect that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Article 159 (1) of the Constitution provides that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and

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and Alternative Dispute Resolution', Available at [http://www.wipo.int/copyright/en/e-commerce/ip\\_survey/chap4.html](http://www.wipo.int/copyright/en/e-commerce/ip_survey/chap4.html). (accessed on 17th April, 2013)

<sup>104</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>105</sup> Article 22(3) (b)(d) *Constitution of Kenya*, 2010



that it is administered without undue regard to procedural technicalities.<sup>106</sup> It echoes the right of all persons to have access to justice as guaranteed by Article 48 of the Constitution. It also reflects the spirit of Article 27 (1) which provides that “every person is equal before the law and has the right to equal protection and equal benefit of the law” [Emphasis ours].<sup>107</sup> Despite these provisions, access to justice especially through litigation is usually hampered by some challenges as discussed in the next section.

## 6.0 CHALLENGES FACING ACTUALIZATION OF ACCESS TO JUSTICE

It has been pointed out that among the most significant obstacles to rule of law are lack of infrastructure (i.e., the presence of legal institutions), high costs of advocacy, illiteracy and/or lack of information.<sup>108</sup> Any interference with the rule of law (in the context of promoting justice for all) greatly affects people’s ability to access justice.

The challenges facing access to justice encompass: legal, institutional and structural challenges; Institutional and procedural obstacles; Social barriers; and Practical and economic challenges.<sup>109</sup> Closely related to these are high court fees, geographical location, complexity of rules and procedure and the use of legalese.<sup>110</sup> Justice has for the longest time been perceived to be a privilege

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<sup>106</sup> Ibid., Article 159(2) (d)

<sup>107</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>108</sup> Dag Hammarskjöld Foundation, ‘Rule of Law and Equal Access to Justice’, op. cit. page 1; See also Ojwang’, J. B. “The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development,” 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

<sup>109</sup> Access to Justice–Concept Note for Half Day General Discussion Endorsed by the Committee on the Elimination of Discrimination against Women at its 53<sup>rd</sup> Session, page 9, Available at <http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/ConceptNoteAccessToJustice.pdf>

<sup>110</sup> *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8<sup>th</sup> & 9<sup>th</sup> March, 2012.

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reserved for a select few in society, who had the financial ability to seek the services of the formal institutions of justice. This is because many people have always taken litigation to be the major conflict management channel widely recognized under the laws as a means to accessing justice. The absence of an efficient system to facilitate the rule of law also contributes to this situation as people are usually out of touch with the existing legal and institutional frameworks on access to justice.<sup>111</sup>

Sometimes litigation does not achieve fair administration of justice due to a number of factors as highlighted above. The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.<sup>112</sup> Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. Litigation is often slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world.<sup>113</sup> Litigation should however not be harshly judged as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary. Criminal justice may also be achieved through litigation especially where the cases involved are very serious. Litigation is associated with the following advantages: the process is open, transparent and public; it is based on the strict, uniform compliance with the law of the land; determination is final and binding (subject possibly to appeal to a higher court).<sup>114</sup> Litigation can also be useful in advancing

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Available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf>

<sup>111</sup> See Toope, S. J., "Legal and Judicial Reform through Development Assistance: Some Lessons", *McGill Law Journal / Revue De Droit De McGill*, [Vol. 48, 2003], pp. 358-412, page 358, Available at [http://pdf.aminer.org/000/266/603/bringing\\_it\\_support\\_for\\_legislative\\_drafting\\_one\\_step\\_further\\_from.pdf](http://pdf.aminer.org/000/266/603/bringing_it_support_for_legislative_drafting_one_step_further_from.pdf) [accessed on 21st March, 2014]

<sup>112</sup> Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Op cit.

<sup>113</sup> Ibid, page 7; See also Patricia Kameri Mbote et al., *Kenya: Justice Sector and the Rule of Law*, Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011, Available at <http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-2011> [accessed on 7th March, 2014]

<sup>114</sup> Chartered Institute of Arbitrators, Litigation: Dispute Resolution, Available at <http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation> [accessed

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the human rights including the right of access to justice.<sup>115</sup> It is noteworthy that the civil Rights Movement would not have prospered without recourse to litigation. Further, the outcome of ADR mechanisms such as arbitral awards relies on the court system for enforcement. However, there are also many shortcomings associated with litigation so that it should not be the only means of access to justice. Some of these have been highlighted above. Litigation is not necessarily a process of solving problems; it is a process of winning arguments.<sup>116</sup>

## 7.0 TOWARDS ACTUALIZATION OF THE RIGHT OF ACCESS TO JUSTICE

For the constitutional right of access to justice to be actualized, there has to be a framework based on the principles of: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies* [Emphasis ours].<sup>117</sup> Recognition of ADR and traditional dispute resolution mechanisms is thus predicated on these cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system.<sup>118</sup>

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on 7th March, 2014]

<sup>115</sup> See Articles 22,70, Constitution of Kenya 2010.; See also generally, Fiss, O., "Against Settlement" 93 *Yale Law Journal* 1073 (1984). Fiss argues that litigation is the most viable channel for fighting for civil rights.; See also Moffitt, Michael L., Three Things to Be Against ('Settlement' Not Included) - A Response to Owen Fiss (May 30, 2009). *Fordham Law Review*, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1412282> [accessed on 18<sup>th</sup> March, 2014]

<sup>116</sup> Advantages & Disadvantages of Traditional Adversarial Litigation, Available at <http://www.beckerlegallgroup.com/a-d-traditional-litigation> [accessed on 7th March, 2014]

<sup>117</sup> See Maiese, Michelle. "Principles of Justice and Fairness," *Beyond Intractability*, (Eds.) Guy Burgess and Heidi Burgess, Conflict Information Consortium, University of Colorado, Boulder (July 2003)

<sup>118</sup> Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, page 6

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In a report on access to justice in Malawi, the authors appropriately noted that ‘*access to justice* does not mean merely access to the institutions, but *also means access to fair laws, procedures, affordable, implementable and appropriate remedies in terms of values that are in conformity to constitutional values and directives*’ (emphasis ours).<sup>119</sup> If the foregoing is anything to go by, then litigation cannot score highly especially in terms of access to fair procedures and affordability. On the contrary, ADR mechanisms can be flexible, cost-effective, expeditious; may foster relationships; are non-coercive and result in mutually satisfying outcomes. They are thus more appropriate in enhancing access to justice by the poor in society as they are closer to them. They may also help in reducing backlog of cases in courts.<sup>120</sup> The net benefit to the court system would be a lower case load as the courts’ attention would be focused on more serious matters which warrant the attention of the court and the resources of the State.<sup>121</sup> Case backlog is arguably one of the indicators used to assess the quality of a country’s judicial system.<sup>122</sup>

Courts have been depicted as being capable of delivering justice according to law and not what may be considered to be fair by the judge or any other person, especially if such conception would depart from statutes or any other established legal principles.<sup>123</sup> It has been observed that the perceived legitimacy of law may depend more upon the fact that it has been enacted through democratic process than because people think it is a good law. Further, the idea of justice for most

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<sup>119</sup>Wilfried Schärf, et al., *Access to Justice for the Poor of Malawi? An Appraisal Of Access To Justice Provided To The Poor Of Malawi By The Lower Subordinate Courts And The Customary Justice Forums*, page 4, Available at <http://www.gsdr.org/docs/open/SSAJ99.pdf> [accessed on 8th March, 2014]

<sup>120</sup> See Shantam Singh Khadka, et al., *Promoting Alternate Dispute Resolution to reduce backlog cases and enhance access to justice of the poor and disadvantaged people through organizing Settlement Fairs in Nepal*, Case Studies on Access to Justice by the Poor and Disadvantaged, (July 2003) Asia-Pacific Rights And Justice Initiative, Available at <http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/Nepal-SettlementFair> [accessed on 8th March, 2014]

<sup>121</sup> Ibid

<sup>122</sup> Alicia Nicholls, *Alternative Dispute Resolution: A viable solution for reducing Barbados’ case backlog?*, page 1, Available at <http://www.adrbarbados.org/docs/ADR%Nicholls> [accessed on 8th March, 2014]

<sup>123</sup> French, R., “Justice in the Eye of the Beholder” in ‘The Commonwealth Lawyer’ *Journal of the Commonwealth Lawyer’s Association*, Vol. 22, No.3, December, 2013, pp. 17-20, at p. 19

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people is said to be larger than “justice according to law” -going beyond allocation of rights, duties, liabilities and punishments and the award of legal remedies.<sup>124</sup>It is remarkable that litigation aims at promoting and achieving all these for the people but justice requires more than that in that it also entails a psychological aspect that needs to be addressed for full satisfaction.

To ensure that the constitutionally guaranteed right of access to justice is fully achieved and enjoyed by all, it is therefore important to explore the potential and the extent to which ADR mechanisms serve this purpose, as most of them have been applied to achieve even the psychological aspect of justice.

## **7.1 ACTUALIZING ACCESS TO JUSTICE THROUGH ADR**

Alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.<sup>125</sup>Generally, proponents of ADR submit that its methods address many systemic problems in litigation and offer several benefits not available through traditional litigation. ADR could relieve congested court dockets while also offering expedited resolution to parties. Second, ADR techniques such as negotiation, mediation and party conciliation could give parties to disputes more control over the resolution process. The flexibility of ADR is also said to create opportunities for creative remedies that could more appropriately address underlying concerns in a dispute than could traditional remedies in litigation. ADR mechanisms are likely and do often achieve party satisfaction in terms facilitating achievement of psychologically satisfying outcomes. By offering the opportunity for consensus-based resolution, ADR also is arguably better suited than litigation to preserving long-term relationships and solving community-based disputes.<sup>126</sup> Most of the ADR mechanisms offer resolution of conflicts as against settlement, with the

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<sup>124</sup> Ibid, pp. 19-20

<sup>125</sup> Muigua, K., “*Alternative Dispute Resolution and Article 159 of the Constitution of Kenya*” Op cit. page 2; See also *Alternative Dispute Resolution*, Available at [http://www.law.cornell.edu/wex/alternative\\_dispute\\_resolution](http://www.law.cornell.edu/wex/alternative_dispute_resolution) [accessed on 7th March, 2014]

<sup>126</sup>Ray,B., ‘Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases’ *Utah Law Review*, (2009) [NO. 3] PP. 801-802, Available at <http://epubs.utah.edu/index.php/ulr/article/viewFile/244/216> [accessed on 12th March, 2014]

exception of a few such as arbitration. It is noteworthy that although ADR generally promotes access to justice, not all of the mechanisms achieve this by resolution; others are dispute settlement, much the same way as litigation.

### *7.1.1 Settlement versus Resolution*

Settlement is said to be an agreement over the issues(s) of the conflict which often involves a compromise.<sup>127</sup> A settlement process “seeks to mollify the opposition without discovering or rectifying the underlying causes of the dispute”. Settlement is said to be power-based in that the outcome majorly relies on the power that is possessed by the parties to the conflict. Due to the changing nature of power the process becomes a contest of whose power will be dominant. Parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in the relationship. Basically, power is the defining factor for both the process and the outcome.<sup>128</sup>

Settlement may be an effective immediate solution to a violent situation but will not thereof address the factors that instigated the conflict. The unaddressed underlying issues can later flare up when new issues or renewed dissatisfaction over old issues or the third party’s guarantee runs out.<sup>129</sup> Settlement practices miss the whole point by focusing only on interests and failing to address needs that are inherent in all human beings, parties’ relationships, emotions, perceptions and attitudes. Thus, the real causes of conflict remain unaddressed with possibilities of erupting in future.<sup>130</sup> Dispute settlement mechanisms remain highly coercive allowing parties limited or no autonomy. To this end, settlement mechanisms may not be very effective in facilitating satisfactory access to justice

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<sup>127</sup> Bloomfield, D., “Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland”, *Journal of Peace Research*, Vol. 32, No. 2(May, 1995), P.152.

<sup>128</sup> Baylis,C., and Carroll, R., “Power Issues in Mediation”, *ADR Bulletin*, Vol. 1, No.8 [2005], Art.1, page 135

<sup>129</sup> Bloomfield, D., “Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland”, *op.cit.* page 153

<sup>130</sup> Fetherston, A.B., “From Conflict Resolution to Transformative Peace building: Reflections from Croatia”, *Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4* (April, 2000), pp. 6-8; See also generally Muigua, K., “Resolving Environmental Conflicts Through Mediation in Kenya” Ph.D Thesis, 2011, *Unpublished*, University of Nairobi

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(which relies more on people's perceptions, personal satisfaction and emotions). The main dispute settlement mechanisms are litigation or judicial settlement and arbitration.<sup>131</sup>

Conflict resolution refers to a process where the outcome is based on mutual problem-sharing with the conflicting parties cooperating in order to redefine their conflict and their relationship.<sup>132</sup> Resolution is non-power based and non-coercive thus enabling it achieve mutual satisfaction of needs without relying on the parties' power.<sup>133</sup> This outcome is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and it is also not zero-sum since gain by one party does not mean loss by the other; each party's needs are fulfilled.<sup>134</sup> Such needs cannot be bargained or fulfilled through coercion and power. These advantages make resolution potentially superior to settlement. Conflict resolution mechanisms include negotiation, mediation in the political process and problem solving facilitation.

It is therefore arguable that resolution mechanisms have better chances of achieving parties' satisfaction when compared to settlement mechanisms. However, each of the two approaches has their own distinct advantages thus making them complementary of each other. The argument thus is not for the exclusive application of one but rather the synergetic application of the two approaches. Each of them has success stories where they have been effectively applied to achieve the desired outcome. For realisation of justice, there is need to ensure that the two are engaged effectively where applicable.

### *7.1.2 Access to Justice through Negotiation*

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<sup>131</sup> See generally Mwangi, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

<sup>132</sup> Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op.cit. page 153

<sup>133</sup> Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, Available at <http://www.beyondintractability.org/bi-essay/culture-of-mediation> [accessed on 08th March, 2014];

<sup>134</sup> See generally Mwangi, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.



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Negotiation is a process that involves parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.<sup>135</sup>The parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation. Negotiation thus allows party autonomy in the process and over the outcome. It is non-coercive thus allowing parties the room to come up with creative solutions.

The Ireland Law Reform Commission in their consultation paper on ADR posits four fundamental principles of what they call principled negotiation: Firstly, Separating the people from the problem; Secondly, Focusing on interests, not positions; Thirdly, Inventing options for mutual gain; and finally, insisting on objective criteria.<sup>136</sup>As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests.

It has been said that negotiators rely upon their perceptions of distributive and procedural fairness in making offers and demands, reacting to the offers and demands of others, and deciding whether to reach an agreement or end negotiations.<sup>137</sup>The argument is that if no relationship exists between negotiators, self-interest will guide their choice of the appropriate allocation principle to use in negotiation. A negotiator who does not expect future interactions with the other person will use whatever principle-need, generosity, equality, or equity-produces the better result for them. Relationships apparently matter in negotiators' definitions of fair outcomes.<sup>138</sup>

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<sup>135</sup> Negotiations in Debt and Financial Management 'Theoretical Introduction to Negotiation: What Is Negotiation?', Document No.4, December 1994, Available at [http://www2.unitar.org/dfm/Resource\\_Center/Document\\_Series/Document4/3Theoretical.htm](http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document4/3Theoretical.htm) [accessed on 8th March, 2014]; See also Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Op cit. page 2.

<sup>136</sup> Roger Fisher and Ury, W., *Getting to Yes-Negotiating Agreement Without Giving in* Op cit., p. 42; See also Ireland Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008 page 43

<sup>137</sup> Nancy A. Welsh, 'Perceptions of Fairness in Negotiation', *Marquette Law Review*, Vol. 87, pp. 753-767, op. cit. at page 753.

<sup>138</sup> *Ibid*, page 756



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It may be argued that negotiation is by far the most efficient conflict management mechanism in terms of management of time, costs and preservation of relationships and has been seen as the preferred route in most disputes.<sup>139</sup> Negotiation can be interest-based, rights-based or power-based and each can result in different outcomes.<sup>140</sup> However, the most common form of negotiation depends upon successfully taking and the giving up a sequence of positions.<sup>141</sup>

It has been noted that positional bargaining is not the best form of negotiation due to a number of reasons namely: arguing over positions results in unwise agreements because when negotiators bargain over positions, they tend to lock themselves into those positions; argument over positions is inefficient as it creates incentives that stall settlement, with parties stubbornly holding onto their extreme opening positions; it endangers an ongoing relationship-anger and resentment often result as one side sees itself bending to the rigid will of the other while its own legitimate concerns go unaddressed; and where there are many parties involved, positional bargaining leads to the formation of coalition among parties whose shared interests are often more symbolic than substantive.<sup>142</sup>

Interest-based negotiation shifts the focus of the discussion from positions to interests, raising a discussion based on a range of possibilities and creative options, for the parties to arrive at an agreement that will satisfy the needs and interests of the parties.<sup>143</sup> This way, both parties do not feel discriminated in their efforts for the realization of the right of access to justice.

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<sup>139</sup> Attorney General's Office, Ministry of Justice, *The Dispute Resolution Commitment-Guidance For Government Departments And Agencies*, May, 2011, Available at <http://www.justice.gov.uk/downloads/courts/mediation/drc-guidance-may2011.pdf> [accessed on 8th March, 2014]; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, page 8, Available at <http://www.chuitech.com/kmco/attachments/article/101/pdf>

<sup>140</sup> Ury, B. & Goldberg, "Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict" *Program on Negotiation at Harvard Law School Cambridge, Massachusetts* 1993, available at [www.williamury.com](http://www.williamury.com), [accessed on 8th March, 2014]

<sup>141</sup> Fisher, R. and Ury, W., *Getting to Yes-Negotiating Agreement Without Giving in*, Op cit., p. 4

<sup>142</sup> Ibid, pp. 4-8

<sup>143</sup> UNESCO-IHP, "Alternative Dispute Resolution Approaches And Their Application In Water Management: A Focus On Negotiation, Mediation And Consensus Building" Abridged version of Yona Shamir, *Alternative Dispute Resolution Approaches and their*

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There can be either soft bargaining or hard bargaining. Soft bargaining as a negotiation strategy primarily emphasizes on the preservation of friendly relationships with the other side. However, while the strategy is likely to reduce the level of conflict, it can also increase the risk that one party would be exploited by the other, who uses hard bargaining techniques.<sup>144</sup> Hard bargaining on the other hand emphasizes results over relationships with insistence by hard bargainers being that their demands be completely agreed to and accepted before any agreement is reached at. This approach avoids the need to make concessions, reduces the likelihood of successful negotiation and harms the relationship with the other side.<sup>145</sup>

It is noteworthy that the most effective form of negotiation is principled negotiation. This form of negotiation is pegged on some basic principles, touching on the point of focus of the parties as well as the people's attitude and behaviour.<sup>146</sup>

People tend to become personally involved with issues and with their own side's positions and thus they take responses to those issues and positions as personal attacks. This arises from differences in perception, emotions and communication. Thus, separating people from the issues allows the parties to address the issues without damaging their relationship and also helps them to get a clearer view of the substantive problem.<sup>147</sup> This way, perceptions of

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Application, Accessible at

<http://unesdoc.unesco.org/images/0013/001332/133287e.pdf> [accessed on 9th March, 2014]

<sup>144</sup> Conflict Research Consortium, University of Colorado, available at [http://www.colorado.edu/conflict/peace/treating\\_core.htm](http://www.colorado.edu/conflict/peace/treating_core.htm) [accessed on 15<sup>th</sup> March, 2014]

<sup>145</sup> See generally Chapter-V, 'Non Adjudicatory Methods of Alternative Disputes Resolution' Available at [http://shodhganga.inflibnet.ac.in/bitstream/10603/10373/11/11\\_chapter%205.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/10373/11/11_chapter%205.pdf) [accessed on 15th March, 2014]

<sup>146</sup> See Conflict Research Consortium, "Principled Negotiation at Camp David" as described in Getting to Yes, Roger Fisher and William Ury. New York: Penguin Books, 1981; See also generally R. Nicole Cutts, 'Conflict Management: Using Principled Negotiation to Resolve Workplace Issues', Available at [http://nl.walterkaltz.org/rnicolecutts\\_principlednegotiation.pdf](http://nl.walterkaltz.org/rnicolecutts_principlednegotiation.pdf) [Accessed on 19th March, 2014] Available at <http://www.colorado.edu/conflict/peace/treatment/pricneg.htm> [accessed on 15<sup>th</sup> March, 2014]

<sup>147</sup>Fisher,R. and Ury,w., *Getting to Yes-Negotiating Agreement Without Giving in*, Op cit., pp.

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actualized access to justice becomes a reality to the parties, who walk away satisfied with the outcome.

It has been postulated that when a problem is defined in terms of the parties' underlying interests it is often possible to find a solution which satisfies both parties' interests. Indeed, it has been observed that information is the life force of negotiation. The more you can learn about the other party's target, resistance point, motives, feelings of confidence, and so on, the more able you will be to strike a favourable agreement with parties focusing on their interests while at the same time remaining open to different proposals and positions.<sup>148</sup>

Parties may generate a number of options before settling on an agreement. However, there exist obstructions to this: parties may decide to take hard-line positions without the willingness to consider alternatives; parties may be intent on narrowing their options to find the single answer; parties may define the problem in win-lose terms, assuming that the only options are for one side to win and the other to lose; or a party may decide that it is up to the other side to come up with a solution to the problem.<sup>149</sup> The assertion is that by focusing on criteria rather than what the parties are willing or unwilling to do, neither party needs to give in to the other; both can defer to a fair solution.<sup>150</sup>

In conclusion, negotiation can be used in facilitating access to justice. What needs to be done is ensuring that from the start, parties ought identify their interests and decide on the best way to reach a consensus.<sup>151</sup> The advantages therein defeat the few disadvantages of power imbalance in some approaches to

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<sup>148</sup> See Chapter 2 'Strategy and Tactics of Distributive Bargaining' page 23, Available at [http://highered.mcgraw-hill.com/sites/dl/free/0070979960/894027/lew79960\\_chapter02.pdf](http://highered.mcgraw-hill.com/sites/dl/free/0070979960/894027/lew79960_chapter02.pdf) [accessed on 19th March, 2014]

<sup>149</sup> *Ibid*, pp. 24-25

<sup>150</sup> See generally, Dawson, R., '5 Basic Principles for Better Negotiating Skills' Available at <http://www.creonline.com/principles-for-better-negotiation-skills.html> [accessed on 19th March, 2014]

<sup>151</sup> See generally, Andrew F. Amendola, 'Combating Adversarialism In Negotiation: An Evolution Towards More Therapeutic Approaches' *Nujs Law Review* 4 *Nujs L. Rev.* (July - September, 2011) pp. 347-370, Available at [http://www.nujslawreview.org/pdf/articles/2011\\_3/andrew-f-amendola.pdf](http://www.nujslawreview.org/pdf/articles/2011_3/andrew-f-amendola.pdf) [accessed on 19th March, 2014]

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negotiation, as already discussed. However, where parties in a negotiation hit a deadlock in their talks, a third party can be called in to help them continue negotiating. This process now changes to what is called mediation. Mediation has been defined as a continuation of the negotiation process by other means where instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the negotiations between the parties.<sup>152</sup> It is also a mechanism worth exploring as it has been successfully used to achieve the right of access to justice for parties.

### *7.1.3 Mediation and Justice*

Mediation is defined as the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.<sup>153</sup> Within this definition mediators may play a number of different roles, and may enter conflicts at different levels of development or intensity.<sup>154</sup> Mediation can be classified into two forms namely: Mediation in the political process and mediation in the legal process.

#### **(a) Mediation in the political process**

Mediation in the political process is informed by resolution as against settlement. It allows parties to have autonomy over the choice of the mediator, the process and the outcome. The process is also associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control, addressing root

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<sup>152</sup> Makumi Mwangiru, *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

<sup>153</sup> Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, (Jossey-Bass Publishers, San Francisco, 1996), p. 14

<sup>154</sup> Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd, (San Francisco: Jossey-Bass Publishers, 2004). Summary written by Tanya Glaser, Conflict Research Consortium, Available at [http://books.google.com/books/about/The\\_Mediation\\_Process.html?id=8hKfQgAACAAJ](http://books.google.com/books/about/The_Mediation_Process.html?id=8hKfQgAACAAJ) [accessed on 8th March, 2014]

causes of the conflict, non-coerciveness and enduring outcomes. With these perceived advantages, the process is more likely to meet each party's expectations as to achievement of justice through a procedurally and substantively fair process of justice.<sup>155</sup>

### **(b) Mediation in the legal process**

Mediation in the legal process is a process where the conflicting parties come into arrangements which they have been coerced to live or work with while exercising little or no autonomy over the choice of the mediator, the process and the outcome of the process. This makes it more of a settlement mechanism that is attached to the court as opposed to a resolution process and defeats the advantages that are associated with mediation in the political process.<sup>156</sup>

The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship.<sup>157</sup> In conflict resolution processes like mediation, the goal, then, is not to get parties to accept formal rules to govern their relationship, but to help them to free themselves from the encumbrance of rules and to accept a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.<sup>158</sup>

Rules have been defined as requiring, prohibiting or attaching specific consequences to acts and place them in the realm of adjudication. By contrast, mediation is seen as one concerned primarily with persons and relationships, and it deals with precepts eliciting dispositions of the person, including a willingness to respond to somewhat shifting and indefinite 'role expectations. 'Mediation is conceived as one that has no role to play in the interpretation and enforcement of laws; that is the role of courts and the function of adjudication. Conflict resolution

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<sup>155</sup> See generally Muigua, K., "Resolving Environmental Conflicts Through Mediation in Kenya" Ph.D Thesis, 2011, *Unpublished*, op.cit.

<sup>156</sup> *Ibid*, Chapter 4; See also sec. 59A, B, C & D of the Civil Procedure Act on Court annexed mediation in Kenya.

<sup>157</sup> Lon L. Fuller, *Mediation – Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases' *Utah Law Review*, (2009) [NO. 3] op. cit. PP. 802-803]

<sup>158</sup> *Ibid*.

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processes, in their focus on people and relationships, do not require impersonal, act-prescribing rules” and therefore are particularly well-suited for dealing with the kinds of “shifting contingencies” inherent in ongoing and complex relationships.<sup>159</sup>

The salient features of mediation (in the political process) are that it emphasizes on interests rather than (legal) rights and it can be cost - effective, informal, private, flexible and easily accessible to parties to conflicts. These features are useful in upholding the acceptable principles of justice: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies* (emphasis ours), thus making mediation a viable process for the actualization of the right of access to justice.<sup>160</sup>

One criticism however is that in mediation, power imbalances in the process may cause one party to have an upper hand in the process thus causing the outcome to unfavourably address his or her concerns or interests at the expense of the other.<sup>161</sup> Nevertheless, in any type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party. However, it may be claimed that inequality in the relationship does not necessarily lead to an exercise of that power to the other party's disadvantage.<sup>162</sup> Another weakness of mediation is that it is non-binding. It is thus possible for a party to go into mediation to buy time or to fish for more information.

Thus, mediation, especially mediation in the political process indeed broadens access to justice for parties, when effectively practiced.

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<sup>159</sup> Ibid, page 803

<sup>160</sup> See also generally Muigua, K., “Resolving Environmental Conflicts Through Mediation in Kenya” Ph.D Thesis, 2011, *Unpublished*, op.cit

<sup>161</sup> See generally, Fiss, O., “Against Settlement”, op.cit.; See also Kariuki Muigua, “*Court Annexed ADR in the Kenyan Context*” page 5. Available at <http://www.chuitech.com/kmco/attachments/article/106/Court%20Annexed%20ADR.pdf> [accessed on 8th March, 2014]

<sup>162</sup>Shokouh HosseinAbadi, The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration, page 3, *Effectius Newsletter*, Issue 13, (2011) Effectius: Effective Justice Solutions, Available at [http://effectius.com/yahoo\\_site\\_admin/assets/docs/Effectius\\_Theoleofdisputeresolutionmechanisms](http://effectius.com/yahoo_site_admin/assets/docs/Effectius_Theoleofdisputeresolutionmechanisms) [accessed on 8th March, 2014]

#### 7.1.4 Justice via Conciliation

This process is similar to mediation except for the fact that the third party can propose a solution. Its advantages are similar to those of negotiation. It has all the advantages and disadvantages of negotiation except that the conciliator can propose solutions making parties lose some control over the process. Conciliation works best in trade disputes. For instance, Section 10 of *the Labour Relations Act*,<sup>163</sup> provides that if there is a dispute about the interpretation or application of any provision of Part II of the Act dealing with freedom of association, any party to the dispute may refer the dispute in writing: to the Minister to appoint a conciliator as specified in Part VIII of the Act; or if the dispute is not resolved at conciliation, to the Industrial Court for adjudication.

Conciliation is different from mediation in that the third party takes a more interventionist role in bringing the two parties together. In the event of the parties are unable to reach a mutually acceptable settlement, the conciliator issues a recommendation which is binding on the parties unless it is rejected by one of them. While the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, it is not a determinative role. A conciliator does not have the power to impose a settlement.<sup>164</sup> This is a reflection of the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law.<sup>165</sup>

A conciliator who is more knowledgeable than the parties can help parties achieve their interests by proposing solutions, based on his technical knowledge that the parties may be lacking in. This may actually make the process cheaper by saving the cost of calling any other experts to guide them.

#### 7.1.5 Seeking Justice through Arbitration

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<sup>163</sup> No. 14 of 2007, Laws of Kenya

<sup>164</sup> Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, Op cit. page 49

<sup>165</sup> Article 6 (4) of the Model law states that –The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute, UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002). Available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2002Model\\_conciliation.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html) [accessed on 8th March, 2014]



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Arbitration is a dispute settlement mechanism. Arbitration arises where a third party neutral (known as an arbitrator) is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award.

The *Arbitration Act*, 1995 defines arbitration to mean –any arbitration whether or not administered by a permanent arbitral institution. This definition is not an elaborate one and hence regard has to be had to other sources. Arbitration has also been described as a private consensual process where parties in dispute agree to present their grievances to a third party for resolution.<sup>166</sup>

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

An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them, and arbitrators are so called because they have arbitrary power; for if they observe the submission and keep within their due bonds, their sentences are definite from which there lays no appeal.<sup>167</sup>

An arbitrator is also defined as a legal arbitrator; a person appointed by two parties to settle a conflict, arbitrate, and decide by arbitration, judge between two parties to a conflict (usually at the request of the two parties).

Arbitration in Kenya is governed by the *Arbitration Act*, 1995 as amended in 2009, the *Arbitration Rules*, the *Civil Procedure Act* (Cap. 21) and the *Civil Procedure Rules* 2010. Section 59 of the *Civil Procedure Act* provides that all references to arbitration by an order in a suit, and all proceedings there under, shall be governed in such manner as may be prescribed by rules. Order 46 of the *Civil Procedure Rules*, inter alia, provides that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court for an order of reference wherever there is a difference. Institutional Rules are also used in guiding the arbitrators as they carry out their work.

Its advantages are that parties can agree on an arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexibility; cost-effective; confidential; speedy and the result is binding. Proceedings in Court are open to the public, whereas

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<sup>166</sup>Farooq Khan, *Alternative Dispute Resolution*, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

<sup>167</sup> B. Totterdill, *An Introduction to Construction Adjudication: Comparison of Dispute Resolution Techniques*. (Sweet & Maxwell, London, 2003) p. 21.



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proceedings in commercial arbitration are private, accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration.

In disputes involving parties with equal bargaining power and with the need for faster settlement of disputes, especially business related, arbitration offers the best vehicle among the ADR mechanisms to facilitate access to justice.

#### *7.1.6 Justice through Med-Arb*

Med-Arb is a combination of mediation and arbitration. It is a combination of mediation and arbitration where the parties agree to mediate but if that fails to achieve a settlement the dispute is referred to arbitration. It is best to have different persons mediate and arbitrate. This is because the person mediating becomes privy to confidential information during the mediation process and may be biased if he transforms himself into an arbitrator.

Med-Arb can be successfully be employed where the parties are looking for a final and binding decision but would like the opportunity to first discuss the issues involved in the dispute with the other party with the understanding that some or all of the issues may be settled prior to going into the arbitration process, with the assistance of a trained and experienced mediator.<sup>168</sup> This is likely to make the process faster and cheaper for them thus facilitating access to justice.

Elsewhere, the courts have held, the success of the hybrid mediation/arbitration process depends on the efficacy of the consent to the process entered into by the parties.<sup>169</sup>

#### *7.1.7 The Arb-Med Justice Option*

This is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. It is best to have different persons mediate and arbitrate. This is because a person arbitrating may have made up his mind who is the successful party and thus be biased during the mediation process if he transforms himself into a mediator. For instance in the Chinese case of *GaoHai Yan & Another v Keeneye Holdings Ltd & Others* [2011] HKEC 514 and [2011] HKEC 1626 (“Keeneye”), the Hong Kong Court of First Instance refused enforcement of

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<sup>168</sup> Mediation-Arbitration (Med-Arb), Available at <http://www.constructiondisputes-cdrs.com/about%20MEDIATION-ARBITRATION.htm> [accessed on 8th March, 2014]

<sup>169</sup> Edna Sussman, Developing an Effective Med-Arb/ Arb-Med Process, *NYSBA New York Dispute Resolution Lawyer*, Spring 2009, Vol. 2, No. 1, page 73, Available at <http://www.sussmanadr.com/docs/Med%20arb%PDF.pdf> [accessed on 8th March, 2014]

an arbitral award made in mainland China on public policy grounds. The court held that the conduct of the arbitrators turned mediators in the case would “cause a fair-minded observer to apprehend a real risk of bias”.<sup>170</sup> Although the decision not to enforce the award was later reversed, the Court of Appeal did not have a problem with the observation on risks involved but with the particular details of that case where the parties were deemed to have waived their right to choose a new third party in the matter.<sup>171</sup>

Arb-med can be used to achieve justice where it emerges that the relationship between the parties needs to be preserved and that there are underlying issues that need to be addressed before any acceptable outcome can be achieved. Mediation, a resolution mechanism is better suited to achieve this as opposed to arbitration, a settlement process.

### *7.1.8 Adjudication and Expedited Justice*

Adjudication is defined under the Chartered Institute of Arbitrators (CIArb) (K) *Adjudication Rules* as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract. Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision within 28 days or the period stated in the contract), flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation. Adjudication is thus effective in simple construction disputes that need to be settled within some very strict time schedules. Due to the limited time frames, adjudication can be an effective tool of actualizing access to justice for disputants who are in need of addressing the dispute in the shortest time possible and resuming business to mitigate any economic or business losses.

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<sup>170</sup> Mark Goodrich, Arb-med: ideal solution or dangerous heresy? Page 1, March 2012, Available at <http://www.whitecase.com/files/Publication/fb366225-8b08-421b-9777-a914587c9c0a/Presentation> [accessed on 8th March, 2014]

<sup>171</sup> Ibid

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The demerits of adjudication are that it is not suitable to non-construction disputes; the choice of the adjudicator is also crucial as his decision is binding and that it does not enhance relationships between the parties.<sup>172</sup>

*7.1.9 Traditional Justice Systems*

It is noteworthy that there is an overlap between the forms of ADR mechanisms and traditional justice systems. The Kenyan communities and Africa in general, have engaged in informal negotiation and mediation since time immemorial in the management of conflicts. Mediation as practised by traditional African communities was informal, flexible, voluntary and expeditious and it aimed at fostering relationships and peaceful coexistence. Inter-tribal conflicts were mediated and negotiated in informal settings, where they were presided over by Council of Elders who acted as 'mediators' or 'arbitrators'.<sup>173</sup>

Their inclusion in the Constitution of Kenya 2010 is a restatement of these traditional mechanisms.<sup>174</sup> However, before their application, they need to be checked against the Bill of Rights to ensure that they are used in a way that promotes access to justice rather than defeating the same as this would render them repugnant to justice or morality.<sup>175</sup> Effective application of traditional conflict resolution mechanisms in Kenya can indeed bolster access to justice for all including those communities whose areas of living poses a challenge to accessing courts of law, and whose conflicts may pose challenges to the court in addressing them.

However, the scope of application of these traditional mechanisms, especially in the area of criminal law is not yet settled. For instance, in the case of *Republic v. Mohamed Abdow Mohamed*<sup>176</sup> the accused was charged with murder but

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<sup>172</sup> K. W. Chau, Insight into resolving construction disputes by mediation/adjudication in Hong Kong, *Journal Of Professional Issues In Engineering Education And Practice*, ASCE / APRIL 2007, pp 143-147 at Page 143, Available at [http://www.academia.edu/240893/Insight\\_into\\_resolving\\_construction\\_disputes\\_by\\_mediation](http://www.academia.edu/240893/Insight_into_resolving_construction_disputes_by_mediation) [accessed on 8th March, 2014]

<sup>173</sup> Kariuki Muigua, *Resolving Conflicts Through Mediation in Kenya* (Glenwood Publishers Ltd, Nairobi, 2012), Chapter two, pp. 20-37; See also generally, Kenyatta, J., *Facing Mount Kenya: The Tribal life of the Gikuyu*, (Vintage Books, New York, 1965)

<sup>174</sup> Articles 159 (2) (3) and 189(4), Constitution of Kenya, op.cit.

<sup>175</sup> Ibid.

<sup>176</sup> Criminal Case No. 86 of 2011 (May, 2013), High Court at Nairobi.

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pleaded not guilty. On the hearing date, the court was informed that the family of the deceased had written to the Director of Public Prosecutions (DPP) requesting to have the murder charge withdrawn on grounds of a settlement reached between the families of the accused and the deceased respectively. Subsequently, counsel for the State on behalf of the DPP made an oral application to have the matter marked as settled, contending that the parties had submitted themselves to traditional and Islamic laws which provide as avenue for reconciliation. He cited Article 159 (1) of the Constitution which allowed the courts and tribunals to be guided by alternative dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The issues were whether a murder charge can be withdrawn on account of a settlement reached between the families of an accused and the deceased; and whether alternative dispute resolution mechanisms as espoused by the Constitution of Kenya, 2010 extended to criminal matters. It was held that under article 157 of the Constitution of Kenya, 2010, the Director of Public Prosecutions is mandated to exercise state powers of prosecution and may discontinue at any stage criminal proceedings against any person; and that the ends of justice would be met by allowing rather than disallowing the application. The Application was thus allowed and the accused person discharged.

This case has however drawn criticism and approval in equal measure and thus the legal position is far from settled.<sup>177</sup> The debate on the applicability of ADR mechanisms in criminal justice is a worldwide one. For instance, it has been observed that criminal justice may either be retributive or restorative. It has been argued that while retributive theory holds that the imposition of some form of pain will vindicate, most frequently deprivation of liberty and even loss of life in some cases, restorative theory argues that “what truly vindicates is acknowledgement of victims’ harms and needs, combined with an active effort to encourage offenders to take responsibility, make right the wrongs, and address the causes of their behavior.”<sup>178</sup> Further, the conventional criminal justice system

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<sup>177</sup> See PravinBowry, ‘High Court opens Pandora’s Box on criminality’, *Standard Newspaper*, Wednesday, June 12th 2013, Available at <http://www.standardmedia.co.ke/?articleID=2000085732> [accessed on 20<sup>th</sup> March, 2014]

<sup>178</sup> Mark S. Umbreit, et.al., ‘Restorative Justice In The Twenty first Century: A Social Movement Full Of Opportunities And Pitfalls’ *Marquette Law Review*, [89:251, 2005] pp. 251-304, page 257, Available at [http://www.cehd.umn.edu/ssw/rjp/resources/rj\\_dialogue\\_resources/RJ\\_Principles/Marquette%20ORJ%2021st%20Century%20Social%20Movement%20Full%20of%20Pitfalls%20and%20%20Opportunities.pdf](http://www.cehd.umn.edu/ssw/rjp/resources/rj_dialogue_resources/RJ_Principles/Marquette%20ORJ%2021st%20Century%20Social%20Movement%20Full%20of%20Pitfalls%20and%20%20Opportunities.pdf) [accessed on 21<sup>st</sup> March, 2014]

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focuses upon three questions namely: What laws have been broken?; Who did it?; and what do they deserve? From a restorative justice perspective, it is said that an entirely different set of questions are asked: Who has been hurt?; What are their needs?; and Whose obligations are these?<sup>179</sup>

The answers to the foregoing questions may have an impact on how the whole process is handled and further the decision on which one to use depends on such factors as other laws that may only provide for retributive justice in some of the criminal cases while at the same time limiting use of restorative justice. Which ever the case, what remains clear is that restorative justice in criminal matters considered serious, which may involve use of ADR more than use of litigation may have to wait a little longer.

## 8.0 THE ROAD TO JUSTICE

So far, the discussion in this paper has traced the philosophical foundations of access to justice, identifying the major attributes of justice in an attempt to conceptualize the real meaning of access to justice. One thing that emerges is that access to justice as a right is perceived in diverse ways by the persons concerned. This depends on the unique circumstances of the case and what the parties in that case really need to see addressed for them to feel satisfied. It therefore follows that one general approach to addressing these needs, like litigation only, can turn out to be very ineffective and often unsuccessful in addressing the unique needs of justice of each party. While litigation would be useful in addressing some of the needs, especially if a party was seeking retributive justice, it may fail to address the needs of a party who were more after achieving restorative justice rather retributive justice depending on the nature of the dispute in question.

It is against this background that the discourse herein now focuses on how true or real justice, as perceived by the parties can be achieved through diversification of the means used to address the dispute.

It has been argued by various scholars that there may be many roads to justice and that different justice needs may be addressed through different institutional setups. Further, an Equal Access to Justice (EA2J) intervention may be directed at customary, traditional or religious justice systems provided that the intervention's primary purposes to increase their compliance with international human rights norms and to reaffirm through dialogue or others

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<sup>179</sup> Ibid, page 258

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means that the state is ultimately responsible to ensure that they conform to such norms.<sup>180</sup>

The UN Secretary-General has indicated that justice is: “an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Its administration involves both formal judicial and informal/customary/traditional mechanisms.” Indeed, most African countries still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.

It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.<sup>181</sup> Another author confirms that access to justice has always been one of the fundamental pillars of many African societies. He notes that ‘Igbo justice is practised in land matters, inheritance issues, socio-communal development strategies, interpersonal relationships and sundry avenues’.<sup>182</sup>

The Constitution of Kenya 2010, under Article 159, provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and Traditional Dispute Resolution Mechanisms shall be promoted as long as that they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.<sup>183</sup>

Courts can only handle a fraction of all the disputes that take place in society. Courts have had to deal with an overwhelming number of cases and as one author notes ‘one reason the courts have become overburdened is that parties are

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<sup>180</sup> Henrik Alffram, ‘Equal Access to Justice A Mapping of Experiences’, sida, April 2011, Available at <http://www.sida.se/Publications/Import/pdf/sv/Equal-Access-to-Justice-A-Mapping-of-Experiences.pdf> [accessed on 9<sup>th</sup> March, 2014]

<sup>181</sup> Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, Available at [www.payson.tulane.edu](http://www.payson.tulane.edu),

<sup>182</sup> Ikenga K. E. Oraegbunam, *The Principles and Practice of Justice in Traditional Igbo Jurisprudence*, *African Journal Online*, page 53, Available at <http://www.ajol.info/index.php/og/article/download/52335/40960> [Accessed on 8<sup>th</sup> March, 2014]; See also generally Makumi Mwangiru, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), op.cit. 40-42

<sup>183</sup> Article 159(3)

increasingly turning to the courts for relief from a range of personal distresses and anxieties. Again, as already discussed elsewhere justice is a multi-faceted concept that requires the satisfaction of various concerns for any process to be deemed effective. Courts cannot address some of the ingredients of justice as conceived in this paper. For instance, courts will not address the real problem or allow parties to air their genuine expectations especially when they are not legally conceivable. Courts will seek to settle the disputes by striking a balance between the conflicting interests. ADR on the other hand seeks to achieve more than that; some of the mechanisms seek to come up with a mutually satisfying outcome. In fact, ADR has been successfully employed in addressing matrimonial causes, inter-community conflicts, business related disputes, amongst others. Indeed, the *Civil procedure Act and Rules*, which govern the conduct of litigation in the Kenyan courts have provisions for encouraging the use of mediation and other ADR in place of trials before a judge.<sup>184</sup> This is just one of the many laws in Kenya that promotes the use of ADR mechanisms in the formal sector.<sup>185</sup> However, it is important to keep in mind the possible shortcomings of mediation in the legal process, as already discussed elsewhere in this paper.

### 8.1 ADDRESSING ROOT CAUSES OF CONFLICT

ADR mechanisms such as negotiation and mediation seek to address the root cause of conflicts unlike litigation which concerns itself with reaching a

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<sup>184</sup> See sec. 59 of the *Civil Procedure Act*, Cap 21 and Order 46, rule 20 of the Civil Procedure Rules, 2010

<sup>185</sup> *The Environment and Land Court Act*, 2011 provides under section 20 thereof that the court may adopt and implement on its own motion with the agreement or at the request of the parties any other appropriate means of alternative dispute resolution including conciliation, mediation, and traditional dispute resolution mechanisms in accordance with Article 159(2)(c); *The Industrial Court Act*, 2011, section 15(3)(4), gives the Court to stay proceedings and refer the matter to conciliation, mediation or arbitration. It can adopt any of the ADR mechanisms in accordance with Article 159 of the Constitution; *Intergovernmental Relations Act*, section 34; the *Land Act* 2012 under section 4 encourages communities to settle land disputes through recognised local community initiatives and using ADR mechanisms (See also Articles 60 & 67 of the *Constitution of Kenya*, 2010); Sec.17(3) of the *Elections Act* 2011 establishes Independent Electoral and Boundaries Commission (IEBC) Peace Committees which are to use mediation in management of disputes between political parties; *The Supreme Court Rules* 2011 empowers the Supreme Court to refer any matter for hearing and determination by ADR mechanisms.



settlement. Settlement implies that the parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. Since a settlement is power-based and power relations keep changing, the process becomes a contest of whose power will be dominant.<sup>186</sup> Rights-based and power-based approaches are used at times when parties cannot or are not willing to resolve their issues through interest-based negotiation.<sup>187</sup> It has been observed that a settlement is an agreement over the issue(s) of the conflict which often involves a compromise.<sup>188</sup>

Settlement practices miss the point by focusing only on interests and failing to address needs that are inherent in all human beings, parties' relationships, emotions, perceptions and attitudes. Consequently, the causes of the conflict in settlement mechanisms remain unaddressed resulting to conflicts in future.<sup>189</sup> Examples of such mechanisms are litigation and arbitration. In litigation the dispute settlement coupled with power struggles will usually leave broken relationships and the problem might recur in future or even worse still the dissatisfied party may seek to personally administer 'justice' in ways they think best. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed. ADR mechanisms are thus better suited to resolve conflicts where relationships matter.

If the parties are to express real satisfaction in their quest for true justice needs in the conflict management mechanism used, then there must be a paradigm shift from focusing on the artificial issues of the dispute to seeking to deal with the real problem so as to avoid future problems, depending on the nature of the dispute and the nature of the parties' relationship. Further, some conflicts would require resolution as against settlement especially if relationships are at stake. Any approach settled for should be chosen on the basis of the actual needs of the parties in regard to justice. This way, the particular method would

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<sup>186</sup> Ibid, page 80

<sup>187</sup> See generally Chapter-V, 'Non Adjudicatory Methods of Alternative Disputes Resolution' op.cit. page 165

<sup>188</sup> David Bloomfield, Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, *Journal of Peace Research*, vol. 32 no. 2 May 1995 151-164, Available at <http://jpr.sagepub.com/content/32/2/151.short> [accessed on 8th March, 2014]; See also generally Makumi Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), op.cit. pp.36-41

<sup>189</sup> Kariuki Muigua, *Resolving Conflicts through Mediation in Kenya*, Op cit., Page 81.



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achieve its chief objective of promoting a just society, where access to justice does not rely on economic or political factors but the real needs of the persons concerned.

## 8.2 RESOLVING CONFLICTS

Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.<sup>190</sup> 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.<sup>191</sup> 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.<sup>192</sup> Resolution is usually preferred to settlement for its effectiveness in addressing the root causes of the conflict and negates the need for future conflict or conflict management.<sup>193</sup>

Furthermore, resolution is arguably more effective in facilitating realization of justice than settlement. This is tied to the fact that in resolution focus is more on addressing the problem than the power equality or otherwise. This ensures that a party's guarantee to getting justice is not tied to their bargaining power. ADR mechanisms that are directed at conflict resolution should therefore be encouraged. The major selling point of the ADR approaches of conflict management is their attributes of flexibility, low cost, lack of complex procedures, mutual problem solving, salvaging relationships and their familiarity to the

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<sup>190</sup> Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, op.cit; See also Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Op cit. page 7

<sup>191</sup> Makumi Mwangiru, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), op.cit. p. 42; See generally David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit., p. 153.

<sup>192</sup> J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, Vol.7.289,p.296

<sup>193</sup> Ibid

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common people. ADR is also arguably more 'appropriate' rather than alternative in the management of some of the everyday disputes among the people of Kenya.

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

## 9.0 CONCLUSION

It is not enough that the right of access to justice is guaranteed both under the international and national frameworks on human rights. Making the enjoyment of these rights a reality requires the efforts of all concerned stakeholders, in reforming the existing frameworks as well as taking up new measures to facilitate the same. The ability to access justice is of critical importance for the enjoyment of all other human rights.<sup>194</sup>As already noted litigation plays an important role in disputes management and must therefore be made available for clients. However, this should not be the only available option since it may not be very effective in facilitating realization of the right of access to justice in some other instances. The application of ADR to achieve a just and expeditious resolution of conflicts should be actively promoted since it is a very viable option for parties whose conflict's nature requires either specialized expertise or requires preservation of relationships.

The prospect of ADR in Kenya as a conflict management option is brilliant and actually one capable of bringing about a just society where disputes are disposed of more expeditiously and at lower costs, without having to resort to judicial settlements. Parties should find solace in the understanding that whoever wishes to avoid the complexities of litigation can seek the services of ADR mechanisms experts if the type of particular dispute so requires.

It is possible to actualize this right of access to justice through the use of ADR in Kenya. ADR offers a viable route to achievement of a just society for all, where there is something for everyone in terms of the available mechanisms for

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<sup>194</sup> Access to Justice (UN CRPD Article 13), Available at <http://www.futurepolicy.org/5789.html> [accessed on 20th March, 2014]

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achieving justice, regardless of their social status in the society. Indeed, ADR can provide the road to true justice in Kenya.

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**CONSTITUTIONAL AND STATUTORY REGIME OF  
ALTERNATIVE DISPUTE RESOLUTION IN KENYA**

*by* OTIENDE AMOLLO\*

**1.0 INTRODUCTION**

The search for efficient and better ways of managing disputes has led to an unprecedented growth of Alternative Dispute Resolution (ADR) mechanisms globally in the last four decades. From its early beginnings, ADR has grown in leaps and bounds to an extent that it has been institutionalized in the legal systems in many countries to complement the conventional judicial system. Indeed, the centrality of ADR in dispute resolution in recent times is evidenced by the increasing developments in legal and institutional frameworks worldwide. In recent times, ADR has flourished due to its advantages in resolving disputes in a non-confrontational way in comparison with the conventional dispute resolution methods.

**2.0 HISTORICAL PERSPECTIVE OF ALTERNATIVE DISPUTE  
RESOLUTION IN KENYA**

The history of alternative dispute resolution mechanisms in Kenya predates colonial rule. The mechanisms were manifested in the Traditional Justice System practiced in different African communities which was anchored on conflict management and reconciliation. In these communities, there existed dispute resolution structures from the family to communal levels, with the elders playing a central role. These mechanisms formed the substantive framework of dispute resolution in the communities and hinged on the cultural and traditional foundations and practices.

In other words, they were the sole dispute resolution mechanisms and not alternative. Although the system did not distinguish between criminal and civil matters, it was effective in resolving disputes in society, including the complex

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\* CMMR. OTIENDE AMOLLO, EBS, LL.B, LL.M, Advocate, Chairperson Commission on Administrative Justice /Ombudsman, former Chairperson of the International Commission of Jurists (K), former Secretary General of the East African Law Society, and former Member of the Committee of Experts on Constitutional Review of the Republic of Kenya.

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matters. The mechanisms adopted included negotiation, conciliation and mediation among others. However, with the advent of colonialism, the English legal system was transplanted in Kenya whose effect was to relegate the African Traditional Justice System to the periphery.<sup>195</sup> Accordingly, the African Traditional Justice System, although not abolished, was only applicable in so far as it was not inconsistent with any written law, and not repugnant to justice and morality.

The foregoing notwithstanding, the new dispute resolution system predicated on the court system did not immediately provide for the legal framework for ADR. It was not until 1914 that the Colonial Government introduced the Arbitration Ordinance, based on the English Arbitration Act of 1889 to provide for arbitration. However, the Ordinance vested absolute control of the arbitral process in the courts of law.<sup>196</sup> In order to enhance arbitration in Kenya, amendments to the Ordinance were made in 1968,<sup>197</sup> 1995<sup>198</sup> and 2009.<sup>199</sup> The amendments were based on the model of the United Nations Commission on International Trade Law of 1985. Two significant shortcomings of the Act were its failure to establish a sole arbitral institution and sole focus on arbitration thereby leaving out other forms of ADR.

Besides the Arbitration Act, a number of laws were enacted or amended with provisions largely calling for use of ADR in dispute resolution. For instance, the Employment Act,<sup>200</sup> Labour Institutions Act,<sup>201</sup> Labour Relations Act<sup>202</sup> and the Civil Procedure Act<sup>203</sup> have provisions that promote ADR. Further, in order to

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<sup>195</sup> Gakeri, J.K. 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR,' *International Journal of Humanities and Social Science*, Vol. 1, No. 6, June 2011

<sup>196</sup> Section 21 of the Ordinance.

<sup>197</sup> Arbitration Act, Chapter 49 of the Laws of Kenya

<sup>198</sup> Act No. 4 of 1995, which came into force on 2<sup>nd</sup> January 1996.

<sup>199</sup> Arbitration (Amendment) Act, 2009, which became operational on 15<sup>th</sup> April 2010.

<sup>200</sup> Act. No. 11 of 2007

<sup>201</sup> Act No. 12 of 2007

<sup>202</sup> Act No. 14 of 2007

<sup>203</sup> Chapter 21 of the Laws of Kenya

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strengthen the legal and institutional frameworks for arbitration, Kenya has now enacted the Nairobi International Centre for Arbitration Act<sup>204</sup> to provide for the establishment of regional centre for international commercial arbitration and Arbitral Court among others.

However, the most significant development was the adoption of the Constitution in August 2010 whose provisions lay emphasis on ADR as an integral part of the dispute resolution system in Kenya. This is particularly captured under Article 159(2)(3) which provides, *inter alia*, that ‘alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted;’ provided that traditional dispute resolution mechanisms can only be used as long as they do not contravene the Bill of Rights, are not repugnant to justice and morality or result in outcomes that are repugnant to justice or morality, or are inconsistent with the Constitution or any written law. Moreover, the Constitution provides for the institutional framework in some instances where some State Organs like Constitutional Commissions and Independent Offices in relation to matters that fall within their mandates.<sup>205</sup>

Further, a number of laws enacted pursuant to the Constitution also have provisions that promote ADR. For instance, Section 8(f) of the Commission on Administrative Justice Act<sup>206</sup> requires the Commission on Administrative Justice to ‘work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration.’ In addition, the Environment and Land Act<sup>207</sup> and the National Land Commission Act<sup>208</sup> also provide for resolution of disputes by way of ADR. Other actors that have played a key role in promoting ADR in Kenya include the Chartered Institute of Arbitrators (Kenya Chapter) which was established in 1984 as one of the branches of the Chartered Institute of Arbitrators headquartered in London, and the Centre for Alternative Dispute Resolution. It is, however, worth of noting that while arbitration has been substantively provided for by the law, there is no substantive law governing the other forms of ADR in Kenya.

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<sup>204</sup> Act No. 26 of 2013

<sup>205</sup> Article 252(1)(b) of the Constitution

<sup>206</sup> Act No. 23 of 2011

<sup>207</sup> Section 20 of the Act

<sup>208</sup> Section 14 of the Act

### **3.0 CONSTITUTIONAL FRAMEWORK OF ALTERNATIVE DISPUTE RESOLUTION IN KENYA**

As earlier stated, the Constitution recognizes ADR and calls for its use in the resolution of disputes. Indeed, this is one of the principles for exercise of judicial authority by the Courts and Tribunals under Article 159(2) of the Constitution. The other relevant provisions of the Constitution are Article 67(2)(f) that empowers the National Land Commission to encourage the application of traditional dispute resolution mechanisms in land conflicts; Article 113 on the mediation Committees between the Senate and the National Assembly on an impasse concerning ordinary Bills relating to county governments; Article 189(4) that lays emphasis on ADR in resolving inter-governmental conflicts by way of negotiation, mediation and arbitration among others; and Article 252(1)(b) on the general functions and powers of Constitutional Commissions and Independent Offices which include conciliation, mediation and negotiation.

However, it is worth of noting that the application of the traditional dispute resolution mechanisms is limited by Articles 2(4) and 159(3) of the Constitution. Article 2(4) provides for the supremacy of the Constitution by stating that ‘any law, including customary law, that is inconsistent with it is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.’ In relation to Article 159(3), traditional dispute resolution mechanisms can only be used as long as they do not contravene the Bill of Rights, are not repugnant to justice and morality or result in outcomes that are repugnant to justice or morality, or are inconsistent with the Constitution or any written law.

### **4.0 STATUTORY FRAMEWORK OF ALTERNATIVE DISPUTE RESOLUTION IN KENYA**

The statutory framework for arbitration, which is one of the forms of ADR, is substantively found under the Arbitration Act. The Act governs domestic and international arbitration and provides autonomy to the parties in fashioning the arbitral process. This means that the parties determine the arbitrator, language to be used, the applicable substantive law, place of arbitration, use of experts as may be appropriate and how the process is conducted. Further, it provides that all arbitral awards are binding and the requirement for enforcement of the awards by the High Court.

In order to strengthen the legal and institutional frameworks of arbitration, the Nairobi International Centre for Arbitration Act was enacted in January 2013 to ‘provide for the establishment of a regional centre for international commercial

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arbitration and the Arbitral Court and other mechanisms for alternative dispute resolution.’ The Act establishes the Nairobi Centre for International Arbitration to ‘promote, facilitate and encourage the conduct of international commercial arbitration in line with the Act and administer domestic and international arbitrations as well as alternative dispute resolution techniques’ among other functions. A fundamental feature of the Act is its broad nature that goes beyond arbitration to include other forms of ADR. However, it is important at this stage to clearly map out how the Centre will relate with the Chartered Institute of Arbitrators and other bodies undertaking arbitration in Kenya.

The Civil Procedure Act and the attendant Rules of 2010 recognize ADR in the resolution of disputes. For instance, sections 1A(1), 1A(2), 59, 59A, 59B, 59C, 59D and 81, and Order 46 of the Civil Procedure Rules, 2010, extensively provide for ADR in civil matters pertaining to the Act. These provisions obligate the courts to employ ADR mechanisms – beyond arbitration – in the resolution of disputes before them to facilitate a just, expeditious, affordable and proportionate resolution of disputes governed by the Act. Further, the Act recognizes court-annexed mediation and gives it prominence in the resolution of disputes before the court.

ADR is also anchored under the Environment and Land Courts Act whose section 20 provides that:

- (a) *Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.*
- (b) *Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.*

The Employment Act,<sup>209</sup> Labour Institutions Act<sup>210</sup> and the Labour Relations Act<sup>211</sup> also provide for ADR through the use of conciliation in labour disputes. Further, the Commission on Administrative Justice is empowered under section

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<sup>209</sup> Section 47(2) of the Act

<sup>210</sup> Section 12(9) of the Act

<sup>211</sup> Sections 58 & 65 – 71 of the Act

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8(f) of the Commission on Administrative Justice Act<sup>212</sup> to 'work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration.'

Other statutes that provide for mediation include the Intergovernmental Relations Act, 2012 whose section 7 establishes a Co-ordinating Summit comprising the President and the 47 Governors, and sections 19 and 20 create the Council of Governors comprising all the 47 Governors to deal with any disputes involving the counties. Further, section 33 of the Act recognizes the involvement of an intermediary in the resolution of any disputes that arises. Similarly, the section 19 of the National Government Co-ordination Act, 2013 provides for the establishment of mediation teams in case of any disputes between the national government and county governments.

It is, however, instructive to note that the mechanisms provided for under these statutes are limited and need strengthening. For instance, the National Co-ordinating Summit under the Inter-governmental Relations Act may not be effective since it comprises interested members without involving a neutral party. Either the 47 Governors may gang up or the President takes his stand to defeat the Governors. The lack of a neutral third party may affect the resolution of disputes. This shortcoming seems to have been remedied by section 33 of the Act which recognises the involvement of an intermediary. Secondly, the mediation mechanism known as Mediation Team under the National Government Co-ordination Act, may not achieve the intended objectives due to the even number and composition. It may be necessary to include a member who is disinterested in the matter to the Mediation Team. Given the mandate of the Commission, it can provide a mechanism of resolving inter-governmental and intra-counties disputes that may arise. Further, it may provide support to the Joint Mediation Committee established under Article 113 of the Constitution through participation as an observer or intermediary.

## **5.0 COURT VERSUS NON-COURT SANCTIONED ALTERNATIVE DISPUTE RESOLUTION**

One of the characteristics of ADR mechanisms is their framework which largely lies outside the formal judicial mechanisms. Indeed, most of the ADR mechanisms are usually undertaken in this sphere, and may involve the family, elders or more formal structures such as the Chartered Institute of Arbitrators and the Commission on Administrative Justice among others. In such cases, the

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<sup>212</sup> Act No. 23 of 2011



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disputes are either lodged directly with the bodies or, as is the case with the Commission, taken up *suo motu*. In the case of the Commission, one of the distinct features under Article 59(2)(j) and Section 8(c) of the Commission on Administrative Justice Act is the power to 'take remedial action' on complaints investigated. The remedial action above is not merely salutary or declaratory, it involves tangible remedies, including binding decisions. Such decisions are binding and must be complied with. In case any party is aggrieved by it, the only recourse available is to challenge it in Court and not refuse to comply. Even in such cases, the Court has limited jurisdiction in handling such matters.

## **6.0 COMPLEMENTARY DISPUTE RESOLUTION IN THE CONTEXT OF KENYA**

Two pertinent questions that usually arise are whether ADR mechanisms are really alternative, and whether ADR is a threat to the judges and the judicial system. In relation to the first issue, it is important to note that conflicts or disputes will always exist in society. While conflicts will always pose risks to peaceful co-existence, the response by the actors plays a significant role in determining the final outcome. Such conflicts will always present themselves in different ways and contexts. In the contemporary world, it has been established that ADR mechanisms play an integral role in conflict management. For instance, in many regions of the world, ADR mechanisms have been employed to manage conflicts with demonstrable positive results. This is because such mechanisms are cost-effective, expeditious, less confrontational, flexible, focused on restorative justice and result in more durable solutions. In addition, the mechanisms may be deeply rooted in the societies and have been tested and found effective.

In this context, ADR is more appropriate to managing the conflicts in comparison to the formal judicial processes. For instance, it would have been inconceivable and impractical to employ litigation to address the post-election violence in Kenya in 2007/2008 since it was not appropriate. ADR was appropriate in the circumstances. In this regard, ADR cannot be viewed as alternative to the litigation, since the latter is not suited for resolving the conflicts. However, it should also be noted that there are instances when litigation is more appropriate than ADR mechanisms. In light of the foregoing, the mechanisms should be seen as complementing each other and that none of them is inferior or alternative to the other.

On the basis of the foregoing, the Constitution of Kenya places a premium on ADR as one of the ways of resolving disputes and obligates State Organs to employ such mechanisms in some circumstances. The approach of the

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Constitution can be said to be that of appropriateness as opposed to alternative as a way of realizing the right to access to justice to all persons under Article 48 of the Constitution.

In relation to the second question posed earlier, it is instructive to note that ADR is not a threat to the Judges or the judicial process. On the contrary, the Judiciary needs ADR for its success. In the first place, as earlier noted, these two mechanisms cater for distinct, but related conflict contexts which may necessitate the application of a mechanism that appropriately responds to the situation. In other words, there are disputes that are better handled through the formal judicial mechanisms instead of ADR, and vice versa. This approach takes cognizance of the fact that not all disputes are suitable for litigation and, therefore, end-up in court. Secondly, the Judiciary has been reeling under huge backlog of cases which ultimately affects the turnaround time in the dispensation of justice. As an illustration, in the 2012/2013 Financial Year, empirical data reveals a massive backlog of cases in the Judiciary of Kenya. For instance, the total number of cases handled by the Judiciary (new and pending) stood at 847,853 out of which 190,093 were resolved leaving 657,760 pending.<sup>213</sup> A detailed caseload for the courts in the same period is shown below:

No.	Court	Filed	Resolved	Pending	Remarks
1.	Supreme Court	18	11	7	Rate of resolution was good owing to the nature of matters handled by the Court and duration of its existence
2.	Court of Appeal	1,162	1,191	5,687	Rate of resolution slightly above the number of filed cases
3.	High Court	54,602	26,502	162,772	More cases filed than resolved ones even

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<sup>213</sup> The Judiciary of the Republic of Kenya, State of the Judiciary and the Administration of Justice, Annual Report, 2012-2013, Nairobi.

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					without considering those pending from the previous years
4.	Magistrates Courts	60,484	163,132	485,976	Rate of resolution was over 250% of filed cases
5.	Kadhis Courts	488	257	3,318	More cases filed than resolved ones even without considering those pending from the previous years
	<b>Total</b>	<b>116,754</b>	<b>190,093</b>	<b>657,760</b>	

Source: The Judiciary of the Republic of Kenya, State of the Judiciary and the Administration of Justice, Annual Report, 2012-2013, Nairobi.

As has been illustrated above, the sheer number of cases is usually reflected in the Daily Cause Lists for the judicial officers, which may not be reasonably dealt with. The true state of affairs gets clearer upon close examination of the population ratio to the number of judicial officers in Kenya which stands at 78,000 people per every judicial officer. This compares poorly with the statistics in other countries or regions such as the European Union where the ratio is 1: 1,500, Rwanda at 1: 42,000 and China/India/Japan at 1: 10,000. Apart from the officers being grossly overwhelmed, the backlog is also a recipe for malpractices in the Judiciary as litigants seek preferential and favourable treatment of their matters. It also causes delay, stifles growth, creates uncertainty and raises the cost of litigation thereby impeding access to justice and eroding faith in the legal system. It may be the case that some of the matters pending before the Court can as well be handled through ADR without resorting to litigation. It is in this regard that ADR comes in to complement the formal judicial mechanisms. It is also instructive to note that the above data does not include the complaints or disputes handled by other bodies during the same period, which in ordinary circumstances, may have ended up in Court. For instance, the Commission handled 18,257 matters out of which 11,253 matters were resolved.

Accordingly, the involvement of other bodies, such as the Office of the Ombudsman, should be seen as complementary and encouraged as a way of enhancing access to justice and realizing the National Values and Principles of Governance under Article 10 of the Constitution. In any event, administration of justice is a shared responsibility among various bodies, including those outside the Judiciary. Based on the foregoing, Judges or the Judiciary should not look at

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such bodies with suspicion or as competitors. Instead, they should be seen as complementing each other.

## **7.0 THE JURISDICTION OF THE COMMISSION RELATING TO ALTERNATIVE DISPUTE RESOLUTION**

The Commission on Administrative Justice (Office of the Ombudsman) is established under Article 59(4) of the Constitution and the Commission on Administrative Justice Act, 2011. The mandate of the Commission is to enforce administrative justice in the public sector by addressing maladministration through effective complaints handling and alternative dispute resolution. In addition, the Commission has a constitutional mandate to safeguard public interest by promoting constitutionalism, securing the observance of democratic values and principles, and protecting the sovereignty of the people. In particular, the mandate of the Commission covers the following:

- a) Maladministration: Service failure, delay, inaction, inefficiency, ineptitude, discourtesy, incompetence and unresponsiveness.
- b) Administrative Injustice: Unfair administrative action
- c) Misconduct and Integrity Issues: Improper conduct, abuse of power and misbehaviour in the Public Service.
- d) Advisory Opinions and Recommendations: Advisory opinions or proposals on improvement of public administration and recommendations on legal, policy or administrative measures to address the specific concerns
- e) Training of Public Officers: Training on effective methods of handling complaints in-house and set up complaints handling facilities.
- f) Performance Contracting: Resolution of public complaints is an indicator in performance contracting. Public institutions submit quarterly reports detailing complaints received and action taken.
- g) Mediation, Conciliation and Negotiation: The Commission is mandated to work with different public institutions to promote alternative dispute resolution through mediation, conciliation or negotiation on matters affecting public administration.

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- h) Special Right: Besides the complimentary duty to secure protection and promotion of human rights and freedoms in public administration, the Commission serves to promote access to information held by the state, and compliance with minority and marginalized groups rights in context of public service.
- i) Shared Role on Constitutionalism: The Commission serves to protect the sovereignty of the people by ensuring all state organs observe the principles of democracy, the constitutional values and respect the supremacy of the Constitution.
- j) Persons in Custody: The Commission is mandated to receive correspondence from any person in custody (prison, remand or mental institution) in confidence and under seal. Working with the relevant organs, the Commission engages on to remedy concerns raised by such persons, including conditions of living and administrative injustices within the facilities.
- k) Implementing Recommendations of Commissions and Task Forces: Noting the failure to act, including by a Cabinet Secretary, constitutes administrative inaction, the Commissions steps in to follow-up implementation of Recommendations by Commissions of Inquiry, Task Forces or other Agencies including necessary policy or legislative amendments.

The Commission's mandate covers all State and Public Offices and Officers, under both National and County government. The Commission investigates, on its own motion, or upon complaint, any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged to be prejudicial or improper, or to result in any impropriety or prejudice. In sum, the Commission's mandate encompasses the traditional role of the Ombudsman as known the world over, with unique additional responsibilities.

In the conduct of its functions the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

In the context of ADR, the Commission is empowered under section 8(f) of the Commission on Administrative Justice Act to *'work with different public institutions*

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*to promote alternative dispute resolution methods in the resolution of complaints relating to public administration.*' This provision largely draws from Article 252(1) (e) of the Constitution that provides the Commissions and Independent Offices with '*powers necessary for conciliation, mediation and negotiation.*' Further, section 8(e) of the Act empowers the Commission to '*facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs.*' Pursuant to these provisions, the Commission has developed Regulations to operationalize the Act.<sup>214</sup> Part V of the Regulations provide for the framework for mediation, conciliation and negotiation by the Commission. Besides resolving complaints, the Commission focuses on dispute prevention through systems investigations and proposals on improvement of public administration [Section 8(a), (b), (d) (e) and (f) of the Act].

## **8.0 SAMPLE MATTERS HANDLED BY THE COMMISSION THROUGH ALTERNATIVE DISPUTE RESOLUTION**

Pursuant to the above stated mandate, the Commission has resolved a number of matters through ADR. This has mainly taken the forms of mediation and conciliation. Notably, the Commission offered mediation services to the Truth, Justice and Reconciliation Commission following a dispute between the Commissioners and the Chairperson. As a result of these efforts, the parties were reconciled and the Chairperson assumed office. Similarly, the Commission offered mediation services to the National Gender and Equality Commission and the Salaries and Remuneration Commission following a dispute on the determination of interim remuneration and allowances for the full-time and part-time Commissioners of the National Gender and Equality Commission. In another matter, the Commission was requested to mediate on a dispute between the National Land Commission and the Salaries and Remuneration Commission relating to the approved salary for the Commission's Vice-Chairperson and the salaries of the Commissioners generally. On receiving the request, the Commission held mediation meetings with both Commissions and the dispute was settled amicably within weeks. Similarly, the Commission was requested by the National Police Service Commission to mediate on the dispute between them and the Inspector-General of Police. This mediation process received a boost from the Forum of Chairpersons of Constitutional Commissions

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<sup>214</sup> The Commission on Administrative Justice Regulations, Legal Notice No. 64, (Kenya Gazette Supplement No. 54), 12<sup>th</sup> April 2013.

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and Independent Offices which supported the initiative. However, the process could not be finalized since it became the subject of litigation in Court.

The second category of matters handled by the Commission through ADR relate to complaints lodged at the Commission, which upon inquiry and review, have been determined to be appropriate for ADR. This category comprises the majority of matters handled by the Commission and usually takes the form of individual and group complaints. In one of such complaints, the Commission successfully mediated a dispute between a complainant and his former employer, the Kenya Revenue Authority (KRA) following his summary dismissal by the Authority on 23rd July 1998. The complainant had admitted losing some funds while working for KRA as a Clerical Officer, but attributed the loss to lack of concentration due to his ailment and death of one of his siblings. He was subsequently charged in court, but was acquitted under section 215 of the Criminal Procedure Code. The complainant appealed twice against his dismissal on the grounds that he had been acquitted by the court, but the appeals were rejected on the basis that KRA had lost confidence in him. He thereafter lodged a complaint with the Commission in 2012 when his second appeal was rejected by KRA. The Commission took up the matter which culminated in a mediation in 2013 which resolved that the complainant's dismissal would be changed to termination in the Authority's interest; he would be paid three months' salary in lieu of notice; and that he would be paid his outstanding leave days.

Similarly, in relation to group complaints, the Commission successfully resolved a complaint from 83 former employees of the Kenya Railways Corporation who alleged delay and unresponsive conduct by the Kenya Railways Staff Retirement Benefits Scheme in paying their gratuity. In particular, they alleged that the Scheme had failed to pay them the retirement gratuity in accordance with the Rules which provided for payment within 30 days upon retirement from service. Further, they alleged that the Scheme had failed to respond to their inquiries on the issue since their retirement in July 2011. Upon receipt of the complaint, the Commission intervened and the complainants were paid their gratuities and lump sum dues by the Scheme. Further, the Commission was informed that the delay in paying the dues had been occasioned by the liquidity constraints facing the Scheme at that time.

The Commission's jurisdiction in conducting ADR was recently recognised by the Court in the *Nyeri High Court Civil Petition No. 3 of 2014, County Government of Nyeri versus the Cabinet Secretary for the Ministry of Education, Science and Technology, and the Principal Secretary for the Ministry of Education, Science and Technology*, where it participated as an Amicus Curie. During the hearing of this matter on 7<sup>th</sup> February 2014, the Court directed the

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parties to attempt an amicable settlement of the dispute with the assistance of the Commission. However, the mediation did not materialize since the matter was thereafter settled by the parties.

Due to the effectiveness of ADR mechanisms in resolving public complaints, the Commission will escalate its activities on ADR in resolving complaints. This will undoubtedly include disputes involving public bodies such as between the two levels of government, county governments and other public bodies.



**PATHOLOGICAL ARBITRATION CLAUSES IN AD HOC  
ARBITRATIONS: KENYA'S EXPERIENCE**

*by* PAUL NGOTHO\*

**1.0 INTRODUCTION**

This paper is on how Kenyan courts treat Pathological Arbitration Clauses in *Ad Hoc* Arbitrations. It also touches on how appointing authorities and arbitrators behave, or should behave, when faced with such clauses. The writer makes some radical proposals on curing the pathological clauses from the Kenyan Arbitration Act, CIArb (K) Arbitration Rules as well as from the law of tort.

Much has been written on how arbitral institutions treat pathological clauses in administered arbitrations. The "Gang of Four" consists of the German Institute of Arbitration (DIS), the Milan Chamber of Arbitration, the Arbitration Institution of the Stockholm Chamber of Commerce, and the Vienna International Arbitration Centre. The Secretary Generals hold seminars to compare notes on various issues on arbitration, including pathological arbitration clauses in administered arbitrations. The writer hopes to attend one of the seminars in due course and has meanwhile decided to write about pathological clauses in *ad hoc* arbitrations.

Defective arbitration clauses were first referred to as "pathological" in 1974 by Frederick Eisemann, who served at the time as the Secretary General of the ICC International Court of Arbitration. Pathology "is the science of causes and effects of diseases, especially the branch of medicine that deals with laboratory examination of samples of body tissue for diagnostic or forensic purposes."

Pathological arbitration clauses can be defined as those drafted in such a way that they may lead to disputes over the interpretation of the

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\* An Arbitrator, Adjudicator and Mediator of commercial, construction and family disputes. Fellow of the Chartered Institute of Arbitrators (FCI Arb), Member of the Royal Institution of Chartered Surveyors (MRICS), Registered Surveyor and a Land Economist (BA, Land Econ).

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arbitration agreement, may result in the failure of the arbitral clause or may result in the unenforceability of an award. All pathological clauses are sick or ill. The illness could be minor, like running nose, coughing, migraines, limping, headache, gaout, cancer etc. Some of the flaws are curable. Others are fatal or inherently suicidal, killing the arbitration agreement completely.

Examples of pathological arbitration clauses include; naming a specific person as arbitrator who is deceased or who refuses to act, naming an institution to administer the arbitration proceedings or to appoint the arbitrators if the institution never existed, is misnamed in the clause or refuses to act.

The occurrence of such clauses is a reflection of the parties' and advisors' optimism at the stage of signing the contract. The mood then is such that neither party takes, or wants to be seen to be taking, undue interest in the possibility of disputes arising. The arbitration clause is not called the "mid-night" clause for nothing.

Arbitration institutions play an important role in weeding out baseless requests for the appointment of arbitrators. In *ad hoc* arbitrations the arbitrator, once appointed, is left to his own devices.

Pathological arbitration clauses waste court time and much more time and money for the parties. They delay the resolution of disputes by engaging parties in non-issues and side-shows, which could have been avoided by more diligent drafting.

## **2.0 THE KENYAN ARBITRATION ACT**

The standard or thermometer for testing pathological clauses is specified in section 6(1) of the Act;

*"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-*

- a) *That the arbitration agreement is null and void, inoperative or incapable of being performed"*

Section 5, which is titled "Waiver of Right to Object", states that,

*A party who knows that any provisions of this Act from which parties may derogate or any requirement that under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.*

Invalidity of an arbitration agreement could jeopardise the recognition and enforcement of the award under section 37(1) (a)(ii) but that dimension will not be explored in this paper.

### 3.0 OTHER JURISDICTIONS

A UK court held recently that the following clause did not amount to an arbitration agreement:

*"In the event of any dispute between the parties pursuant to this Agreement, the parties will endeavour to first resolve the matter through Swiss arbitration. Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction". (Christian Kruppa v Alessandro Benedetti & Anr<sup>215</sup>)*

At least 4 clauses in that arbitration agreement are pathological:

1. "the parties **will** endeavour to first resolve the matter through Swiss arbitration". An arbitration clause should put an obligation on parties to refer disputes to arbitration. The language of "endeavouring" or "attempting" is generally reserved to the negotiation, mediation and the other procedures which do not guarantee an outcome.
2. Ideally, an arbitration agreement is couched in mandatory terms like "shall", not "will" but whether or not that alone would invalidate the agreement is debatable.
3. How/why would a "resolution not be forthcoming" if a dispute is referred to arbitration? A cheeky or particularly pro-arbitration court could have ordered the parties to refer the dispute to arbitration and leave issues unresolved by arbitration, if any, to be dealt with by the

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<sup>215</sup> [2014] EWHC 1887)

court.

4. "Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction" There are several ways to skin this cat. The simple explanation is that the clause completely negates any intentions of arbitration disputes arising from the contract. The second one is that the clause effectively identified England as the "seat" as opposed to any other seat.

The whole clause, read in its entirety, shows that the parties did not understand what arbitration was all about. Therefore, they could not possibly have intended to refer disputes to arbitration.

In the case of *Tritonia Shipping Inc v South Nelson Forest Products Corporation*<sup>216</sup> a charter-party provided merely 'arbitration to be settled in London.' The Court of Appeal held that disputes under the charter-party should be arbitrated in London in accordance with the agreement of the parties.

In the case of *London-Goldstar International (HK) Ltd v Ng Moo Kee Engineering Ltd*<sup>217</sup> the arbitration clause provided that arbitration would be 'in a third country...in accordance with the rules of procedure of the International Commercial Arbitration Association'. No third country was nominated and no such association existed. The Supreme Court of Hong Kong held that the parties had nevertheless agreed to go to arbitration: the term 'third country' meant any country other than those of which the parties were nationals and the reference to a non-existence association could be deleted as meaningless.

#### **4.0 OVER SPECIFICATION**

"Sometimes a drafter of an arbitration clause may be too over-zealous and thus come up with an arbitration clause with either too many terms or one that may be difficult to implement. For example a clause may provide as follows:

*"the arbitration shall be conducted by three arbitrators, each of whom shall be fluent in Hungarian and shall have twenty or more years of experience in the design of computer chips and one of whom shall act as chairman, shall be an expert on the law of Hapsburg empire."*

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<sup>216</sup> [1966] Lloyd's Rep. 114.

<sup>217</sup>[1993] 2 Hong Kong Law Reports (HKLR), 73

When an arbitration clause is over-detailed, those layers of details could make it difficult or impossible to apply when a dispute arises.

## 5.0 THE UNCONSCIONABLE

A party may seek to avoid an arbitration agreement on the ground that it is unconscionable. In the United States of America there have been recent cases in which parties have attacked the selection of the ICC Arbitration Rules in contracts on the ground that the ICC's administrative costs are excessive and thus that the arbitration clause is unconscionable.

This was the case in *Brower v Gateway 2000 Inc*<sup>218</sup> in which a computer manufacturer's standard terms and conditions agreement included in the box of the computer, provided for arbitration of any dispute in accordance with the ICC Arbitration Rules. The agreement also stated that by keeping the computer for more than thirty days, the consumer accepted the terms and conditions. The New York court noted that the ICC advance fee of \$ 4000 (for a claim of less than \$ 50,000) is more than the cost of most of the defendant's products. The court held that the excessive cost of the ICC fees would effectively deter and bar consumers from arbitration, leaving them no forum for their disputes. The ICC fees were held unreasonable and the arbitration clause unconscionable and unenforceable."

## 6.0 DEROGATION FROM INSTITUTIONAL RULES

In drafting the arbitration clause, the parties should consider whether they can modify the institutional rules adopted. Most of the institutional rules allow parties to modify them.

However in some cases the ICC has on its part refused to administer arbitration because of alterations made by the parties' agreement to particular rules deemed by the ICC to be fundamental to its arbitral procedure.<sup>219</sup> It is not

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<sup>218</sup> 246 A.D.2d 246, 676 N.Y.S.2d 569 (N.Y.A.D. 1 Dept. 1998).

<sup>219</sup>Thuo Caroline Wambui, 'Pitfalls in the Drafting of Arbitration Agreements' (University of Nairobi School of Law, 2011),

<http://erepository.uonbi.ac.ke/bitstream/handle/11295/14914/%20Pitfalls%20In%20The%20Drafting%20Of%20Arbitration%20Agreements?sequence=3>.

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advisable to amend the arbitration clauses in standard forms of contract. Leave ICC, FIDIC etc as they are. Do not try to improve them. They have been tried and tested.

### 7.0 THE PATHOLOGICAL ARBITRATOR

In *ACC Limited v Global Cements*<sup>220</sup>, the Supreme Court of India considered the issue as to whether the arbitration clause would remain valid if the arbitrator named in the arbitration clause was dead.

The arbitration clause in question stated:

*"21. If any question or difference or dispute shall arise between the parties hereto or their representatives at any time in relation to or with respect to the meaning or effect of these presents or with respect to the rights and liabilities of the parties hereto then such question or dispute shall be referred either to Mr. N.A. Palkhivala or Mr. D.S. Seth, whose decision in the matter shall be final and binding on both the parties."*

The agreement containing the arbitration clause was entered into in 1989. Arbitration was invoked in 2011. By that time, the arbitrators named in the arbitration clause had died. One of the parties had approached the High Court under Section 11. The High Court had held that since there was no indication that parties intended that arbitration clause would cease to be in existence. The court held that it was the policy of law to promote the efficacy of arbitration and therefore the efficacy of commercial arbitration must be preserved when dealings are based on agreement providing for recourse to arbitration when disputes arise. Consequently, the court appointed a retired Supreme Court judge as arbitrator."<sup>221</sup>

### 8.0 KENYAN EXAMPLES

In *Mugoya Construction & Engineering Ltd (Plaintiff) v National Social Security Fund and another (Defendants)*<sup>222</sup>, the arbitration agreement stated the arbitrator

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<sup>220</sup> (MANU/SC/0489/2012).

<sup>221</sup>Jasmine Joseph, 'Arbitration Clause Survives Death of the Named Arbitrator: SCI Rules' <http://practicalacademic.blogspot.com/2012/06/arbitration-clause-survives-death-of.html>.

<sup>222</sup> [High Court (Milimani Commercial Courts), Civil Case 59 of 2005].

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would be appointed “by the Chairman or Vice Chairman of the East African Institute of Architects who will, when appropriate, delegate such appointment to be made by the Chairman or Vice Chairman of the local (National) society of Architects”.

The East African Institute of Architects does not exist, and probably never existed. The court could not believe that the organisation did not exist, and noted that if it by any chance did not, then the parties “have freedom to resort to *the relevant provisions* of the Arbitration Act 1995” (*emphasis added*). The court did not specify which those provisions were but it referred the dispute to arbitration all the same.

## 9.0 THE CHARITABLE JUDGE

In *Motik Telecoms Ltd v Telkom Kenya Lt*,<sup>223</sup> the plaintiff, a debt collector entered into an agreement with the defendant for debt collection. A dispute arose, prompting the plaintiff to make an application for the court to compel the parties to refer the dispute to arbitration.

The arbitration mechanism was in two clauses of the contract. The first one stated “if a dispute is not resolved in an amicable and formal manner within 2 days, then either party may refer the dispute to arbitration.” The second clause stated that the dispute would be referred to the arbitration of two persons, “one to be appointed by the Company **and one by one Arbitrator**”. The statement providing for the appointment of the second arbitrator did not make sense.

An earlier draft of the second clause stated above provided that the second arbitrator would be appointed by the other party. Unfortunately, that draft was not signed and had been superseded by the final signed copy, which had the defective clause.

The court found that there was clear intent of the parties to refer disputes to arbitration in spite of the defective clause. It invoked section 3A of the Civil Procedure Rules which states, “nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice” and ordered the parties to refer the dispute to arbitration. Thus CPR saved the Arbitration Clause.

## 10.0 ARBITRATION VERSUS EXPERT DETERMINATION

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<sup>223</sup> High Court (Milimani Commercial Courts), Civil Case 879 of 2009.

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In *Agricultural Finance Corporation and another v Lustman & Co (1990) Ltd*<sup>224</sup>, the plaintiffs owned a building and had contracted the defendant as the managing and letting agent. They terminated the contract and filed a court suit for the recovery of money allegedly collected on their behalf and not remitted to them. The defendant applied for stay pending arbitration. It cited a clause in the contract that any disputes regarding any amounts due or payable by one party to the other would be “calculated by any reputable firm of independent public accountants agreed by the parties” and that the calculation would be conclusive and binding.

The plaintiff argued that there was no arbitration agreement and that if there had been one, stay should not be granted anyway because the defendant had already filed its pleadings, in addition to four advocates having entered appearance at different times.

The court found that the alleged arbitration clause fell short of Black's Law Dictionary's definition of arbitration as “a process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard” (*emphasis by the court*).

The plaintiff would probably have achieved the objective of the private resolution of the dispute if it had asked the court to order expert determination instead of arbitration.

### **11.0 DON'T SHOOT YOURSELF IN THE FOOT**

In *Pacific Insurance Brokers (EA) Ltd vs Housing Finance Co. of Kenya Ltd*<sup>225</sup> an arbitration clause provided;

*“In the event of a dispute arising from the interpretation and/or meaning of the agreement, both HFCK and K & M agree to go for arbitration to be presided over by the then Chairman of the Law Society of Kenya with each party nominating their own arbitrator. The decision will be binding to both HFCK and K & M. Otherwise, either party can determine to take the case before the High Court, should it find that the decision is inequitable. However, HFCK and K & M pledge to resolve all issues amicably and in any event no Court action will be instituted*

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<sup>224</sup> High Court (Milimani Commercial Courts), Civil Suit 134 of 2004

<sup>225</sup> High Court (Milimani Commercial Courts) Civil Case 227 of 2009



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*before three (3) months of arbitration's ruling to allow time for negotiation to resolve the difference."*

## 12.0 DON'T THROW THAT LAUNDRY RECEIPT AWAY

A dry cleaning firm in Nairobi has the following in font size No. 7 at the rear of the receipt, "*Conditions of Acceptance*

*All disputes arising out of this contract shall be referred to the decision of one arbitrator who shall be appointed by the Kenya National Chamber of Commerce and Industry within one calendar month after having been required in writing to do so by either of the parties and only after a deposit of Kshs.500/= is made by each party to cover arbitration cost. The making of an award shall be condition precedent to any liability to the customer for any claim hereunder and if such claim shall not be within 6 months from the date a disclaimer have been referred to a arbitration under the provision herein contained, then the claim shall not for a purpose be deemed to have been abandoned and waived and shall not thereafter be recoverable. (on the reverse side of the receipt, in small print – font size 7 )*

*(The costumer is required to put a signature against the following declaration at the front of the receipt: "I declare that I have seen the Conditions of Acceptance displayed on the Notice Board and the Reverse of the receipt and agree to be bound by them. Signature.....)"*

## 13.0 THE PATHOLOGICAL APPOINTING AUTHORITY

In *Donwoods Company Ltd v Samura Engineering Ltd*<sup>226</sup>, there was nothing wrong with the arbitration agreement itself. The problem was that a party, which had taken part in the proceedings by attending the preliminary meeting, paying the arbitrator's fee deposit, served pleadings, chose to challenge the arbitrator's jurisdiction on the day of the hearing. The reason was that the arbitrator had been appointed by the Chartered Institute of Arbitrators (Kenya Branch) and not by the Architectural Association of Kenya as stipulated in the arbitration agreement.

The judge dismissed the application with costs, having considered section 6 (1)(a) of the Act in view of the 6 month delay from the arbitrator's appointment

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<sup>226</sup> High Court (Commercial & Admiralty Division at Milimani Law Courts) Civil Suit Misc No 714 of 2012.

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to the date of the challenge as well as the fact that the applicant had not shown that it would suffer any prejudice if the arbitration proceeded.

#### 14.0 THE VENUE VERSUS SEAT OF ARBITRATION

A Fuel Purchase Agreement cited in *Kenya Oil Company Ltd v Westmount Power (Kenya) Ltd*<sup>227</sup>, provided among other things, that “it is hereby agreed that the site of the Arbitration shall be London, England”.

Both parties were Kenyan. The contract was performed in Kenya. The witnesses were likely to be in Kenya.

The word “site” in the arbitration agreement could present several challenges because it is capable of two interpretations. One is that the place or venue of arbitration shall be London. The alternative interpretation or possibility is that the parties meant that the seat (not site) of arbitration would be London. Of course it is possible for the site/venue to be Kenya while the seat remains United Kingdom.

Whether the arbitration is held physically in Kenya or in London has a huge effect on costs. The cost of flights, hotel accommodation, visa applications (and granting of visas is not guaranteed) for counsel, parties and witnesses, etc. Not to mention that a foreign- based arbitrator is likely to charge more than a Kenyan one.

Another pathological clause reads, “*The place and seat of arbitration shall be Nairobi and the language of arbitration shall be English*”. The fact that the arbitrator is sitting in Nairobi does not make Nairobi the seat of arbitration. Indeed, Nairobi is not legally capable of being a *seat* of arbitration.

The seat is the juridical seat, and not the venue of the arbitration or the place where the hearings are held. It is the jurisdiction/nation whose arbitration law would govern the procedure and whose courts would have jurisdiction on issues like stay of proceedings, removal of arbitrator, etc.

It is advisable for drafters to avoid the phrase *seat* in an arbitration agreement like the plague unless they are double sure they know what a seat of arbitration is. The omission of the seat in the agreement does not make arbitration pathological. An arbitrator can determine the seat of arbitration after hearing the parties, if need be. It is easier to correct omission than commission. Sins of omission are easier to deal with than those of commission as far as the seat is concerned.

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<sup>227</sup> Civil Suit No. 106 of 2002 in High Court of Kenya, Commercial and Admiralty Division).

## 15.0 “Shall” Vs “May”

In *Kenya Ports Authority v Amarco (Kenya) Ltd*<sup>228</sup> the arbitration clause stated that disputes “may be submitted by either party to arbitration...”

Justice P. Waki observed that the use of the word “may” instead of shall” did not compel the parties to refer the dispute to arbitration and that, therefore, the arbitration agreement was “inoperable”.

## 16.0 DID THEY MEAN THAT? REALLY?

In *Naizons (K) Ltd v China Road & Bridge Corporation (Kenya)*<sup>229</sup>, the arbitration clause provided that the arbitration shall be “conducted by the Institute of Engineers of Kenya... The appointed of Arbitration shall be the Chairman of the Institute of Engineers of Kenya”.

This case was in court for reasons different from the obviously pathological arbitration clause. The parties probably missed the fact that IEK was incapable of carrying out an arbitration, and so the arbitration agreement was inoperable.

## 17.0 THE INARBITRABLE: TAKING JOKES TOO FAR

In *Emily Susanne Dyk Wissanja v Zahid Asafali Wissanja*<sup>230</sup>, the court observed that “It is possible for parties to have an arbitration agreement in respect of a number of matters in relation to their marriage including property but such matters may not extend to those over which the law has placed exclusive jurisdiction in the courts. In such situations, once in court the parties may invoke mediation or other permissible mode of alternative dispute resolution as provided for by the law to settle some or all of the questions before the court as the court may direct. In the result I find that the proceedings before the arbitrator chosen by the parties were void. Parties cannot confer jurisdiction on any private or public tribunal over a matter in which jurisdiction is reserved to the courts only.”

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<sup>228</sup> High Court Mombasa, Civil Suit No. 23 of 2000

<sup>229</sup>Court of Appeal, Civil Appeal No. 157 of 2000.

<sup>230</sup> (HCT-00- FD-MC-0008-2009) [2009] UGHC 34 (23 July 2009) High Court of Uganda.

## **18.0 WHAT IS THIS TRYING TO SAY? THE PATHOLOGICAL ADVOCATE**

In *Trattoria Ltd v Joaninah Wanjiku Maina*<sup>231</sup>, an arbitration clause stated, "Save as may hereinbefore be otherwise specifically provided all questions hereafter in dispute between the parties hereto and all claims for compensation or otherwise not mutually settled or agreed between the parties hereto shall be referred to arbitration by a single arbitrator (assisted by assessors or professional advisors as the arbitrator shall deem necessary to appoint) in like manner as provided in by paragraphs 1 and 2 of the 2<sup>nd</sup> Schedule hereto for a valuer and every award made under this Clause shall be expressed to be made under the Arbitration Act (Cap 49) or other Act or Acts for the time being in force in Kenya in relation to arbitration".

## **19.0 PERSONAL EXPERIENCE: THE INSURED VERSUS THE INSURER**

Arbitration agreement not inherently pathological, but the circumstances made it impractical and probably unconscionable. One party's default saved the situation.

The arbitration agreement was in the insurance policy. It required a 3-person arbitral tribunal. The claim was for about Ksh.500, 000/= or about USD 5,900. The fees for a 3- person tribunal and the legal costs would have exceeded that sum by far.

The writer was appointed by the Insured in what was expected to be a 3-person tribunal. He accepted appointment and immediately offered to resign on condition that the parties must appoint someone else as a sole arbitrator to save time and especially costs. He also offered to waive the fees for the time he had spent on the matter so far. The Insurer did not respond.

The Insured served notice under section 12(3) to have the arbitrator it had appointed become the sole arbitrator. The insurer did not respond. Thus the party appointed arbitrator became the sole arbitrator as provided under section 12(4).

The parties eventually settled and agreed that the Insurer would pay the arbitrator's fees. The arbitrator sent a fee note to the Insurer, who did not respond. The arbitrator issued an award of his fees. The only issue for determination was the quantum. The Insured eventually paid up when threatened with enforcement proceedings.

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<sup>231</sup>HCC Civil Case No. 126 of 2008.

## **20.0 PROPOSED SOLUTIONS**

### **20.1 SIMPLY DO IT RIGHT! - AGE QUOD BENE AGIS**

*"The leading rule for the lawyer, as for the man of every other calling, is diligence."*  
(Abraham Lincoln)

George Washington, the first President of the United States, borrowing from his experience as an arbitrator of private disputes in the 1770s, left nothing to chance in his last will and testament:

*"I hope and trust, that no disputes will arise concerning them; but if, contrary to expectations, of the usual technical terms, or because too much or too little has been said on any of the devices to be consonant with law, my will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and understanding; two to be chosen by the disputants - each having a choice of one - and the third by those two. Which three men thus chosen, shall, unfettered by law, or legal constructions, declare their sense of the testators' intention; and such decision is, to all intents and purposes to be as binding on the parties as if it had been given in the Supreme Court of the United States."*

### **20.2 APPOINTING AUTHORITIES: DO NOT READ SOMEONE ELSE'S LETTER.**

An organization should not spend time and money making an appointment. It should simply decline to make the appointment and advise the person applying for the appointment to direct the application to the right organization.

### **20.3 ARBITRATORS SHOULD STOP PLAYING HIDE AND SEEK!**

In the absence of an administering institution, which would look at the arbitration agreement critically prior to making an appointment, arbitrators in *ad hoc* arbitrations should on appointment or at the earliest opportunity interrogate the arbitration clauses and address pathological issues squarely.

They should ask themselves if they have been appointed prematurely or properly. If they find that they have not been properly appointed, they should

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promptly do the honourable thing: resign.

Raising the issue upfront gives the parties an opportunity to amend the pathological clause or enter into a new arbitration agreement altogether.

## **21.0 PARTY AGREEMENT**

Party autonomy allows the parties to amend an existing arbitration agreement or to replace the pathological one with a new one.

### **21.1 BEHOLD THE HEART SURGEON!**

The arbitration agreement is the heart of arbitration. Any problem with it could jeopardise the whole process. Enter the heart surgeon.

The Chartered Institute of Arbitrators Arbitration Rules of 2012 give the arbitrator powers to correct or amend pathological arbitration clauses. Rule 16B (2) stipulates that,

*The Arbitral Tribunal has jurisdiction to order on application by a party, the correction or amendment of any such agreement, and of the arbitration agreement, submission or reference, but only to the extent required to rectify any manifest error, mistake or omission which it decides to be common to all the parties."*

The English Act of 1996 is less explicit but creative arbitrators and parties could navigate their way around section 48 (5) (c), which is in the context of remedies available to parties. It states that,

*The tribunal has the same powers as the court ... to order the rectification, setting aside or cancellation of a deed or other document.*

Bernstein, Wood, Tackerberry and Marriot have not commented at all on this section in their excellent contribution to the Handbook of Arbitration Practice.

The writer is not aware of any use of the above section to cure pathological clauses. It could be argued that such was beyond the contemplation of the legislators. To be fair, no one in the whole world had heard of or even imagined that human heart transplants were possible until Dr Christiaan Barnard performed one in 1967.

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**21.2 MALPRACTICE SUITS - LET THE NEGLIGENT ADVISORS PAY!**

Professional advisers owe their clients (and potentially third parties under the law of tort) a duty of care to ensure that the contracts, including the arbitration clauses, are prepared to a professional standard. If the

advisors clients breach and the clients suffer loss, then the clients could sue successfully for professional negligence.

Pathological clauses deny parties an opportunity to resolve a dispute privately and probably inexpensively. They also spend money they would have put to other use if the arbitration agreement had been drawn correctly.

It is time *somebody* got sued for crafting silly arbitration clauses. A well publicised malpractice suit would do wonders, especially if the firm sued its one of the leading worldwide consultancy or legal names.

**22.0 ADVOCACY**

Following the personal experience narrated above, the writer influenced the adoption of a practical arbitration clause in motor and various other classes of insurance by all the insurance companies in Kenya.

There are probably other industries in Kenya which are stuck with pathological arbitration clauses in their standard forms. The maritime contracts used in Kenya are suspect.

**23.0 PREPARING ARBITRATION AGREEMENTS FROM SCRATCH**

Some of the critical components are:

Provision that disputes shall be resolved by arbitration Designate the body which would appoint an arbitrator if cannot agree on one person.

Conditions precedent (like notice of dispute, mediation as a contractual pre- condition to mediation, the time limits, etc) could frustrate the arbitration process. The interplay among the various ADR procedures and time limits must be calibrated thoughtfully.

Specify the qualifications of the arbitrator if you consider the qualifications important. Take the advise of a specialist if necessary. Keep it short and simple.

**24.0 PROPOSED STANDARD CLAUSES FOR DOMESTIC ARBITRATIONS - JUST COPY AND PASTE!**

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The choice depends on the sums of the contract (which acts as a pointer to the sums likely to be disputed about), technical nature of the industry, complexity of the issues in the underlying contract, nationality of the parties, etc. The following clauses are worth considering:

1. "Disputes arising from this agreement shall be resolved by an arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch)."
2. "Disputes arising from this agreement shall be resolved amicably by a mediator appointed jointly by the parties. If no mediator is appointed or if the dispute is not resolved fully within 30 days after the appointment of a mediator, then the unresolved issues shall be referred to an arbitrator appointed by the parties or in default by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) at the request of either party."
3. "Disputes arising from this agreement shall be resolved by an arbitrator appointed by the parties or in default by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) at the request of either party. The arbitrator shall be at least a *Member* (MCIArb) of the Chartered Institute of Arbitrators."
4. "Disputes arising from this agreement shall be resolved by an arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch). The arbitrator shall be a Fellow of the Chartered Institute of Arbitrators."
5. "Disputes arising from this agreement shall be resolved by a non-Kenya arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch)."
6. "Disputes arising from this agreement shall be resolved by an arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch). The arbitrator shall be an advocate of the High Court of Kenya and a Fellow (FCIArb) of the Chartered Institute of Arbitrators."



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**THE REGULATION OF PRIVATE POWER; ARBITRATION AND THE COURTS**

by **NORMAN MURURU**<sup>1</sup>

*"There must be no Alsatia in England where the King's writ does not run."*<sup>2</sup>

*"Power corrupts, Absolute power corrupts absolutely."*<sup>3</sup>

**1.0 IN THE PUBLIC ARENA**

1. Disputes determined by Magistrates and Judges with legal training and judicial experience.
2. Full time state employees. This gives them opportunity to concentrate only in judging and thus acquire relevant skills and expertise.
3. Judicial process and adherence to well tried and proven procedures and rules contributes to consistency and predictability of outcomes.
4. Doctrine of judicial precedent (where like today is judged as like before) contributes to consistency and predictability.
5. When errors occur, a further opportunity exists to correct them by way of appeal.
6. Process conducted in open court. Interested persons can follow proceedings and scrutinise the resulting judgment.

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<sup>1</sup> BA (B Econ), LLB (Hons) Dip Hsg, FIQSK, FAAK, FCIArb, Chartered Arbitrator

<sup>2</sup>Scrutton, LJ in *Czarnikow & Co v. Roth Schmidt & Co* (1932) CA

<sup>3</sup> Lord Acton ([John Emerich Edward Dalberg Acton](#)), first Baron Acton (1834–1902).

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7. All the above combine to protect the litigants and the society against arbitrariness, bias and incompetence and assures them that justice has been done and seen to have been done.

## **2.0 IN THE PRIVATE ARENA**

1. Arbitral proceedings are created by the will of the transacting parties.
2. No state involvement in the selection of the neutral/trier of facts or in the process.
3. Parties free to agree on procedure and other aspects of the process.
4. Appointee may or may not be legally trained.
5. Appointee may or may not be trained in arbitral procedures.
6. Appointment ad hoc and one off. Coming from profession/background the appointee is part time in arbitration and unlikely to have acquired the amount of experience a Judge acquires, being not full time on the job.
7. Process is closed to the public. Corrective and educative contribution of informed commentators lacking.
8. No publication of awards. Corrective and educative contribution of informed commentators lacking.
9. Doctrine of precedent does not apply, so Arbitrators are not bound by what others, however eminent, have ruled in the past on similar issues. Thus, consistency and predictability are lacking.
10. Shortcomings in 7, 8, 9 above may lead to errors/mistakes in the process and in the result which go uncorrected. A disservice to litigants and to society.

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11. Absence of appeal provisions may reinforce situation at 10.above.

### **3.0 COURT INVOLVEMENT**

1. Being private and consensual, party autonomy in deciding what to resolve by arbitration may appear far reaching. However, there are limits prescribed by the doctrines of arbitrability and public policy.
2. Statutes and public policy reserves certain matters for decision by state courts only.  
Examples: criminal matters, issues of personal status and matters implicating third parties not enjoined in the arbitral proceedings.
3. Attempts to venture into such areas in arbitration will be struck down by the court.
4. Jurisdiction: Contracts and arbitration agreements are the private law of the transacting parties. Tribunal mandated to only process that which has been agreed by the parties.
5. Requirement for substantive jurisdiction
  - a) Existence of a valid arbitration agreement
  - b) The appointment process of the Tribunal is as per the agreement
  - c) Matters submitted for decision are as per the arbitration agreement
  - d) Remedies sought to be civil remedies and not penal (no fines or punishment)
  - e) Matters submitted for decision to comply with the requirements of arbitrability
- 6 Proceedings which lack any of the basic requirements of jurisdiction expose the whole process to nullification by the courts.

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7. Court intervention **before** arbitration.

- a) Assist in constitution of Tribunal
- b) Stay court action in favour of arbitration
- c) Grant conservatory/protective measures

8. Court intervention **during** arbitration:

- a) To confirm jurisdiction
- b) To regulate appointment process/confirm validity of appointment
- c) To remove and replace Arbitrators for lack of impartiality  
Independence
- d) To replace Arbitrators when agreed procedure breaks down.
- e) To issue interim orders/conservatory/ protective measures
- f) To assist in evidence taking
- g) To deal with procedural challenges (where permitted)
- h) To answer questions of law (where permitted)

9. Court involvement **after** award

This is the phase that engages courts most actively. Parties request courts basically for two remedies; recognise and help enforce award **OR** nullify award.

9.1 Courts of law are enjoined by statute, constitution and public policy to uphold due process of law and proper application of law. For courts of law to grant their stamp of approval to an award they must be satisfied that the process and the outcome have met certain minimum standards that fulfill the above goals.

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Similarly, for a state court to strike down an award (nullify) it must be satisfied that the process and/or the outcome have fallen below the same standard.

9.2 This is when **Lord Justice Scrutton's** concerns take centre stage; i.e. the fundamental principles of national law must be upheld at all times. It is the same concern that motivates judges in USA to strike down awards that are in "*manifest disregard of the law*" even though the FAA (Federal Arbitration Act) does not specify this as a ground for vacatur.

**10. Court intervention after arbitration:**

To **Nullify** award :

10.1 For lack of legal capacity of party, for procedural irregularity or unfairness (breach of due process and natural justice).

- a) for breach of arbitrability requirements
- b) for invalid arbitration agreement
- c) for breach of public policy

**10.2 Other instances**

- a) For arbitrariness and manifest disregard of the law (where permitted).
- b) For substantive error of law (where permitted).
- c) For lack of proper notice of appointment of arbitral tribunal.
- d) For lack of proper notice of arbitral proceedings.
- e) For inability of party to present case.
- f) For bribery, corruption and undue influence (where permitted).

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g) For dealing with dispute not falling within the terms of reference or going beyond scope of reference (ultra petita) (exceeding jurisdiction).

h) For irregular composition of arbitral tribunal (not compliant with agreement of the parties).

i) For irregular arbitral procedure (not compliant with agreement of the parties).

10.3 To **remit** award - for amendment/ correction by arbitral Tribunal

10.4 To **modify** award - by appeal/revision process (where permitted).

10.5 To **recognise** and **enforce** award - where award -debtor is unwilling to comply.

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**"COURT MANDATED MEDIATION- THE FINAL SOLUTION TO EXPEDITIOUS DISPOSAL OF CASES**

by ALLEN WAIYAKI GICHUHI<sup>4</sup>

## **1.0 PREAMBLE**

For many years, we have all been lamenting about the monotony of litigation and the constant backlog of cases that keep mounting as days go by. In many instances, legal practitioners become disillusioned with litigation practice and reminisce about the good old days when things worked. Well, those historical days are long gone and we are now faced with a deluge of cases brought about by an increasing litigious society. The present population has now increased four-fold since the golden days and has become increasingly aware of its legal rights.

## **2.0 WHY EMBRACE ALTERNATIVE DISPUTE RESOLUTION**

### **MECHANISMS?**

We all appreciate that there are a myriad of problems we all face in the arduous task of litigation. The immense backlog of cases, the past strikes of

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<sup>4</sup>The writer is the litigation partner in Wamae & Allen Advocates and a Fellow of the Chartered Institute of Arbitrators, Council Member of the Law Society of Kenya, the Convenor of the Litigation Committee of the Law Society of Kenya, a member of the Advocates Remuneration Committee of the Law Society of Kenya, Member of the following committees- Nairobi Court of Appeal Bar-Bench Committee, Milimani Commercial and Admiralty Division, Environment & Land Court, the Legal Sub-Committee of the Chartered Institute of Arbitrators and an adjunct lecturer at the Kenya School of Law on Civil Procedure and Trial Advocacy. He is also a regular speaker at the Law Society of Kenya's Continuous Legal Education programmes where he has been giving lectures since 2005. He is also a director of the Nairobi Centre for International Arbitration.

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advocates complaining about shortage of judicial officers and an overworked judiciary have wrecked havoc to the expeditious conclusion of cases.

**The judiciary has set out the following statistics in its publication “State of the Judiciary and the Administration of Justice” as regards the filing of cases in the year 2012-2013<sup>5</sup>. The report reads:**

*“The most visible quantitative indicator of service delivery of justice is the numerical turnover of cases. The total number of cases filed is an important indicator of people’s confidence in the court. In the reporting period, 116,754 new cases were filed in courts across Kenya. During the same period, the courts heard and determined some 190,093 cases. This means that on average all the courts across Kenya completed 757 cases every working day. Still, some 657,760 are pending.”*

*A total of 116,754 new cases were filed in courts across Kenya. The courts heard and determined some 190,093 cases. “ “*

**TABLE 1.1: Consolidated Caseload for all Courts, 2012/13**

<i>Court</i>	<i>Filed</i>	<i>Resolved</i>	<i>Pending</i>
<i>Supreme</i>	<i>18</i>	<i>11</i>	<i>7</i>
<i>Court of Appeal</i>	<i>1,162</i>	<i>1,191</i>	<i>5,687</i>
<i>High Court</i>	<i>54,602</i>	<i>26,502</i>	<i>162,772</i>
<i>Magistrates Court</i>	<i>60,484</i>	<i>163,132</i>	<i>485,976</i>
<i>Kadhis Court</i>	<i>488</i>	<i>257</i>	<i>3,318</i>

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<sup>5</sup>Annual Report 2012-2013.



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<b>TOTALS</b>	<b>116,754</b>	<b>190,093</b>	<b>657,760<sup>6</sup></b>
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*The bulk of the Judiciary's service delivery occurred in the Magistrates' and Kadhis' courts, where Kenyans first - and often last - interact with the Judiciary. During the period under review, the total case load in Magistrates' and Kadhis' courts was 652,683. Of these, 60,484 new cases were initiated in the Magistrates' courts, which also resolved 163,132 cases and still had 485,976 pending by June 30, 2013. Another 488 cases were commenced in the Kadhis' courts, which resolved 257 and had 3,318 still pending by June 30, 2013.*

*These numbers present a mixed picture of triumph as well as fresh challenges requiring quantitative and qualitative study of the Judiciary's method and capacity to deliver access to justice. The upsurge in recruitment of judges and magistrates, investment in technology for better case management, review of our working methods and introduction of an institution wide Performance Management System, are measures being undertaken to clear this heavy case backlog."*

Matters cannot possibly be heard when one looks at the bloated cause lists in both the High Court and the Chief Magistrates Courts. On average, it takes up to 2 hours for the court to go through its cause list before allocating time to deal with the matters. Invariably, majority of the hearings and applications are simply taken out.

The above statistics now give credence for the need to urgently embrace Alternative Dispute Resolution mechanisms. Of these mechanisms we shall concentrate on mediation.

To understand what mediation is all about we shall highlight the contextual definitions of mediation from part 1 of the English County Court Mediation

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<sup>6</sup>These figures include raw estimates of cases carried forward from previous years. A comprehensive audit and caseload census is currently underway and will provide the definitive statistics on case backlog.-Annual Report 2012-2013.

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Schemes<sup>7</sup>. We shall address the various pertinent questions associated with mediation.

*2.1 MEDIATION-WHAT IS IT?*

Mediation is a well established process for resolving disputes in which people in dispute, who have failed to reach a negotiated settlement, are assisted by a mediator to come to a mutually acceptable outcome.

In the English county courts, mediations are time-limited, usually to a maximum of three hours, and cost-limited.

*2.2 MEDIATORS- WHO ARE THEY?*

The mediator is a third party who is independent, impartial, and has no stake in the outcome of the process; helps parties in dispute to clarify issues, explore solutions and negotiate their own agreement and does not advise those in dispute, but helps people to communicate with one another.

The mediator's skills include treating the parties fairly; helping the parties focus on the issues and on achieving a resolution; listening; being clear and open; having the ability to deal with impasses; respecting confidentiality and confirming the parties are satisfied with any agreement.

*2.3 MEDIATION- WHAT ARE THE BENEFITS?*

Mediation offers a focus on the future, with emphasis on helping parties rebuild relationships rather than apportioning blame for what happened in the past; promotes collaborative problem-solving between those in dispute, reaching a solution which is acceptable to all and confidentiality.

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<sup>7</sup> This scheme provides a toolkit meant to provide a Better Dispute Resolution Service. Part 1 consists of the basic questions that must be answered before setting up the scheme. One can easily access this scheme on the internet under "County Court Mediation Schemes". It was set up around March 2005 and is the blue print for setting up a mediation scheme in the English courts.

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In addition, mediation is generally more cost effective than taking a case to full trial; is a flexible process that can be used to settle disputes with a wider range of outcomes that the court can offer and is an excellent preventive tool which can be used to stop problems becoming worse.

2.4 *WHEN DOES MEDIATION WORK?*

Mediation works best when those in dispute are:

- a) willing to take part;
- b) prepared to be as honest and open as they can about the situation and the part they have played in;
- c) willing to work cooperatively with the other person to find a solution;
- d) willing to consider continuing to have a relationship in the future as businesses, neighbours, colleagues or family, for example;
- e) put in a position where they feel safe with no threat of physical violence.

Mediation may work less when:

- a) what is needed is an urgent court ruling (e.g. an injunction);
- b) people feel coerced into taking part;
- c) they have no reason to continue their business or other relationship;
- d) there is threat of physical violence or one party is intimidated by the other;
- e) there is a need for the public/legal judgment (e.g. because a legal precedent is needed to clarify the law or inform public policy);
- f) the case involves human rights;

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- g) the case involves vexatious litigants. The rest of the world is now recognizing the reality of mediation as the panacea for expeditious disposal of cases. The term ADR (with emphasis on mediation) has its genesis in America as an alternative to the adversarial system of litigation, which was cumbersome, technical and expensive.

Our immediate neighbours have embraced the concept of ADR and we regrettably have been left behind despite being the leading economic power in the East African region.

It is with this realisation that radical surgery was required to the judicial landscape that the Rules Committee, which is a creature of section 81 of the Civil Procedure Rules Chapter 21 of the Laws of Kenya, embarked on a national exercise that was aimed at soliciting views from the members of the public on the changes required to bring about realistic practical and user friendly changes to the Civil Procedure Rules. With this in mind the Rules Committee approached the Chartered Institute of Arbitrators with one request – create the draft Court Alternative Dispute Resolution Rules. The institute was approached on account of its experience in matters of arbitration, mediation, conciliation and negotiation. Most importantly, the Institute had also created its own *“Draft Mediation Rules of the Chartered Institute of Arbitrators (Kenya Branch)”*. It thus had the unique advantage of having draft Rules in place. In addition, a number of its members had attended a one-month course on mediation in the United States of America in the month of September 2004. Their experience was an added advantage, as time would tell.

The Institute accepted this noble task and immediately called upon other stakeholders who duly sent their representatives. The aim was to have a broad task force encompassing stakeholders in various professional organisations with a view to coming up with the draft Court Mandated Mediation Rules that would be universally accepted.

## 2.5 THE STAKEHOLDERS

The following are the various stakeholders who comprised the membership of the committee under the stewardship of the Chartered Instituted of Arbitrators. They came to constitute the Alternative Dispute Resolution Task Force. The following were the members:

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- a) The Law Society of Kenya. As co-convenor of the Practice Committee, I had already constituted a sub-committee on drafting the Alternative Dispute Resolution Rules. My sub-committee had also co-opted the International Commission of Jurists. This sub-committee was co-opted into the ADR task force.
- b) The International Commission of Jurists.
- c) The Dispute Resolution Centre.
- d) The University of Nairobi represented by the Faculty of Law- Parklands Campus.
- e) The International Federation of Women Lawyers (FIDA).
- f) Family Mediation Center (FAMEC).

The unique blend of various professional bodies constituted the ADR Task Force Committee that constituted 17 members headed by Mr. O.P Nagpal – the Chairman. This broad spectrum of professionals was aptly qualified to draft Kenya’s ADR Rules. The first task of the committee was to appreciate that in drafting the mediation rules, it would not be an exercise of reinventing the wheel but rather an exploration and appreciation of what other jurisdictions had to offer. The committee was fortunate to have a *plethora* of material on mediation from jurisdictions in the commonwealth and the United States of America.

## 2.6 SOURCES OF INSPIRATION

The task force carried out an extensive comparative analysis of the practice of ADR in various jurisdictions worldwide. It was agreed that we would not reinvent the wheel but instead selectively borrow the ADR practices from various jurisdictions and adapt them to suit our own peculiar circumstances.

The following are the sources of inspiration:

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- a. The Centre for Effective Dispute Resolution. This is the leading ADR center in the United Kingdom and was launched in 1990 as a non-profit organization.
- b. The Arbitration and Conciliation Act, 2000 Act No. 7 of Uganda. The Ugandans have combined Arbitration and Conciliation in one statute.
- c. The High Court (Amendment) Rules, 1997 of Zambia. Rule 4 of the Zambian Rules make it mandatory for parties to resort to mediation in all litigation cases save for certain exceptions.
- d. Order VIII A First Pre-Trial Settlement and Scheduling Conference, Order VIII B Final Pre- Trial Settlement and Scheduling Conference and Order VIII C Arbitration, Negotiation and Mediation Procedure of the Civil Procedure Rules of Tanzania. The interesting aspect of the Tanzanian model is that the judge or magistrate presides and conducts the actual settlement conferences. An independent mediator is not involved.
- e. Florida Statutes Chapter 44 on Mediation Alternatives to Judicial Action. The Florida Rules of Civil Procedure.
- f. Administrative Order 3.110 (C) of the County Mediation in Alachua County. (The County court civil actions draw heavily from the Florida Statutes).
- g. Rule 24.1 Mandatory Mediation under Regulation 194 of the Revised Regulations of Ontario, 1990 made under the Courts of Justice Act.

After researching widely and collating the material the ADR task

force constituted a sub-committee with the mandate of drafting the Rules. I had the honour of heading the sub-committee which comprised two advocates cum university lecturers- Mr. Steve Kairu and Mrs. Florence Jaoko.

Before coming up with the draft we had to appreciate how other jurisdictions embraced Alternative Dispute Resolution mechanisms. This was important as we had to consider the most apt means for Kenya.

### 3.0 COMPARATIVE ANALYSIS OF OTHER JURISDICTIONS THAT EMBRACED MEDIATION

#### 3.1 CANADA

Canada also at one time faced a crisis in its court system on account of the backlog of cases. This is best exemplified by Master Robert N. Beaudoin<sup>8</sup>

*“In Ontario, the need for our Civil Justice Reform arose from the twin evils of cost and delay. On average, it took a civil proceeding three to five years to proceed to trial from the date of filing with the Registrar. Complex cases took even longer. We estimated that it took the average litigant \$ 38,000 to take a case to a three-day trial. The high costs and delays were undermining public confidence in our civil justice system and resulted in a denial of meaningful access. Our Chief Justice described the situation as being in crisis.”*

The Canadians then adopted two emerging techniques in the area of civil justice reform: case management and mandatory referral to mediation.

The following exposition is a brief summary of Master Robert N. Beaudoin’s paper.

##### 3.1.1 Case Management

Case management is a process whereby the court takes over the control of the progress of litigation and imposes timelines for the completion or critical events. The reason for a timetable is simple; if lawyers know that their case needs to be dealt with at a certain period of time; they will put their minds to it. They will keep the file open and be more prepared to discuss it with the other side. In the Canadian system the cases are assigned specific tracks.

The features of the case management system are:

- a. *3 Tracks.*

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<sup>8</sup> Master Robert N. Beaudoin, “Case Management in Ontario” paper presented by his lordship, who is a judge in the Superior Court of Justice, Ottawa, Ontario.

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A fast track requires a settlement conference to be held within 180 days of filing of the first defence. A standard track requires the settlement conference to take place within 240 days of the first defence. Complex cases may involve a third tier known as a customized “track”.

***b. Case Conference***

This is similar to the former Summons for Directions that was repealed from our Civil Procedure Rules).

***c. Settlement Conferences***

The last event before trial. If the matter cannot be resolved amicably then a trial date is assigned.

***d. Trial Management Conferences***

This is optional. Just before the trial the judge tries to explore methods of reducing the amount of time to be spent on the trial.

***e. Fixed Trial Dates***

At the settlement conference the judge then fixes the trial date.

***3.1.2 Mandatory Mediation***

Mandatory mediation complements case management by requiring the parties and their counsel, at an early stage of the proceedings, to attend before a third party with a neutral view to resolving the dispute in a mutually acceptable way. The Canadian experience relied on an interest-based approach. Interest based mediation attempts to resolve the dispute by focusing on the interest of the parties, i.e. what is the motivation behind the litigation; and by encouraging the parties to a mutually satisfactory resolution of their dispute.

The Ontario Ministry of Attorney General set up the Ontario Mandatory Mediation Programme, which introduced Rule 24.1 on Mandatory Mediation. The purpose of the Rule was to establish a pilot Project for mandatory mediation in case managed actions, in order to reduce costs and delay in litigation and



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facilitate early and fair resolution of disputes.<sup>9</sup> Mediation was actually introduced as a practice direction.

The necessity for the pilot project was to identify the success of the mediation process and identify what type of mediation was to be adopted. Following the pilot scheme's evaluation, the Canadian Rules Committee decided to make the Rule a permanent part of the civil procedure.

The Evaluation Committee that supervised the pilot scheme concluded that:<sup>10</sup>

- a) Mandatory mediation under the Rule (Rule 24.1) had resulted in significant reductions in the time taken to dispose of cases.
- b) Mandatory mediation had resulted in decreased costs to the litigants.
- c) Mandatory mediation has resulted in a high proportion of cases (roughly 40 % overall) being settled earlier in the litigation process – other benefits being noted in many other cases that do not completely settle.
- d) In general, litigants and lawyers had expressed considerable satisfaction with the mediation process under the Rule.
- e) These positive findings applied generally to all cases types.

An evaluation of the pilot scheme was conducted by Dr. Julie Macfarlane of the Faculty of Law at the University of Windsor. The following was established:<sup>11</sup>

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<sup>9</sup> The entire Rule 24.1 Mandatory Mediation can be accessed via the internet at [http://www.attorney\\_general.jus.gov.on.ca/html/MANMED/rule.htm](http://www.attorney_general.jus.gov.on.ca/html/MANMED/rule.htm). This Rule is actually a complete code on the *modus operandi* of court mandated mediation. It can be compared to an order in our Kenyan civil procedure rules. The draft Order 45 B of the draft mediation rules that we set out below is a progeny of Rule 24.1.

<sup>10</sup>Evaluation of the Ontario Mandatory Mediation Program (rule 24.1) Final Report – the First 23 Months. (March 12,2001) Robert G, Hahn and Associates Limited, Queens Printer, 2001.

<sup>11</sup> Dr. Julie Macfarlane, Court –Based mediation for Civil Cases: An evaluation of the Ontario Court (General Division) ADRCenter (November 1995).

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- a) 54 % of those cases attending the mediation settled, at least in part.
- b) Cases that settled at the ADR Centre did so in half the time of non-referred cases that settles before trial.
- c) A majority of lawyers and clients, both in cases that settled and those that did not, were satisfied with the process.
- d) A majority of lawyers considered that the referral saved legal costs to their client both in cases that did not and did settle.
- e) Settlement rates were consistent across a broad category of cases.

Integration of ADR with case management significantly has contributed to the overall success of the Canadian programme. Since the system was implemented the following is the success rate:<sup>12</sup>

- a) 98% of the case managed proceedings commenced in 1997 are resolved.
- b) 96% of the case managed proceedings commenced in 1998 are resolved.
- c) 88% of the case managed proceedings commenced in 1999 are resolved.
- d) 61% of the case managed proceedings commenced in 2000 are resolved.
- e) 2% of the matters are resolved after trial.

### 3.2 THE UNITED STATES

The United States has been the main bastion of mediation.

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<sup>12</sup> Master Robert Beaudoin's paper *supra* at page 10.

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This is not surprising considering that millions of cases are filed there annually. This would inundate the court system if all cases were settled through litigation.

In 1990 the US Congress passed the Civil Justice Reform Act and in 1990 the Alternative Dispute Resolution Act (ADR). The ADR Act required each of the United States 94 districts to authorise the use of ADR in civil actions. Each district was permitted to design its own ADR programme. Whilst some made ADR mandatory, most do not and the use of ADR is generally left to the discretion of the judge assigned to the case and/or parties.

When it comes to mandatory mediation, the proactive approach of the courts is evidenced in the decision of the US Court of Appeals for the first Circuit in *In Re Atlantic Pipe Corp* (September 2002) that a federal trial court, even in the absence of a statute or local rule authorising ADR, has the inherent authority to order mandatory mediation if the case is appropriate for mediation and the court's order contains adequate safeguards.<sup>13</sup> The court held:

*“When mediation is forced upon unwilling litigants, it stands to reason that the likelihood of settlement is diminished. Requiring parties to invest substantial amounts of time and money in mediation under such circumstances may well be inefficient. The fact remains, however, that none of these considerations establishes that mandatory mediation is always inappropriate. There may well be specific cases in which such a protocol is likely to conserve judicial resources without significantly burdening the objectors’ rights to a full, fair and speedy trial. Much depends on the idiosyncrasies of the particular case and the details of the mediation order...This is particularly true in complex cases involving multiple claims and parties. The fair and expeditious resolution of such cases often is helped along by creative solutions - solutions that simply are not available in the binary framework of traditional adversarial litigation. Mediation with the assistance of a skilled facilitator gives parties an opportunity to explore a much wider range of options, including those that go beyond conventional zero-sum resolutions.”*

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<sup>13</sup> 304 F. 3d 135, 14-5 (1<sup>st</sup> Cir. 2002) U.S App.

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The courts in the United States have also shown a willingness to stay proceedings to compel performance of a mediation clause. In *CB Richard Ellis , Inc. V American Environmental Waste Management*<sup>14</sup> (December 1998) the US District Court for the Eastern District of New York held that it was appropriate to stay proceedings and compel mediation because the mediation clause in the disputed agreement was sufficient to manifest the parties' intention to attempt to settle any dispute by reference to mediation and, further , that the mediation clause as drafted would fit within the terms of the Federal Arbitration Act 1988 which provided statutory powers to compel mediation in accordance with the terms of the agreement.<sup>15</sup>

### **3.3 THE ENGLISH SYSTEM**

The use of ADR in England dates from around 1989. It was in that year that both ADR and CEDR (the Centre for Effective Dispute Resolution) were founded. Although ADR was already established in other jurisdictions, notably the USA, the initial response in England was slow. The genesis of ADR orders commenced in the commercial courts in 1993, which introduced simple forms asking parties if they had tried the use of ADR and whether ADR had been explored with the other side. This was essentially a practice direction implemented by the commercial court.

In 1998 the Court of Appeal instituted an ADR scheme. This consisted of the Court sending a letter to the parties inviting them to consider mediation and if it was thought inappropriate explaining why. Although in the first six months or so of the operation of the scheme 250 letters were sent, but there were only 12 mediations.<sup>16</sup> Between November 1997 and April 2000, 38 appeal cases were

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<sup>14</sup> 1998 US Dist. LEXIS 20064.

<sup>15</sup> Further reading on the United States system can be obtained in an article by Kent Dreadon -"Mediation: English Developments in an International Context". The journal of Arbitration Volume 71 Number 2 May 2005 at page 116.

<sup>16</sup> ADR & the English Courts Current Issues & Future Trends - John Gatenby 25<sup>th</sup> April 2002 Addleshaw Booth &Co. at page 2.

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mediated following agreement by both sides.<sup>17</sup> In an additional 99 cases one party was willing to mediate. The main reasons for refusing to mediate included:

- a) a judgment was required for public policy;
- b) the appeal turned on a point of law;
- c) the past history or behavior of the opponent.

The Civil Procedure Rules 1998 (“CPR”) which now govern civil procedure in the English courts resulted from a far reaching enquiry and report by Lord Woolf. The general aims of the report were to produce a new set of rules of the entire civil court system. The general aims of the report were to produce a new set of rules, which would result in litigation being avoided wherever possible, cooperation between the parties in the course of litigation being increased, the rules and procedure being less complex, therefore producing greater certainty, and the cost of litigation being more affordable, predictable and proportionate to the sum at stake. Finally, a key element was the introduction of court management of cases.

Historically, the management of civil litigation had been in the hands of the parties, in particular the plaintiff (now called “claimant”) who was described as having the “conduct of the case”.

The “Access to Justice” report endorsed the approach of the Commercial Court in its practice direction in 1993, and addressed the relationship between ADR and the courts. Lord Woolf states it would not be right for the courts to compel parties to use ADR but he does think that where a party has unreasonably refused a proposal by the court to attempt ADR or acts unco-operatively in the course of ADR that should be something which the court can take into account on the question of costs.<sup>18</sup>

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<sup>17</sup> Tamara Øyre “Civil Procedure Rules and the Use of Mediation/ADR” reported at page 22 of the journal of Arbitration Volume 70 Number 1 February 2004.

<sup>18</sup> Gatenby *ibid* at page 3.

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Unlike the Canadian Rule 24.1 which was a comprehensive and complete code, the English Civil Procedure Rules, Part 1 is headed “Overriding Objectives” and includes the following provisions:

- 1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly.
- 1.3 The parties are required to help the Court to further the overriding objective.
- 1.4 (1) The Court must further the overriding objective by actively managing cases.
  - (2) Active case management includes...
    - (e) encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the use of such procedure:
    - (f) helping the parties to settle the whole or part of the case.

The English system did not adopt a court mandated mediation but instead opted for a court annexed voluntary system. Pilot schemes were set up in various towns.

The oldest scheme is the Central London County Court Scheme, which was set up post-Woolf.

Professor Hazel Genn evaluated the efficacy of the scheme and found that:<sup>19</sup>

**Demand**

The rate at which parties accepted mediation offers remained at about 5 % throughout the life of the scheme and despite vigorous attempts to stimulate demand. Demand was virtually non-existent among personal injury cases, although these comprised almost half of the cases offered mediation. Contract,

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<sup>19</sup> The Central London County Court Pilot Mediation Scheme Evaluation Report. Arbitration, Volume 67, No. 1 February 2001 at pages 109-112.

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goods/services disputes and debt cases had the highest levels of demand although the joint acceptance rate was less than 10 %. The joint demand for mediation was lowest when both parties had legal representation.

Acceptance of mediation was highest among disputes between businesses. Interviews with solicitors rejecting mediation revealed:

- a) Lack of experience and widespread ignorance of mediation among the legal profession:
- b) Apprehension about showing weakness through accepting mediation within the context of traditional adversarial litigation.
- c) Evidence of litigant resistance to the idea of compromise, particularly in the early stages of litigation.

#### Outcomes

The majority (62 %) of the cases settled at the mediation appointment and this settlement remained constant between case types, indicating that mediation can be used across a wide spectrum of cases. Plaintiffs were prepared to discount their claims heavily in order to achieve settlement.

#### Time and Cost

Saving in months was achieved. Only half believed they saved on costs.

#### Evaluation of Mediators and Mediation Process

The litigants valued the opportunity to state their grievance and focus on the issues in the disputes; fully to participate in a process relatively free from legal technicality and the qualities of the mediators.

The solicitors welcomed speed of the process; the opportunity to review the process with a neutral party; the concentration on realities and the opportunity to repair damaged business relationships.

The Negative Assessments by parties showed deficiencies in mediator's knowledge of the law and issues in dispute; undue pressure to settle and bullying by mediators and mediators being "insufficiently" directive.

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**Mediators**

Skill amongst the mediators varied. Some of the most successful mediators were barristers, many of whom were prepared to be explicitly evaluative during the course of mediation.

She concluded that:

- a) Mediation is capable of promoting settlement in a wide range of civil cases when parties have volunteered to accept mediation.
- b) Personal injury cases are amenable to mediation even when both liability and quantum are in issue. Mediation offers a process that parties to civil disputes on the whole find satisfying.
- c) Conflicts can be reduced and settlements reached that parties find acceptable.
- d) Mediation can promote and speed up settlement.
- e) It is unclear to what extent mediation saves costs and unsuccessful mediation can increase costs.
- f) Mediation can magnify power imbalances and works best in civil disputes when there is some rough equality between the parties and in representation.
- g) Mediators require special personal qualities, good training and experience.
- h) Demand for mediation is very weak and the legal profession has a crucial role in influencing demand.

She also found that the issues requiring attention were:

- a) The impact of weak demand of an increase in mediation fees to an economic level;



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- b) Training of mediators;
- c) Quality control of mediators;
- d) Accountability and ethics of mediators.

It is clear that the English court annexed schemes have not proved popular.

As a further illustration on this, the Central London County Court (CLCC) begun another pilot scheme known as Automatic Referral to Mediation Scheme (ARMS). The pilot scheme begun in March 2004. In this scheme 100 cases a month are randomly assigned to mediation rather than a hearing, and parties who do not want to participate in mediation must justify their decision to a judge. Evidence from Hazel Genn's research on this pilot for the DCA (as yet unpublished) indicates that 80% of cases have sought to opt out from mediation although the proportion of cases in which both parties opt out is higher among personal injury cases than among other cases of 689 cases automatically referred to mediation between May and October 2004, only 53 mediations have taken place. However, of those that have agreed to mediate the success rate is 66%. In a majority of cases legal advisers are advising clients against using mediation!<sup>20</sup>

The impact of the Woolf reforms is best exemplified as follows<sup>21</sup>:

*“Lord Woolf’s approach to reform was to encourage the early settlement of disputes through a combination of pre-action protocols, active case management by the courts and cost penalties for the parties who unreasonably refused to attempt negotiation or consider ADR. Such*

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<sup>20</sup> Page 3 to 4 in “Civil Justice since the Woolf reforms-how useful is ADR? ASA UK.

<sup>21</sup> Extract from page 2 “Civil Justice since the Woolf reforms- how useful is ADR?” ASA UK. This paper can be accessed online at [http://www.asauk.org.uk/go/MiscPage\\_31.html](http://www.asauk.org.uk/go/MiscPage_31.html)

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*evidence as there is indicates that the Woolf reforms are working, to the extent that pre-action protocols are promoting settlement before application is made to the court; most cases are settling earlier and fewer cases are settling at the door of the court. In fact most cases are settled without a hearing. However costs have increased, or have at least been front-loaded. In particular, in cases where mediation has been attempted and agreement has not been reached, costs are clearly higher for the parties."*

In fact on November 13, 2002, at the South-East European regional conference on dispute resolution, even Lord Woolf recognised that litigants needed more encouragement to go to mediation. "(It is) going to take a substantial period of time until we get where we really want to with ADR." He said that one of the reasons for this was **that mediation had not been made compulsory**. (Emphasis mine).

**Cost Sanctions on Refusal to Mediate**

The English courts have in a series of judgments considered the imposition of costs sanctions on parties for refusing to mediate<sup>22</sup>.

In *Dunnet v Railtrack*<sup>23</sup>, the Court of Appeal made no order as to costs in favour of the successful defendant. This was because the defendant had ignored the possibility of ADR even when the court had specifically recommended it.

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<sup>22</sup> A brief exposition of the cases is neatly illustrated by Kent Dreadon in his article "Mediation: English Developments in an International Context" at page 112 of the journal on Arbitration Volume 71, No.2 May 2005. I have substantially adopted his analysis of the cases.

<sup>23</sup> [2002] 2 All E.R 850

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More recently, the Court of Appeal has given further guidance on when cost sanctions are appropriate. In *Valentine v Milton Keynes General NHS Trust*<sup>24</sup> it distinguished *Dunnet* on the basis that, where a party can demonstrate it has made real efforts to compromise the dispute, for example, by making reasonable and generous settlement offers that had been rejected, it would not be punished in costs for refusing to mediate.

Further in *Halsey v Milton Keynes General NHS Trust*<sup>25</sup>, in dismissing two appeals against costs awarded in favour of successful claimants who had refused to mediate, it held that the burden was on the unsuccessful party seeking a costs sanction against the successful litigant to show why there should be a departure from the general rule that costs should follow the event. It also held that the fundamental principle was such that such departure was not justified unless it can be shown that the successful party acted unreasonably in refusing to mediate. The factors which the Court of Appeal suggested were relevant to the question of whether a party unreasonably refused to mediate were said to include (but were not limited to):

- a) The nature of the dispute;
- b) The merits of the case;
- c) The extent to which other settlement methods had been attempted;
- d) Whether the costs of the mediation would have been disproportionately high;
- e) Whether any delay in setting up and attending the mediation would have been prejudicial; and
- f) Whether the mediation had a reasonable prospect of success.

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<sup>24</sup> [2003] EWCA Civ. 1274

<sup>25</sup> [2004] EWCA Civ. 576

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I have deliberately set out the issue of cost sanctions, as this is part of the Rules contained in the draft court mandated scheme that has been formulated. This can be seen in Rule 9 that deals with non-compliance. In my view this would be the only useful aspect of the English system that we can consider.

#### **4.0 AMENDMENTS TO THE CIVIL PROCEDURE ACT**

When the Constitution was promulgated in 2010 Article 159 (2) (c) expressly provides that courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).<sup>26</sup>

Previously, the repealed Constitution made no provision for alternative dispute resolution.

The committee proposed various amendments and a new Order to address mediation exclusively. Finally in December 2012, the Civil Procedure Act was amended pursuant to Act No. 12 of 2012.

The following is a summary of the crucial amendments to the Civil Procedure Act.

1. Section 2 defined the process of mediation, mediation rules and a mediator.
2. Section 59 A established the Mediation Accreditation Committee whose 12 members will be appointed by the Chief Justice. The committee is empowered to, inter alia, determine the criteria for certification of mediators, propose rules for certification, maintain a register of qualified mediators, enforce the code of ethics and establish appropriate training programmes for mediators.

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<sup>26</sup>Article 159(3) states 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 inconsistent with the Constitution or any written law.

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3. Section 59 B-gives the court the discretion to refer a dispute to mediation upon request of the parties, where it deems it appropriate or if the law so requires. Such mediation shall be conducted in accordance with the mediation rules.<sup>27</sup> No appeal shall lie against a mediation agreement.
4. Section 59 C- other alternative dispute resolution methods are also applicable. This section does not describe the methods.
5. Section 59 D-the court is empowered to enforce private mediation agreements.

The proposed amendments affect the Civil Procedure Act, introduce a new Order XLV B and create new forms. The amendments were presented to the Rules Committee for consideration.

*4.1 THE KENYAN DRAFT ON ADR*

The draft we came up with was deliberated by the main task force and the final draft was then presented to the Rules Committee on 30<sup>th</sup> November 2004. The rules are a blend of the Ontario Rules spiced with the Zambian Rules. These were considered to be the most apt for our jurisdiction. The task force carried out a thorough and considered review and finally came up with the model qualified for our jurisdiction. It was clear the English system was impractical as it did not have a complete code on the practice of mediation.

The following drafts are before the Rules Committee.

*Order 45A<sup>28</sup>*

Order 45A r.1  
Referral to  
Mediation

1(1) In all suits suitable for mediation the court shall within 21 days after close of pleadings convene a scheduling conference with the parties and/or their counsel for directions.

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<sup>27</sup>These Rules have not been gazetted or enacted.

<sup>28</sup>The previous Order XLV now appears as Order 46 in the Civil Procedure Act 2010.

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(2). The court may in suitable cases conduct the mediation or refer the suit to Mediation Registrar.

(3) In cases where court initiated mediation fails the court shall forthwith refer the suit to the registry for further action by any other court.

(4) In all suits referred to the Mediation Registrar under sub-rule 2, the Mediation Registrar shall convene the first scheduling conference within thirty days for the purpose of referring the case to mediation.

(5) Upon a referral order being made the mediator shall without delay convene a mandatory session.

O.45A. r2  
Appointment  
& List of  
Mediators

2(1) The Registrar shall maintain and make available to all parties to whom this Order applies and the public, a list of persons qualified to serve as mediators.

(2) The Mediation Registrar shall appoint a mediator who will conduct the mediation and who will be:

- a) A person chosen by agreement of the parties from the list, or
- b) A person assigned by the Mediation Registrar from the list, or
- c) A person who is not named on the list, if the parties consent to his appointment.

(3) Every person appointed as mediator under sub-rule 2 shall comply with the provisions of this Order and with the code of ethics in Appendix I to these rules.

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(4)The list referred to in sub-rule (1) shall be the list compiled by the committee appointed under section 59B and shall be approved by the Rules Committee from time.

3(1) The Chief Justice may with the recommendation of the Rules Committee  
O.45A r.3 prescribe and regulate the remuneration of mediators.

Mediator's  
fees

(2) Each party shall pay an equal share of the mediator's fees for the mandatory session at least seven days before the session provided that if none of the parties has paid the mediator's fees, the mediator shall cancel the mediation and immediately file with the Mediation Registrar a certificate of non-compliance.

(3) The mediator's fees for the mandatory session shall cover up to three hours of mediation.

(4) After the first three hours of mediation, the mediation may be continued if the parties and the mediator agree to do so and agree on the mediator's fees or hourly rate for additional time.

(5) If a mediator cancels a session under rule 6[2] of this order because a party fails to comply with rules 6[1] that party shall pay such cancellation fees as the mediator may direct.

(6) If a mediator cancels a session under rule 7[2] of this order because a party fails to attend within the first thirty minutes of the session, the party who fails to attend shall pay such cancellation fees as the mediator may direct.

(7) If all the parties fail to comply or attend, as the case may be, they shall pay the cancellation fees in equal shares.

(8) A party's failure to pay a share referred to in rule 3[2] or 3[7] shall not affect the liability of the other party or parties.

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(9) A party who has instituted a suit as a pauper with respect to the proceeding is not required to pay fees under this order.

4. A mediation shall take place within three (3) months after the referral order provided that time may be extended for further two (2) months having regard to the number of parties or the complexity of issues or with the consent of the parties which consent shall be filed in court.

O.45A r.4

Time for

O.45A r.5  
Mediation  
Hearing

5. The mediator shall, immediately after the referral order, fix a date for the mediation and shall, at least fourteen days before that date, serve on every party a notice in the prescribed form stating the place, time and date of the mediation session and that their attendance shall be mandatory. The mediator shall file a copy of the notice in court.

O.45A.r.6

Procedure  
before

6(1) Every party shall at least seven days before the mediation comply with following conditions:

- (a) Prepare a statement in the prescribed form and provide a copy of the same to every other party and the mediator.
- (b) The statement shall identify the factual and legal issues in dispute and briefly set out the position and interests of the party making the statement.
- c) Attach to the statement documents in support of the statement.

(2) Where it is not possible to conduct a mediation session because a party fails to comply with rule 6(1), the mediator shall, unless he is satisfied that such non-compliance is for good reason, cancel the session and immediately file with the Mediation Registrar a certificate of non-compliance. If the mediator is satisfied that such non-compliance is for good reason he shall reschedule another session consistent with the provisions of Rule 4.



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7. (1) The parties and their lawyers, where the parties are represented, shall attend the mediation unless the mediator orders otherwise. If the party is a company, corporation, partnership, government agency or entity other than an individual, an officer or director of sufficient rank with the authority from such entity to settle the suit or matter, shall attend.

O.45A r.7  
Attendance  
at mediation

(2) If it is not possible to conduct a scheduled mediation because a party fails to attend within the first thirty minutes of the time appointed for commencement of the mediation, the mediator shall cancel the mediation and immediately file with the Mediation Registrar a certificate of non-compliance.

8. At the commencement of the mediation, the mediator shall read and explain to the parties the statement of understanding on the role of the mediator in the prescribed form and shall require the parties to sign the form.

O45A r.8  
Role of  
mediator

Provided that where either or both of the parties fail to sign the form such failure shall not preclude the mediator from proceeding with the mediation.

9.(1) When a certificate of non-compliance is filed, the Mediation Registrar shall within 14 days summon the parties by notice specifying the time and place at which they are required to attend court for further directions in the suit.

O.45A r.9  
Non-

(2). Upon attendance by the parties the Mediation Registrar may make any of the following orders:

a) an order that further mediation shall take place on such terms as the court shall consider appropriate, or

b) an order that the suit shall proceed to trial, or

c) such order as to costs as is appropriate in the circumstances, or

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d) such other order as is appropriate in the circumstances.

10. All communication at a mediation, the mediator's notes and

O.45A r.10 records shall be confidential and shall be deemed to be  
Confidentiality without prejudice.  
& without  
prejudice

11. Within ten days after the mediation is concluded, the mediator shall give the  
O.45A. r.11 Mediation Registrar and the parties a report on the mediation in  
the prescribed form.

Mediator's

12. (1) If there is an agreement resolving some or all of the issues in dispute, it  
shall be signed by the parties and filed in court by the mediator  
O.45A r.12 within ten days after the mediation is concluded.

Agreement

(2) If the agreement settles the suit, the mediator shall file in court  
a notice to that effect and the court shall register the agreement  
and enter judgment in terms of the agreement.

(3) If no agreement is reached the suit shall be set down for hearing.

13.(1) With the consent of the parties the court may at any stage in the suit, make  
O.45A r.13 an order requiring the parties to participate in further mediation.

Consent order  
for additional

(2) The court may include any necessary directions in the order

O.45A r.14

14. No appeal shall lie against a judgment entered  
under rule 12(2).

No appeal against  
judgments

O.45A r.15

15. 1 (1) Anything said during a mediation session shall be  
inadmissible in any legal proceedings as evidence.

Inadmissibility  
in other court

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(2) Neither the mediator nor any person present at the mediation may be summoned, compelled or otherwise required to testify or to produce records or notes relating to the mediation in any proceedings before any court of law.

(3) A mediation shall not be taped nor any transcript of it be made.

(4) Any record of what took place at mediation shall not be admissible before any court of law, unless the parties agree in writing.

2. The provisions of this rule do not:

a) apply to a mediated agreement, or

b) prevent the admission of factual evidence relating to the cause of action that would be admissible notwithstanding sub rules (1) and (2) above.

O.45A  
r.16  
Protection

16. A mediator shall have the protection in the same manner and to the same extent as granted under section 6 of the Judicature Act to judges, magistrates and other persons acting judicially.

O.45A. r17  
Forms

17. Forms Nos. 1 to 7 of Appendix H shall be used for the respective purposes therein mentioned.

O.45A r.18  
Procedure

18. All applications under 59D of the Act shall be filed and served on the other party within 7 days of the filing.

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19. If there is no opposition to the agreement within seven days of service the agreement shall be registered as a judgement of the court.

20. If the application is opposed it shall be heard and determined within 21 days

21. Applications under this Order shall be made by notice of motion.

PROPOSED APPENDIX H- MEDIATION FORMS

**APPENDIX H**

**MEDIATION**

**No.1**

**NOTICE OF APPOINTMENT OF MEDIATOR**

**(Order 45A Rule 2 (2))**

**(Title )**

**TO: MEDIATOR**

- 1. I certify that I have consulted with the parties and the parties have chosen you as the mediator for the mediation as required by Rule 2(2).**
- 2. Please proceed to immediately fix a date for the mediation session.**

**Dated at this day of 20---**

**MEDIATION REGISTRAR**

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(Copied to the parties advocates)

No. 2

**NOTICE BY ASSIGNED MEDIATOR**

(Order 45A Rule 5)

(Title)

TO: 1.  
2.

I have been assigned to conduct the mediation session under Rule 1.

The mediation session will take place on (date), from (time) to (time), at (place)

Unless the court orders otherwise, you are required to attend this mediation session. If you have a lawyer representing you in this action, he or she is also required to attend.

You are required to file a statement of issues 7 days before the mediation session. (The prescribed form is attached).

When you attend the mediation session, you should bring with you any documents that you consider of central importance in the action. You should plan to remain throughout the scheduled time. If you need another person's approval before agreeing to a settlement, you should make arrangements before the mediation session to ensure you have ready telephone access to that person throughout the session even outside regular business hours.

**(NB. YOU MAY BE PENALISED UNDER RULE 6 (2) AND 7 (2) IF YOU FAIL TO FILE A STATEMENT OF ISSUES OR FAIL TO ATTEND THE MEDIATION SESSION).**

(Date) (Name, address, telephone number and fax number of mediator)

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Cc. Mediation Registrar

**No. 3**

**STATEMENT OF ISSUES**

**(Order 45A Rule 6)**

**(Title)**

**(To be provided to mediator and parties at least seven days before the mediation session)**

1. **Factual and legal issues in dispute**

**The plaintiff (or defendant) states that the following factual and legal issues are in dispute and remain to be resolved.**

**(Issues to be stated briefly and numbered consecutively)**

2. **What the party hopes to achieve.**

**(Brief summary)**

3. **Attached documents**

**Attached to this form are the following documents that the plaintiff (or defendant) considers of central importance in the action: (list)**

**(date)**

**(Party's signature)**

**(Name, address, telephone number and fax**

**number of advocate of party filing statement of issues, or of party)**

**(NOTE: When the plaintiff provides a copy of this form to the mediator, a copy of the pleadings shall also be included.**

**No. 4**

**STATEMENT OF UNDERSTANDING: THE ROLE OF THE MEDIATOR**

**(Order 45A Rule 8)**

**(title)**

1. **My name is ..... I have been assigned to mediate your case. I serve as a neutral party to help you resolve your dispute. I will not act as an advocate for any party.**

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2. This mediation is strictly confidential. No party shall be bound by anything said or done in mediation unless a settlement is reached. If a settlement is reached, the agreement shall be reduced to writing and, when signed, shall be binding upon all parties to the agreement. Each party agrees not to request that, I, the mediator testify against the other party, nor ask me or the other party to testify regarding statements made in mediation.

Please sign below to acknowledge that you have understood this statement as read and explained to you.

.....  
Plaintiff(s)

.....  
Defendant(s)

.....  
Plaintiff's Advocate  
Advocate

.....  
Defendant's

.....  
Mediator's Signature

.....  
Date

NO. 5

**CERTIFICATE OF NON-COMPLIANCE**

**(Order 45A Rule 9)**

**(title)**

**TO: MEDIATION REGISTRAR**





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No. 7

**MEDIATED AGREEMENT**

**(Order 45A Rule 12)**

**(title)**

**We, the undersigned parties to this case have agreed to settle our dispute as follows:**

**Dated the                      day of                      20----**

.....

**Plaintiff(s)**

.....

**Defendant(s)**

.....

**Plaintiff's Advocate**

.....

**Defendant's Advocate**

.....

**Mediator's Signature**

.....

**Mediator's Full Name**

**Code of Ethics for Mediators**

- 1. Objectives**
  - a. to provide guiding principles for Mediators' conduct;
  - b. to provide a means of protection for the public; and

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- c. to promote confidence in mediation as a process for resolving disputes

## **2. Definitions**

In this Model Code of Conduct:

“Mediation” means a process in which a neutral and impartial third person, a Mediator, assists disputing parties to reach a resolution of some or all their disputes. It is an informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.

“Mediator” means an impartial person whose role in mediation is to assist and encourage parties to a dispute to:

- a. communicate and negotiate in good faith with each other;
- b. identify and convey their interests to one another;
- c. assess risks;
- d. Consider possible settlement options;
- e. voluntarily resolve their dispute

The ultimate decision-making authority however rests solely with the parties.

“Impartial” means being and being seen as unbiased towards parties to a dispute, their interest and the options they present for settlement. “Impartiality” means freedom from favouritisms or bias in work, action, or appearance and includes a commitment to assist all parties, as opposed to any one individual.

“Conflict of interest” means direct or indirect financial or personal interests in the outcome of the dispute or any existing or past financial, business, professional, family or social relationship which is likely to affect impartiality or reasonably create an appearance of partiality or bias.

## **3. Mediation concepts**

Mediation is based on concepts of communication, negotiation, facilitation and problem solving that emphasize:

- a. self-determination;
- b. the needs and interest of the parties;
- c. fairness;

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- d. procedural flexibility;
- e. confidentiality;
- f. full disclosure

**4. Principle of self-determination**

- a. Self-determination is the right of parties in mediation to make their own voluntary, non-coerced decisions regarding the possible resolution of any issue in dispute which decisions are made without any improper influence. Self-determination is a fundamental principle of mediation which Mediators shall respect and encourage.
- b. Mediators shall provide information about their role in mediation before mediation commences, including the fact that authority for decision-making rests on the parties, not Mediators.
- c. Mediators shall not provide legal or technical advice to the parties.
- d. Mediators shall have the responsibility to advise unrepresented parties to obtain independent legal advice, where appropriate. Mediators also have the responsibility to advise parties of the need to consult other professionals to help parties make informed decisions.

**5. Impartiality**

- a). A Mediator shall serve only in those case matters in which he/she can remain impartial
- b). Mediator has a duty to remain impartial throughout the course of the mediation process
- c). If a Mediator becomes aware of his/her lack of impartiality, he/she shall immediately disclose the parties that he/she can no longer remain impartial and he/she shall withdraw from the mediation and another Mediator shall be appointed by the Court.

**6. Conflict of Interest**

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- a. Generally. A Mediator shall not mediate a matter that presents a clear or undisclosed conflict of interest. A conflict of interest arises when any relationship between the Mediator and the Mediation participants or the subject matter of the dispute compromises the Mediator's impartiality.
- b. Burden of disclosure. The burden of disclosure of any potential conflict of interest rests on the Mediator. Disclosure shall be made as soon as practical or as soon as the Mediator becomes aware of the interest or relationship giving rise to the potential conflict of interest.
- c. Effect of disclosure. After appropriate disclosure, the Mediator may serve if all parties agree. However, if conflict of interest clearly impairs a Mediator's impartiality, the Mediator shall withdraw regardless of express agreement of the parties
- d. Conflict during mediation. A Mediator shall not create a conflict of interest during the Mediation. During mediation a Mediator shall not provide any services that are not directly related to the mediation process.
- e. Professional relationship. Mediators of their associates or partners shall not establish a professional relationship with any of the parties in the matter related to the mediation which could give rise to a conflict of interest, without the consent of the parties.

**7. Commitment.**

Mediators' commitment is to the parties and the process and they shall not allow pressure or influence from any third parties to compromise the independence of the Mediator.

Information of the type which the mediator should disclose includes:

- a. having acted in any capacity for any of the parties

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- b. the mediator's firm (if applicable) having acted in any capacity for any of the parties;
- c. having any financial or other interest (whether direct or indirect) in any of the parties or in the subject matter or outcome of the mediation; or
- d. having any confidential information about any of the parties or in the subject matter of the mediation.

**8. Confidentiality**

- i) Mediators shall inform the parties of the confidential nature of mediation.
  
- ii) Mediators shall not disclose to anyone who is not a party to the mediation any information or documents that are exchanged for or during the mediation process except:
  - a) With the mediating parties' written consent
  
  - b) When ordered to do so by court or required to do so by law;
  
  - c) When the information/documentation discloses an actual or potential threat to human life or safety of any person if the information in question is not disclosed;
  
  - d) For the purposes of preparing any report or summary that is required to be prepared by Mediators; or
  
  - e) When the information/documentation is non-identifiable, (unless all the parties otherwise authorize identification) and is used for research, statistical, accreditation or educational purposes and is limited only to what is required to achieve these purposes

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- f) The Mediator wishes to seek guidance in confidence on any ethical or other serious question arising out of the mediation.
  
- iii) If Mediators hold private sessions (breakout meetings or caucuses) with a party, they shall discuss the nature of such sessions with all parties prior to commencing such sessions. In particular Mediators shall inform parties of any limits of confidentiality applicable to information disclosed during private sessions.
  
- iv) Mediators shall maintain confidentiality in the storage and disposal of mediation notes, records and files.

**9. Commitment and availability**

Before accepting an appointment, a Mediator must be satisfied that he/she has time available to ensure that the mediation can proceed in an expeditious manner.

**10. Quality of the process**

- i) Mediators shall make reasonable efforts to ensure the parties understand the mediation process before mediation commences.
  
- ii) Mediators have a duty to ensure that they conduct a process which provides the parties with opportunity to participate in the mediation and which encourages respect among the parties.
  
- iii) Mediators shall inform parties to a dispute that mediation is only effective when the parties with full authority to settle are in attendance and when they are willing to consider options for their settlement.
  
- iv) Mediators have an obligation to acquire and maintain professional skills and abilities required to uphold the quality of the mediation process.

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- v) Misrepresentation prohibited: A Mediator shall not intentionally or knowingly misrepresent any material fact or circumstance in the course of conducting mediation.
- vi) **Postponement or cancellation:** If for any reason a party is unable to freely exercise self-determination, a Mediator shall cancel or postpone a mediation
- vii) Gifts and solicitation: A Mediator shall neither give nor accept a gift or favour, loan or other item of value in any mediation process. During the mediation process, a Mediator shall not solicit or otherwise attempt to procure future professional services or accept any offers made for such services.
- viii) **Demeanour:** A Mediator shall be patient, dignified and courteous during the mediation process
- ix) **Integrity and impartiality:** A mediator shall not accept any engagement, provide any service, or perform any act that would compromise the Mediator's integrity or impartiality.

## 11. Advertising

Mediators may not advertise nor offer services to parties, clients or potential clients:

- a) Mediators shall refrain from guaranteeing settlement or promising specific results.
- b) Mediators shall provide accurate information about their education background, mediation training and experience and other ADR skills to the Court and the parties in any written material and in any oral explanation of the same.

## 12. Agreement to Mediate

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Mediators shall ensure before the mediation commences that the parties understand the terms of mediation whether or not they are contained in a court order, written agreement or contact to mediate, which terms shall include but not be limited to the following:

- a) Confidentiality of communications and documents;
- b) The right of the Mediator and parties to terminate or suspend mediation; and
- c) The fact that the mediator is not compellable as a witness in court or other proceedings by any parties to the mediation.

**13. Parties' agreement**

The Mediator will act in accordance with the Court order or direction or agreement (whether written or oral) made between the parties in relation to the mediation ("the mediation Agreement") (except where to do so would cause a breach of this code) and will use his/her best endeavours to ensure that the mediation proceeds in accordance with such terms.

**14. Termination or suspension of mediation**

i) Mediators shall withdraw from mediation for the reason referred to in paragraph 5 iii) and 6 iii). The Mediator will withdraw from the mediation if he/she:

- a) Is in breach of this code; or
- b) Is required by the parties to do something which would be in material breach of this code.

ii) Mediators may suspend or terminate the mediation if requested



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by one or more of the parties to the mediation. Mediators may suspend mediation if in their opinion:

- a. the process is likely to prejudice one or more of the parties;
  - b. one or more of the parties is using the process inappropriately;
  - c. one or more of the parties is delaying the process to the detriment of another party or parties
  - d. the mediation process is detrimental to one or more of the parties or the Mediator;
  - e. it appears that a party is not acting in good faith; or
  - f. there are other reasons that are or appear to be counterproductive to the process.
- iii) The Mediator may withdraw from the mediation at his/her own discretion if:
- a) Any of the parties is acting in breach of the Court Order or direction or the Mediation Agreement
  - b) Any of the parties, in the Mediator's opinion, is acting in an unconscionable or criminal manner;
  - c) The Mediator decides that continuing the mediation is unlikely to result in a settlement; or
  - d) Any of the parties alleges that the Mediator is in material breach of this Code.
- iv) Mediators shall terminate the mediation if the conditions referred to

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in 13 (iii) are not rectified. However, this shall not be done without first giving any defaulting party a reasonable opportunity to rectify the default as appropriate.

15. Other conduct of mediation

Nothing in this Model Code of Conduct replaces, supersedes or alienates ethical standards and codes which may be imposed or additionally imposed upon any Mediator by virtue of the Mediator's professional calling.

16. Professional competence

A Mediator shall decline an appointment, withdraw, or request appropriate assistance when the facts and circumstances of the case are beyond the Mediator's skill or experience.

4.2 IMPLEMENTATION

Based on the extensive research on the practice of ADR in other jurisdictions, it was unanimously agreed that we should opt for the Canadian experience which was simple, practical and cost effective.

We now turn to how the scheme will be implemented.

*Awareness Workshops*

This can be achieved through:

- a. The media.
- b. The Law Society of Kenya can educate its members through the Continuous Legal Education program.
- c. The Chartered Institute of Arbitration can conduct seminars and lunch talks to various institutions and professional bodies.
- d. FIDA Kenya has embarked on promoting the goals of ADR to its members.
- e. Awareness workshops for the judiciary would be conducted.

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f. The University of Nairobi can enhance the practical training of future mediators. The faculty of law has in fact introduced a course on ADR.

g. *The Pilot Scheme*

A pilot scheme would have to be implemented on a trial basis. The finer details are being worked out. However it is proposed that trained mediators will be conducting the actual mediation sessions in the cities and selected towns across the country. The pilot scheme may run for a number of months to identify the teething problems of court mandated mediation. This will only take place after the amendments have been effected to the Civil Procedure Rules.

Research was undertaken on the pilot schemes in other jurisdictions. We particularly looked at the pilot schemes that were set up in Britain. Most of the research was internet based.

*The Leeds Combined Court Centre Mediation Scheme*

A report was prepared for the Lord Chancellor's Department on the operation of the scheme between the periods 1 July 2000 to 31 August 2001 by the Barbara College Leeds Metropolitan University September 2001.

The following are the highlights of the report.

a) *Costs of the Scheme*

a. The users did not consider the cost prohibitive. The fees for a half day mediation ranged from £ 250 to 650 plus VAT and £ 1,600 for accommodation. Parties thought that the mediation had saved them on the total potential cost of resolving the dispute.

b) *Evaluation and Feedback of the Scheme*

Feedback from the scheme was based on short questionnaires obtained from the participants. The success rate of matters settled through mediation was 57 %.

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We observed that in Britain, unlike Canada, mediation is court annexed and not mandated by the rules like in Ontario, Canada. This resulted in fewer cases than in Canada being settled through mediation.

One of the important aspects in contributing to the success of the mediation process was the availability of information. Inadequate information was found to contribute to the failure of a mediated settlement.

*Adequate information exchange must be encouraged if our homegrown pilot scheme is to succeed.*

*The Central London County Court Pilot Mediation Scheme*

This has been dealt with earlier.

The evaluation report (earlier mentioned) by Professor Hazel Genn (see the Arbitration Journal Vol. 67 No. 1 February 2001 at page 109). This was the first scheme in Britain and was established by the judges in 1996 for non-family civil disputes with a value of over £ 3,000. This sum was raised to £ 5,000 or higher

The evaluation report was based on:

- a. data collected from hundreds of court files of mediated and non-mediated cases;
- b. observation of mediation sessions.

*Demand*

The scheme's demand was low- a dismal 5 % throughout its life. Demand was virtually non-existent in personal injury cases. However mediation was popular among the business community. The lack of demand was mainly attributed to ignorance of mediation in the legal profession and lack of experience.

*Outcomes*

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62% of cases that went to mediation were settled. Parties were more ready to discount their claims to reach a mediated settlement.

***Cost***

The mediation fee was £ 100 per party. Parties are responsible for their own costs. Some of the recommendations that emerged from the scheme were:

- a. Improve demand for mediation. Lawyers had a greater role to play to popularize the method.
- b. Training of mediators
- c. Quality control of mediators.
- d. Accountability and ethics of mediators.

We found that the above two schemes would guide us in setting up our own pilot scheme.

***Evaluation of the Ontario Mandatory Mediation Program***

The evaluation exercise involved the participation of lawyers, mediators litigants and court officials. It covered a period of 23 months. In fact the evaluation was undertaken by an independent party. In our case we have proposed that consultant be contracted to carry out the evaluation exercise.

***4.2.1 Implementing Authority***

The courts would be the implementing authority. We are all optimistic that the Rules Committee will rise to the occasion and amend our civil procedure rules to introduce effective case management which will amplify the success of the pilot scheme of court mandated mediation.

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The writer is a member of two bar-bench committee where he has spearheaded the introduction of alternative dispute resolution mechanisms in the draft practice directions.

Without proper case management, the success of the intended court mandated mediation pilot scheme might be in jeopardy.

One of the crucial aspects that the implementing authority has to consider is how the cases are to be selected for mediation.

This may initially voluntary or the pilot scheme rules can make it mandatory for all new cases filed after the commencement of the pilot scheme rules.

The Commercial Court Division (Mediation Pilot Project) Rules, 2003 was enacted in Uganda and made it mandatory under Rule 7 for each party to indicate if it consents or opposes mediation.<sup>29</sup>

#### *4.2.2 Centres for Mediation*

The cost implication is of utmost importance. We recommend that 3 centres be set up for the evaluation of the pilot scheme. They will be based in the cities of Nairobi, Mombasa and Kisumu. A total of 50 trained mediators should be drawn from each city; 30 from Nairobi and 10 each from the other cities.

Nairobi should take the lion share on account of the various court divisions.

The scheme of course cannot take off until we have the 50 trained mediators in place.

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<sup>29</sup> Rule 7 applied to new cases, backlog cases and references to mediation. The scheme was implemented at the Commercial Court. In our case, we expect the scheme to be implemented in all the civil and commercial divisions of our high court.

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It is expected that each mediator should handle at most 4 cases per month. This means that 2,400 cases will be handled if the scheme runs for a year. This will form the basis for evaluation of the scheme.

***4.2.3 Venues***

In the London scheme, the venue is in the court precincts when the mandatory three hour mediation would take place in the evenings.

We appreciate that the courts in Kenya may lack the space to provide the mediation.

There are two possibilities:

- a. Set aside some court chambers or courts for mediations to take place from 2.30 till 5.30 pm.
- b. The trained mediators can offer their offices for free during the life of the pilot scheme. It is expected that they will be trained for free and will undertake to take up at least 4 cases per month and offer their offices for the sessions as payback for the training costs expended.

***4.2.4 Fees***

We recommend that the fees as set out in the draft Rule 3 (1) be paid to the mediator for each mediation session. The Canadian system is cost effective and thus inspired our draft. The pilot scheme is expected to be donor funded as no party would want to expend money on mediation after court fees have already been paid. However each party to the mediation will be responsible for its advocate's fees.

***4.2.5 Steering Committee***

It is crucial to constitute a steering committee whose function will be to oversee the implementation, coordination and eventual evaluation of the pilot scheme.

The steering committee will also maintain a list of trained mediators who will be the initial core of the mediators who will participate in the pilot scheme.

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It may be meeting bi-monthly to evaluate the pilot scheme with the assistance of an independent evaluator.

The committee can comprise the following members:

- a. A judge who will chair it. It is recommended that the judge who will chair it should have a bias towards mediation. His role is crucial as he will be the point man for the judiciary and will also promote the scheme in the judiciary. He should be supported by a Chief Magistrate in promoting and overseeing the pilot scheme. Once again the Chief Magistrate must have training in mediation.
- b. A representative from the Ministry of Justice/ The Attorney General's Chambers.
- c. Four representatives of the ADR Task Force that drew up the rules. Each of the representatives must represent one of the professional bodies that constituted the ADR Task Force.

The terms of reference of the steering committee can be defined. As they will be expected to monitor the pilot scheme in conjunction with an independent evaluator (mentioned below) a sitting allowance and traveling allowance should be considered. In addition accommodation provisions must be taken into consideration.

*Awareness Campaign*

The steering committee will be expected to come up with a plan of action aimed at the successful implementation of the pilot scheme.

The steering committee must also launch the scheme through the following means:

- a. Posters to advertise the scheme in court.



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- b. Leaflets that can be distributed to interested parties and in particular the Law Society of Kenya, which can advertise the scheme through its newsletter.
- c. Newspaper and media advertisement.
- d. A launch party at which all the stakeholders will be invited.

*Mediation Secretariat*

One of the mandates of the steering committee will be to eventually consider the establishment of a Mediation Secretariat. The Mediation Secretariat once set up is expected to exercise the following functions and powers:

1. Be the accrediting body for mediators. It will set up the standards for practicing mediators who will have to adhere to the prescribed code of ethics. As the accrediting body it will maintain a list of trained mediators.
2. Promote the practice and training of mediators in the country.
3. Recommend on the fees to be charged by mediators.
4. Advise on the level of indemnity insurance for the mediators.

*Independent Evaluator*

It is recommended that the steering committee should employ the contractual services of an independent evaluator who will be mandated to evaluate the scheme and eventually submit its report at the end of the scheme to the steering committee.

**5.0 CONCLUSION**

***Court Mandated Mediation- the Final Solution to Expeditious Disposal of cases: Allen Waiyaki Gichuhi***

Ladies and Gentlemen, I pray that I have aptly demonstrated the urgent need for mediation in Kenya. The success of the intended pilot scheme rests in our hands. Let us not make the mistakes that manifested the English system which was mainly due to resistance and apathy by the lawyers in England. We should rather emulate the successes of the Canadian experience which substantially led to the substantial eradication of the perennial backlog of cases.

The pilot scheme will determine the viability of a court mandated mediation in Kenya.

We shall now conclude with the immortal words of Lord Denning L.J in the celebrated case of **Nyali Ltd v A.G**<sup>30</sup> :

*“It is recognition that common law cannot be applied in a foreign land without considerable qualification. Just as with the English Oak so with the English Common Law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to the other folk. These offshoots must be cut away. In this far of lands the people must have a law which they understand and which they will respect. The common law cannot fulfill this rule except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task. I trust that they will not fail therein.”*

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<sup>30</sup> [1955] 1 ALL ER 646

*Emerging Perspectives And Challenges In Dispute Resolution: Kamau Karori*  
**EMERGING PERSPECTIVES AND CHALLENGES IN DISPUTE  
RESOLUTION**

*by* **KAMAU KARORI\***

## **1.0 INTRODUCTION**

- a) The last three or so years have seen global interest and focus on Africa.
- b) As the world turns to Africa for investments, there is an urgent need to establish and promote sustainable dispute resolution mechanisms.
- c) Disputes are an inescapable companion of money and investments.
- d) Already there is visible increase in demand for an effective and efficient means of resolving disputes between contracting parties and to protect investments.

## **2.0 WHY ARBITRATE**

A majority of the surveys conducted in the recent past including the paper prepared by The London School of International Arbitration on "*Choices in International Arbitration*", show that arbitration is still by far the most preferred and utilised method of dispute resolution.

Consumers of arbitration services identify the following as important factors influencing their choice of place of arbitration;

- a) choice of law governing the substance of the dispute,
- b) the seat of arbitration and **arbitration institution**.
- c) policies about arbitration.

## **2.1 RELUCTANT SPOUSE**

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\* The author is an advocate of the High Court of Kenya and a Fellow of Chartered Institute of Arbitrators.

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The obvious expectation was that with growth in foreign investment there would be corresponding growth in number of international arbitrations conducted in Africa. This is particularly so because of the obvious disadvantages of arbitrating away from the domicile of the dispute of the parties such as:

- a) The cost of transportation and putting up witnesses in foreign countries is prohibitive.
- b) logistical challenges relating to travel including the requirement for visas in certain instances.
- c) in some instances complications might arise in moving documents from the local country to a foreign country.

#### **2.1.1 Why Do Foreign Investors still Resist Submitting Their Disputes To Local Arbitration.**

##### *Reality Check*

- a. The unspoken reason for the reluctance is based on perceptions regarding local arbitrators and systems including the Courts.
- b. The perception as regards the government and the Courts is as follows:-
  - i. Perceived lack of respect by Courts for party autonomy. Willingness by courts to assume jurisdiction even in the face of arbitration clause. Is this real?
  - ii. Perception that Courts will favour local entities- "*bias*".
  - iii. Corruption- "**the elephant in the room**"-Are there sufficient safeguards?
  - iv. The bribery legislations considered.
  - v. Doubts regarding the **level of exposure and experience of arbitrators** in handling complex international disputes. The egg and chicken concept.

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- vi. Fear regarding the wrong or fluid interpretation of the concept of public policy.
  - vii. Apprehension regarding the right of appeal in our statutes.
  - viii. Perception of lack of sufficient number of arbitrators with the relevant knowledge and skills.
  - ix. The **lack of established jurisprudence** on arbitration which fuels uncertainty.
  - x. Absence of a cohesive and established regional arbitration centre - Do we need all these centres?
  - xi. Apprehension regarding the ease with which Courts can assume jurisdiction.
  - xii. Fear that the Government and powerful individuals will use the Courts to frustrate arbitration or enforcement procedure.
- c. The most feared entity is clearly the Courts. The perception being that the Courts act as the big brother in relation to arbitration. Is this true? Is the involvement of the Courts always bad?

#### **2.1.2 The Unwelcome Guest**

*Is interference by Court always unwelcome?*

The Courts are sometimes wrongly accused. No rational system of law can completely do away with the role of the courts. They are clearly useful in the following instances:-

- a) At the point of referral of the dispute to arbitration.
  - i. Appointment of arbitrators.
  - ii. Assistance in choice of law, location.
- b) During the arbitration process.
  - i. Interlocutory orders for discovery, security for costs
  - ii. Summoning of witnesses.

- iii. Production of documents.
- iv. Taking evidence.
- c) Post delivery of award in recognition and enforcement.
- d) Defence of public interests---controversial.'

### **3.0 FORMS OF COURT INTERFERENCE**

The general and desirable position though is that Courts should discourage parties from approaching it in matters referred to arbitration.

Forms of unwelcome interference include:-

- a. Insisting that some disputes be resolved by national courts. Here, Courts tend to interfere instead of supporting the arbitral process. This runs counter to the parties' intention.
- b. Failure to appoint/remove arbitrators in good time when there is no agreement, no institution or appointing authority.
- c. In some instances Courts decline to give effect to arbitration clauses by refusing to stay proceedings in Court under the guise that the Court has unlimited jurisdiction over all matters.

Fortunately, in Kenya, the courts are on the right track and have made numerous decisions upholding the sanctity of the right to arbitrate. In *Safaricom Limited vs. Ocean View Beach Hotel and 2 Others*<sup>1</sup>, the Court of Appeal stated that it was not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under Section 17(6) of the Arbitration Act of Kenya. It further held that the commercial court had no business acting against an Act of Parliament or ruling on a matter it was not competent to rule on.

Similarly, in *Anne Mumbi Hinga vs. Victoria Gatheru*<sup>2</sup>, the Court of Appeal criticized the High Court for entertaining various applications brought before it even when it was clear that the High Court had no jurisdiction.

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<sup>1</sup> Civil Application No. 327 of 2009.

<sup>2</sup> Civil Appeal No. 8 of 2009.

### 3.1 DELAY

To make this region attractive we must address the genuine reservations. In all the surveys, delay and costs have been cited as the key complaints in both domestic and international arbitration. In Kenya and in most developing countries, delay is attributable to among others:-

- (a) Absence of sufficient manpower.
- (b) Failure by Arbitrators to adopt procedures which will avoid delay.
- (c) Lack of legally recognised sanctions for delay occasioned by the Arbitrators.
- (d) One party failing to participate in the appointment of Arbitrator or raising unreasonable objections to the proposed Arbitrators.
- (e) Use of interim reliefs and applications to court as a device for procedural delay in some cases.
- (f) Delay at the enforcement and recognition stage.

In *National Oil Corporation v. Prisko Petroleum Network Limited*<sup>3</sup>, the Respondent refused to participate in the appointment of an arbitrator or the hearing. It did not file an application for setting aside the Award within three (3) months of notification and only waited to object to the recognition and enforcement of the Award on grounds of validity of the agreement and jurisdiction of the arbitrator.

The Court proceeded to examine the grounds for setting aside *vis a vis* the grounds upon which a Court would decline to enforce an Award and held that even where a party had failed to apply to set aside an Award under Section 35, it was still open to the same party to object to enforcement under Section 37 of the Act

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<sup>3</sup> Misc. No. 27 of 2014.

## **3.2 HUNTER-HUNTED**

### **3.2.1 *The Shifting Attitude***

Increase in the number of Judges in Kenya, removal of technical objections and emphasis on case management procedures have resulted in expeditious disposal of matters.

Courts are now able to resolve disputes in relatively short periods of time.

Court mandated arbitration and mediation has potential of reducing backlog.<sup>4</sup>

Courts may overtake arbitration in speed

### **3.2.2 *Capacity***

Disputes requiring arbitration are growing but the number of arbitrators has not been increasing at a level sufficient to match the increased workload. The few available arbitrators are likely to be overstretched.

In Kenya and Africa generally, the Advocates dealing with arbitrations are the same Advocates who appear in Court. Institutions lack capacity and finances to meet the increased demand for ADR locally and internationally.

The manner of appointment of arbitrators by the Institute in Kenya is based on the principal of fairness as opposed to expertise and/or knowledge of the aspect of contention. There is also a limited number of qualified and experienced arbitrators which translates to higher fees and delay in publishing awards.

### **3.2.3. *Under Siege?***

Shortcoming with regard to arbitrators and the governing institutions is however not unique to Kenya or Africa. In the London School of International 2013 survey<sup>5</sup>, 50% of the interviewees were disappointed with arbitrator performance. This was attributed to:-

- a) Bad decision/outcome.
- b) Excessive flexibility or failure to control the process.

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<sup>4</sup> The Fourways Junction case.

<sup>5</sup> The survey was in respect of arbitrations conducted in Europe, not Africa.



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- c) Poor reasoning in the award.
- d) Lack of arbitrator knowledge and expertise in the subject matter of the dispute.
- e) Arbitrator tardiness in rendering the award.
- f) Lack of independence.
- g) Bias.
- h) Awarding excessive fees - self enrichment?

**3.2.4 Risk of running on empty**

- a) Remuneration of Arbitrators-Is it reasonable?
- b) Exporting disputes to traditional arbitration centres. A sustainable solution?
- c) A chief complaint regarding escalation of costs of arbitration is attributable to the appointment of foreign Counsels to appear for the local parties in most instances on the instruction of the local party's local Counsel.

**4.0 WAY FORWARD**

It is now agreed that arbitration even with its challenges is still the way to go. The maladies can be cured as follows;

- a) Amendments to the Kenya Arbitration Act to provide the minimum qualifications before a person can be appointed an Arbitrator.
- b) The Institute can introduce a system of classifying members in bands based on the professional academic experience.
- c) The Institute can come up with a system of peer reviewing Awards without compromising the confidentiality or party autonomy.
- d) Creating and marketing one strong regional arbitration centre to attract foreign investors.

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- e) Establishing a balance between the independence and therefore neutrality of the arbitral process and the jurisdiction of national courts over the arbitral process.
  - i. In respect of applications to set aside and appeals, other than as agreed by the parties, the Courts can insist on a percentage of the Award being deposited in court to discourage frivolous applications.
  - ii. Legislative action should be taken to ensure that there is minimal Court interference.
  - iii. Continuous training of the performance of arbitrators so that high standards are maintained.
  - iv. Arbitrators should be empowered/encouraged to sanction parties engaged in deliberate delays with costs.
  - v. Push towards improper conduct by a party or its Advocate being punished.
- f) Arbitrators should encourage parties to engage in settlement negotiations thus reducing the issues for determination or resolving the dispute in its entirety.
- g) The Arbitration Act can be amended to provide for a non- refundable penalty to be paid by a party who does not appoint an arbitrator as per their agreement.
  - i. Costs allocation according to the result rather than leaving it to the parties to bear their own costs.
  - ii. Some institutions have followed the route of affiliation to existing institutions. Mauritius for instance borrows expertise from the London Court of International Arbitration (LCIA).
- h) Finding the most effective methods of expediting arbitration i.e:-
  - i. Identification by the Tribunal of the issues to be determined after constitution.

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- ii. Appointment of a sole arbitrator.
- iii. Limiting or excluding document production.
- iv. Use of witness statements as a substitute to oral evidence.
- v. Limited cross examination. Can it be dispensed with?
- vi. Sequential as opposed to simultaneous exchange of submissions.
- vii. Imposing time limits for oral submissions.
- viii. Predetermined time lines for delivery of Award.

*Overview Of The Adjudication Process In Kenya: Eng.V. Aharoni*  
**OVERVIEW OF THE ADJUDICATION PROCESS IN KENYA**

by **ENG.V. AHARONI\***

**ABSTRACT**

*Kenya's building and construction industry is growing at a fast rate due to the increasing investment in real estate and the progressive implementation of the Kenya Vision 2030. This industry is characterized by giant building and construction companies. Building and construction contracts are complex in nature, involving complex issues and multiple parties. In this regard, disputes emerge in the course of contract performance hence necessitating a development oriented dispute resolution mechanism. In this paper, the author examines adjudication as a viable Alternative Dispute Resolution mechanism for the building and construction industry. The paper traces the origin of adjudication and its entrenchment into the legal framework in Kenya. Further, the author critically evaluates the application of adjudication in disputes resolution vis-à-vis the court process; the merits and demerits as well as the adjudication procedure. The author also discusses the content and formalities of an adjudicator's decision and the enforcement thereof. Finally, the paper concludes by laying down the options available to an aggrieved party after the adjudication process.*

## **1.0 THE ORIGIN OF ADJUDICATION**

Internationally, adjudication can be traced from the United States of America and the United Kingdom. In the United States, the Dispute Adjudication Boards (DAB) evolved in 1960s and 70s due to complex Civil Engineering projects.<sup>1</sup> Adjudication as a concept emerged also in the UK in 1994 following the Latham

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\*IEK, ASCE FCI Arb, Chairman of the American Society of Civil Engineers Group in Kenya

<sup>1</sup> N C Maiketso, M J Maritz, 'Adjudication as an Alternative Dispute Resolution Method in the South African Construction Industry', *Journal of the South AFRICAN Institute of Engineering*, vol.54 no.2 Midrand 2012; Available at [http://www.scielo.org.za/scielo.php?pid=S1021-20192012000200007&script=sci\\_arttext](http://www.scielo.org.za/scielo.php?pid=S1021-20192012000200007&script=sci_arttext) ; see also Gaitskell, 'Trends in Construction Dispute Resolution', Paper based on Talks given to the society of Construction Arbitrators on 14<sup>th</sup> May 2005; and the Society of Construction law in London on 5<sup>th</sup> July 2005; available at <http://www.scl.org.uk/files/129-gaitskell.pdf> [August 19, 2014]

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Report<sup>2</sup>. Initially, Adjudication was designed by the World Bank to be utilized for small scale construction contracts whose value at the time was lower than US\$ 10 million. Currently, FIDIC has its own version (the Green Book) but it recommends the use of adjudication for projects whose value is US\$ 0.5 – 1 million.

In Kenya, the origin of the adjudication process dates back to the El-Nino aftermath in 1987/88, when the World Bank donated US\$ 100M for repair and reconstruction of projects, mainly roads. In order to clearly establish the application of adjudication in Kenya, the author shall briefly review the historic evolution of the Conditions of Contract published by the *Federation Internationale Des Ingenieurs – Conseils*.

## **2.0 THE HISTORY OF STANDARD FORMS OF CONDITIONS OF CONTRACT IN KENYA**

The early FIDIC documents in Kenya were the International forms of FIDIC. Over the years, Kenya gradually adopted the subsequent forms of FIDIC 2, 3, 4 and the 1999 FIDIC Rainbow (popularly known as FIDIC 5) for Civil Engineering Works.

Currently, in the building and construction industry, the Joint Building Council (JBC) standard forms such as Lump-Sum Contracts and Measured Works Contracts are used with some amendments from time to time.

These forms of contract are basically an agreement between an Employer and a Contractor, administered by an all-powerful “Engineer” (or “Architect” in case of a building contract).

## **2.1 THE ROLE OF THE ENGINEER UNDER THE CONTRACT (OR ARCHITECT IN A BUILDING CONTRACT)**

The Engineer or architect should be fair, just, reasonable and independent. He or she is required to administer the contract, ensure quality control, take

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<sup>2</sup> United Kingdom, *Constructing the Team-The Latham Report*. Final Report of the Government/Industry Review of the Procurement and Contractual Agreements in the UK Construction Industry, 1994; conducted by Sir Michael Latham. Notably, the report recommended adjudication as a mandatory dispute resolution mechanism. See “*The Latham Report and Its Aftermath*”, available at <http://ebooks.narotama.ac.id/files/Coulson%20on%20Construction%20Adjudication%20%282nd%20Edition%29/Chapter%201%20%20The%20Latham%20Report%20and%20its%20Aftermath.pdf> [August 19, 2014].

### *Overview Of The Adjudication Process In Kenya: Eng.V. Aharoni*

measurements, and approve periodic and final payment to the Contractor and resolve disputes arising from the contract.

Initially, the Engineer was appointed by an independent firm of Consulting Engineers. The consultants were independent but remunerated by the employer. The appointed Engineer was neutral, independent and fair to both parties. In 1980s, some of the Kenya's Government Ministries changed their policy and appointed one of their own Chief Officers as the Engineer. For instance, the Ministry of Public Works<sup>3</sup>, appointed the Chief Engineer Roads, the Ministry of Water appointed the Director of Water etc.

In such appointments, impartiality is highly compromised. In addition, there is a risk of stalling of projects and multiple arbitrations.

The World Bank, noting the above challenges when donating US\$ 100 Million to Kenya for the El Nino repairs required the inclusion of an adjudicator in the projects funded. The concept of adjudication developed and currently the FIDIC 1999 Contracts and the current JBC Contracts in Kenya include adjudication clauses.

Today, adjudication is also included as a term in construction contracts in Australia, New Zealand, Singapore and Malaysia. In Kenya, complex road projects, dams etc., adopt the 1999 edition of FIDIC which contains an automatic adjudication clause. Similarly, development projects funded by the World Bank, the European Union and JICA often adopt conditions of contract containing adjudication clauses.

### **3.0 THE LEGAL FRAMEWORK**

Currently, there is no specific legislation in Kenya in respect of adjudication. Adjudication is applied based on the adjudication clause in the main contract or agreement entered into by the parties. In the England however, adjudication is based on legislation under the Housing Grants, Construction and Regeneration Act 1996.

In Kenya the Chartered Institute of Arbitrators compiled the *Adjudication Rules* in October 2003. The Institute has prepared an Adjudication Bill which is in the process of being tabled in Parliament for approval for the enactment of an Adjudication Act. Currently, adjudication can only be utilised if it is included as term in the main contract or adopted from the CI Arb Adjudication Rules by mutual consent of the parties.

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<sup>3</sup> Currently the Ministry of Transport and Infrastructure.

### **3.1 APPOINTMENT OF THE ADJUDICATOR OR A THREE MAN TRIBUNAL**

Under section 14 of the CIArb Adjudication Rules, an adjudicator or a panel of adjudicators can be appointed as follows;

1. Appointment under the contract. The main contract bears an adjudication clause appointing or providing for the appointment of the adjudicator.
2. Subsequent to a dispute, the parties may appoint an Adjudicator by mutual consent, failing which the Contract should include an appointing agent such as the Chairman of the Chartered Institute of Arbitrators.
3. In more complex contracts, the adjudication is normally conducted by a Dispute Adjudication Board of three Members. Each party to the contract nominates one adjudicator. The two nominees choose their Chairman. The three adjudicators are then to act impartially under the rules set in the contract.
4. In most complex Contracts, the DAB is nominated at the onset of the project. It is a full term DAB and serves until the completion of the project. The DAB monitors the project, receives progress reports and participates in meetings even if no dispute arises. The advantage is that when a dispute occurs, they are in a position to resolve it expeditiously since they have background knowledge of the project and the origin of the dispute. They are remunerated monthly throughout the project. Their costs are mitigated by saving from the prevention of costly delays due to disputes, resolving issues promptly and facilitating faster completion of projects.

### **3.2 THE ADJUDICATION PROCESS**

The adjudication process is provided for under section 18 of the CIArb Adjudication Rules. Generally, the adjudication process involves a sequence of events. Throughout the process, the Adjudicator is the master of the process, unless otherwise agreed by the parties or stipulated in the contract. The following are the events in the adjudication process.

1. Before the adjudication (the claim becomes a dispute);
2. The notice of adjudication;

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3. The selection and appointment of an adjudicator;
4. The Referral;
5. The Defence;
6. During the Adjudication;
7. The Decision; Time Limit
8. After the Decision.

### **3.3 THE ADJUDICATOR'S DECISION**

The adjudicator's decision is provided for under section 20 and 23 of the CIArb Adjudication Rules. It should have the following;

1. Background information;
2. Definition of the points of Jurisdiction;
3. Schedule of Issues to be decided upon;
4. Clear Statement accepting or rejecting any matter or issue put forward;
5. Reasoned recommendation. The parties have the right to know the reasons for the decision.
6. Interest. If the adjudicator is conferred with powers to award interest, he can award either simple interest or compound interest. The CIArb Adjudication Rules recommend the awarding of simple interest.
7. Party to Party cost. Normally, each party bears his own cost. However, if given power by the adjudication clause, the adjudicator should award costs on the cost follows the event principle, that is to say, the loser pays the costs.

The three persons tribunal of adjudicators is of great value to projects as they contain representatives of both the Contractor and Employer capable of assessing the dispute from a critical point of view. The endeavor is for all members of the tribunals to agree and issue recommendations for resolution of disputes.



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However a dissenting opinion of a member can be published alongside the recommendation of the majority view. This rarely occurs because it devalues the process and is likely to lead to arbitration.

8. The Adjudicator's costs. Normally this is awarded on fifty -fifty basis by the Parties. However, if given power by the contract adjudication clause, then cost must follow the event.
9. The decision must be signed and dated by the Adjudicator before it becomes valid.

## **4.0 AFTER THE ADJUDICATOR'S DECISION**

The Adjudication Rules of the CIArb section 26 stipulates that the adjudicator may on his own initiative or at the request of either party correct the decision so as to remove any clerical mistake or error or ambiguity, provided that the initiative is taken or the request made within 14 days of the notification of the decision to the parties.

This is a notable difference between the adjudicator's decisions and the arbitrator's decision in that the adjudicator's decision must be implemented immediately, whether the party agree or not or whether he takes the process further to arbitration or perhaps to the court, hence the notion in adjudication, "Pay now, argue later".

## **4.1 GOING TO COURT**

### **4.1.1 ADR or Litigation?**

If the parties have not included an arbitration and/or adjudication clauses in their contract, it does not affect their ability to revert to any other ADR system, such as negotiation, mediation, expert determination etc. A contract in the construction industry does not affect the right of either party to resort to adjudication by mutual agreement or by involving a mutually accepted appointing authority.

However, the effect of there being no arbitration clause in a construction contract is that any appeal of an adjudicator's decision must be made in court. In every other contract which does not have an arbitration clause the legal proceedings in any dispute must revert to litigation.

## **4.2 ADVANTAGES AND DISADVANTAGES OF LITIGATION**

Court proceedings are the chief rival to arbitration and adjudication. The main advantage of the court process is that the judge is not remunerated by the parties and the use of the court room is responsibility of the state.

Secondly, the judgment given by the court is enforced by the court itself, whereas an arbitrator's award has to be transformed into a judgment before it can be enforced.

Thirdly, in court process, each case is heard and decided by a judge who is appointed because of his experience in analyzing and evaluating evidence and his knowledge of the law.

## **4.3 ADVANTAGES OF ADJUDICATION**

Adjudication has several advantages as opposed to litigation. Notably, whereas litigation is characterized with delays hence delayed justice, adjudication is expeditious hence timely justice for the parties. In addition, adjudication has the following advantages:

- a. Cost effective.
- b. Confidential.
- c. Flexible.
- d. Specific/expert knowledge of the subject matter.
- e. The adjudicator's decision is usually implemented immediately avoiding the wastage of costly project delays.
- f. The CIArb Arbitration Rules stipulate that the Adjudicator's recommendation be implemented immediately and remain in force until and unless it is overruled by Arbitration or Litigation. The English Housing Grants Construction and Regeneration Act 1996 contain this provision and the same provision is also incorporated into the proposed adjudication legislation by the Chartered Institute of Arbitrators (Kenya Branch).

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- g. If not accepted by any of the parties, the recommendation of the Adjudication Tribunal can still be submitted to Arbitration but this rarely happens.

**ENHANCING ACCESS TO JUSTICE IN KENYA THROUGH ADR:  
TOWARDS THE GLOBAL PLATFORM**

by **KYALO MBOBU**<sup>1\*</sup>

**ABSTRACT**

*The prospects are high in the country with individuals and corporate embracing ADR as a comparatively superior mechanism to litigation<sup>2</sup>. In light of the Constitution of Kenya, 2010<sup>3</sup> Kenya has shifted the plane towards promotion and enhancing alternative dispute resolution as a means of broadening access to justice. Various mechanisms, institutions and programs have been developed towards this end. The implementation is ongoing and various players have played an active role to achieve access to justice.*

*This paper explores the legal embodiments at the international and national level with regard to ADR as a component of access to justice. It takes a journey through Alternative Dispute Resolution in Kenya discussing history, funding, capacity of service providers, accessibility and awareness as determinants of service delivery from the perspective of ADR. It outlines the experience and challenges in Kenya and the challenges faced by the Institutions offering ADR in the country.*

*In conclusion, the paper advances the possible mechanisms of enhancing and broadening the use of ADR in the wider Kenyan societies for proper attainment of access to justice. It establishes that the future is promising for Kenya in achieving access to justice.*

**1.0 BACKGROUND**

In Kenya, the practice and concept of alternative dispute resolution has been existent since the pre-colonial time. Native communities adopted traditional dispute resolution methods in reaching settlement amongst the adversaries<sup>4</sup> on

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\*Author is an Advocate of the High Court, Certified Public Secretary and a Fellow of the Chartered Institute of Arbitrators.

<sup>2</sup> Dr. Kariuki Muigua, *Heralding a new dawn: Achieving justice through effective application of Alternative Dispute Resolution Mechanisms(ADR) in Kenya*: Chartered Institute of Arbitrators Journal Vol. 1, No. 1, 2013

<sup>3</sup> Article 159(2) and Article 48 of the Constitution

<sup>4</sup> See Dr Jacob Gakeri *Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR*” Dr. Jacob Gakeri, International Journal of Humanities and

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issues of land disputes. The practices in other communities in the country have been seldom used in the post colonialism period and their application limited to matters construed as not being repugnant to justice and morality. However, it is instructive to note that in *Republic vs Mohamed Abdow Mohamed*<sup>5</sup> the High Court allowed an application to discontinue a criminal case of murder on account of a traditional settlement reached between the families of the accused and the deceased respectively.

In Kenya, the transplantation of English law through the Orders-in-Council 1900 and 1907 saw the beginning of a new historical epoch in dispute resolution in colonial Kenya.<sup>6</sup> It heralded the demise of customary practices of dispute resolution. Arbitration was later re-introduced by the Arbitration Ordinance 1914 as an extrinsic concept. The Ordinance was based on the English Arbitration Act 1889 whose central feature was the absolute control of the arbitral process by courts of law. The English statute was amended in 1950 but retained the main provisions of its predecessor.

After independence, Kenya's parliament promulgated a 'new' Arbitration Act, Chapter 49 (now repealed). The Act was a carbon copy of the English Arbitration Act of 1950 and remained the operative statute until 1995 when the current Arbitration Act<sup>7</sup> was proclaimed. The current Arbitration Act is based on a Model of the United Nations Commission on International Trade Law (UNCITRAL) which was adopted in 1985 with a view to encouraging arbitration and processes that would have global recognition. United Nations came up with a model of a statute that has been adopted by many countries. The essence of the Act is that it provides for very broad party autonomy in fashioning the Arbitration process.<sup>8</sup> Noteworthy, none of the successive statutes ever made reference to customary arbitration or alternative dispute resolution mechanisms.<sup>9</sup>

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Social Science Vol. 1 No. 6; June 2011 p. 222 available online at <http://www.ijhssnet.com/journals/Vol.1.No.6:June.2011/25.pdf> (accessed on 4/4/2014)

<sup>5</sup> Criminal Case No. 86 of 2011. Even though this decision has caused debate, the learned judge gave effect to Article 159 of the Constitution, 2010

<sup>6</sup> See Jacob Gakeri, *supra*

<sup>7</sup> Arbitration Act, No. 4 of 1995 Cap 49 Laws of Kenya. (see also Jacob Gakeri, *supra*)

<sup>8</sup> - See more at: <http://kenyalawresourcecenter.blogspot.com/2011/07/arbitration-agreement.html#sthash.YyjbkuYC.dpuf>

<sup>9</sup> 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration

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Access to justice is emerging as an important modern day legal topic not only in the national arena but also in the international arena. In international law, access to justice norms have provided rights to individuals both within the context of rights but also outside the classical human rights regime of famous multilateral treaties such as the International Covenant on Civil and Political Rights. Though it is still the subject of debate in terms of its meaning, extent and effect, the concept of access to justice revolves around the ease with which the ordinary citizens are able to make use of the law, legal institutions and procedures to sort out their disputes as well ensure the protection and enjoyment of their rights<sup>10</sup>. It should have the ultimate goal of affecting peoples' everyday experience of justice. Where the right of access is guaranteed, the avenue through which it will be exercised must also provide justice and the overall result should be improved quality of everyday justice for all members of the community.

## **2.0 LEGAL FRAMEWORK FOR ADR IN KENYA**

The Alternative Dispute Resolution mechanisms in Kenya is regulated and provided for in the Constitution of Kenya 2010<sup>11</sup>, Arbitration Act (Cap 49 Laws of Kenya), Nairobi Centre for International Arbitration Act 2013, Appellate Jurisdictions Act, Civil Procedure Act(Cap 21 Laws of Kenya) and the Arbitration Rules . The legislative framework provides for a foundation and environment for the existence of ADR in the Country. The Constitution<sup>12</sup>, for instance outlines broad based principles of enhancing access to justice.

Internationally, Article 33 of the Charter of the United Nations outlines the conflict management mechanisms in no unclear terms and is the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they States or individuals. It outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to. It provides that the parties to any dispute shall, first of all seek a solution by negotiation, enquiry,

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and ADR” Dr. Jacob Gakeri, International Journal of Humanities and Social Science Vol. 1 No. 6; June2011

<sup>10</sup> Draft Report on Audit of Laws on Access to Justice, KLRC (March, 2012). See also FIDA Kenya, “*The Peoples Version Informal Justice System*” (2011), which defines access to justice as ‘*the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards*’; “Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution”, A Report by the Kenya Civil Society Strengthening Program, 2011

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mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice

### **3.0 CONCLUSION**

Alternative Dispute Resolution through the Kenyan experience proves to be the most viable and attractive to all citizens. With increased awareness and formulation of policies towards realization global standards, the commercial and harmonious co-existence among individuals and corporate is assured. Introduction of online Dispute Resolution platforms, funding of both state and non-state actors: collaboration with other local, regional and global partners, provision of variety ADR options amongst others would help us beat the challenges. The epic shall be to achieve access to justice in its broadest nature and attain global standards.

**APPLICABILITY OF TRADITIONAL DISPUTE RESOLUTION MECHANISMS IN CRIMINAL CASES IN KENYA: CASE STUDY OF REPUBLIC V MOHAMED ABDOW MOHAMED [2013] EKL R**

*by* FRANCIS KARIUKI\*

**ABSTRACT**

*The Constitution of Kenya 2010 provides a firm basis for the application of traditional dispute resolution mechanisms. It presents courts and tribunals with the opportunity to apply these mechanisms in a wide array of disputes, including in criminal cases. Traditional dispute resolution systems are anchored and firmly embedded in the customs and traditions of communities and thus being part and parcel of their lives. These processes have been applied by communities in settling disputes of a civil and criminal nature. Consequently, they have the potential to enhance access to justice and strengthen adherence to the rule of law as they promote social justice and foster harmonious co-existence.*

*Using the court decision in Republic v Mohamed Abdow Mohamed [2013] eKLR, as a springboard, the paper examines the applicability and/or appropriateness of traditional dispute resolution mechanisms in settling criminal cases. The paper argues that the scope of Article 159 of the Constitution is wide enough to apply to criminal matters. It also puts forth the argument that whereas courts aim at punishing the accused persons thus retributive in nature, traditional justice system proffers restorative justice. It is argued that by encouraging restorative justice in criminal matters, these mechanisms can promote social cohesiveness, peace, social justice and development. The paper also discusses the challenges and prospects in the use of traditional dispute resolution mechanisms in Kenya.*

**1.0 AN OVERVIEW OF DECISION IN REPUBLIC V MOHAMED ABDOW MOHAMED [2013] EKL R<sup>1</sup>**

In this case Mohamed Abdow Mohamed was charged with the murder of Osman Ali Abdi. The offence was jointly committed with others not before court

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\*LLB, LLM, MCI Arb and Lecturer at Strathmore University Law School.

<sup>1</sup> Criminal Case No. 86 of 2011, High Court at Nairobi.



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on 19<sup>th</sup> October, 2011 at Eastleigh, 10<sup>th</sup> Street in the Starehe District within Nairobi County. When arraigned in court, the accused pleaded not guilty to the charge. The trial was set to commence on 26<sup>th</sup> March 2012. However, on the hearing day, Mr. Kimanthi for the State informed the court that Mr. Bonyo, Counsel on record holding brief for the deceased's family had written to the Director of Public Prosecutions (DPP) requesting that the charge be withdrawn on account of a settlement reached between the families of the accused and the deceased respectively. On the instructions of the DPP, Mr. Kimanthi made an oral application in court to have the matter marked as settled citing Article 159 of the Constitution. The court allowed the application and discharged the accused citing Article 157 of the Constitution under which the DPP is mandated to exercise state powers of prosecution and in that exercise may discontinue at any stage criminal proceedings against any person. According to the court, the ends of justice would be met by allowing the application rather than disallowing it.

## **2.0 UNDERSTANDING TRADITIONAL DISPUTE RESOLUTION MECHANISMS**

Traditional dispute resolution mechanisms can be described as all those mechanisms that local or rural communities or peoples have applied in managing disputes/conflicts since time immemorial and which have passed from one generation to the other. Such mechanisms have been described using different tags. Terms such as African, community, traditional, non-formal, informal, customary, indigenous and non-state justice systems, are often used interchangeably in describing localized and cultural-specific dispute resolution mechanisms. They are embedded in the culture and customs of communities especially those found in rural areas.<sup>2</sup> As such they vary from community to community. Although they predate colonial times, they have undergone some changes over time as a consequence of the introduction of Western legal systems in Africa. In Kenya, traditional dispute resolution mechanisms have remained resilient despite the onslaught by the formal legal system. Communities continue to apply remnants of traditional justice systems in settling disputes in Kenya. At the heart of these mechanisms is the fact that they are embedded in African customary laws. They are thus anchored on traditional norms and values of

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<sup>2</sup> Access to Justice in Sub-Saharan Africa, Penal Reform International 2000, p.11, available at <http://www.gsdr.org/docs/open/SSAJ4.pdf>, accessed on 01/04/2014.

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Africans, and hence part and parcel of the social fabric. It is partly because of this reason, that the colonial administration in Kenya retained aspects of African customary law within the legal framework to ensure social ordering and stability.<sup>3</sup> Consequently, in recognizing African customary law subject to the repugnancy clauses, the colonial powers were also implicitly recognizing and validating traditional justice systems. However, as argued later in this paper, subjecting customary law to the repugnancy clause has also contributed greatly to the destruction of traditional justice systems.

An underlying theme common to most traditional dispute resolution mechanisms is the fact that they are concerned with the restoration of relationships, peace-building and parties' interests. They are not concerned with the allocation of rights between disputants.<sup>4</sup> They therefore seek, to a great extent, to promote restorative justice as opposed to retributive justice. In this regard, Allot notes that the central theme with traditional dispute resolution mechanisms is "*the notion of reconciliation or the restoration of harmony*" in the community. He asserts that harmony cannot be realized "*unless the parties are satisfied that justice has been done.*"<sup>5</sup> On his part Elechi posits that traditional justice systems apply restorative and transformative principles in conflict resolution. This is so because the victims, offenders and the entire community are involved and participate in the definition of harm and in the search for a solution acceptable to all stakeholders.<sup>6</sup> To firm up this view Zehr notes that restorative justice focuses more on the needs of victims, communities and offenders. Decisions were community oriented with little damage and nobody was excluded.<sup>7</sup>

Oricho observes that traditions and values undergirding traditional dispute resolution mechanisms were restorative in handling criminal offenders.

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<sup>3</sup> Section 3, Judicature Act, Cap.8.

<sup>4</sup> ICJ-Kenya Report, "Interface between Formal and Informal Justice Systems in Kenya," (ICJ, 2011), p. 32.

<sup>5</sup> A.N. Allott, "African Law," in Derrett, J.D *An Introduction to Legal Systems*, (Sweet & Maxwell, 1968), pp. 131-156.

<sup>6</sup> O.Oko Elechi, "Human Rights and the African Indigenous Justice System," A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada.

<sup>7</sup> H. Zehr, *The Little Book of Restorative Justice*, (PA, Good Books, 2002).

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Restorative justice prefers collaborative and inclusive processes and outcomes that are mutually agreed upon rather than imposed. Offenders must acknowledge and take responsibility for their actions to receive proper punishment, healing and forgiveness. The results of the justice system must repair broken relationships and address the causes of the crime while meeting the needs of victims-offenders and communities. The Council of elders was a plausible alternative in building trust and eventually improving damaged relationships.<sup>8</sup> As indicated by Johnstone, restorative justice represents a major paradigm shift to crime and justice and how society relates to offenders. In the Council of Elders' system of leadership each member had a sense of belonging and the right to be heard. The term commonly used by the community was 'WE' not 'I' as in individualistic communities.<sup>9</sup>

Some of the salient features of traditional justice systems are that: they view the problem as that of the whole community or group; they put emphasis on reconciliation and restoration of social harmony; traditional arbitrators are community members appointed on the basis of status or lineage; there is a high degree of public participation ; customary law is one of the factors considered in reaching a compromise; the rules of evidence and procedure are flexible; there is no legal representation; the process is voluntary and the decision is based on agreement; penalties are restorative; enforcement of decisions is secured through social pressure or fear of curses; the decision is confirmed through rituals aiming at reintegration; and like cases need not be treated alike.<sup>10</sup>

Traditional dispute resolution mechanisms have been neglected and treated with utter contempt by formal courts. This is as a result of the notion that African culture is inferior, archaic and uncivilized compared to western cultures. However, due to challenges in accessing justice in courts particularly by the poor, TDRM are now beginning to gain currency. The myriad challenges encountered in litigation are pushing people back to TDR. Litigation is often regarded as slow, expensive and cumbersome.

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<sup>8</sup> D. O. Oricho, "Understanding the traditional Council of Elders and restorative justice in conflict transformation," available at <http://www.sjweb.info/sjs/pjnew/pjshow.cfm?PubTextID=8449>, accessed on 01/04/2014.

<sup>9</sup> *Ibid*; J. Gerry, *Restorative Justice: Ideas, Values, Debates*, (Willan Publishing, 2002).

<sup>10</sup> *Ibid*, p. 22.

### 3.0 TRADITIONAL DISPUTE RESOLUTION MECHANISMS AND CUSTOMARY LAW

As already pointed out, traditional justice systems are anchored and firmly embedded in the traditions, customs and practices of local communities. Their success in promoting access to justice therefore depends to a great extent to the protection and recognition of African customary law. This is in consonance with the view among structural-functionalist anthropologists that patterns of social ordering determine the justice systems in any given society.<sup>11</sup>

Despite the strong linkages and interconnections between customary law and traditional conflict management systems, customary law has been suppressed, undermined and destroyed and its remnants denied recognition within the legal system for a long time in Kenya. Colonialism set the stage for this state of affairs by imposing English legal system on Africans who were governed by African customary law. At independence therefore, the country adopted the formal justice system. The prevailing view then was that traditional governance institutions including dispute resolution mechanisms would be an obstacle to development and that as the country modernized they would die. This was not to be because traditional governance institutions have continued to coexist with formal legal systems. This has created a plurality or duality of justice systems which persists even today under which customary law is seen as being inferior 'law'. Some have attributed the resilience of traditional justice systems to the inefficiency, ineffectiveness or inadequacy of the formal justice systems in reaching to local communities. It is also said that formal justice systems are also inappropriate in handling disputes that are not rule-oriented and that are communal in nature.

Under the current legal framework, customary law is one of the sources of law applicable in Kenya so long as it is not inconsistent with the Constitution.<sup>12</sup> Additionally, the Constitution recognizes the culture and heritage of the Kenyan people and enjoins the State to promote the cultural diversity of the Kenyan

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<sup>11</sup> ICJ-Kenya Report, "Interface between Formal and Informal Justice Systems in Kenya," *Op. cit.*

<sup>12</sup> Article 2(4), Constitution of Kenya.

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people.<sup>13</sup> Further, the Judicature Act also lists customary law as a source of law, applicable in civil disputes where one or more of the parties are subject to it or affected by it and so long as it is not repugnant to justice and morality.<sup>14</sup> Although, customary law is one of the applicable sources of law in Kenya, its application is limited to certain civil and not criminal matters. Thus, the Magistrates' Court's Act restricts the civil cases to which African customary law may apply. These matters are 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.<sup>15</sup> In one case, *Kamanza Chiwaya v Tsuma* the High Court held that the above list of claims under customary law was exhaustive and excludes claims in tort or contract in agreement.<sup>16</sup> It is my contention that under the Constitution of Kenya 2010 customary law can apply to a very wide array of civil and criminal cases.<sup>17</sup>

Customary law has not been fully codified. And so because the main source of information about customary law is tradition, customary has to be proved through expert witnesses, literature and past court decisions.<sup>18</sup>

In some jurisdictions, courts have understood customary law liberally as including not only 'official' customary law, the version codified or recorded by colonial masters, but also 'living' customary law. 'Living' customary law is that which grows out of processes of adaptation and change that reflect the voices, views and struggles of a range of different interests and sectors in rural society.<sup>19</sup> It changes with times, from one generation to the other. Williams and Fayker

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<sup>13</sup> *Ibid*, Article 11.

<sup>14</sup> Section 3(2), Judicature Act, Cap. 8.

<sup>15</sup> Section 2, Magistrates' Court's Act, Cap. 10.

<sup>16</sup> Unreported High Court Civil Appeal No.6 of 1970.

<sup>17</sup> This is however subject to Articles 2(4) and 159(3) of the Constitution 2010.

<sup>18</sup> P. Kameri-Mbote & M. Aketch, "Justice Sector and the Rule of Law," (Open Society Foundations, 2011), p.174.

<sup>19</sup> J. Williams & H.A. Fayker, "Women's Access to Justice-Evidence, Custom and Equality,"

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describes 'living' customary law as the development of law by those who live it.<sup>20</sup> The custom would have to be established, and the duty of the court would be to develop it in line with the Bill of Rights.<sup>21</sup> Because of the fluidity of customary law, its legislation may hamper its development. This means that since traditional dispute resolution mechanisms are based on customs and traditions, legislating on these mechanisms may lead to inflexibility, underdevelopment and destruction of African customary law.

Because of the low place that customary law occupies in the Kenyan legal system, traditional dispute resolution mechanisms have been subjected to the litmus test of repugnancy or being contrary to the Bill of Rights for instance if they are discriminatory, gender biased or against the rules of natural justice. In *R v Mohamed Abdow*, traditional dispute resolution mechanisms were given effect to by the court because it was in accordance with the customs of the two families concerned. Parties felt that justice could only be done and seen to be done through the application of customary law. This is what could foster social cohesiveness, coexistence and communal living. It is evident then that fixation to legal formalism and dogma that castigates customary or traditional norms that aids in access to justice should be abandoned. Traditional dispute resolution mechanisms are a part of the culture of the Kenyan people and that is why they chose to have them included in the Constitution.

#### **4.0 LEGAL FRAMEWORK FOR TRADITIONAL DISPUTE RESOLUTION MECHANISMS**

Apart from being anchored on customary law, which is one of the sources of law in Kenya, traditional justice systems are explicitly recognized within formal laws. There are numerous provisions in our laws that allow for the application of traditional dispute resolution mechanisms.<sup>22</sup> Article 159 (2) (c) of the Constitution

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Perspectives Issues 3 (2013), 12-14.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> See generally the Penal Code Cap. 63, Criminal Procedure Code Cap. 75, National Cohesion and Integration Act No. 12 of 2008 etc

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entreats the courts and tribunals in exercising judicial authority to be guided by *inter alia*, the principle that:

*“alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3);”*

However, traditional dispute resolution mechanisms are not to be applied 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.<sup>23</sup>

One of the principles of the land policy in Kenya is that land is to be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in a way that encourages communities to settle land disputes through recognised local community initiatives consistent with the Constitution.<sup>24</sup> In addition, one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.<sup>25</sup> Further, the Marriage Act 2014 provides that parties to a customary marriage may undergo through a process of conciliation or customary dispute resolution mechanisms before the court may determine a petition for the dissolution of the marriage.<sup>26</sup>

It remains to be seen how traditional dispute resolution mechanisms will be operationalised in the different areas where they are applicable. Some important aspects about TDRM to reflect upon are the following. Firstly, although each of the ethnic tribes in Kenya has conflict management mechanisms, they are not yet documented. This would be necessary since even for customary law it has to be proved before a court of law. Secondly, what criteria should be used in deciding whether certain matters not expressly provided for in the Constitution are amenable to TDRM, for example in criminal cases? Fourthly, does the Constitution limit the application of TDRM to certain matters, for example civil

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<sup>23</sup> Article 159(3), Constitution of Kenya 2010.

<sup>24</sup> *Ibid*, Article 60(1) (g).

<sup>25</sup> *Ibid*, Article 67(2) (f). See also Section 5(1) (f) of the National Land Commission Act, Act No. 5D of 2012.

<sup>26</sup> Section 68(1), Marriage Act 2014.



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matters? Fifthly, is there need for traditional customary courts that run parallel to the normal court system? Sixthly, if we are to have, traditional courts who would head them? And lastly, can there be legal representation before a traditional court or forum? Is it judges, magistrates, local leaders, traditional elders, chiefs, family heads, men or women? These are some of the issues that need reflection upon as we move towards implementing the constitutional provisions touching on TDRM.

## **5.0 TRADITIONAL DISPUTE RESOLUTION MECHANISMS AND ACCESS TO JUSTICE**

Access to justice is a broad concept that is not easy to define. It may refer to a situation where people in need of help, find effective solutions available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution.<sup>27</sup> It could also refer to judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue. Further, it refers to a fair and equitable legal framework that protects human rights and ensures delivery of justice.<sup>28</sup> It also refers to the opening up of formal systems and structures of the law to disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.<sup>29</sup>

Access to justice could also include the use of informal dispute resolution mechanisms such as Alternative Dispute Resolution (ADR) mechanisms and traditional dispute resolution mechanisms, to bring justice closer to the people and make it more affordable. This is the sense in which access to justice is discussed in this paper. Courts have said that access to justice includes the

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<sup>27</sup> M.T. Ladan, "Access to Justice as a Human Right under the Ecowas Community Law," available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07->, (accessed on 19/04/2014).

<sup>28</sup> *Ibid.*

<sup>29</sup> Global Alliance against Traffic in Women (GAATW), Available at <http://www.gaatw.org/atj/> (accessed on 09/03/ 2014).



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enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.<sup>30</sup>

Courts have also opined that the right of access to justice in the Constitution requires us to look beyond the dry letter of the law, and that it is a reaction to and a protection against legal formalism and dogmatism.<sup>31</sup> Article 48 must be located within the Constitutional imperative that recognizes the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized for it is within the legal processes that the rights and fundamental freedoms are realized. Article 48 therefore invites the court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law.

Recognition of traditional dispute resolution mechanisms in the Constitution must be understood within this context. TDRM are accessible, flexible and inexpensive. They do not employ technicalities as complex as courts do and use local languages that are easily understood by parties. There is no need for legal representation under TDRM. They therefore have the potential to enhance access to justice. Article 48 of the Constitution enjoins the State to ensure access to justice for all persons and if any fee is required, it shall be reasonable and not impede access to justice. Judicial authority is to be exercised to ensure justice is done to all irrespective of status; justice is not delayed and that justice is administered without undue regard to procedural technicalities. TDRM brings about reconciliation and harmony meaning that justice is done to all. It also ensures the expeditious resolution of disputes without regard to technicalities.

To ensure access to justice through TDRM a number of issues have to be reflected upon. First, should TDRM be formalized or should they operate as stand-alone traditional customary courts? Formalization of TDRM may mean

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<sup>30</sup> *Dry Associates Limited v Capital Markets Authority & another* Nairobi Petition No. 358 of 2011 (Unreported).

<sup>31</sup> *Kenya Bus Service Ltd & another v. Minister of Transport & 2 others* [2012] eKLR.

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that these mechanisms will suffer from the challenges that have impeded access to justice within formal systems. However, formalizing may engender compliance with the Bill of Rights. The advantage of having traditional customary courts is that they may allow for the application of customary law by experts in customs and traditions from different communities. However, where traditional courts are in place they have, *inter alia*, been blamed for undermining women rights by focusing on the powers of traditional leaders, thus perpetuating patriarchy.

In the *Mohamed case* the Court and the DPP's office accepted the settlement as suggested by the parties themselves. If TDRMs are to be integrated in the court system, the process must give the parties autonomy in the resolution of their dispute. Nonetheless, in this case the court would have to determine whether the alleged custom is unconstitutional, repugnant to justice and morality or contravenes the Bill of Rights. In satisfying itself that the constitutional threshold is met, the court needs to consider the constitution in totality. The judge must bear in mind that the Constitution is to be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.<sup>32</sup>

Secondly, what matters should be amenable for resolution through traditional justice systems? The legal framework in Kenya allows for limited application of customary law in civil cases.<sup>33</sup> The implication is that traditional justice systems may apply in civil cases subject to those limitations. However, in criminal cases the view has been that traditional justice systems cannot apply to criminal cases. This is not entirely correct as will be demonstrated shortly. But in implementing traditional justice systems so as to enhance access to justice, what kind of criminal cases, when (for example, at what stage of the criminal justice process) and how are the mechanisms to be applied? This is not expressly provided in the law and some form of regulation would be appropriate in applying traditional justice systems in criminal cases. The writer suggests how traditional justice systems are to be regulated in subsequent parts of this paper.

## **5.1 RESTORATIVE JUSTICE VIS-À-VIS RETRIBUTIVE JUSTICE**

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<sup>32</sup> Article 259, Constitution 2010.

<sup>33</sup> Section 2, Magistrates' Court's Act, Cap. 10.

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Traditional dispute resolution mechanisms bring about restorative rather than retributive justice. Retributive justice postulates that punishment for a crime is acceptable as long as it is proportionate to the harm caused.<sup>34</sup> Retributive justice is premised on three principles. Firstly, those who commit certain kinds of wrongful acts, mostly serious crimes, morally deserve to suffer a proportionate punishment. Secondly, that it is intrinsically and morally good for someone to mete out punishment to offenders. And thirdly, that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers.<sup>35</sup> The idea of retributive justice has played a dominant role in theorizing about punishment over the past few decades.<sup>36</sup>

**Restorative processes bring those harmed by crime or conflict, and those responsible for the harm, into communication, enabling everyone affected by a particular incident to play a part in repairing the harm and finding a positive way forward.** In criminal justice, restorative processes give victims the chance to tell offenders the real impact of their crime, to get answers to their questions, and an apology. Restorative justice holds offenders to account for what they have done, helps them understand the real impact of what they've done, to take responsibility and make amends.<sup>37</sup>

Restorative justice has, at its heart, the notion of victim and offender coming face-to-face as part of a restorative process for those involved. It is a process for resolving crime that focuses on redressing the harm done to victims, while holding offenders to account and engaging the community in the resolution of conflict. The main goal of restorative justice is to provide opportunities for both victims and offenders to be involved in finding ways to hold the offender accountable for their offending and, as far as possible, repair the harm caused to the victim and community.<sup>38</sup>

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<sup>34</sup> W. Alec, "Retributive Justice", *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), Edward N. Zalta (ed.), forthcoming URL = <http://plato.stanford.edu/archives/fall2014/entries/justice-retributive/>.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Available at [http://www.restorativejustice.org.uk/what\\_is\\_restorative\\_justice](http://www.restorativejustice.org.uk/what_is_restorative_justice), (accessed on 08/08/2014).

<sup>38</sup> Available at <http://www.justice.govt.nz/policy/criminal-justice/restorative-justice>, (accessed on

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The principles that undergird restorative justice process are, *inter alia*, that: they are voluntary; flexible; responsive; both the victim and offender participate fully and are informed; offender is held accountable and they ensure the emotional and physical safety of participants.<sup>39</sup> Traditional justice systems are grounded on these principles. Reconciliation of parties and restoration of social harmony are at the heart of traditional justice systems.<sup>40</sup> Even the penalties under TDRM, usually focus on compensation or restitution so as to restore the *status quo* but not to punish the offender.<sup>41</sup> However, sometimes traditional justice forums may order the restitution of, for example, twice the number of the stolen goods to their owner, “especially when the offender has been caught in *flagrante delicto*” and fines may be levied. Imprisonment has never existed as a penalty for any offence. Corporal punishment, however, has been and continues to be administered by a number of traditional systems in Africa – almost invariably on juvenile offenders, but never on women or girls.

Formal justice systems have for long focused and overemphasized on meting out some form of punishment for wrongdoing. Virtually all the statutes that regulate law and order in Kenya prescribe a punishment for every kind of offence committed. The rationale has always been that those who commit wrongful acts should be punished even if punishing them would serve no other purpose than just punishing them. In this regard, the formal justice system promotes retributive justice and does not seek to bring affected parties together to resolve the issues affecting them. The State does not deal adequately with the issues that may arise in the post-punishment period. Its focus is short term and fails to deal with the concerns of the victims, their families and larger community. This partly explains why our prisons are full of prisoners, some serving sentences over petty offences

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08/08/2014).

<sup>39</sup> *Ibid*

<sup>40</sup> See the *Abunzi* or Mediation Committees in Rwanda which settle disputes, reconcile the conflicting parties and restore harmony in the community, available at <http://www.rwandapedia.rw/explore/abunzi>, (accessed on 08/08/2014).

<sup>41</sup> S. Merry, “The Social Organisation of Mediation in Non-industrialised Societies: Implications for Informal Community Justice in America,” in Abel (ed) *The Politics of Informal Justice*, Vol. 2 (1982), pp. 17-45.

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which would have been resolved through the application of traditional justice systems where offenders would be reconciled with the victims.<sup>42</sup>

Although, a crime is an act against the state and therefore the state has the right to determine what punishment suffices for a particular crime, some form of balancing between restorative and retributive justice is necessary. It has to be realized that tax payers' money is expended in keeping prisoners in prisons. In addition, punishments meted out by courts may harden criminals and thus lower their deterrent role.. Imprisonment also tends to exclude prisoners from their communities, and after imprisonment they are seen as outcasts in the society. Formal justice systems do not have appropriate mechanisms for integrating offenders into the society as does traditional justice systems. They also ignore the victim because the focus is on meting out a punishment.

Existing literature reveals that African indigenous justice systems offer opportunities for dialogue amongst the victim, the offender, their families and friends, and the community.<sup>43</sup> Traditional justice systems are thus inclusive systems that address the interests of all parties to the conflict. The social solidarity and humane emphasis of the system is reflected in the treatment of offenders. Offenders are encouraged to understand and accept responsibility for their actions. Accountability may result in some discomfort to the offender, but not so harsh as to degenerate into further antagonism and animosity, thereby further alienating the offender.<sup>44</sup>

## **5.2 RESOLUTION VIS-À-VIS SETTLEMENT**

Traditional justice mechanisms are resolution as opposed to settlement mechanisms. In resolution parties cooperate and mutually agree to find a solution to a conflict. Parties dig dipper into the conflict to identify the causes of the conflict and aim at a post-conflict relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the

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<sup>42</sup> The draft Victim Protection Bill, 2014 seeks to include the aspect of the victim in the whole judicial criminal system.

<sup>43</sup> O.Oko Elechi, "Human Rights and the African Indigenous Justice System," A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada, p.2.

<sup>44</sup> *Ibid*, p.3.

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conflict and rejects power based out-comes.<sup>45</sup> This explains why traditional justice systems would proffer restorative justice rather than retributive justice. Because traditional justice systems address the underlying causes of a conflict and other factors that may have a bearing on successful reconciliation including the history of the relationship between the parties, they may be the most appropriate in dealing with historical land injustices.<sup>46</sup>

In the *Mohammed case*, a resolution of the conflict could not be feasible during the court process. It is only after the two families had sat down for negotiations and reconciliation, and blood money paid that '*each of the parties was satisfied and felt adequately compensated.*' Application of traditional justice systems in this case addressed the root causes of the dispute. Parties felt satisfied with the outcome and relationships between the two families were fostered. An appeal on the matter could not be forthcoming.

A settlement on the other hand, is what is obtained in court. Disputing in courts and in arbitration, is in the nature of a contest where the party with the best advocate, powerful and most resourceful prevails. It is also a zero-sum game in the sense that one party must lose. Further, it is superficial in nature and fails to address all the cause of a conflict. This is because it focuses on the parties in court, it is individualistic trying to allocate rights to the parties before it. The underlying causes of the conflict are ignored and the likelihood of the dispute flaring up again are high. Because a settlement focuses on interest as opposed to needs, that are inherent in all human beings, it fails to deal with the parties' relationships, emotions, perceptions and attitudes. Parties may therefore feel dissatisfied and appeal the outcome of a settlement and to a higher court.<sup>47</sup>

This is in contrast to traditional justice systems which aim at consensus building in conflict management. They do not isolate the dispute from its overall social context but rather through that context the indigenous tribunals seek a solution which maximizes social harmony or abates group conflict or tension.

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<sup>45</sup> J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria," *Cardozo Journal of Conflict Resolution*, Vol.7; D. Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland," *Journal of Peace Research*, Vol. 32, No. 2 (May, 1995), pp. 152-153; M. Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006).

<sup>46</sup> Penal Reform International, 2000, *Op. cit*, p.28.

<sup>47</sup> *Ibid.*

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Reconciliation of parties through compromise and consensus characterizes outcomes in traditional justice systems, whereas litigation and arbitration manifests a 'winner-take-all' attitude."<sup>48</sup> Therefore, traditional justice systems ensure a "win-win" outcome for both parties.

## **6.0 TRADITIONAL DISPUTE RESOLUTION MECHANISMS AND HUMAN RIGHTS**

One of the main criticisms against traditional justice systems is that they are incapable of respecting and protecting the fundamental rights and freedoms of suspects and parties before such forums. A common view has been that they do not uphold human rights standards and they are repugnant to justice and morality. This thinking is premised on a wrong assumption that pre-colonial Kenya did not have a concept of human rights. But the question always asked is whose morality is it that is used to calibrate African customary law against? It is my submission that this was the dominant view during colonialism, and was meant to present Western culture as a dominant culture and African customary law as an inferior one.

It is this perception against traditional justice systems that has contributed to the resistance that they have faced in law and policy. But traditional justice systems existed even before formal justice systems. They are not younger or inferior. Traditional justice processes and procedures respect and protect the rights and interests of victims, offenders, and the community.<sup>49</sup> They are the dominant justice systems because they are accessible and understood by local people. 50 years after independence, it has been realized that formal justice systems have failed to deliver justice to Kenyans. It is for this reason that the Constitution has provided for the use of traditional justice systems in enhancing access to justice.

The basis for recognition and protection of human rights and freedoms is to preserve the dignity of individuals and communities, promotion of social justice and the realization of the potential of all human beings. The Bill of Rights is an

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<sup>48</sup> B. Upendra, 'People's Law in India: the Hindu Society,' in M. Chiba ed., *Asian Indigenous Law* (KPI, 1986), p.227.

<sup>49</sup> O.Oko Elechi, "Human Rights and the African Indigenous Justice System," A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada, p.23.



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integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.<sup>50</sup> The rights and freedoms in the Constitution are not to be limited except in the ways contemplated by the Constitution. However, there are certain rights and fundamental freedoms that cannot be limited by law or any other means. These rights are: - freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus*.<sup>51</sup> Traditional justice systems must therefore not impose sentences that contravene these rights and freedoms. However, some of the sentences under traditional justice systems like beatings, banishment from communities are also inflicted under formal justice systems. Some practices under traditional justice systems such as oath administration, performance of curses and exorcising may be against human rights.

However, and contrary to the dominant view that African justice systems are anti-human rights, Elechi asserts that the restoration of rights, dignity, interests and wellbeing of victims, offenders, and the entire community has been the goal of African justice systems. It is argued that there are greater opportunities for the achievement of justice under traditional justice systems than with African state criminal justice systems because they seek to empower victims, offenders and the community at large. Being a victim-centered justice system, traditional dispute resolution mechanisms prioritize the safety of victims and assist them to restore their injury, lost property, sense of security and dignity. Again, the victims' needs for information, validation, social support, and vindication are given prominence in African justice systems.<sup>52</sup> Formal justice lack such facilities and resources.

## **7.0 APPLICATION OF TDRM IN LAND DISPUTES AND CUSTOMARY MARRIAGE DISPUTES**

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<sup>50</sup> Article 19(1) of the Constitution of Kenya, 2010.

<sup>51</sup> *Ibid*, Article 25.

<sup>52</sup> O.Oko Elechi, "Human Rights and the African Indigenous Justice System," A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada.



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In recognition of the volatile nature of land disputes in Kenya, the Constitution requires the National Land Commission to encourage the application of traditional dispute resolution mechanisms in land conflicts.<sup>53</sup> Land disputes are some of the common matters that courts handle in Kenya. And due to the sensitivity of the land question in Kenya, traditional dispute resolution mechanisms would be the most amenable. This is because they would foster relationships and coexistence even after the dispute settlement. Property rights are held within a social context, and within most customary systems; persons define themselves by reference to the lands they come from.<sup>54</sup> Principles pertaining to land policy in Kenya encourage the use of local initiatives to settle land disputes at the community level.<sup>55</sup>

Already courts have begun encouraging disputants to use traditional dispute resolution mechanisms in land disputes. In the case of *Lubaru M'imanyara v Daniel Murungi*<sup>56</sup>, parties filed a consent seeking to have the dispute referred to the **Njuri Ncheke Council of Laare** Division, Meru County. The court citing Articles 60(1) (g) and 159(2) (c) of the Constitution referred the dispute to the Njuri Ncheke noting that it was consistent with the Constitution. The consent reached by the parties was adopted as an order of the court. In *Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others* [2012] Makau J discussed how the *Njuri Njeke* council of elders works. The council of elders receives complaints and summons parties who are free to submit to their jurisdiction or not. The parties have to consent to submit before *Njuri Ncheke* council. Once a party refuses to submit to the *Njuri Ncheke* council of elders the council is supposed to refer the complainant to court of law. The court went on to state that in cases of deadlock in the case before *Njuri Ncheke* there are mechanisms of breaking such a deadlock, such mechanisms are performance of *Kithiri* curse or *Nthenge* oath. Apart from the *Njuri Ncheke*, the courts have recognized the role of the *Gasa* Council of Elders of Northern Kenya in dealing with land disputes.<sup>57</sup>

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<sup>53</sup> Article 67(2) (f).

<sup>54</sup> S. Farran, "Law, Land, Development and Narrative: A Case Study from the South Pacific" 6 *International Journal of Law in Context*, (2010), pp. 1-21, at 1.

<sup>55</sup> Article 60, *Constitution of Kenya*, 2010.

<sup>56</sup> Miscellaneous Application No. 77 of 2012. [2013] eKLR.

<sup>57</sup> *Seth Michael Kaseme v Selina K. Ade*, Civil Appeal 25 of 2012; [2013]eKLR.

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In relation to customary marriage disputes, the Marriage Act 2014 provides for the application of traditional dispute resolution mechanisms over such disputes. According to Section 68(1) thereof;

*“The parties to marriage celebrated under Part V may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of marriage.”*

However, customary dispute resolution must conform to the principles of the Constitution.<sup>58</sup> Further, the person who takes parties through the process of conciliation or traditional dispute resolution must prepare a report of the process for the court.<sup>59</sup> Here, it seems that courts will play a supervisory role over customary dispute resolution processes to ensure compliance with the Constitution. But, who will be the dispute resolver in such an instance? Is it a traditional leader, a counsellor, family member, village elder or chief? Application of TDRM in customary marriages may contribute to enhanced access to justice by parties in customary marriages since most disputes touching on marriages have had to be handled by courts. Courts have not given customary law the similar treatment as statutory law, and thus parties to customary unions could not have justice there.

## **8.0 APPLICABILITY OF TDRM IN CRIMINAL CASES IN KENYA**

Traditional justice systems or principles akin to those underpinning traditional justice system are already being applied in the formal criminal justice framework in Kenya. For example, Section 176 of the Criminal Procedure Code courts are urged to promote reconciliation. The said section provides as follows:

*“In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.”<sup>60</sup>*

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<sup>58</sup> Section 68(2), *Marriage Act*, 2014.

<sup>59</sup> *Ibid*, section 68(3).

<sup>60</sup> Section 176, *Criminal Procedure Code*, Cap. 75.

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Under the National Cohesion and Integration Act, the National Cohesion and Integration Commission is established to, *inter alia*, promote, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya.<sup>61</sup> To realize this, the Commission is mandated with the task of promoting arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms so as to secure and enhance ethnic and racial harmony and peace.<sup>62</sup> The Commission is also enjoined to take all reasonable endeavors to conciliate a complaint referred to it under section 49 and by a written notice it can require any person to attend before it to discuss the subject matter of the complaint and any documents specified in the notice.<sup>63</sup> It is instructive to note that under the Act a complaint may include hate speech, which is an offence under the Act. As such, traditional justice systems have not only been applied to misdemeanors but also to felonies. Under the Penal Code, reconciliation is employed in resolving misdemeanors.

In Rwanda, the *Abunzi* has jurisdiction over criminal cases involving the removal or displacement of land terminals and plots; any form of devastation of crops by animals and destruction of crops when the value of crops ravaged or destroyed do not exceed three million Rwandan francs or US \$4,762; theft of crops when the value of crops does not exceed three million Rwandan francs and larceny (theft) when the value of the stolen object does not exceed three million Rwandan francs.<sup>64</sup>

Because of their strong connection to customs, unwritten laws, traditions and practices,<sup>65</sup> traditional justice systems may be most appropriate in dealing with certain matters of a criminal nature. Most traditional justice systems had procedures for dealing with serious criminal offences such as murder.<sup>66</sup> However,

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<sup>61</sup> Section 25(1), National Cohesion and Integration Act, No. 12 of 2008.

<sup>62</sup> *Ibid*, Section 25(2) (g).

<sup>63</sup> *Ibid*, Section 51.

<sup>64</sup> Available at <http://www.rwandapedia.rw/explore/abunzi>. (accessed on 09/08/2014).

<sup>65</sup> ICJ-Kenya Report, "Interface between Formal and Informal Justice Systems in Kenya," *Op. cit*, p.32.

<sup>66</sup> *Ibid*, p.33.

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in their application they must 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.<sup>67</sup> If traditional justice systems are in compliance with Article 159(3), there is no bar to their applicability in criminal cases where the parties have so consented to their use. Judicial authority emanates from the people and where courts and tribunals should allow people to resolve their disputes in the most appropriate forum they so choose. In *Ndeto Kimomo v Kavoi Musumba*<sup>68</sup> Law V.P stated as follows on a similar point:-

*"In my view, when the parties agreed to have their case decided by taking of an oath, they were in effect withdrawing the appeal from the High Court's jurisdiction and invoking another jurisdiction, involving procedures such as slaughtering a goat, beyond the control of the High Court. The parties were of course entitled to have their case decided in any lawful way they wished, by consent."*

The court went on to give an example of what would happen in such an instance:

*"...For instance, to take an extreme and improbable example, it would be open to the parties to an appeal to say to the Judge "we have decided that this appeal is to be decided by the toss of a coin." The Judge would surely say: "In that case, you must either withdraw this appeal, or come before me in due course with a consent order that the appeal be allowed or dismissed." It would be wrong in principle, in my view, for the Judge to adjudicate on whether the coin had been properly tossed or not, and to decide the appeal on that basis."*

It has also be held that where parties have resorted to traditional dispute resolution procedures consensually, courts should not participate in those procedures, or dispose of a case as a result of the outcome of those procedures, in the absence of a clear and unambiguous agreement as to that result on which a consent decree can be based. Such proceedings would be a nullity. This is what informed the office of the DPP in the *Mohammed case* to accept the request made

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<sup>67</sup> Article 159(3), *Constitution of Kenya*, 2010.

<sup>68</sup> [1977] KLR 170.

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by the parties to have the case withdrawn and marked as settled.<sup>69</sup> The role of the court in such a circumstance as presented by the Mohamed case is to consider the three issues provided in Article 159(3). If satisfied that the issues have not been contravened then it shall allow such an application to pass. Additionally, under Article 159 courts can promote the usage of TDRMs on their own motion by asking parties to go and try settling the case using TDRMs.

Since the Constitution does not limit the application of TDRMs to any area of the law, the important issue would be to determine when, how and under what circumstances they can apply in criminal cases or whether there is a need to come up with a standard for cases that would be settled under TDRMs. Courts have expressed the view that traditional dispute resolution mechanisms are applicable to misdemeanors and not felonies.<sup>70</sup> However, in the *Mohamed case* we see TDRMs being applied effectively to a murder case, a capital offence. It is also imperative to assess the point at which courts can encourage parties to try TDRMs. In one case the judge held that a conviction could not be quashed on the basis that there had been reconciliations.<sup>71</sup> In my view, where it is evident that parties have amicably resolved a matter after a conviction, a court should be ready to quash to quash a conviction. Judicial authority emanates from the people and in the exercise of this authority courts are enjoined not to give undue regard to legal technicalities. Moreover, upholding a conviction after reconciliation would not foster social cohesion and harmony which is at the heart of traditional dispute resolution mechanisms.

In *Stephen Kipruto Cheboi & 2 others v R*<sup>72</sup> five (5) appellants were convicted of offences emanating from their conduct when they assaulted three (3) complainants. All the appellants and complainants were brothers. However, the conviction of two of the appellants was quashed on 10<sup>th</sup> May 2012 on the basis that traditional dispute resolution mechanisms were applicable to misdemeanors and not felonies. This is why it is only 3 Appellants who appealed against conviction in the present case arguing that there had been discussions yielding in an amicable resolution of the dispute. The resolution was aimed at voluntarily

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<sup>69</sup> Article 157 of the Constitution, confers on the DPP State powers of prosecution under which he may discontinue at any stage criminal proceedings against any person.

<sup>70</sup> *Stephen Kipruto Cheboi & 2 others v R* [2014]eKLR.

<sup>71</sup> *Ibid.*

<sup>72</sup> [2014] eKLR.

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enhancing family cohesion and reconciliation. The reconciliation meeting had been attended by 89 persons from Nerkwō-Katee village. An affidavit was filed by one of the complainants asking court to quash convictions. Court held that a conviction could stand even though there had been reconciliation.

Under the TDRMs each community has its own sentences that they mete out on offenders. Some of these sentences include curses, oaths, beatings, being exorcised etc. In the *Mohammed case*, the two families reached a settlement that was recognized by the court as valid. The settlement entailed payment of blood money in form of camels, sheep and other livestock. The essence of blood money was to 'compensate' for the blood lost of the deceased person. Communities that still allow for caning of offenders would be stopped by the courts from carrying out such a sentence does not satisfy the three stage test. Corporal punishment does not have any place in the Constitution as it infringes on the right to human dignity. Therefore, each community needs to re-evaluate the sentences that they give out on offenders and ensure compliance with the three stage test in totality. Failure to do so would lead to it falling on its fours.

## **9.0 PROSPECTS AND CHALLENGES IN USE OF TDRM**

Traditional justice systems have the potential to promote access to justice. They are especially accessible by the rural poor and the illiterate. They are flexible, voluntary, foster relationships, proffer restorative justice and give some level of autonomy to the parties in the process. Traditional dispute resolution mechanisms are therefore, the most appropriate in relation to certain disputes such as family disputes and land disputes where the parties' relationships after the conflict situation need to be restored. It is my submission that even in criminal cases the Constitution does not expressly prohibit their application. Further, looking at the Constitution broadly, traditional justice systems can co-exist with formal justice systems so as to promote the values and principles in the Constitution particularly access to justice.

Application of traditional justice systems will also reduce the backlog of cases in courts since most disputes will be resolved locally. Traditional justice systems have also been very effective in peace efforts in different parts of the country. They are good forums for dialogue on matters affecting communities. Further, because they are resolution mechanisms, they are able to address the underlying causes of a conflict. They heal the emotional and physical wounds the parties suffered as a result of the conflict. And unlike litigation which mostly deals only

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with disputants, traditional justice systems address the concerns of the victim, the accused and the wider community. This is exemplified by the case of *Stephen Kipruto Cheboi & 2 others v R*<sup>73</sup> where a reconciliation meeting was attended by 89 persons from Nerko-Katee village yet the dispute concerned brothers.

Although traditional justice systems have the potential to enhance access to justice, a number of challenges exist in their use in the administration of justice. First, because customary law is considered inferior in comparison to statutory law, traditional justice systems may be undermined thus constraining their application in the delivery of justice. Secondly, and probably the most problematic issue is whether traditional dispute resolution mechanisms can apply to criminal cases. One view on this issue is that Article 159(2) (c) of the Constitution is worded in such a way that it does not limit the applicability of TDRMs to criminal cases. The other view could be that, the Constitution provides expressly for instances when traditional justice systems are to apply mostly in land disputes and can thus not apply to criminal justice system.

It is also argued that Article 159(1) does not extend to courts in criminal manners and does not give power to the Director of Public Prosecution to consent to settlements without invoking laid down procedure of plea bargaining or excusing murder suspects. This interpretation is wrong because the Constitution does not state that traditional dispute resolution mechanisms are not to apply to criminal cases. Because of the likelihood of disempowering the DPP in certain cases especially sensitive ones such as rape and defilement, some form of regulation is necessary. This could be in the form of guidelines outlining certain cases that cannot be settled out of court due to their sensitivity.

Another argument advanced against the use of traditional justice systems in criminal cases, is that criminal cases are matters between the state and the accused and not between citizen and citizen. Such an argument is based on a misconception of traditional justice systems and the role they play where applied. Criminality is not between the state and the accused only. There are other constituents to a dispute who are affected by the outcome of a dispute. These include the victim, accused, the family of the accused and victim and the community. Actually, one of the criticisms against the court system is its failure to address the interests of victims of crimes. Traditional justice systems fill in this gap.

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<sup>73</sup> [2014] eKLR.



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In Zimbabwe, whether a case is to be decided using customary or general law is determined by the Customary Law and Local Courts Act based on circumstances such as: the mode of life of the parties, subject matter of the case, the understanding by the parties of the provisions of customary law of Zimbabwe and the relative closeness of the case and the parties to customary law or the general law of Zimbabwe.<sup>74</sup> In Swaziland customary courts have jurisdiction both in criminal and civil matters over Swazi nationals residing within their jurisdictional areas. However, at a practical level whether a criminal case is to be tried by a traditional or formal court is made at a police station. It is argued that the choice is normally influenced by the strength of the case such that if evidence is strong the case is sent to a magistrate's court and if weak it is sent to traditional courts.<sup>75</sup> The different approaches have to be researched into to assess their appropriateness. Moreover, circumstances are quite different in the different countries.

Thirdly, because of the evolving nature of customary law, traditional justice systems should not be legislated. Traditional justice systems vary from community to community, and thus they would be challenges in coming up with a legislation harmonizing or consolidating different mechanisms. This may impede the growth of customary law. Again, legislating on traditional justice systems may lead to rigidity, inflexibility, underdevelopment and destruction of African customary law. If there is need for legislation on traditional justice systems, it should be a framework law outlining the principles that such processes must comply with, e.g. fairness, non-discrimination and adherence to human rights standards. However, the regulatory framework on traditional justice systems must allow for their development.

Courts should not involve themselves in traditional justice procedures.<sup>76</sup> Once it is established that a traditional justice system exists, courts should promote that system by developing it in accordance with the Constitution. The

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<sup>74</sup> See S. Chirawu, "Challenges to Outlawing Harmful Cultural Practices for Zimbabwean Women," in *Women, Custom and Access to Justice*, Heinrich Boll Stiftung, Perspectives-Political Analyses and Commentary, Issue 3 December 2013, pp.15-17.

<sup>75</sup> T. Masuku, "Women and Justice in Swaziland: Has the Promise of the Constitution been Fulfilled?" in *Women, Custom and Access to Justice*, Heinrich Boll Stiftung, Perspectives-Political Analyses and Commentary, Issue 3 December 2013, pp.22-25.

<sup>76</sup> *Ndeto Kimomo v Kavoi Musumba [1977] KLR 170.*



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State should not be involved in the appointment of traditional leaders or 'arbitrators.' In addition, legal representation in traditional dispute resolution fora should be barred completely. A party should appear in person or be represented by a spouse, family member, neighbour or member of the community. Barring legal representation would safeguard these processes from legalities and technicalities applied in litigation. Further, the rationale for excluding legalities is that certain legal procedures such as cross-examination may be inconsistent with traditions, especially where the person being cross-examined is a senior male in the family or community.<sup>77</sup>

Consequently, traditional justice systems should not be incorporated in the formal judicial system. Traditional justice systems should be entirely voluntary, consensual and their decisions non-binding. In some jurisdictions, traditional customary courts have been established that allow for the application of customary law by experts in customs and traditions from different communities. This would be a better alternative instead of incorporating them with courts.

Fourthly, traditional justice systems must be sensitive to the plight of women. Such processes should not be discriminatory against women. They should encourage the appointment of women as elders and allow them to represent themselves in such forums.

The other hindrance to the application of traditional justice systems is the uncodified nature of the customary law of the different ethnic communities in Kenya. As such, these mechanisms have to be proved in court to determine their existence and application by expert witnesses, through case law, sworn testimonies of traditional leaders and existing literature of customary law. Documentation of traditional justice systems and research on the different systems would be necessary to ascertain where, how and under what conditions they operate<sup>78</sup> and to determine whether they comply with the thresholds set in the Constitution.

Going forward there is need for dialogue and consensus building with communities as custodians of customary laws, particularly on the need to prohibit certain customary practices that are retrogressive, repugnant to justice

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<sup>77</sup> T. Masuku, "Women and Justice in Swaziland: Has the Promise of the Constitution been fulfilled?" *Op. cit.*

<sup>78</sup> Available at <http://www.gsdrc.org/go/display/document/legacyid/98>. (accessed on 13/08/14).

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and morality and that are unconstitutional.<sup>79</sup> Through such efforts traditional leaders will see the need for changing customary law to accord to constitutional thresholds.

Traditional leaders must realize that they have a constitutional mandate to ensure that they ensure the delivery of an effective process. They must ensure fairness in their processes, deliver justice without delay and do justice to all irrespective of status. Further, they must ensure that the processes do not contravene the Bill of Rights, repugnant to justice and morality or result in outcomes that are repugnant to justice or morality or be inconsistent with the Constitution or any written law. This would require some of form of training.

## 10.0 CONCLUSION

The *Mohamed case* is a good precedent. Recognition of traditional justice systems was meant to open up and liberalize the justice system in efforts to enhance access to justice due to the inaccessibility of formal justice systems. By extension also, their recognition is an appreciation of the ethnic, cultural and religious diversities amongst Kenyans and their resolve to live peacefully and harmoniously by having disputes resolved using mechanisms that are flexible and easier to apply. Traditional justice systems have the potential to enhance access to justice. They are flexible, informal, they foster relationships, use local languages and do not allow for legal representation. They are victim-centered justice systems, addressing all the constituents in dispute that is the victim, accused and the wider community. There are also easily accessible and therefore available in rural areas. Consequently, they can be helpful in easing the perennial problem of backlog of cases in our court system. They can also reduce the congestion of our prisons and the tax payers' burden because they are restorative rather than retributive justice systems.

In retributive justice systems, the offender is punished by meting out a punishment equal to the crime he has committed. The decision in the *Mohammed case* has paradigmatically shifted this thinking about crime. The decision has shown that to realize restorative justice and foster peace among communities criminal justice system should refocus also on the victims, the concerned families

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<sup>79</sup> S. Chirawu, "Challenges to Outlawing Harmful Cultural Practices for Zimbabwean Women," *Op. cit*, p. 17.

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and the community. Formal justice system has for long focused on the offender and neglected the victim.

Application of TDRMs is thus expected to strengthen adherence to the rule of law because they enhance social justice and foster harmonious co-existence. This in turn fosters good governance and spurs economic development. This explains their wide acceptance. A case has been established for the application of TDRMs in criminal cases where the three stage test has been fully complied with. The courts need to heed to the voice of Kenyans who inserted that clause in the Supreme governing law- the Constitution. Let justice prevail.

**'THE TANZANIA ARBITRATION ACT: MEETING THE CHALLENGES OF TODAY WITH YESTERDAY'S TOOLS?'**

*by* **PROF. RASHDA RANA\***

Is it reasonable to expect commercial people to meet the challenges of today with yesterday's tools and expect them to be in business tomorrow? The one area in which this becomes most problematic is when businesses are faced with disputes. By then, relationships are already constrained and in efficient tools for the resolution of the dispute become a hindrance and not a help. In such a situation, what the parties need is a smooth, effective and streamlined means by which the parties' dispute can be resolved and not one that is fraught with difficulty requiring the parties to overcome complex and cumbersome hurdles.

In this paper, I have endeavoured to provide an objective review of the Tanzanian Arbitration Act, ultimately, urging change to bring it in line with global changes in arbitration legislation. Those global changes are tending towards harmonization. That does not mean, of course, that nation states cannot import their own stamp of individualization. Nation states can incorporate changes to harmonized laws that take into account any particular intricacies of their culture or position so long as the overall effect is not negated. But, in this instance, change is not only desirable, it is essential, necessary and urgent.

As George Bernard Shaw famously said, "*Progress is impossible without change, and those who cannot change their minds cannot change anything.*"

It is a trite observation that there has been a vast increase in global trade. But it is worth reminding ourselves of the central reason for the upsurge in alternative dispute resolution. The increase in trade means an increase in

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\* Barrister, Arbitrator, Mediator, FCI Arb.

I wish to express my gratitude to the Chartered Institute of Arbitrators Kenya Branch for allowing me to have this paper presented at the Conference and also to Sarah Mhamkawa for agreeing to read it. The views expressed in the paper are, of course, all my own. I should be happy to receive any comments.

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cross border transactions between parties from different jurisdictions with different legal systems and different expectations. Nowhere is this more starkly being played out than in Africa where there are many developing and emerging nations experiencing the highs and lows of increased trade. The highs are, of course, many including growth in GDP, improved living standards, improved income levels, growth of the middle classes and so on. The lows can be varied and usually are faced by Governments in having to tackle outdated infrastructure, administration and legislation.

Here, I shall be focusing only on legislation and in particular the Arbitration Act. In summary, I conclude that this might be an opportune time to take advantage of the progress made with the recent amendments of the UNCITRAL Model Law to bring the arbitration legislation of Tanzania in line with advancements and developments in arbitration around the world.

As most of you will be aware, the Arbitration Act (Cap 15 Revised Edition 2002) is the principal law regulating arbitration in Tanzania. It follows closely the provisions in its predecessors, first introduced in 1931 and then amended in 1971. It is unfortunate that despite the recent amendments to the Arbitration Act being brought into effect after the UNCITRAL Model Law was promulgated, the legislature did not see fit to reflect in it the Model Law. Rather the Arbitration Act still contains archaic provisions dealing with the arbitral process, those that have been given up by many jurisdictions in favour of current best practices and more effective means. For example, the Arbitration Act still refers to the Geneva Protocol on Arbitration Clauses 1923 (appearing as Schedule 3)

and despite the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 coming into force in 1965 in Tanzania, the Arbitration Act still refers to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (appearing as Schedule 4).

Tanzania appears to have two principal arbitration bodies, both with their own set of arbitral rules: the Tanzania Institute of Arbitrators (TIA) and the National Construction Council (NCC). Although the NCC Rules were intended for construction disputes they seem to have been applied in respect of disputes in other areas too. In addition, the Civil Procedure Code (Cap 33 Revised Edition 2002) (CPC) contains a default set of arbitration rules and procedures that apply if the parties agree to refer a dispute that is being heard before a court to arbitration. Schedule 2 to the CPC regulates procedure for filing of arbitral awards without court intervention.

As well as the Arbitration Act Tanzania has entered into a number

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of bi-lateral investment treaties and therefore arbitration under the *Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (**the Washington Convention**) is also provided for.

Schedule 1 of the Arbitration Act provides a default set of rules relating to most aspects of arbitration procedure. Subject to the parties' contrary expression, a submission to arbitration is irrevocable and must be deemed to incorporate the provisions in Schedule 1 (s.4, *Arbitration Act*). Matters not addressed explicitly are generally left to the tribunal to determine.

In addition, provisions of the Arbitration Act enable a party to petition the court for orders to overcome either:

- a. The counterparty's or an appointed arbitrator's refusal to meet the prescribed timelines, including for the appointment of an arbitrator;  
or
- b. An arbitrator's inability to carry out duties on the basis of physical or mental incapacity.

For example, a party can petition the court to appoint an arbitrator if the other party fails to appoint an arbitrator in a timely manner (*section 8*). This allows a party to legitimately commence proceedings irrespective of the counterparty's lack of engagement. The High Court can remove an arbitrator and this power cannot be waived by the parties. Schedule 1 does not contain any provisions relating to the commencement of arbitral proceedings.

The Arbitration Act does not prohibit any particular type of dispute from being resolved by arbitration. However, disputes concerning land must be heard by the superior courts and specific statutory tribunals (s.167, *Lands Act Cap 113 Revised Edition 2002 as amended*). Therefore, apart from land disputes, all other disputes seem to be arbitrable. The concept of *kompetenz-kompetenz* is not recognised even obliquely and in any event is somewhat watered down with the provision in section 11 which provides that the tribunal has power "to state a special case for the opinion of the court on any question of law involved".

The High Court of Tanzania can remove an arbitrator if he/she commits "any misconduct" (s.18, *Arbitration Act*). While any misconduct is not defined, a party can probably petition the High Court for the removal of an arbitrator if he shows bias, prejudice or otherwise conducts himself in a manner not appropriate for the office.

Notwithstanding any agreement to the contrary, the following provisions

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of the Arbitration Act apply:

- a) The ability to apply for a stay of legal proceedings if there is prima facie evidence of a valid arbitration clause (s.6). This provision does not mirror the provisions of the Model Law or the provisions for the recognition and enforcement of arbitration agreements in the New York Convention;
- b) The court's power to extend time for beginning arbitral proceedings and other time limits (s.7).
- c) The tribunal's general (but vaguely expressed) duty to act fairly and impartially as between the parties.

However, the singular and glaring error is an absence of any provisions dealing with the arbitral process itself. The Arbitration Act jumps from appointment to award with barely any provisions dealing with process in between. The High Court can provide assistance but no other powers of the tribunal are provided for in the legislation. It goes without saying that the principal grounds for the recognition, enforcement, challenge or setting aside of foreign arbitral awards are only mentioned in the context of the outmoded references within the legislation to the *Geneva Protocol* and the *Geneva Convention*.

One could, however, examine in detail the various problems and issues that arise with the legislation as it exists today but one must look first to the core principle and basis for the promotion of international arbitration in order to make sense of the manner in which the legislation may be amended. What is important, therefore, is to appreciate the conceptual changes that need to take place and to ensure that the legislation is 'in harmony' with the international arbitration legislation of many jurisdictions around the world. What makes international commercial arbitration most effective is, in part, the fact that all players can rely on the uniformity or harmonised provisions that apply to the procedural aspects of the arbitration and consequently the enforcement of the arbitral award produced as result of that procedure.

The key aspect of arbitration has always been that it is based on agreement between persons. Unlike national court systems, which are provided by the state, no arbitral tribunal exists unless two parties contractually undertake to create one. The result is that the arbitration agreement becomes the primary source of the rights, powers and duties of the arbitral tribunal.

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Accordingly, the parties retain considerable freedom over issues such as the place of arbitration, the applicable law, the language of the arbitration, the composition of the bench, and the confidentiality of proceedings. There is, in short, great scope for flexibility and neutrality, which are attractive features for parties from commercial backgrounds, particularly when they come from different countries and fear being subjected to an unfamiliar and foreign judicial system.

The centrality of the parties' agreement to arbitration has also been an important factor in encouraging uniformity in international arbitration law. Most nation states now realise that there are substantial benefits in providing a legal regime that facilitates and encourages international arbitration and respects the parties' agreement as much as possible. Not only does a country benefit economically from becoming a host site for international arbitration business, but also those citizens who engage in trade and commerce benefit generally from having a flexible and neutral system of dispute resolution. This development in turn encourages the flow of international business on a global level as increased certainty exists at the dispute resolution stage.

Instead of placing procedural barriers in the way of parties proceeding to arbitration or allowing excessive intrusion by national laws and courts in the process or introducing uncertainty, the principle of 'party autonomy' is now firmly established as the benchmark for international arbitration law worldwide. In this respect one can see the immediate and enduring benefit of a model law.

A model law is a legislative text that is recommended to States for enactment as part of their national law. A model law is an appropriate vehicle for modernization and unification of national laws when it is expected that States will wish or need to make adjustments to the text of the model to accommodate local requirements that vary from system to system, or where strict uniformity is not necessary. It is precisely this flexibility which makes a model law potentially easier to negotiate than a text containing obligations that cannot be altered and promotes greater acceptance of a model law than of a convention dealing with the same subject matter.

Notwithstanding this flexibility, and in order to increase the likelihood of achieving a satisfactory degree of unification and to provide certainty about the extent of unification, States are encouraged to make as few changes as possible when incorporating a model law into their legal systems.

The UNCITRAL Model Law on International Commercial Arbitration has been adopted in its vanilla form as well as adapted to the subject matter under



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consideration and to the degree of flexibility sought by the drafters. It has been a very successful example of international preparation of a legal text in the private law area. To date, 69 countries and non-sovereign jurisdictions have adopted the Model Law. Within this number are federated states which have adopted the Model Law as a basis for their domestic legislation as well, thereby, providing for uniform legislation in both domestic and international arbitration spheres.

The origin of the Model Law can be traced back to the *New York Convention*. The fundamental rule of that Convention is laid down in its Art. III, which provides:

*“each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon (...) and that “there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.” [Emphasis added]*

The *New York Convention* has been a remarkable success in achieving that basic rule,<sup>1</sup> but its ambit is limited. Indeed, a party wishing to enforce an award under the *New York Convention* will have to be informed of a number of matters not dealt with in the *New York Convention*, such as whether the award will be enforced by a court or by another authority, or which court or which other authority; the procedure to be followed; the conditions or fees that may be charged and how they relate to those imposed on the recognition or enforcement of domestic awards in the country of enforcement. All those important details are found in the statutes of the country of enforcement. In the Arbitration Act these matters have been dealt with in a cumbersome, inelegant and confusing way.

UNCITRAL recognized the difficulties and undertook the preparation of what became the UNCITRAL Model Arbitration Law. The main purpose of the Model Law is to reduce the discrepancy between domestic procedural laws affecting international commercial arbitration.

The UNCITRAL Model Arbitration Law deals with the essential elements of a favourable legal framework for the conduct of arbitration proceedings, such as: arbitration agreement; composition of arbitral tribunal (including

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<sup>1</sup> As at July 2014, the number of Contracting States was 150.

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appointment, substitution and challenge of arbitrators); jurisdiction of arbitral tribunal (including its competence of arbitral tribunal to rule on its own jurisdiction and its power to order interim measures); conduct of arbitral proceedings (treatment of parties, determination of rules of procedure, hearings and written proceedings, party default, appointment of experts, court assistance in taking evidence); making of award and termination of proceedings (settlement, form and contents of award; its correction and interpretation); setting aside and arbitral award; conditions for recognition and enforcement of awards and grounds for refusing recognition or enforcement.

When preparation of the UNCITRAL Model Arbitration Law first began it was thought that it would be primarily useful for the developing world. Some thought that industrialized countries believed that their law of arbitration was adequate, if not much better than whatever UNCITRAL might produce. Interestingly, the past thirty years have shown that the UNCITRAL Model Arbitration Law has indeed been highly useful for developing countries, but interestingly also for many industrialized countries which have reformed their law by adopting the Model Law.<sup>2</sup>

UNCITRAL has not established fixed criteria or minimum requirements for determining when a country can be regarded as having enacted the Model Law. Nevertheless, it could be said that generally domestic arbitration statutes are considered to be enactments of the Model Law when it is clear that the legislator took the Model Law as a basis and made certain amendments and additions, but did not simply take the Model Law as one amongst various models or follow only 'its principles'. This usually means also that the bulk of the provisions of the Model Law have been enacted and that the domestic statute does not contain any provision incompatible with the basic philosophy of the Model Law.<sup>3</sup>

Within those general parameters, a certain degree of adaptation is admissible and indeed necessary, as are certain deviations, in particular where they are intended to adjust the Model Law to the local context. Many of the decisions that need to be made by an enacting State were anticipated by UNCITRAL, while others may be particular to the country concerned, or at

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<sup>2</sup> For example, Australia, Canada, Germany, Ireland, New Zealand.

<sup>3</sup> See, for instance, the Arbitration Ordinance (Hong Kong); the International Arbitration Act (Singapore) and the Arbitration Act 2005 (Malaysia).

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least to the group of countries with similar legal systems.<sup>4</sup>

Instruments produced by UNCITRAL may only become binding law after a State has decided to adopt it – either by ratification or by domestic enactment – but no State is obliged to do so. Thus, the entire work of harmonization done by UNCITRAL is of voluntary nature and takes full account of State sovereignty. This characteristic explains the continuous and often difficult search for consensus in the work of UNCITRAL, which relies only on the acceptability of its texts to achieve wide adoption.

Importantly, the central tenets of uniformity, harmony and consistency are spelt out in Art 2 of the Model Law:

*“Article 2 A. International origin and general principles  
(As adopted by the Commission at its thirty-ninth session, in 2006)*

*(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.*

*(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.”*

Finally, I urge the Tanzanian Government to heed the call for reform and adopt the Model Law as its arbitration law, thereby giving those people conducting business with Tanzanian entities (as well as the government itself) greater confidence in the processes available to them for the speedy and effective resolution of disputes and the enforcement of awards. An overhaul of the legal framework for arbitration will give investors a strong guarantee that arbitration in Tanzania is safe, efficient and a business-friendly means of dispute settlement.

A new world demands the use of new tools. Arbitration in Tanzania needs to be part of the new world and ditch the outdated, outmoded tools of yester year.

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<sup>4</sup> One of the best overall description of the choices made both at UNCITRAL and by States in their adoption of the UNCITRAL Model Arbitration Law is Peter Binder, International Commercial Arbitration in UNCITRAL Model Law Jurisdictions (London, Sweet & Maxwell 2000).

## HISTORICAL DEVELOPMENT OF ARBITRATION LAW IN BOTSWANA

by EDWARD WILLIAM LUKE\*

### 1.0 INTRODUCTION

Before the colonial period, most African societies had their own informal dispute resolutions. Each community had its unique rules and norms for the resolution of certain disputes.<sup>1</sup>

For example, the Bushmen or the Basarwa have lived traditional lives for many years, yet they have had dispute resolution mechanisms which have evolved without courts and a formal state system suited to the needs of a collective hunter-gatherer society.<sup>2</sup> Disputes would occur over food, land and mates. Those in conflict would bring other members of the tribe together to hear out both sides. If an agreement 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 resolved.

During colonial period, the colonial powers acknowledged and preserved the people's customs, traditions and institutions.

In terms of the background of the development of arbitral enactment in Africa, the impact of colonial rule on the arbitral systems on the continent should be recognized as this period contributed immensely to the development of arbitration law in Botswana.

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\*Barrister in England & Wales, Attorney in Botswana, Barrister and Solicitor in Sierra Leone.

<sup>1</sup> A. A. Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*, Cambridge University Press (2001), pp 115, Available at <http://books.google.co.bw/books?id=q837mIPTXFoC&pg=PR14&lpq=PR14&dq=Amazu+A.+Asouzu:+International+Commercial+Arbitration+and+African+States&source>.

<sup>2</sup> B. Laurence, "A History Of Alternative Dispute Resolution" (2005), available at <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1309&context=adr>.

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The courts established during the colonial period by the colonial government had a duty to observe and enforce customary laws. However, this could be done only if it was not 'repugnant to public policy, incompatible with natural justice, equity or good conscience'.

## **2.0 THE CURRENT REGIME**

Due to the fact that the 1889 UK Arbitration which greatly influenced our arbitration laws was largely repealed, Botswana revised its arbitration laws in the late 1950s and 1960s. Thus, the past few years have witnessed reforms in the Botswana arbitration laws.

### **2.1 WHAT LEGISLATION GOVERNS THE ENFORCEMENT OF ARBITRATION PROCEEDINGS IN BOTSWANA?**

Parties are free to choose the law governing the arbitration proceedings, but where they have not predetermined the law, the arbitral proceedings are governed by the Arbitration Act. For example, if the parties' chosen method for selecting arbitrators fails, the court can appoint an arbitrator for them. **Section 11** of the Act provides the Court with the power to appoint an arbitrator or umpire, it reads *inter alia* as follows;

*'Any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing an arbitrator, umpire or third arbitrator, and if the appointment is not made within seven clear days after the service of the notice, the Court or a judge thereof may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties'.*

Though the Arbitration Act governs the enforcement of arbitration proceedings in Botswana, parties are mainly guided by the arbitration agreement or submissions into which they have entered. Generally, an arbitration clause is inserted into an agreement contract between the parties which specifies how the dispute will be resolved.

According to Section 2 of the Arbitration Act, arbitration means "any proceedings held pursuant to a submission....submission means a written

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agreement, wherever made, to submit present or future differences to arbitration, whether an arbitrator is named therein or not.”

In the case of *Southern District Council v Vlug And Another*<sup>3</sup> Newman J made reference to the case of *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another*<sup>4</sup>, where Smalberger ADP emphasised the point that an arbitration arises through the exercise of private rather than public powers, and does not fall within the sphere of 'administrative action in the following words;

*“The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement... As arbitration is a form of private adjudication the function of an arbitrator is not administrative but judicial in nature.”*

Parties choose the rules that will regulate the arbitration proceedings. Where no rules are specified, the arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Act.

## **2.2 WHAT HAS BEEN THE APPROACH OF THE NATIONAL COURTS TO THE ENFORCEMENT OF ARBITRATION AGREEMENTS?**

Botswana courts have adopted a positive approach towards the enforcement of arbitration agreements. To this end, Section 20 of the Act, titled Enforcement of Award reads as follows;

*An award on a submission may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.*

A review of precedents show a general recognition by our courts in upholding arbitration proceedings. The Botswana legal system acknowledges and appreciates arbitration as a good and valid alternative dispute resolution mechanism.

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<sup>3</sup> 2010 3 BLR 315 HC.

<sup>4</sup> 2002 (4) SA 661 (SCA), at p 673H.

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Where there is an arbitration clause in a contract which is the subject of court proceedings, a party to the court proceedings may promptly raise the issue of an arbitration clause and the courts will stay proceedings and refer the parties to arbitration.

According to **Section 6 (1)** of the Act, any party to a submission or any person claiming through or under such party, can apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings subject to such terms and conditions as may be just.

The court has discretion as to whether or not to stay proceedings, but it would generally do so once satisfied that a dispute fell within the ambit of arbitration, and a very strong case would have to be made before a court would exercise its discretion to preclude the operation of an arbitration agreement.

In the case of *Bm Packaging(Pty) Ltd v PPC Botswana (Pty) Ltd*<sup>5</sup> it was held that if either party required that a dispute should be referred to arbitration, the other party must accede to it because the parties had agreed to do so in advance in terms of the contract. A party to the agreement could not unilaterally elect to proceed to court for the purpose of resolving any dispute and thus deprive the other party of its contractual right to arbitration.

### *2.2.1 Grounds for Review*

The general rule is that an arbitrator's award is final in nature. Where parties consent to submit a decision to a tribunal they are bound by its decision and review can only lie if the fundamental principles of justice have been violated.<sup>6</sup> In reviewing proceedings, the court only concerns itself with the arbitrator's

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<sup>5</sup> 1998 BLR 309 (HC).

<sup>6</sup> Reference made to *African Tourism Group v Modibedi* (2009)1 BLR 262 in *Complant Botswana (Pty) Ltd V Anthony Michael Dawson Allen and Dawson and Fraser Mechanical Contractors (Pty) Ltd*.

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conduct, that is, whether he acted in good faith. The grounds on which decisions could be reviewed are;<sup>7</sup>

- a) Lack of jurisdiction on the part of the decision maker;
- b) That the decision maker was an interested party<sup>8</sup>, biased, guilty of malice or corrupt; and
- c) That there was gross irregularity in the proceedings.<sup>9</sup>

As already stated, where parties have agreed to refer an issue to arbitration, the courts rarely interfere. In the case of *Three Partners Resort (Pty) Ltd v KPMG Botswana and African Sun Limited PPC*<sup>10</sup> the courts referred to the English courts of appeal decision of *Mercury Communications Ltd v The Director General of Telecommunications*<sup>11</sup> where Hoffmann LJ observed that:

*"... in question in which the parties have entrusted the power of decision to a valuer or other decision maker, the courts will not interfere either before or after the decision. This is because the courts' views about the right answer to the question are irrelevant. On the other hand the court will intervene if the decision maker has gone outside the limits of his decision-making authority."*<sup>12</sup>

The court also made reference to the case of *Nikko Hotels (UK) Ltd v MEPC plc*<sup>13</sup> where it was concluded that *"...if the parties agreed to refer to the final and conclusive judgment of an expert...the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the court as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert had not performed the task assigned to him..."*

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<sup>7</sup> *Champion Construction (Pty) Ltd v Allen and Another* 2006 (2) BLR 56 (HC).

<sup>8</sup> See also Section 12 of the Arbitration Act.

<sup>9</sup> See also Section 13 (2) of the Arbitration Act.

<sup>10</sup> CVHGB-000257-13.

<sup>11</sup> (1994) CLC 1125 CA.

<sup>12</sup> At page 1140.

<sup>13</sup> (1991) 2 EGLR 103.



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In terms of Section 13(2) of the Arbitration Act, an arbitral award could be reviewed only on the ground of procedural irregularities. An arbitrator is considered to have misconducted the proceedings where he conducted them wrongfully, dishonestly or improperly. The arbitrator's conduct should disclose either *mala fides* or bias on his part.<sup>14</sup>

Further, section 13(2) titled 'The Court's powers to remove an arbitrator or umpire, to set award aside and to award costs' states that where an arbitrator or umpire has misconducted the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside, and may award costs against any such arbitrator or umpire personally.'

The words 'misconduct of the proceedings' covers both the behaviour of the arbitrator (when she/he misconducts himself) and/or the process (when he misconducts the proceedings)

The misconduct should be of such a nature that it undermines the entire process. It should be shown to refer to some wrongful, dishonest and improper conduct on the part of the arbitrator.<sup>15</sup>

As is discussed in the case of *Southern District Council v Vlug and Another*<sup>16</sup>, an honest mistake either of law or of fact made by an arbitrator cannot be characterised as misconduct just as a Judge cannot be said to have misconducted himself if he has given an erroneous decision on a point of law.<sup>17</sup> This is to make sure that an arbitrator is free in giving his ruling or decision.

Where an arbitrator has given a fair consideration to the matter which has been submitted to him for determination, it would be impossible to hold that he had been guilty of misconduct merely because he had made a bona fide mistake either of law or of fact. However, as already stated, the mistake should not be so gross or manifest that it could not have been made without some degree of

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<sup>14</sup> The decision of *Champion Construction (Pty) Ltd v Allen and Another* [2006] 2 B.L.R. was applied in the case of *Southern District Council v Vlug and Another* 2010 3 BLR 315 HC.

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misconduct or partiality on the part of the arbitrator.<sup>18</sup> If an award was to be set aside in such circumstances it would be really on the ground of misconduct and not of mistake.<sup>19</sup> Newman J had this to say on the issue;

*“A gross or manifest mistake is not per se misconduct. At best, it provides evidence of misconduct which, taken alone or in conjunction with other considerations, will ultimately have to be sufficiently compelling to justify an inference...of what has variously been described as ...wrongful and improper conduct ... dishonesty... and mala fides or partiality ... and moral turpitude.”<sup>20</sup>*

Therefore, courts will recognize and enforce an arbitral award in the absence of any valid and convincing ground for setting aside or for refusal of recognition and enforcement.

### **3.0 REGIONAL AND INTERNATIONAL INSTRUMENTS THAT BOTSWANA IS PARTY TO**

#### **3.1 REGIONAL CONVENTIONS**

##### **3.1.1 SADC Protocol**

Botswana ratified the SADC Protocol concerning the recognition and enforcement of arbitral awards. The Protocol was signed by the head of State/Government on 18 August 2006. The entity is aimed at fostering economic development and integration among the constituent states.

#### **3.2 INTERNATIONAL CONVENTIONS**

##### **3.2.1 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (Washington Convention)***

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<sup>18</sup> Landeshut v Koenig 20 SC 33 at 34.

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The Convention seeks to encourage investment in developing countries by enabling States and foreign investors to submit their disputes to an independent and neutral forum.<sup>21</sup>

Botswana has since signed 8 bilateral investment treaties, the first on 31<sup>st</sup> July 1997 and last on the 21<sup>st</sup> March 2011.

### *3.2.2 New York Convention*

Foreign arbitration is governed by the Recognition and Enforcement of Foreign Arbitral Awards Act. Botswana ratified the New York Conventions on the 20<sup>th</sup> of December 1971. The revised arbitration laws/Act now incorporates parts of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) into domestic law.

In doing so, Botswana entered a reservation that it would apply the conventions only to the recognition and enforcement of awards made in the territory of another state.<sup>22</sup> It further entered an additional reservation that it would apply the convention only to differences arising from legal relationships, contractual or otherwise, that are considered commercial under their national laws.<sup>23</sup>

Since the New York Convention regulates the recognition and enforcement of foreign awards, it merely provides for the enforcement of awards made in other New York Convention countries.

Therefore, there is no provision for the enforcement of foreign awards made in countries that are not parties to the New York Convention; foreign awards that are made in non-New York Convention countries might not be enforceable in Botswana. Due to this loop-hole, it is respectfully submitted that Botswana adopted the UNCITRAL Model Law.

### *3.2.3 UNCITRAL Model Law*

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<sup>21</sup> Ibid.

<sup>22</sup>United Nations Treaty Collection, Available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII-1&chapter=22&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en)

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Botswana was elected by the General Assembly on the 15<sup>th</sup> of April for a six-year term beginning on 21 June, 2010. This showed a step in the right direction as The Model Law carries the basic principles expected of a modern arbitration law. It is far advanced than the present Arbitration Act in respect of its regulation of arbitral proceedings.

#### 4.0 CONCLUSION

Arbitration in Botswana has grown to be one of the most preferred means of alternative dispute resolution (ADR) as they are faster and less costly and more private. Furthermore, parties have the ability to get arbitrators who have arbitrator process expertise and specific subject matter expertise. As a results Botswana arbitration laws continue to grow and evolve.

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#### 2.0 INTRODUCTION

Before the colonial period, most African societies had their own informal dispute resolutions. Each community had its unique rules and norms for the resolution of certain disputes.<sup>24</sup>

For example, the Bushmen or the Basarwa have lived traditional lives for many years, yet they have had dispute resolution mechanisms which have evolved without courts and a formal state system suited to the needs of a collective hunter-gatherer society.<sup>25</sup> Disputes would occur over food, land and mates. Those in conflict would bring other members of the tribe together to hear

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out both sides. If an agreement 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 resolved.

During colonial period, the colonial powers acknowledged and preserved the people's customs, traditions and institutions.

In terms of the background of the development of arbitral enactment in Africa, the impact of colonial rule on the arbitral systems on the continent should be recognized as this period contributed immensely to the development of arbitration law in Botswana.

The courts established during the colonial period by the colonial government had a duty to observe and enforce customary laws. However, this could be done only if it was not 'repugnant to public policy, incompatible with natural justice, equity or good conscience'.

## **2.0 THE CURRENT REGIME**

Due to the fact that the 1889 UK Arbitration which greatly influenced our arbitration laws was largely repealed, Botswana revised its arbitration laws in the late 1950s and 1960s. Thus, the past few years have witnessed reforms in the Botswana arbitration laws.

### **2.1 WHAT LEGISLATION GOVERNS THE ENFORCEMENT OF ARBITRATION PROCEEDINGS IN BOTSWANA?**

Parties are free to choose the law governing the arbitration proceedings, but where they have not predetermined the law, the arbitral proceedings are governed by the Arbitration Act. For example, if the parties' chosen method for selecting arbitrators fails, the court can appoint an arbitrator for them. **Section 11** of the Act provides the Court with the power to appoint an arbitrator or umpire, it reads *inter alia* as follows;

*'Any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing an arbitrator, umpire or third arbitrator, and if the appointment is not made within seven clear days after the service of the notice, the Court or a judge thereof may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties'.*

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Though the Arbitration Act governs the enforcement of arbitration proceedings in Botswana, parties are mainly guided by the arbitration agreement or submissions into which they have entered. Generally, an arbitration clause is inserted into an agreement contract between the parties which specifies how the dispute will be resolved.

According to Section 2 of the Arbitration Act, arbitration means “any proceedings held pursuant to a submission....submission means a written agreement, wherever made, to submit present or future differences to arbitration, whether an arbitrator is named therein or not.”

In the case of *Southern District Council v Vlug And Another*<sup>26</sup> Newman J made reference to the case of *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another*<sup>27</sup>, where Smalberger ADP emphasised the point that an arbitration arises through the exercise of private rather than public powers, and does not fall within the sphere of 'administrative action in the following words;

*“The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement... As arbitration is a form of private adjudication the function of an arbitrator is not administrative but judicial in nature.”*

Parties choose the rules that will regulate the arbitration proceedings. Where no rules are specified, the arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Act.

## **2.2 WHAT HAS BEEN THE APPROACH OF THE NATIONAL COURTS TO THE ENFORCEMENT OF ARBITRATION AGREEMENTS?**

Botswana courts have adopted a positive approach towards the enforcement of arbitration agreements. To this end, Section 20 of the Act, titled Enforcement of Award reads as follows;

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<sup>26</sup> 2010 3 BLR 315 HC.

<sup>27</sup> 2002 (4) SA 661 (SCA), at p 673H.

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*An award on a submission may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.*

A review of precedents show a general recognition by our courts in upholding arbitration proceedings. The Botswana legal system acknowledges and appreciates arbitration as a good and valid alternative dispute resolution mechanism.

Where there is an arbitration clause in a contract which is the subject of court proceedings, a party to the court proceedings may promptly raise the issue of an arbitration clause and the courts will stay proceedings and refer the parties to arbitration.

According to **Section 6 (1)** of the Act, any party to a submission or any person claiming through or under such party, can apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings subject to such terms and conditions as may be just.

The court has discretion as to whether or not to stay proceedings, but it would generally do so once satisfied that a dispute fell within the ambit of arbitration, and a very strong case would have to be made before a court would exercise its discretion to preclude the operation of an arbitration agreement.

In the case of *Bm Packaging(Pty) Ltd v PPC Botswana (Pty) Ltd*<sup>28</sup> it was held that if either party required that a dispute should be referred to arbitration, the other party must accede to it because the parties had agreed to do so in advance in terms of the contract. A party to the agreement could not unilaterally elect to proceed to court for the purpose of resolving any dispute and thus deprive the other party of its contractual right to arbitration.

### *2.2.1 Grounds for Review*

The general rule is that an arbitrator's award is final in nature. Where parties consent to submit a decision to a tribunal they are bound by its decision and

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<sup>28</sup> 1998 BLR 309 (HC).

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review can only lie if the fundamental principles of justice have been violated.<sup>29</sup> In reviewing proceedings, the court only concerns itself with the arbitrator's conduct, that is, whether he acted in good faith. The grounds on which decisions could be reviewed are;<sup>30</sup>

- d) Lack of jurisdiction on the part of the decision maker;
- e) That the decision maker was an interested party<sup>31</sup>, biased, guilty of malice or corrupt; and
- f) That there was gross irregularity in the proceedings.<sup>32</sup>

As already stated, where parties have agreed to refer an issue to arbitration, the courts rarely interfere. In the case of *Three Partners Resort (Pty) Ltd v KPMG Botswana and African Sun Limited PPC*<sup>33</sup> the courts referred to the English courts of appeal decision of *Mercury Communications Ltd v The Director General of Telecommunications*<sup>34</sup> where Hoffmann LJ observed that:

*"... in question in which the parties have entrusted the power of decision to a valuer or other decision maker, the courts will not interfere either before or after the decision. This is because the courts' views about the right answer to the question are irrelevant. On the other hand the court will intervene if the decision maker has gone outside the limits of his decision-making authority."*<sup>35</sup>

The court also made reference to the case of *Nikko Hotels (UK) Ltd v MEPC plc*<sup>36</sup> where it was concluded that "...if the parties agreed to refer to the final and

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<sup>29</sup> Reference made to *African Tourism Group v Modibedi* (2009)1 BLR 262 in *Complant Botswana (Pty) Ltd V Anthony Michael Dawson Allen and Dawson and Fraser Mechanical Contractors (Pty) Ltd*.

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<sup>31</sup> See also Section 12 of the Arbitration Act.

<sup>32</sup> See also Section 13 (2) of the Arbitration Act.

<sup>33</sup> CVHGB-000257-13.

<sup>34</sup> (1994) CLC 1125 CA.

<sup>35</sup> At page 1140.

<sup>36</sup> (1991) 2 EGLR 103.



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*conclusive judgment of an expert...the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the court as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert had not performed the task assigned to him..."*

In terms of Section 13(2) of the Arbitration Act, an arbitral award could be reviewed only on the ground of procedural irregularities. An arbitrator is considered to have misconducted the proceedings where he conducted them wrongfully, dishonestly or improperly. The arbitrator's conduct should disclose either *mala fides* or bias on his part.<sup>37</sup>

Further, section 13(2) titled 'The Court's powers to remove an arbitrator or umpire, to set award aside and to award costs' states that where an arbitrator or umpire has misconducted the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside, and may award costs against any such arbitrator or umpire personally.'

The words 'misconduct of the proceedings' covers both the behaviour of the arbitrator (when she/he misconducts himself) and/or the process (when he misconducts the proceedings)

The misconduct should be of such a nature that it undermines the entire process. It should be shown to refer to some wrongful, dishonest and improper conduct on the part of the arbitrator.<sup>38</sup>

As is discussed in the case of *Southern District Council v Vlug and Another*<sup>39</sup>, an honest mistake either of law or of fact made by an arbitrator cannot be characterised as misconduct just as a Judge cannot be said to have misconducted himself if he has given an erroneous decision on a point of law.<sup>40</sup> This is to make sure that an arbitrator is free in giving his ruling or decision.

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#### **4.0 REGIONAL AND INTERNATIONAL INSTRUMENTS THAT BOTSWANA IS PARTY TO**

##### **3.1 REGIONAL CONVENTIONS**

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Botswana ratified the SADC Protocol concerning the recognition and enforcement of arbitral awards. The Protocol was signed by the head of State/Government on 18 August 2006. The entity is aimed at fostering economic development and integration among the constituent states.

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The Convention seeks to encourage investment in developing countries by enabling States and foreign investors to submit their disputes to an independent and neutral forum.<sup>44</sup>

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Botswana. Due to this loop-hole, it is respectfully submitted that Botswana adopted the UNCITRAL Model Law.

### **3.2.4 UNCITRAL Model Law**

Botswana was elected by the General Assembly on the 15<sup>th</sup> of April for a six-year term beginning on 21 June, 2010. This showed a step in the right direction as The Model Law carries the basic principles expected of a modern arbitration law. It is far advanced than the present Arbitration Act in respect of its regulation of arbitral proceedings.

## **4.0 CONCLUSION**

Arbitration in Botswana has grown to be one of the most preferred means of alternative dispute resolution (ADR) as they are faster and less costly and more private. Furthermore, parties have the ability to get arbitrators who have arbitrator process expertise and specific subject matter expertise. As a results Botswana arbitration laws continue to grow and evolve.

## HISTORICAL DEVELOPMENT OF ARBITRATION LAW IN BOTSWANA

by EDWARD WILLIAM LUKE\*

### 3.0 INTRODUCTION

Before the colonial period, most African societies had their own informal dispute resolutions. Each community had its unique rules and norms for the resolution of certain disputes.<sup>1</sup>

For example, the Bushmen or the Basarwa have lived traditional lives for many years, yet they have had dispute resolution mechanisms which have evolved without courts and a formal state system suited to the needs of a collective hunter-gatherer society.<sup>2</sup> Disputes would occur over food, land and mates. Those in conflict would bring other members of the tribe together to hear out both sides. If an agreement 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 resolved.

During colonial period, the colonial powers acknowledged and preserved the people's customs, traditions and institutions.

In terms of the background of the development of arbitral enactment in Africa, the impact of colonial rule on the arbitral systems on the continent should be recognized as this period contributed immensely to the development of arbitration law in Botswana.

The courts established during the colonial period by the colonial government had a duty to observe and enforce customary laws. However, this could be done

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only if it was not 'repugnant to public policy, incompatible with natural justice, equity or good conscience'.

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Due to the fact that the 1889 UK Arbitration which greatly influenced our arbitration laws was largely repealed, Botswana revised its arbitration laws in the late 1950s and 1960s. Thus, the past few years have witnessed reforms in the Botswana arbitration laws.

### **2.1 WHAT LEGISLATION GOVERNS THE ENFORCEMENT OF ARBITRATION PROCEEDINGS IN BOTSWANA?**

Parties are free to choose the law governing the arbitration proceedings, but where they have not predetermined the law, the arbitral proceedings are governed by the Arbitration Act. For example, if the parties' chosen method for selecting arbitrators fails, the court can appoint an arbitrator for them. **Section 11** of the Act provides the Court with the power to appoint an arbitrator or umpire, it reads *inter alia* as follows;

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Parties choose the rules that will regulate the arbitration proceedings. Where no rules are specified, the arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Act.

## **2.2 WHAT HAS BEEN THE APPROACH OF THE NATIONAL COURTS TO THE ENFORCEMENT OF ARBITRATION AGREEMENTS?**

Botswana courts have adopted a positive approach towards the enforcement of arbitration agreements. To this end, Section 20 of the Act, titled Enforcement of Award reads as follows;

*An award on a submission may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.*

A review of precedents show a general recognition by our courts in upholding arbitration proceedings. The Botswana legal system acknowledges and appreciates arbitration as a good and valid alternative dispute resolution mechanism.

Where there is an arbitration clause in a contract which is the subject of court proceedings, a party to the court proceedings may promptly raise the issue

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### *Historical Development Of Arbitration Law In Botswana: Edward William Luke*

of an arbitration clause and the courts will stay proceedings and refer the parties to arbitration.

According to **Section 6 (1)** of the Act, any party to a submission or any person claiming through or under such party, can apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings subject to such terms and conditions as may be just.

The court has discretion as to whether or not to stay proceedings, but it would generally do so once satisfied that a dispute fell within the ambit of arbitration, and a very strong case would have to be made before a court would exercise its discretion to preclude the operation of an arbitration agreement.

In the case of *Bm Packaging(Pty) Ltd v PPC Botswana (Pty) Ltd*<sup>5</sup> it was held that if either party required that a dispute should be referred to arbitration, the other party must accede to it because the parties had agreed to do so in advance in terms of the contract. A party to the agreement could not unilaterally elect to proceed to court for the purpose of resolving any dispute and thus deprive the other party of its contractual right to arbitration.

#### **2.2.1 Grounds for Review**

The general rule is that an arbitrator's award is final in nature. Where parties consent to submit a decision to a tribunal they are bound by its decision and review can only lie if the fundamental principles of justice have been violated.<sup>6</sup> In reviewing proceedings, the court only concerns itself with the arbitrator's conduct, that is, whether he acted in good faith. The grounds on which decisions could be reviewed are;<sup>7</sup>

- g) Lack of jurisdiction on the part of the decision maker;
- h) That the decision maker was an interested party<sup>8</sup>, biased,

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guilty of malice or corrupt; and

- i) That there was gross irregularity in the proceedings.<sup>9</sup>

As already stated, where parties have agreed to refer an issue to arbitration, the courts rarely interfere. In the case of *Three Partners Resort (Pty) Ltd v KPMG Botswana and African Sun Limited PPC*<sup>10</sup> the courts referred to the English courts of appeal decision of *Mercury Communications Ltd v The Director General of Telecommunications*<sup>11</sup> where Hoffmann LJ observed that:

*"... in question in which the parties have entrusted the power of decision to a valuer or other decision maker, the courts will not interfere either before or after the decision. This is because the courts' views about the right answer to the question are irrelevant. On the other hand the court will intervene if the decision maker has gone outside the limits of his decision-making authority."*<sup>12</sup>

The court also made reference to the case of *Nikko Hotels (UK) Ltd v MEPC plc*<sup>13</sup> where it was concluded that *"...if the parties agreed to refer to the final and conclusive judgment of an expert...the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the court as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert had not performed the task assigned to him..."*

In terms of Section 13(2) of the Arbitration Act, an arbitral award could be reviewed only on the ground of procedural irregularities. An arbitrator is considered to have misconducted the proceedings where he conducted them wrongfully, dishonestly or improperly. The arbitrator's conduct should disclose either *mala fides* or bias on his part.<sup>14</sup>

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<sup>9</sup> See also Section 13 (2) of the Arbitration Act.

<sup>10</sup> CVHGB-000257-13.

<sup>11</sup> (1994) CLC 1125 CA.

<sup>12</sup> At page 1140.

<sup>13</sup> (1991) 2 EGLR 103.

<sup>14</sup> The decision of *Champion Construction (Pty) Ltd v Allen and Another* [2006] 2 B.L.R. was applied in the case of *Southern District Council v Vlug and Another* 2010 3 BLR 315 HC.

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Further, section 13(2) titled 'The Court's powers to remove an arbitrator or umpire, to set award aside and to award costs' states that where an arbitrator or umpire has misconducted the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside, and may award costs against any such arbitrator or umpire personally.'

The words 'misconduct of the proceedings' covers both the behaviour of the arbitrator (when she/he misconducts himself) and/or the process (when he misconducts the proceedings)

The misconduct should be of such a nature that it undermines the entire process. It should be shown to refer to some wrongful, dishonest and improper conduct on the part of the arbitrator.<sup>15</sup>

As is discussed in the case of *Southern District Council v Vlug and Another*<sup>16</sup>, an honest mistake either of law or of fact made by an arbitrator cannot be characterised as misconduct just as a Judge cannot be said to have misconducted himself if he has given an erroneous decision on a point of law.<sup>17</sup> This is to make sure that an arbitrator is free in giving his ruling or decision.

Where an arbitrator has given a fair consideration to the matter which has been submitted to him for determination, it would be impossible to hold that he had been guilty of misconduct merely because he had made a bona fide mistake either of law or of fact. However, as already stated, the mistake should not be so gross or manifest that it could not have been made without some degree of misconduct or partiality on the part of the arbitrator.<sup>18</sup> If an award was to be set aside in such circumstances it would be really on the ground of misconduct and not of mistake.<sup>19</sup> Newman J had this to say on the issue;

*"A gross or manifest mistake is not per se misconduct. At best, it provides evidence of misconduct which, taken alone or in conjunction with other considerations, will ultimately have to be sufficiently compelling to justify an inference...of what has*

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<sup>15</sup> St Joseph's college v Dawson and another (Pty) ltd and others (2002) 2 BLR 419.

<sup>16</sup> 2010 3 BLR 315 HC.

<sup>17</sup> Dickenson & Brown; Brown v Fisher's Executors 1915 AD 166

<sup>18</sup> Landeshut v Koenig 20 SC 33 at 34.

<sup>19</sup> Southern District Council v Vlug And Another 2010 3 BLR 315 HC.

*Historical Development Of Arbitration Law In Botswana: Edward William Luke variously been described as ...wrongful and improper conduct ... dishonesty... and mala fides or partiality ... and moral turpitude.*<sup>20</sup>

Therefore, courts will recognize and enforce an arbitral award in the absence of any valid and convincing ground for setting aside or for refusal of recognition and enforcement.

## **5.0 REGIONAL AND INTERNATIONAL INSTRUMENTS THAT BOTSWANA IS PARTY TO**

### **3.1 REGIONAL CONVENTIONS**

#### **3.1.1 SADC Protocol**

Botswana ratified the SADC Protocol concerning the recognition and enforcement of arbitral awards. The Protocol was signed by the head of State/Government on 18 August 2006. The entity is aimed at fostering economic development and integration among the constituent states.

### **3.4 INTERNATIONAL CONVENTIONS**

#### **3.4.1 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (Washington Convention)***

The Convention seeks to encourage investment in developing countries by enabling States and foreign investors to submit their disputes to an independent and neutral forum.<sup>21</sup>

Botswana has since signed 8 bilateral investment treaties, the first on 31<sup>st</sup> July 1997 and last on the 21<sup>st</sup> March 2011.

#### **3.2.2 *New York Convention***

Foreign arbitration is governed by the Recognition and Enforcement of Foreign Arbitral Awards Act. Botswana ratified the New York Conventions on the 20<sup>th</sup> of December 1971. The revised arbitration laws/Act now incorporates

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

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parts of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) into domestic law.

In doing so, Botswana entered a reservation that it would apply the conventions only to the recognition and enforcement of awards made in the territory of another state.<sup>22</sup> It further entered an additional reservation that it would apply the convention only to differences arising from legal relationships, contractual or otherwise, that are considered commercial under their national laws.<sup>23</sup>

Since the New York Convention regulates the recognition and enforcement of foreign awards, it merely provides for the enforcement of awards made in other New York Convention countries.

Therefore, there is no provision for the enforcement of foreign awards made in countries that are not parties to the New York Convention; foreign awards that are made in non-New York Convention countries might not be enforceable in Botswana. Due to this loop-hole, it is respectfully submitted that Botswana adopted the UNCITRAL Model Law.

#### **3.2.5 UNCITRAL Model Law**

Botswana was elected by the General Assembly on the 15<sup>th</sup> of April for a six-year term beginning on 21 June, 2010. This showed a step in the right direction as The Model Law carries the basic principles expected of a modern arbitration law. It is far advanced than the present Arbitration Act in respect of its regulation of arbitral proceedings.

## **4.0 CONCLUSION**

Arbitration in Botswana has grown to be one of the most preferred means of alternative dispute resolution (ADR) as they are faster and less costly and more private. Furthermore, parties have the ability to get arbitrators who have arbitrator process expertise and specific subject matter expertise. As a results Botswana arbitration laws continue to grow and evolve.

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<sup>22</sup>United Nations Treaty Collection, Available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII-1&chapter=22&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en)

<sup>23</sup> R. F. Opong, *Private International Law In Commonwealth Africa*, Cambridge University Press (2013), pp 398.

**REFLECTIONS ON ACCESS TO JUSTICE THROUGH  
ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN A  
GLOBALISED SOCIETY**

*by* **LAWRENCE MUIRURI NGUGI\***

Disputes are an inevitable occurrence of all social, political and economic aspects of human interaction. Many of these disputes are resolved outside of the formal frameworks of the judicial system. Society has endeavoured to channel the disruptive elements of dispute and diffuse this through various mechanisms of settlement and resolution. One common denominator of all such mechanisms is the quest for just outcomes. However not every initiative to handle disputes will achieve the desired outcome. This has given rise to a now familiar subject of 'access to justice' which has remained a central concern for every legal system whether within the developed nations or the developing nations.

This paper proceeds on a first assumption that access to justice is achieved when members of a society have unhindered opportunity to have their disputes resolved or settled through means that result in just outcomes. When viewed from this perspective, access to justice is not confined to availability of a service or the cost but it assumes a broader meaning. An effective mechanism of dispute resolution must be able to address the interests of disputants and obtain an end state that each considers being just. Second the paper assumes that the subject of access to justice is not confined to the public justice system but it can be contextualized within the framework of the more privatized alternative dispute resolution systems.

In the context of an internationalized society dispute resolution transcends local jurisdictions. It is dynamic and influenced by a myriad of external considerations. The world today has an internationalized citizenship with Multinationals doing business across the globe and consumers purchasing goods from foreign ports. Globalization of trade and commerce has seen an exponential growth in inter-state movement of goods and services. Inevitably, the process also results in a growth in trans-border disputes. In the present day society, access to justice must mirror the dynamism of global trade and commerce. Mechanisms must evolve that will provide an effective and efficient means of dispute resolution across borders. The international community will grapple with the

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\* Ag. Registrar, Nairobi Centre for International Arbitration

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challenge of realizing a truly universal regime for resolution of commercial disputes.

Perceptions of bias against the systems of developing nations remain a major obstacle to the realization of this goal. Whether a myth or fact, the view that the international commercial dispute resolution system has favoured the traditional Centre's of arbitration has persisted for some time. With the shift of focus in international investments to the developing regions of the world this debate will gain momentum. It should not be lost from the focus of such a debate that the aim of any dispute resolution mechanism must be a just outcome to the disputants. A resolution that does not inspire the confidence of parties irrespective of the economic divide will not provide the desired boost to access to justice.

The emergence of Centres for dispute resolution in various capitals of the world is a laudable step towards achieving greater access to justice. The skeptics will regard this as a proliferation or mushrooming of institutions without a net impact on the global scene. Those who view the trend of establishment of such Centres as a long overdue move to even the field of international dispute resolution are closer to the demands of our changing societies. International dispute resolution and commercial arbitration in particular has long been regarded as a growth industry. Governments have invested directly or indirectly in the establishment of Centres for international arbitration. Centres such as those to be found in Kuala Lumpur, Dubai, Singapore and Hong Kong are a deliberate strategy to position their economies on the global map of dispute resolution. These economies have taken advantage of a gap in the international arena and offered a solution.

From the prism of international relations access to justice has thus acquired new frontiers. Emerging economies should consider the impact of access to predictable and flexible methods of dispute resolution within their legal regime as an attraction to foreign direct investments (FDI). This assures investors that their investments will not only be protected but disputes will be resolved in a reliable fashion. Access to justice cannot be confined to the domestic sphere or addressed without regard to the place of a nation in the international community.

The East Africa Region has witnessed an influx in FDI and increasing interest in areas such as mining, exploration and infrastructure. The region is at a junction in its economic transition with countries aiming to transform into industrialized economies on an average of 15 to 20 years. The region stands at a concentric meeting point of other Regional Economic Communities and an ever expanding Free Trading Area. This development will pose a dilemma to the justice systems in the various countries. Innovative ways must be developed and harnessed to enhance access to justice to a growing population involved in regional commerce.

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Alternative dispute mechanisms can provide an avenue to channel commercial related disputes and reduce over-reliance on the formal judicial system. Admittedly, the judicial system will continue to play a critical role where disputes are either not arbitrable or they are of such a nature that court intervention is required. The Court's will be relied upon to develop precedent that supports alternative dispute resolution and maintains a healthy complimentary relationship with the formal processes. In Kenya for instance, the Constitution has ushered in a new dawn for alternative dispute resolution. The waters must be navigated with circumspection to avoid the pitfalls of an intrusive regime while respecting the Constitutional rights of disputants. Finding a balance should be the eventual aim of the policy and decision-makers. Already the world is embracing the tenets of rule of law in the definition of future interaction.

The Nairobi Centre for International Arbitration (NCIA) has positioned itself to offer viable solutions that will enhance access to justice through alternative dispute resolution within the region and attract the international arena to resolve commercial disputes in Nairobi. This will be achieved through a raft of innovative initiatives that will make NCIA an arbitration Centre of choice. We are forging partnerships with domestic bodies such as the Chartered Institute of Arbitrators (Kenya) regional institutions such as Mauritius Centre for International Arbitration, the Kigali Centre for International Arbitration and the Kuala Lumpur Regional Centre for Arbitration. As the players pursue a unified and collaborative approach each will remain relevant to its core mission and complementary to the other in enhancing access to justice to a growing internationalized society of the present time.

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This paper proceeds on a first assumption that access to justice is achieved when members of a society have unhindered opportunity to have their disputes

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In the context of an internationalized society dispute resolution transcends local jurisdictions. It is dynamic and influenced by a myriad of external considerations. The world today has an internationalized citizenship with Multinationals doing business across the globe and consumers purchasing goods from foreign ports. Globalization of trade and commerce has seen an exponential growth in inter-state movement of goods and services. Inevitably, the process also results in a growth in trans-border disputes. In the present day society, access to justice must mirror the dynamism of global trade and commerce. Mechanisms must evolve that will provide an effective and efficient means of dispute resolution across borders. The international community will grapple with the challenge of realizing a truly universal regime for resolution of commercial disputes.

Perceptions of bias against the systems of developing nations remain a major obstacle to the realization of this goal. Whether a myth or fact, the view that the international commercial dispute resolution system has favoured the traditional Centre's of arbitration has persisted for some time. With the shift of focus in international investments to the developing regions of the world this debate will gain momentum. It should not be lost from the focus of such a debate that the aim of any dispute resolution mechanism must be a just outcome to the disputants. A resolution that does not inspire the confidence of parties irrespective of the economic divide will not provide the desired boost to access to justice.

The emergence of Centres for dispute resolution in various capitals of the world is a laudable step towards achieving greater access to justice. The skeptics will regard this as a proliferation or mushrooming of institutions without a net impact on the global scene. Those who view the trend of establishment of such Centres as a long overdue move to even the field of international dispute resolution are closer to the demands of our changing societies. International dispute resolution and commercial arbitration in particular has long been regarded as a growth industry. Governments have invested directly or indirectly in the establishment of Centres for international arbitration. Centres such as those to be found in Kuala Lumpur, Dubai, Singapore and Hong Kong are a deliberate



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strategy to position their economies on the global map of dispute resolution. These economies have taken advantage of a gap in the international arena and offered a solution.

From the prism of international relations access to justice has thus acquired new frontiers. Emerging economies should consider the impact of access to predictable and flexible methods of dispute resolution within their legal regime as an attraction to foreign direct investments (FDI). This assures investors that their investments will not only be protected but disputes will be resolved in a reliable fashion. Access to justice cannot be confined to the domestic sphere or addressed without regard to the place of a nation in the international community.

The East Africa Region has witnessed an influx in FDI and increasing interest in areas such as mining, exploration and infrastructure. The region is at a junction in its economic transition with countries aiming to transform into industrialized economies on an average of 15 to 20 years. The region stands at a concentric meeting point of other Regional Economic Communities and an ever expanding Free Trading Area. This development will pose a dilemma to the justice systems in the various countries. Innovative ways must be developed and harnessed to enhance access to justice to a growing population involved in regional commerce.

Alternative dispute mechanisms can provide an avenue to channel commercial related disputes and reduce over-reliance on the formal judicial system. Admittedly, the judicial system will continue to play a critical role where disputes are either not arbitrable or they are of such a nature that court intervention is required. The Court's will be relied upon to develop precedent that supports alternative dispute resolution and maintains a healthy complimentary relationship with the formal processes. In Kenya for instance, the Constitution has ushered in a new dawn for alternative dispute resolution. The waters must be navigated with circumspection to avoid the pitfalls of an intrusive regime while respecting the Constitutional rights of disputants. Finding a balance should be the eventual aim of the policy and decision-makers. Already the world is embracing the tenets of rule of law in the definition of future interaction.

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## Call for Submissions

**Alternative Dispute Resolution** is a publication of the Chartered Institute of Arbitrators, Kenya engineered and devoted to provide a platform and window on relevant and timely issues related to alternative dispute resolution mechanisms to our ever growing readership.

**Alternative Dispute Resolution** welcomes and encourages submission of articles focusing on general, economic and political issues affecting alternative dispute resolution as the preferred dispute resolution mechanisms.

Articles should be sent as a word document, to the editor ([editor@ciarbkenya.org](mailto:editor@ciarbkenya.org)) and a copy to the editorial group ([adrjournal@ciarbkenya.org](mailto:adrjournal@ciarbkenya.org)). Articles should ideally be around 3,500 – 5,000 words although special articles of up to a maximum of 7,500 words could be considered.

Articles should be sent to the editor to reach him not later than Tuesday 29<sup>th</sup> October, 2014. Articles received after this date may not be considered for the next issue.

Other guidelines for contributors are listed at the end of each publication. The Editor receives and considers each article received but does not guarantee publication.

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Each submission:-

- Should be written in English
- Should conform to international standards and must be ones original writing
- Should ideally be between 3,500 and 5,000 words although in special cases certain articles with not more than 7,500 words could be considered
- should include the authors name and contacts details
- should include footnotes numbered
- must be relevant and accurate
- should be on current issues and developments

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Chartered Institute of Arbitrators, Kenya  
Nicholson Drive, off Ngong Road  
between Bemuda Plaza and  
Central Church of Nazarene  
P.O. Box 50163-00200, Nairobi  
Tel: 2712481, 2722724 Fax: 2720912  
Mobile: 0734 652205 or 0722 200496  
Email: [info@ciarbkkenya.org](mailto:info@ciarbkkenya.org)  
Website: [www.ciarbkkenya.org](http://www.ciarbkkenya.org)