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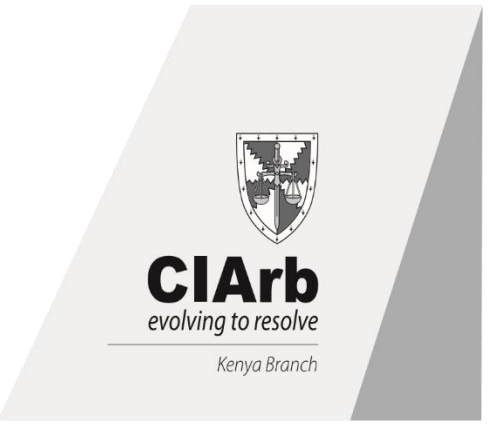
JOURNAL VOLUME 11 ISSUE 4 2023



ALTERNATIVE DISPUTE RESOLUTION

Volume 11 Issue 4 **2023**

Alternative Dispute Resolution is a journal of the Chartered Institute of Arbitrators (Kenya Branch).

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Typesetting by:
New Edge GS,
P.O. Box 60561 – 00200,
Tel: +254 721 262 409/ 737 662 029,
Nairobi, Kenya.

Printed by:
Mouldex Printers
P.O. Box 63395,
Tel – 0723 366 839,
Nairobi, Kenya.

Published by:
Glenwood Publishers Limited
P.O. Box 76115 - 00508
Tel +254 2210281,
Nairobi, Kenya.

This Journal should be cited as ***(2023) 11(4)*** *Alternative Dispute Resolution*

ISBN 978-9966-046-14-7

Editor's Note

We are pleased to launch another issue of the *Alternative Dispute Resolution (ADR) Journal*, Volume 11, No. 4.

The ADR Journal is a publication by the Chartered Institute of Arbitrators (CIArb), Kenya that spearheads intellectual discourse on pertinent and germane issues in Alternative Dispute Resolution (ADR) and other related fields of knowledge.

It offers a platform where scholars, ADR practitioners, judicial officers, law lecturers and students can share knowledge, ideas, emerging jurisprudence and reflects on the practice of ADR. The Journal is aimed towards advancing the growth of ADR as a viable tool for the management of disputes in Kenya and across the globe.

The role of ADR in access to justice has gained recognition in the recent past. In Kenya, the Constitution advocates for the promotion of ADR mechanisms towards achieving access to justice. The Journal addresses some of the current concerns and challenges facing ADR mechanisms and proposes recommendations towards enhancing the suitability of ADR mechanisms in the quest towards Access to Justice.

The ADR Journal is devoted to the highest quality academic standards. It is peer reviewed and refereed in order to achieve this goal.

This volume contains papers and case reviews on salient themes in ADR including *Navigating the Digital Dispute Resolution Landscape: Challenges and Opportunities; A Heterodox View of Alternative Dispute Resolution in Kenya; Assessment of The Impact of Court Procedural Rules in Implementation of the Court Annexed Mediation Programme (Camp) in Kenya; Reforming Virtual Court Sessions in Kenya to Enhance Access to Justice: Addressing the challenges; Reflections on Human Rights in Arbitration; Resolving Multiparty*

Construction Disputes by Arbitration. The Challenges and Solutions; Addressing Constitutional Issues Arising Out of Arbitrable Commercial Disputes: The Bia Tosha and Kenya Breweries Limited Cases; Construction Adjudication: Overcoming Challenges of Enforcement; Resolving Conflicts Through Mediation in Kenyan Schools; and *Judicial Overreach and The Backlash from Elected Institutions*.

It also contains a review of *the Journal of Conflict Management and Sustainable Development, Volume 10, Issue 4 (2023)* and a book review of *Embracing Environmental Social and Governance (ESG) Tenets for Sustainable Development (2023).*

The Journal continues to shape the landscape of ADR practice in Kenya and beyond. It is one of the most widely cited and referenced publications in ADR. The Editorial Team welcomes feedback and suggestions from our readers across the globe to enable us to continue improving the Journal.

I wish to thank the contributing authors, Editorial team, reviewers and everyone who has made this publication possible.

The Journal is committed towards equality and non-discrimination in academia and offers a platform where everyone can share his/her ideas and thoughts on key issues in ADR. To this end, the Editorial Board welcomes and encourages the submission of papers, book reviews and case summaries on emerging and pertinent issues in ADR to be considered for publication in subsequent issues of the Journal.

The Editorial Board receives and considers each article but does not guarantee publication. Submissions should be sent to the editor through editor@ciarbkenya.org and adrjournal@ciarbkenya.org and copied to admin@kmco.co.ke.

The Journal is available online at *https://ciarbkenya.org/journals/*

Dr. Kariuki Muigua, Ph. D; FCIArb; C.Arb
Editor.
Nairobi, August 2023.

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Dr. Kariuki Muigua is a distinguished law scholar, an accomplished mediator and arbitrator with a Ph.D. in law from the University of Nairobi and with widespread training and experience in both international and national commercial arbitration and mediation. Dr. Muigua is a Fellow of Chartered Institute of Arbitrators (CIArb)-Kenya chapter and also a Chartered Arbitrator. He also serves as a member of the National Environment Tribunal. He has served as the Chartered Institute of Arbitrator's (CIArb- UK) Regional Trustee for Africa from 2019 -2022. He is member of the Permanent Court of Arbitration (PCA) The Hague.

He became the first winner of the Inaugural CIArb (Kenya Branch) ADR Lifetime Achievement Award 2021. He was also the winner of the ADR Practitioner of the Year Award 2021 given by the Nairobi LSK and the ADR Publisher of the Year 2021 awarded by CIArb Kenya. He was also awarded the ADR Practitioner of the Year Award 2022 at the AfAA Awards. The award which was presented by the African Arbitration Association is awarded to the Arbitrator/ADR practitioner who is adjudged to have made outstanding achievements in, or contribution to, the development of Arbitration/ADR in Africa.

He is an Advocate of the High Court of Kenya of over 30 years standing and practicing at Kariuki Muigua & Co. Advocates, where he is also the senior advocate. His research interests include environmental and natural resources law, governance, access to justice, human rights and constitutionalism, conflict resolution, international commercial arbitration, the nexus between environmental law and human rights, land and natural resource rights, economic law and policy of governments with regard to environmental law and economics. Dr. Muigua teaches law at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), Wangari Maathai Institute for Peace and Environmental Studies (WMI) and the Faculty of Law, University of Nairobi.

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Dr. Ken possesses a comprehensive understanding of the practice and procedures in ADR having acted as adjudicator, arbitrator and mediator in a wide range of disputes. He sits as a member of the Dispute Resolution Panel of the Architectural Association of Kenya (AAK) and also has vast experience in ADR training having engaged in the various participant training events as a trainer for the Chartered Institute of Arbitrators (Kenya Branch).

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I currently work as a Senior State Counsel at the Office of the Attorney General and Department of Justice(OAG&DOJ), Kenya in the Legal Advisory and Research Division (LA&RD). I provide technical support in the execution of the advisory role of the Office to government Ministries, Departments and Agencies(MDA's), State Agencies as well as Constitutional Commissions.I am also providing technical and research support to the Presidential Taskforce on the Review of the Legal and Regulatory Framework on Religious Organisations in Kenya. My areas of interest include governance, constitutionalism, access to justice and inclusion for persons living with disabilities, alternative dispute resolution law, data governance and ethics and energy transition governance.
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Storm Thiaka is an ambitious and hard-working final year law student with a passion for alternative dispute resolution. His vision for effective access to justice and course instruction on ADR led him to acquire a certificate in Mediation from the Karl Mediation and Arbitration Centre an accredited institution, further deepening his knowledge and interest for the utility and importance of mediation within Kenya's judicial system. Currently pursuing a Bachelor's degree in Law from the University of Nairobi and working as a legal researcher under the guidance of a senior lecturer at the University, Storm has acquired the skill and experience to put his reflections to paper, giving insight into new opportunities for alternative dispute resolution in the country.

Endeavouring to contribute to the world of ADR, Storm has authored an article titled, "*Resolving Conflict through Mediation in Kenyan Schools.*" This insightful piece opens up the scope of Child-Inclusive Mediation, by making a case for mediation as a viable solution for the unique issues that children in Kenyan schools face. Through extensive research and an out-of-the-box approach, Storm explores the new avenues open to ADR practitioners and the field of ADR as a whole. Storm is an active volunteer in a number of international organizations and initiatives such as the Millennium Fellowship, Lawyers Against Poverty and the International Lawyers Project. Through his work and future practice, Storm aims to be a powerful advocate for access to justice and an avid supporter of mediation as an integral part of achieving better outcomes for disputing parties.
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Dr. Wamuti Ndegwa is an Advocate of the High Court of Kenya of over 26 years standing. He holds Bachelor of Laws (LL.B) Honours degree, Master of Laws degree (LL.M) and Doctor of Philosophy (PhD) in Law from the University of Nairobi. As a legal practitioner Ndegwa, is an accomplished trial lawyer specializing in commercial disputes. He practices in Nairobi and Mombasa under Ndegwa, Sitonik, & Karina Advocates. In addition, Ndegwa is a certified mediator under Mediation Training Institute International (MTI) East Africa, a trainer of trainers in the Faculty of the National Institute of Trial Advocacy, and a lecturer at the University of Nairobi where he teaches administrative law, torts, research methods and public procurement regulation. He chairs the committee on human rights and governance at the School of Law of the University of Nairobi at Mombasa.

Ndegwa is prolific researcher and has recently published research papers including,

a. *Adjudicating Land Disputes in a Rapidly Changing Social, Economic and Political Environment* (December, 4th 2019). Kenya Law: VOLUME 8 [No. 1] December 2020

b. *Restoring The Limits Of Judicial Adjudication: Focus On Impeachments* (2020) Journal of cmsd Volume 4(5). Restoring-The-Limits-of-Judicial-Adjudication.pdf (journalofcmsd.net)

Some of the seminar papers he has presented include,

a. *Emerging Legal Tools in Civil Societies Fight Against Corruption (Kenya Experience)* University of Oxford, Oxford Institute for Ethics, Law and armed conflict (Conference on the legal remedies for corruption – (June 6, 2014).

b. *Bail/Bond in serious cases: Balancing National Security and Human Rights in Terrorism Offences,* Ngulia Lodge Judges and Magistrates South West Region Stakeholders Retreat (July 26, 2014).

c. *Introspection & Reflection: Perspectives From The Practitioner: Judges Colloquium Whitesands Hotel July 7, 2017.*

d. *Adjudicating Land Disputes in a Rapidly Changing Social, Economic and Political Environment (*2019 Environment and Land Court Annual Judges Conference).

Previously, Ndegwa led research projects as the lead consultant of the National Consultant for Attorney General & Department of Justice in consultancy for developing the False Claims. The Bill seeks to introduce a law that provides for private persons to undertake legal action to recover public assets lost to corruption and rewarding the private person with a commission. Ndegwa was the Lead Counsel in the Judicial Commission of Inquiry into the Violence in the Tana River, Tana Delta, and Tana North Districts.

Ndegwa is an Anglican by faith and currently, he is the Chancellor of the Diocese of Mombasa in the Anglican Church of Kenya.

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Alternative Dispute Resolution – Volume 11 Issue 4

Navigating the Digital Dispute Resolution Landscape: Challenges and Opportunities

By: ***Hon. Dr. Kariuki Muigua****

Abstract

The paper critically interrogates digital dispute resolution. It defines digital dispute resolution and discusses the progress made towards embracing this concept. The paper highlights some of the platforms and processes that have fostered digital dispute resolution. It further explores the challenges and opportunities presented by digital dispute resolution. The paper also offers proposals towards enhancing the digital dispute resolution landscape.

1.0 Introduction

A dispute refers to a disagreement on a point of law or fact, a conflict of legal views or of interests between two or more people[1]. A dispute has also been defined as a disagreement by two or more people over issues or interests that are finite and divisible[2]. Disputes can be interest-based, rights-based or power-based[3]. Disputes often arise due to disagreement as to the existence or validity of a claim by one party[4]. They can also occur due to questions arising from the

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[1] Mavrommatis Palestine Concessions (Greece *v*. Great Britain), Judgment of 30 August 1924,
1924 *PCIJ* (Ser. A) No. 2, at 11.
[2] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015
[3] Ibid
[4] Marshall. P., 'Would ADR Have Saved Romeo and Juliet?' *Osgood Hall Law Journal*, Volume 36 (1998)

performance or nonperformance of certain obligations[5]. It has been observed that disputes involve the recognition by the parties that they are entitled to some kind of resolution or solution to the dispute[6].

Dispute resolution refers the process of managing a dispute by meeting at least some of each side's needs and addressing their interests[7]. It has also been defined as the process of settling disagreements between parties[8]. The aim of dispute resolution is to manage disputes in an efficient manner by fostering a rapport, considering interests and values separately, appealing to overarching values, and indirect confrontation[9]. It has been pointed out that in dispute resolution, parties in the first instance often attempt to utilize informal mechanisms provided in the particular arena where the dispute arises then, as a last resort, disputants might take the controversy to a public forum being courts of law[10]. Thus, in managing disputes parties often start with informal processes such as negotiation, then move on to mediation if the negotiation process fails, and, if necessary, end in arbitration or litigation where the mediation process fails[11].

Various dispute resolution mechanisms are recognized at the global, regional and national levels. These mechanisms are either public or private, mandatory

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[5] Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion
of 30 March 1950 (first phase), 1950 *ICJ Rep*. 65, at 74.
[6] Mwagiru. M., 'Conflict in Africa: Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), p. 42
[7] Harvard Law School., 'Dispute Resolution.' Available at *https://www.pon.harvard.edu/tag/dispute-resolution/* (Accessed on 03/08/2023)
[8] Moffitt. M., & Bordone. R., 'The Handbook of Dispute Resolution.' Available at *https://books.google.co.ke/books?hl=en&lr=&id=NYeZrfzBDVUC&oi=fnd&pg=PR11&ots=1Pde6J8OLC&sig=tHspP8Bf9aZ_SgRn8q9OIPqh7p0&redir_esc=y#v=onepage&q&f=false* (Accessed on 03/08/2023)
[9] Ibid
[10] Sander. F., 'Alternative Methods of Dispute Resolution: An Overview.' *Florida Law Review*, Volume 37, Issue 1
[11] Harvard Law School., 'Dispute Resolution.' Op Cit

or optional[12]. At the international level, the *Charter of the United Nations* enjoins parties to an international dispute, to first seek a solution to their dispute by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice[13]. The Charter of the United Nations thus recognizes various dispute resolution processes including Alternative Dispute Resolution (ADR) processes and judicial settlement. In Kenya, the Constitution enshrines various dispute resolution processes including courts and ADR mechanisms such as reconciliation, mediation, arbitration and traditional dispute resolution mechanisms[14]. It can thus be argued that dispute resolution generally entails the use of courts and ADR processes such as negotiation, mediation, conciliation, arbitration and traditional dispute resolution mechanisms.

The method of dispute resolution discussed above have their own advantages and disadvantages. Courts as an avenue for dispute resolution have been hailed for the ability to foster finality in dispute management, binding nature of decisions and ability to enforce such decisions, availability of interim measures of protection in case of emergencies and the availability of precedents thus creating certainty in dispute resolution[15]. However, use of courts in dispute resolution faces several challenges including high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow[16]. ADR processes on the other hand have been hailed for their advantages which include informality, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost effective management of disputes[17]. However, it has also been pointed that some of these mechanisms have several drawbacks including power imbalances, lack

[12] Sander. F., 'Alternative Methods of Dispute Resolution: An Overview.' Op Cit
[13] Charter of the United Nations, 24 October 1945, 1 UNTS XVI., Article 33.1
[14] Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi
[15] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[16] Ojwang. J.B, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), pp. 19-29: 29
[17] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

of precedents, non-binding nature of some mechanisms, lack of formal recognition and inability to grant urgent protection such as injunctions[18].

The landscape of dispute resolution has witnessed significant changes in the recent past. Technological developments such as block chain and Artificial Intelligence (AI) are not only disrupting the way we transact on markets and conclude contracts but are also fundamentally changing the processes and modes of law enforcement and dispute resolution[19]. Consequently, it has been asserted that technological revolution has ushered in a new era of dispute resolution in the form of digital dispute resolution[20]. The paper critically interrogates digital dispute resolution. It defines digital dispute resolution and discusses the progress made towards embracing this concept. The paper highlights some of the platforms and processes that have fostered digital dispute resolution. It further explores the challenges and opportunities presented by digital dispute resolution. The paper also offers proposals towards enhancing the digital dispute resolution landscape.

2.0 Interpreting Digital Dispute Resolution

Technology is a disruptive phenomenon that has the capacity to end traditional business models, to cast whole industries into oblivion, and to destroy traditional crafts, arts, and professions[21]. Rapid digitalization is affecting all aspects of life including the way we interact, work, shop and receive services as well as how value is created and exchanged[22]. Technology has impacted the

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[18] Ibid

[19] Eidemuller. H., & Wagner. G., 'Digital Dispute Resolution.' Available at *https://blogs.law.ox.ac.uk/business-law-blog/blog/2021/09/digital-dispute-resolution* (Accessed on 03/08/2023)

[20] Katsh. E., & Rabinovich-Einy. O., 'Digital Justice: Technology and the Internet of Disputes.' Available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3508311* (Accessed on 03/08/2023)

[21] Eidemuller. H., & Wagner. G., 'Digital Dispute Resolution.' Op Cit

[22] United Nations Conference on Trade and Development., 'Digital Economy Report: 2021.' Available at *https://unctad.org/system/files/official-document/der2021_overview_en_0.pdf* (Accessed on 04/08/2023)

nature and practice of the legal profession in Kenya and across the globe in the 21st century[23]. Despite its relatively slow progress in embracing technology, the legal profession has in the recent past been more adaptive to technology as a matter of necessity due to ascendancy of information technology, the globalization of economic activity, the blurring of differences between professions and sectors, and the increasing integration of knowledge[24].

The expansion of digital trade and digitally enabled transactions has been tremendous in Kenya, and digitization has become a vital element of a wide range of daily activities and service delivery[25]. With more and more individuals throughout the globe engaged in immediate cross-border exchanges of digital commodities, and as the infrastructure that supports the Internet increases, obstacles of distance and cost that previously appeared insurmountable have begun to fall away[26]. This, therefore, calls for investment in institutional frameworks that will ably overcome the challenges that come with digital economy, as far as management of the digital trade disputes is concerned[27].

Digital transformation has also affected the resolution of disputes and the enforcement of claims[28]. The disruptions caused by the COVID-19 pandemic

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[23] Muigua. K., 'Embracing Technology for Enhanced Efficiency and Access to Justice in the Legal Profession.' Available at *http://kmco.co.ke/wp-content/uploads/2022/06/Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-in-the-Legal-Profession-Dr.-Kariuki-Muigua.pdf* (Accessed on 04/08/2023)

[24] Ibid

[25] Kiriti-Nganga. T & Mbithi. M, 'The Digital Trade Era - Opportunities and Challenges for Developing Countries: The Case of Kenya' (2021), in book: Adapting to the Digital Era: Challenges and Opportunities (pp.92-109), World Trade Organization, at p.94

[26] Lund. S & Manyika. J, 'How Digital Trade Is Transforming Globalisation' (by International Centre for Trade and Sustainable Development (ICTSD) 7, 2016), at p.1

[27] Muigua. K., 'The Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2022/04/The-Evolving-Alternative-Dispute-Resolution-Practice-Investing-in-Digital-Dispute-Resolution-in-Kenya-Kariuki-Muigua.pdf* (Accessed on 05/08/2023)

[28] Eidemuller. H., & Wagner. G., 'Digital Dispute Resolution.' Op Cit

have brought to light, the impact of technology on modern legal practice and led to the adoption of practices such as virtual court sessions, electronic filing of pleadings and online delivery of judgments and rulings[29]. The use of technology has also permeated into the field of Alternative Dispute Resolution (ADR) with practices such as online mediation, online arbitration, smart contracts and block chain arbitration being embraced[30]. It has been argued that the traditional court system is incapable of administering justice on a large scale in light of the digital transformation and there is need to embrace digital dispute resolution in order to effectively manage technology related disputes[31].

Digital dispute resolution has been described as the process of managing disputes on the internet through the use of suitable technology or platforms[32]. It involves the use of technology to facilitate the rapid, cost effective and specialised resolution of disputes involving digital technology including crypto assets, cryptocurrency, smart contracts, distributed ledger technology, and fintech applications[33]. Digital Dispute Resolution is often compared to Online Dispute Resolution (ODR) which refers to a set of processes that allow for the

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[29] Muigua. K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice' available at *http://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New-Frontiers-EmbracingTechnology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf* (Accessed on 04/08/2023)

[30] Yeoh. D., 'Is Online Dispute Resolution the future of Alternative Dispute Resolution.' Available at *https://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/* (Accessed on 04/08/2023)

[31] Peters, S., "The evolution of alternative dispute resolution and online dispute resolution in the European Un." *CES Derecho* 12, no. 1 (2021): 3-17, at p.6

[32] Sadushi. M., 'The Theory and Practice of Dispute Resolution in The Digital Age.' Available at *https://eajournals.org/gjplr/vol-5-issue-7-december-2017/theory-practice-dispute-resolution-digital-age/* (Accessed on 05/08/2023)

[33] AShurst., 'Digital Dispute Resolution Rules Published.' Available at *https://service.betterregulation.com/sites/default/files/digital-dispute-resolution-rules-published.pdf* (Accessed on 04/08/2023)

resolution of disputes via online mechanisms such as the internet or some form of technology that allows for virtual communication[34].

Technology has the ability to make dispute resolution more efficient[35]. It has been observed that technology is transforming the landscape of dispute resolution by generating an ever- growing number of disputes and at the same time challenging the effectiveness and reach of traditional dispute resolution avenues such as courts[36]. Technology holds the promise for an improved dispute resolution landscape that is based on fewer physical, conceptual, psychological and professional boundaries, while enjoying a higher degree of transparency, participation and change[37]. Technology could be used to ensure that every case has a single data set that can be used at every stage of the dispute resolution process in order to avoid the repetition of the same facts and issues in pleadings, witness statements, expert reports, skeleton arguments and opening and closing written submissions[38].

The United Kingdom has made progress towards embracing digital dispute resolution by adopting the Digital Dispute Resolution Rules which are meant to facilitate the rapid and cost-effective resolution of commercial disputes, particularly those involving novel digital technology such as crypto assets, cryptocurrency, smart contracts, distributed ledger technology, and fintech

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[34] Mania. K., 'Online Dispute Resolution: The Future of Justice.' *International Comparative Jurisprudence*, No. 1 of 2015, (pg 76-86)
[35] Ibid
[36] Rabinovich-Einy..O., & Katsh. E., 'Reshaping Boundaries in an Online Dispute Resolution Environment.' *International Journal of Online Dispute Resolution*, Volume 1, No. 1 (2014)
[37] Ibid
[38] Ashurst., 'Dispute Resolution in need of a "Digital Makeover?".' Available at *https://www.ashurst.com/en/insights/dispute-resolution-in-need-of-a-digital-makeover/#:~:text=Technology%20could%20be%20used%20to,opening%20and%20closing%20written%20submissions* (Accessed on 04/08/2023)

applications[39]. The Rules must be agreed upon in writing by both parties, either before or after a disagreement arises[40]. The Rules provide language for use in a contract, a digital asset (such as a crypto asset, digital token, smart contract, or other digital or coded representation of an asset or transaction), or a digital asset system[41]. Further, the United Nations Commission on International Trade Law in its Dispute Resolution in the Digital Economy Initiative recognizes the importance of technology in enhancing the efficiency of dispute resolution but with emphasis on the need to take into account the disruptive aspects of digitalization, in particular with respect to due process and fairness[42]. In Kenya, the Digital Economy Blue Print envisages the use of digital dispute resolution mechanisms such as Online Dispute Resolution to enforce contracts, resolve disputes and protect consumers[43]. These are some of the initiatives adopted towards embracing digital dispute resolution.

Some of the technological innovations that have enhanced digital dispute resolution include the use of block chain technology and Artificial Intelligence (AI) programs such as smart contracts and Chat GPT[44]. Block chain technology has facilitated Block chain Dispute Resolution (BDR) which provides a platform for management of disputes arising out of block chain and smart contract transactions or for traditional disputes that are not related to block chain transactions[45]. Further, it has been contended that technologies such as AI could

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[39] United Kingdom, Digital Dispute Resolution Rules, April 2021 Available at *https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech_DDRR_Final.pdf* (Accessed on 05/08/2023)

[40] Ibid

[41] Ibid

[42] United Nations Commission on International Trade Law., 'UNCITRAL's Dispute Resolution in the Digital Economy Initiative.' Available at *https://uncitral.un.org/en/parisarbitrationweekdrde#:~:text=The%20UNCITRAL%20project%20on%20the,information%20with%20a%20view%20to* (Accessed on 05/08/2023)

[43] Republic of Kenya., 'Digital Economy Blueprint.' Available at *https://www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf* (Accessed on 05/08/2023)

[44] Ashurst., 'Dispute Resolution in need of a "Digital Makeover?' Op Cit

[45] Kumtepe. C., 'A Brief Introduction to Blockchain Dispute Resolution.' *John Marshall Law Journal*, Volume 14, No. 2 (2021)

be used to quickly sift through the mass of complex facts to identify the key issues at the heart of each dispute thus enhancing the efficiency of dispute resolution[46]. Smart contracts have also been embraced in the field of digital dispute resolution[47]. These are programs stored on a block chain that run when predetermined conditions are met[48]. They are often used to automate the execution of an agreement so that all participants can be immediately certain of the outcome, without any intermediary's involvement or time loss[49]. Smart contracts can also automate a workflow, triggering the next action when conditions are met[50]. Smart contracts are versatile and can be embraced in digital dispute resolution in order to enhance speed, efficiency, accuracy, transparency and cost effectiveness[51]. Indeed, smart legal contracts are being adopted which execute automatically when conditions have been met[52]. These include digital wills and legal agreements between organizations[53].

Further, it has been asserted that programs such as Chat GPT have the potential of enhancing efficiency and expeditiousness in dispute resolution in areas such as legal research and formulating legal opinions[54]. It can provide quick and

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[46] Ibid
[47] Ibid
[48] IBM., 'Smart Contracts Defined.' Available at *https://www.ibm.com/topics/smart-contracts* (Accessed on 04/08/2023)
[49] Ibid
[50] Ibid
[51] Zebpay., 'Smart Contracts Vs Blockchain.' Available at *https://zebpay.com/blog/difference-between-smart-contract-vs-blockchain* (Accessed on 04/08/2023)
[52] Educative., 'Types of contracts in Solidity.' Available at *https://www.educative.io/answers/types-of-contracts-in-solidity* (Accessed on 04/08/2023)
[53] Ibid
[54] Flake. A., 'Chat GPT and Litigation Technology, Reprised.' Available *at https://www.theartofresolution.net/chat-gpt-and-litigation-technology-reprised/* (Accessed on 04/08/2023)

convenient solutions to many legal research and contract analysis tasks[55]. Chat GPT can also foster dispute resolution mechanisms such as International Commercial Arbitration in areas such as language translation in disputes involving parties from different nationalities[56]. It can also be used in text summarization and production of relevant case notes thus aiding the process of dispute resolution[57]. Due to its ability to save time and effort by automating tasks and creating documents and communication quickly, Chat GPT and similar platforms will continue to have a significant impact on the legal landscape including dispute resolution[58].

It is thus evident that there is immense potential for digital dispute resolution. However, despite its potential, digital dispute resolution raises several challenges.

3.0 Challenges facing Digital Dispute Resolution

One of the fundamental challenges with digital dispute resolution relates to jurisdiction. The trans-national nature of technology such as the Internet and the cyberspace is that jurisdictional problems abound in dispute resolution since a dispute may involve parties from different nationalities[59]. One of the advantages of traditional dispute resolution mechanisms such as litigation and ADR

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[55] Vinciullo. A., 'The Risk of Law Firms Relying on Chat GPT to Perform Contract analysis and Legal Research.' Available at *https://www.linkedin.com/pulse/risk-law-firms-relying-chat-gpt-perform-contract-legal-vinciullo/* (Accessed on 04/08/2023)

[56] ArbTech., 'Practical Implications of ChatGPT for Arbitration Practitioners.' Available at *https://www.arbtech.io/blog/practical-implications-of-chatgpt-for-arbitration-practitioners* (Accessed on 04/08/2023)

[57] Ibid

[58] Monachino. C., 'Chat GPT: A Look into the Future (Litigation).' Available at *https://www.clemetrobar.org/?pg=CMBABlog&blAction=showEntry&blogEntry=91543#:~:text=Chat%20GPT%20and%20similar%20platforms,navigate%20the%20quickly%20changing%20environment.* (Accessed on 04/08/2023)

[59] Clark. E et al., 'Online Dispute Resolution: Present Realities, Pressing Problems and Future Prospects.' Available at *https://www.tandfonline.com/doi/pdf/10.1080/1360086032000063084* (Accessed on 05/08/2023)

processes including arbitration and mediation is that jurisdictional issues are well catered for through governing laws and parties' agreement[60]. However, the worldwide nature of the cyberspace may create the challenge of jurisdiction and governing law in management of disputes due to different approaches to these concepts across the globe[61]. It has been asserted that in order to address this concern, there may be need to develop a dispute resolution mechanism for a worldwide context[62].

Further, it has been observed that digital dispute resolution may result in due process and fairness concerns[63]. Digital dispute resolution lacks the procedural safeguards available in traditional dispute resolution mechanisms which ensure due process and fairness. For example, interim reliefs can be obtained without the need to prove irreparable injury or probable success on the merits and without a balancing of interests[64]. Further, aspects such as notice, discovery, collective action, live hearings, confrontation of witnesses, a neutral decision maker, and a transparent process which guarantee due process and fairness in traditional dispute resolution mechanisms may be absent in digital dispute resolution[65]. Thus, the decentralized and expeditious nature of the digital dispute resolution framework creates fundamental questions of how to safeguard fairness and due process to the emphasis on quick management of disputes and lack of control mechanisms in some instances[66]. There is need to

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[60] Ibid
[61] Ibid
[62] Rabinovich-Einy..O., & Katsh. E., 'Reshaping Boundaries in an Online Dispute Resolution Environment.' Op Cit
[63] United Nations Commission on International Trade Law., 'UNCITRAL's Dispute Resolution in the Digital Economy Initiative.' Op Cit
[64] Thornburg. E., 'Going Private: Technology, Due Process, and Internet Dispute Resolution.' Available at *https://core.ac.uk/download/pdf/216915944.pdf* (Accessed on 05/08/2023)
[65] Ibid
[66] Koulu. R., 'Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement.' Available at *https://web.archive.org/web/20180721214039id_/https://script-ed.org/wp-content/uploads/2016/05/koulu.pdf* (Accessed on 05/08/2023)

address this concern in order to enhance the viability of digital dispute resolution.

It has also been contended that digital dispute resolution faces enforcement challenges[67]. Recognition and enforcement of outcomes in digital dispute resolution mainly depends on voluntary compliance by the parties a situation that create challenges especially in the cross- border context[68]. Although voluntary compliance is possible, an effective redress mechanism is needed to force compliance in case the final decision reached in the digital dispute resolution process is not voluntarily followed[69].

Another pertinent concern in digital dispute resolution relate to security and privacy. The systems supporting digital dispute resolution may be subject to cyberattacks[70]. In such cases, unauthorized persons may access the system and engage in unwarranted practices such as stealing of information, deleting information or sending unwanted information to the detriment of some parties[71]. Thus, in digital dispute resolution the privacy and security of the user is susceptible to being compromised since technology can be hacked or exploited to steal information and spy on people among other malpractices[72]. There is need to address privacy and security concerns in digital dispute resolution in order to promote its viability.

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[67] Ibid
[68] Hanriot. M., 'Online Dispute Resolution (ODR) As a Solution to Cross Border Consumer Disputes: The Enforcement of Outcomes.' *McGill Journal of Dispute Resolution*, Volume 2, No. 1, 2015
[69] Ibid
[70] Muigua. K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice' Op Cit
[71] Ibid
[72] Blockchain Council., '7 Key Technologies That Are Powering the Metaverse.' Available at *https://www.blockchain-council.org/metaverse/technologies-powering-metaverse/* (Accessed on 05/08/2023)

Finally, the use of digital dispute resolution such as AI platforms can potentially result in errors. It has been observed that AI models are only as good as the data they are trained on and thus if the data is biased, incomplete, or inaccurate, the AI model's predictions and decisions will also be biased, incomplete, or inaccurate[73]. For example, when using platforms such as Chat GPT to analyze a contract , if a party misses a key provision, it could lead to costly legal disputes down the line[74]. Similarly, if Chat GPT is used to conduct legal research and the results are incomplete or biased, it could lead to incorrect legal advice being provided to clients[75]. Therefore, it is imperative to ensure that when using such platforms in dispute resolution, all safeguards are taken into account to ensure the accuracy, competence and completeness of results[76].

There is need to address the foregoing problems in order to foster digital dispute resolution.

4.0 Way Forward

In order to foster digital dispute resolution there is need to foster digital literacy[77]. It has been correctly observed that with the emerging concepts of Artificial Intelligence, Block Chain technology there is need to enhance digital technology capabilities and potential and efforts must be made at all levels of education to upgrade digital skills[78]. Through digital literacy, people will be more ready to embrace digital dispute resolution since they will be familiar with the technology enabling the processes including Block chain technology and AI processes such as smart contracts and Chat GPT[79].

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[73] Vinciullo. A., 'The Risk of Law Firms Relying on Chat GPT to Perform Contract analysis and Legal Research.' Op Cit
[74] Ibid
[75] Ibid
[76] Eidemuller. H., & Wagner. G., 'Digital Dispute Resolution.' Op Cit
[77] Republic of Kenya., 'Digital Economy Blueprint.' Op Cit
[78] Raizada S and Mittal JK, 'Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education' (2020) 20 Medico Legal Update 188, 189.
[79] Ibid

In addition, there is need to address the privacy and security concerns in digital dispute resolution in order to enhance its viability[80]. It has been pointed out that privacy and security concerns in digital technology can be addressed through measures such as enforcing communication via secure channels, performing strong identity verification to ensure devices are not compromised, limiting the use of third-party software and browsing to unsafe websites and encrypting data on devices to protect against device compromise and theft[81]. Data privacy and security is essential in digital dispute resolution to prevent unauthorized people from accessing the system and obtaining information especially where such information relates to the dispute at hand[82]. Promoting data privacy and security is vital in enhancing digital dispute resolution.

It is also imperative to address the jurisdictional problems inherent in digital dispute resolution. It has been argued that the cross-border indifference of internet technologies has brought with it a plethora of jurisdiction and conflict of laws issues[83]. Territoriality based concepts of regulating have failed to adequately deal with these borderless challenges[84]. This problem can be addressed through the adoption of uniform laws and developing consistent dispute resolution mechanisms with uniform applicability across jurisdictions when dealing with similar disputes especially those that are commercial in nature[85]. This will address the jurisdictional concerns inherent in digital dispute resolution and further enhance the enforcement of outcomes arising from digital dispute resolution models.

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[80] Blockchain Council., '7 Key Technologies That Are Powering the Metaverse.'
[81] Ebner. N., & Zeleznikow. J., 'Fairness, Trust and Security in Online Dispute Resolution.' *Journal of Public Law and Policy*, Volume 36, Issue 2 (2015)
[82] Ibid
[83] Clifford. D., & Van Der Sype. Y., 'Online Dispute Resolution: Settling Data Protection Disputes in a Digital World of Customers.' *Computer Law & Security Review.*, Volume 32, Issue 2 (2016)
[84] Ibid
[85] Rabinovich-Einy..O., & Katsh. E., 'Reshaping Boundaries in an Online Dispute Resolution Environment.' Op Cit

Finally, there is need to ensure the appropriateness and accuracy of digital dispute resolution platforms in order to promote fairness, transparency and accuracy of results[86]. Parties should only adopt such systems once all the processes have been conducted to ensure their credibility and accuracy[87]. Further, when using AI platforms such as smart contracts and Chat GPT in dispute resolution, it is vital to ensure that the correct data, information and instructions are provided to ensure the credibility of results[88]. Through such measures, digital dispute resolution will become an ideal mechanism of managing disputes.

5.0 Conclusion

The disruptive nature of technology has shifted the landscape of dispute resolution leading to the emergence of digital dispute resolution[89]. Digital dispute resolution has the ability to facilitate the rapid, cost effective and specialised resolution of disputes by embracing the use of suitable technology or platforms[90]. Consequently, technologies and platforms such as Block Chain, smart contracts and Chat GPT are increasingly being embraced in dispute resolution[91]. However, the practice of digital dispute resolution raises several concerns. These include jurisdictional problems, due process and fairness concerns, enforcement problems, security and privacy issues and the possibility of errors[92]. In order to address these problems there is need to foster digital

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[86] Abedi. F., 'Universal Standards for the Concept of Fairness in Online Dispute Resolution in B2C E-Disputes.' Available at *https://kb.osu.edu/bitstream/handle/1811/101530/1/OSJDR_V34N2_357.pdf* (Accessed on 05/08/2023)

[87] Ibid

[88] Vinciullo. A., 'The Risk of Law Firms Relying on Chat GPT to Perform Contract analysis and Legal Research.' Op Cit

[89] Eidemuller. H., & Wagner. G., 'Digital Dispute Resolution.' Op Cit

[90] Sadushi. M., 'The Theory and Practice of Dispute Resolution in The Digital Age.' Op Cit

[91] Ashurst., 'Dispute Resolution in need of a "Digital Makeover?' Op Cit

[92] Clark. E et al., 'Online Dispute Resolution: Present Realities, Pressing Problems and Future Prospects.'

literacy, promote data security and privacy, adopt uniform laws, develop consistent dispute resolution mechanisms with uniform applicability across jurisdictions and ensure the appropriateness and accuracy of digital dispute resolution platforms[93]. Through these measures, the digital dispute resolution landscape will be successfully navigated towards fostering efficient and effective management of disputes in the digital age.

[93] Rabinovich-Einy..O., & Katsh. E., 'Reshaping Boundaries in an Online Dispute Resolution Environment.' Op Cit

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A Heterodox View of Alternative Dispute Resolution in Kenya

By: ***L. Obura Aloo****

Abstract

Almost all discussions regarding Alternative Dispute Resolution (ADR) in Kenya assume that the virtues of ADR are self-evident and few consider the very real drawbacks of ADR. This paper examines the veracity of some of the arguments that may be raised against ADR particularly those informed by the social conflict theories. By considering aspects of the historical development of the modern ADR movement in Kenya, social conflict theory arguments against ADR are evaluated. Noting that modern ADR in Kenya has its roots in the western legal tradition the paper concludes that it is important for policy makers and law reformers to be aware of and pay attention to the arguments made against ADR as policy making and law reform work is undertaken.

1. Introduction

It could be seen as heretical in a journal on Alternative Dispute Resolution (ADR) to address oneself to the arguments against ADR. Indeed, in Kenya, debate on the advantages and disadvantages of ADR is almost non-existent. It is assumed that the virtues of ADR are self-evident and outweigh any drawbacks. The Constitution of Kenya at article 159 provides that in exercising judicial authority courts and tribunals are required to promote ADR.[1] Including the promotion of ADR in the Constitution settles the question of the application of ADR in Kenya among thought leaders. As such, the ADR movement in Kenya does not have any detractors. The Greek Chorus is on the side of ADR. Yet it precisely when all are moving in tandem singing the same tune that a reminder of the danger of a single story is apt.[2] Intellectual

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[1] Article 159(2)(c) of the Constitution of Kenya enjoins courts and tribunals in exercising judicial authority to be guided by several principles among them the principle that "alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted…."

[2] For a different context see Chimananda Ngozi Adichie Ted Talk "Danger of a Single Story"

hegemony is undesirable. Debate should never be closed for "debate is the lifeblood of intellectual activity".[3]

Modern ADR movement has been accused by some of being part of an effort to promote a neoliberal agenda of capital globalisation and with it a pacific ideology of social control.[4] Despite this, a review of past editions of this journal do not reveal any exploration of the veracity of these and other types of critics of ADR in the local context. This paper proposes to examine some of the arguments that may be raised against ADR particularly those informed by social conflict theories that a local ADR adherent may want to bear in mind especially when policy issues are involved.

The paper begins, in part II, by exploring from a historical perspective some of the developments of the modern ADR movement as seen from Kenya. It then, in part III, reminds us of the social conflict theories' views of law and society and considers how some arguments raised against ADR are informed by social conflict theories. Part IV concludes, making some observation about the arguments against ADR and the future development of modern ADR in Kenya.

2. 'Modern' ADR in Kenya

The 'modern' ADR movement is a historical result of the introduction of the formal court system during the colonial period.[5] ADR methods are defined as

https://www.ted.com/talks/chimamanda_ngozi_adichie_the_danger_of_a_single_story/no-comments

[3] Mohamood Mamdani "Is African studies to be turned into a new home for bantu education in UCT?" Social Dynamics 242 (1998); 63-73

[4] Nader, Laura. "The Globalisation of Law: ADR as "soft" Technology" Proceedings of the Annual Meetings American Society of Internal Law 1999 pp 304 – 311

[5] "Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanism that are utilized to manage disputes without resort to the often-costly adversarial litigation" see Muigua, Kariuki. *Alternative Dispute Resolution and Access to Justice in Kenya*. Glenwood Publishing, Nairobi 2015 p. 19. Although the methods may predate the establishment of the formal courts, hey only become alternative once the courts are set up.

an antithesis of the formal court system.[6] With European colonialism a broad pluralist socio-legal ordering emerged "subordinating local society to colonial rule and its new forms of government, economic relations, and systems of law."[7] Almost invariably the colonial powers established their own legal systems of law and dispute resolution paying little heed to the pre-existing systems which they viewed as primitive and for "natives only."[8] The common approach was for "…the colonial state not only to monopolise criminal prosecutions but also to introduce western style civil justice for more important larger disputes, and in which colonial settlers, traders, missionaries and others might have an interest. The focus was on adjudication."[9]

Colonial administrators and lawyers were extremely proud of the legal system they introduced into the colonies.[10] Sir Kenneth Robert Wray one-time Colonial Legal adviser wrote:

> British administration in overseas countries has conferred no greater benefit than English Law and justice. This may be a trite observation, but I offer no apology. It has been said so often by so many people- as many

[6] Muigua, Kariuki. *Alternative Dispute Resolution and Access to Justice in Kenya*. Glenwood Publishing, Nairobi 2015 p. 19 "Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanism that are utilized to manage disputes without resort to the often-costly adversarial litigation."

[7] Robert, S., and M. Palmer *Dispute Processes: ADR and the Primary Forms of Decision-Making.* Cambridge University Press Cambridge, 2005. p. 11.

[8] Joireman, Sandra F. "Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy" Journal of Modern African Studies 39(2) 2001 p 4

[9] Robert, S., and M. Palmer *Dispute Processes: ADR and the Primary Forms of Decision-Making.* Cambridge University Press Cambridge, 2005. p. 11.; see also Muigua, Kariuki. *Alternative Dispute Resolution and Access to Justice in Kenya*. Glenwood Publishing, Nairobi 2015 p. 61-63

[10] Cotran, Eugene. "The Development and Reform of the Law in Kenya" *Journal of African Law* Vol 27 No 1 pp 42-61 at 43 arguing that the attitude of the colonial judges to the administration of English law was that English law was superior and other systems inferior.

> laymen as lawyers and perhaps more Africans than Englishmen that it may be assumed to be true.[11]

Even as the colonial legal system was introduced in Kenya, it had been much criticised in England.[12] In popular literature in the mid-1800s Charles Dickens took stabs at the dispassionate, slow, complex, and expensive court system. In his novel Bleak House, for example, Dickens descried the slow and painful process of *Jarndyce v Jarndyce,* a fictional court case, in the English Court of Chancery. The case involved the fate of a large inheritance. At the end of the story the case is finally resolved but, by then, legal costs had devoured the whole estate. Dickens introduces the case in a way that clearly shows how hopeless it was:

> Jarndyce v Jarndyce drones on. This scarecrow of a suit has, in the course of time, become so complicated that no man alive knows what it means. The parties to it understand it least: but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement about as to all the premises. Innumerable children have been born into the cause, innumerable your people have married into it, innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties to Jarndyce v Jarndyce without knowing how or why, whole families have inherited legendary hatred within the suit. The little plaintiff or defendant who was promised a new rocking horse when Jarndyce v Jarndyce should be settled, has grown up possessed himself of a real horse, and trotted away into the other world…but Jarndyce v Jarndyce still drags it dreary length before the courts, perennially hopeless.[13]

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[11] Robert-Wray, Kenneth "The Adoption of Imported Law in Africa" *Journal of African Law* 1960 pp 66-78 at 66

[12] For example, English philosopher Jeremey Bentham was a well know lifelong critique of English Law. Bentham, J. *An Introduction to the Principles of Morals and Legislation* 1789

[13] Dicken, Charles. *Bleak House*. Penguin Classics.

This fictional account illustrates the court process as Dickens viewed it. It was a version of this system that was introduced into the African colonies.[14] The introduction of an alien system, which was itself imperfect, led some pragmatic judges to see the benefits of the use of alternatives.[15] The arguments for the application of ADR in Kenya therefore developed almost as soon as the western legal system was introduced.[16] The first volume of the law reports in the East African Protectorate records the support for ADR in the case of *Radid bin Mwjabu v Abdul Rehman bin Mohmed*[17]which was decided in 1906. The case involved a dispute over the ownership of a plot located on Mombasa Island and was initially brought before a magistrate. By consent of the parties, who were both natives, the matter was referred to arbitration by the Kadhi. The magistrate pronounced judgment in accordance with the award which was given orally in court. The award was not in writing as required by the relevant provisions of the Civil Procedure Code. When the unsuccessful party appealed to the High Court, Chief Justice Hamilton, while acknowledging that the Code required the award to be in writing, observed:

> This is simply an attempt to get this case retired on appeal after a final settlement has been agreed to. I should in all cases be loath to interfere to re-open an arbitration of this nature unless on very good grounds shown[18]

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[14] The Supreme Court of Judicature Acts of 1873 and 1875 reorganized the English legal system to abolish the distinction between the courts of common law and courts of equity but flaws remained. For a contemporary history of the Judicature Act 1873 and its effect see Perkins, Willis B. "The English Judicature Act of 1873" Michigan *Law Review* Vol 12 (1914) pp 277-292

[15] See Justice Hamilton in *Rashid bin Mwjabu v Abdul Rehma bin Mohamed* (1897-1905) 1 KLR 83.

[16] For history of Arbitration Legislation in Kenya for example see Gakeri J "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 pp 219-241

[17] *Rashid bin Mwjabu v Abdul Rehma bin Mohamed* (1897-1905) 1 KLR 83

[18] *Rashid bin Mwjabu v Abdul Rehma bin Mohamed* (1897-1905) 1 KLR 83 at 84

A year later in 1907, in the case of *Shevaki v Makoha*[19] Chief Justice Hamilton again expressed the view that some matters ought to be decided by local custom rather than courts. The law report records that in this case a Kamba man, through private prosecution, charged another Kamba man with committing adultery with one of his wives. The accused was convicted and sentenced to 6 months on prison with hard labour. Reversing the conviction, Justice Hamilton stated that cases of this nature are eminently suited for settlement by native custom i.e., payment of compensation and the (Indian) Penal Code should only be resorted to in special cases where the aggrieved party is likely to take his revenge in physical acts of violence against the adulterer.

Later, in the case of *Kimani wa Kabato v Kioi wa Nagi* [20] , decided just after the First World War, the court emphasised the significance of alternative forms of dispute resolution in a land matter involving Africans. The case centred on a protracted land dispute in what is now the Dagoretti area near Nairobi. Colonial Judge Maxwel J, who had previously served as an administrator, expressed his preference for alternative forms of dispute resolution in the following terms:

> This is the second case of this kind within that area which has been brought before this court. (and, as it happens myself) within a few months, and from what I have seen and hear I gather that the proprietorship of every few acres of if –and possibly too of land further afield –may be contested at any moment. Local feelings run high and each native there is obviously willing to spend more than he can afford both in time and money to get the netter of his neighbour.
>
> And I express my personal opinion that this Court is not the most fitting arena for settlement of disputes of this nature. It seems to me they would have a far greater chance of equitable adjustment by a District

[19] *Shevaki v Makoha* (1906-1908) Vol II KLR 50
[20] *Kimani wa Kabato v Kioi wa Nagi Vol* VIII (1921) EALR 129

> Commissioner –possibly even after a somewhat informal hearing. Such- the political records show- was the practice in the past….[21]

Thus, we can see, from these examples, that, even as English rule was established in Kenya, it was acknowledged that the western court system had weaknesses and it was not suited for all situations. This encouraged a pragmatic search for alternatives.

Roscoe Pound in his famous 1906 lecture *The Causes of the Popular Dissatisfaction with the Administration of Justice* divided the weaknesses of the legal system into those that were universal to all legal systems and those that were peculiar to the Anglo-American Legal system.[22] Pound was reflecting on the American legal system at the time but many of his observations are apt today for any common law system. Regarding the universal issues in the operation of law, he argued that operation of rules is necessarily mechanical, and this leads to rigidity in the law. The rigidity is one of the "penalties of uniformity". Second, there is a difference in the rate of progress between the law and public opinion. Different class interests mean that there are different approaches to law- society may progress faster than law. Pound, in words that ring true of law and morality debates then as they do in the present age, stated that:

> The law seeks to harmonize …activities and to adjust the relations of every man with his fellows so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult. It is impossible that legal and ethical ideas should be in entire accord in such a society.[23]

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[21] *Kimani wa Kabato v Kioi wa Nagi* Vol VIII (1921) EALR 129, 130

[22] Pound, Roscoe. "The Causes of Popular Dissatisfaction with the Administration of Justice- Presented at the Annual convention of the American Bar Association" 29 ABA Report 1 395-417, 1906.

[23] Pound, Roscoe. "The Causes of Popular Dissatisfaction with the Administration of Justice- Presented at the Annual convention of the American Bar Association" 29 ABA

A third problem that Pound identified with the administration of justice is that there is a general assumption that administration of justice is an easy task to which anyone is competent. This, he argued, leads everyone to have opinions about what ought to be done. Pound was of the view that there is a popular impatience with the restraint of the law. The lynch mobs complain about the slow pace of justice.

The specific issues relating to the Anglo-American system of law that Pound identified include the individualistic spirit of the common law that does not quite fit in a collectivist age. Common law contentious procedure makes litigation appear to be a game.[24] The common law judges thus decide cases only as presented to them and this may not be in consensus with the public's general perception of the facts or justice.[25] The exaggerated contentious procedure irritates parties and witness alike. This echoes Jeremy Bentham's earlier attack on the complexities and expenses of procedure and the confusing technical rules of evidence which he believed were sustained by lawyers and judges.[26]

From an African perspective, the adversarial legal system can be faulted for not being in tandem with society.[27] Anthony Allot, writing in the 1960s, put it in these terms:

Report 1 395-417, 1906. p. 397 The Hart-Fuller Debate on morality and law published in Harvard Law Review in 1958 illustrate the point made by Pound. See Hart, H.L.A. (1958) "Positivism and the Separation of Law and Morals" Harvard Law Review 71(4) 593-629 and Fuller, Lon L. (1958) "Positivism and Fidelity to the Law – A Reply to Professor Hart" Harvard Law Review 71(4) 630-672

[24] Pound, Roscoe. "The Causes of Popular Dissatisfaction with the Administration of Justice- Presented at the Annual convention of the American Bar Association" 29 ABA Report 1 395-417, 1906. p. 401

[25] Pound, Roscoe. "The Causes of Popular Dissatisfaction with the Administration of Justice- Presented at the Annual convention of the American Bar Association" 29 ABA Report 1 395-417, 1906. p. 401

[26] On Bentham's efforts to reform the common law see Perkins, Willis B. "The English Judicature Act of 1873" Michigan *Law Review* Vol 12 (1914) pp 277-292

[27] Oluduro, Olibayo. Customary Arbitration in Nigeria Developments and Prospects 19 Af J Int'l & Comp L 307 (2011)

> In western (or at least English) legal procedure litigation is often treated as a sort of game, with the judge as umpire holding the whistle, blowing when one party gets offside, and awarding victory to the side who scores the most goals. The contrast with typical African procedure is a sharp one…African justice often has the qualities of being arbitral and consensual, of simplicity and publicity. The law and procedure are intelligible and acceptable to the people, and the *vox populi* often gains a hearing, not least when bystanders join in and give their opinion on the merits of the case. In brief, justice procedure reflects the common African principle that government and decisions are ultimately by popular consensus.[28]

The winner takes all approach of the courts is often viewed with animosity and disrespect for the continuous enmity and dissatisfaction it creates between warring parties[29] At times decisions by the courts lead to nothing but future litigation, loss of life and limb and perpetual unrest.[30] Even the setting of the courts is too formal for the nature of African people who are ordinarily warm and gregarious.[31]

Pound noted three other problems with the common law system that manifested themselves at the time. Political enviousness brought about by the doctrine of separation of powers which led to hindering the full working of the courts, a lack, in his view of a general legal philosophy in the courts and the

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[28] Anthony Allot. *Essays on African Law*. London Butterworth 1960 pp 68-69 See also Seidman "The Legal Process in Africa" in Burentt, William *an Introduction to the Legal System in East Africa. East African* Literature Bureau. 1975 pp158-159 arguing that parties are sometimes poorly equipped to respond to the technical demand to the adversarial system.

[29] Oluduro, Olibayo. Customary Arbitration in Nigeria Developments and Prospects 19 Af J Int'l & Comp L 307 (2011)

[30] Oluduro, Olibayo. Customary Arbitration in Nigeria Developments and Prospects 19 Af J Int'l & Comp L 307 (2011)

[31] Oluduro, Olibayo. Customary Arbitration in Nigeria Developments and Prospects 19 Af J Int'l & CompL 307 (2011)

problems he saw from lack of codification of the law. The need for ADR is often juxtaposed against these and other perceived difficulties with the court system.

Many of the inadequacies stem from the structure of the court system. The court process involves (1) an independent judge applying (2) pre-existing legal norms after (3) an adversarial process to achieve (4) a dichotomous decision in which one of the parties is assigned the legal right and the other found wrong.[32]

Several characteristics of the court systems can be discerned.[33] Courts are a state provided mechanisms for dispute resolution with state appointed judges.[34] The state provides buildings or structures as well as the human and financial resources where litigation is carried out.[35] Court system in characterized by formalities from the procedures as well as the court decorum to be observed.[36] The process is multi-tier system. It begins with the court of first instance with an appellate structure or hierarchy. The court process is informed by the limitations of civil procedure and the path chosen by the parties.[37] The court process is hardly a consensual process and can thus be destructive of relations.[38] The outcomes are either win or lose and never win-win.[39] There is hardly room for compromise. It is these characteristics and in some instances inefficiencies and deficiencies of the court that birthed the modern ADR movement.[40]

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[32] Schapiro, M "Courts: A Comparative and Political Analysis" Chicago & London The University of Chicago Press 1981

[33] See generally Harvey, William Burnett. *Legal Systems in East Africa.* EALB Nairobi. 1972 Chapter II 'The Structure and Process of Civil Litigation' p. 113-208

[34] In Kenya see art 159-173 The Constitution of Kenya Government Printer Nairobi 2010

[35] In Kenya see art 159-173 The Constitution of Kenya Government Printer Nairobi 2010

[36] Weda, Ambrose O. *The Ideal Lawyer*. Law Africa Publishing. Dar-es-Salaam. 2014

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

[38] The court process tends to address the dispute rather the wider conflict from which it arose thus resulting in a settlement (which may be temporary) rather than resolution, see Muigua, K *Resolving Conflicts Through Mediation in Kenya*. 2nd ed Glenwood Publishing Nairobi. 2017 pp. 52-59 for conflict-dispute distinction.

[39] Allision, John R "Five Ways to Keep Disputes Out of Court" *Harvard Business Review* (Jan-Feb) 1990

[40] See note 40 below.

Although, ADR has existed in societies from time immemorial, it is generally accepted that the current rejuvenation of ADR can be traced to the boom in ADR in the United States starting in the early 1970's. The speech by Harvard Professor Frank Sandler at the 1976 Pound Conference is often used to mark the date of the resurgence of ADR.[41] Sander criticised the law school and lawyers' emphasis on court and litigation as the obvious and natural dispute resolution method. He advocated for flexibility at the courthouse so that it could be a dispute resolution centre. The idea of multi door courthouse has developed from this.

However, others suggest that the credit for the rejuvenation of ADR should be given to the intellectual founders of the ADR Movement who provided the ideas, concepts, and framework upon which the modern ADR movement is built. Lon Fuller is viewed as "the foremost jurist to have inspired the development of ADR and as the intellectual father of the field.[42] He has been described as the "Jurisprudence of ADR".[43] Lon Fuller argued that certain types of disputes are not amenable to adjudication for resolution. Among the disputes

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[41] Sandler, Frank E.A. "Varieties of Dispute Processing" 70 *FRD* 79 (1976) see Cohen, Amy J. "The Rise and Fall and Rise Again of Informal Justice Systems and the Death of ADR" (2022) 54 Connecticut Law Review 197-240 p. 212; Sternlight, Jean R. "Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad" 56 *DePaul L Rev* 567 (2007) p. 570; for life of Frank Sandler see *http://franksander.com/leading-the-alternative-dispute-resolution-field/* The Pound Conferences were named after Roscoe Pound and his early work on problems in the court system including the article cited above.

[42] Menkel-Meadow, Carrie. "Mothers & Fathers of Intervention: The Intellectual Founders of ADR" (2000) 16 Ohio St J Disp Resol 1 at 14

[43] Menkel-Meadow, Carrie. "Mothers & Fathers of Intervention: The Intellectual Founders of ADR" (2000) 16 Ohio St J Disp Resol 1 at 4; Fuller, L. L. and Kenneth Winston "The Forms and Limits of Adjudication." *Harvard Law Review* 92 (1978) the initial discussion circulated Legal Philosophy Discussion Group at Harvard Law School in 1957; Marc Galanter's views were also influential. Galanter indicated that the "density of the legal relationship" affects use of ADR. Parties interact with each other often (repeat players) would be less likely to use official litigation system and would be more likely to use systems of private remedies. See Galanter, Marc. "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change" *Law and Society Review* (1974) Vol 9 No 1 pp 95-160 at p. 130.

Fuller identified as unsuitable for adjudication are the polycentric disputes whose solution may lie in managerial discretion or contract rather than in adjudication.

The debate about the place of ADR in the legal system reached its height in the 1980s.[44] Arguments were made about the cost of the legal processes, the complexity of the rules and the delays in the judicial process. Lon Fuller pointed out that the nature of the court system itself creates a challenge to delivery of justice.[45] Harvard law Dean Derrek Bok wrote about various inefficiencies in the legal system including how law schools prepared students for legal combat rather than for other forms of conflict management. He observed that little time was devolved to courses such a mediation, negotiation, and other new voluntary mechanisms for resolving disputes without going to court. The profession, in his view, was not served well by the court-oriented learning because "lawyers devote more time to negotiating conflicts than they spend in the library or in the courtroom." He predicted that over the next few years, societies greatest opportunities would be in collaboration and compromise rather than competition and rivalry and lawyers would be bypassed if they did not get on board.[46] These arguments become quite popular in the 1980s.

However, popularity is not always a sign of the quality of an endeavour. The proponents of ADR were not without foes. There existed strong critics of ADR. One of the more celebrated being Owen Fiss whose major criticism of ADR is that it promoted settlement at the expense of justice.[47] In Fiss' view settlement

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[44] Menkel-Meadow, Carrie. "Mothers & Fathers of Intervention: The Intellectual Founders of ADR" (2000) 16 Ohio St J Disp Resol 1 at 14

[45] Fuller, L. L. and Kenneth Winston "The Forms and Limits of Adjudication." *Harvard Law Review* 92 (1978) 353-409; Aubert, V. "Courts and Conflict Resolution." *Journal of Conflict Resolution* 11(1967): 40-51; Wexler, Steven. "Practicing Law for Poor people" The Yale Law Journal Vol 79 No 5 (1970) 1049-1067

[46] Bok, Derek C. "A Flawed System of Law and Practice and Training" 33 *J. Leg Educ* 570 at pp582-583

[47]Fiss, Owen. "Against Settlement" 93 Yale L.J. 1073 (1984) p. 1085; Brooker, Penny "The Juridification of ADR" *Anglo-American Law Review* 28(1) 1-36 (1999); Harry T. Edwards

"should neither be encouraged nor praised" as it represents a capitulation to the conditions of mass society.[48] ADR can also replace rule of law with non-legal values.[49] It is also said the ADR can lead to second class justice where new rights may not emerge.[50] ADR is not appropriate where there is need for public vindication, an interpretation of law, a precedent set to reform general practice, civil or constitutional rights.[51] As ADR methods become more popular they themselves become "juridified" with formalism and procedures.[52]

Austin Sarat wondered whether the real problem with the court system had been identified and whether ADR was the correct solution.[53] Sarat argued that ADR programs are overly formalistic in their view of disputes. They tend to have an image of social life as one in which order prevails and conflict is the exception which is to be remedied through various ADR mechanism such as mediation, arbitration, and others. There is significant social pressure not to dispute and a matter in court is one which has overcome this social pressure. To take the matter in court as the starting point of analysis is therefore, in Sarat's view, erroneous.[54]

Despite the objections to ADR that were raised, by the end of the 1980s, the ADR champions had all but won the debate and we see the arguments against ADR

"Alternative Dispute Resolution: Panacea or Anathema?" (1986) *Harvard Law Review* p. 668-687

[48] Fiss, Owen. "Against Settlement" 93 Yale L.J. 1073 (1984) p. 1075

[49] Fiss, Owen. "Against Settlement" 93 Yale L.J. 1073 (1984) p. 1085

[50] Fiss, Owen. "Against Settlement" 93 Yale L.J. 1073 (1984) p. 1089

[51] Fiss, Owen. "Against Settlement" 93 Yale L.J. 1073 (1984) p. 1089

[52] Brooker, Penny "The Juridification of ADR" *Anglo-American Law Review* 28(1) 1-36 (1999)

[53] Sarat, Austin. "Alternative Dispute Resolution: Wrong Solution, Wrong Problem" Proceedings of the Academy of Political Science Vol 37 No 1 *New Direction in Liability Law* (1988) pp 162-173

[54] Sarat, Austin. "Alternative Dispute Resolution: Wrong Solution, Wrong Problem" Proceedings of the Academy of Political Science Vol 37 No 1 *New Direction in Liability Law* (1988) pp 162-173 at 168

as reflected in the leading journals going mute.[55] However, the modern ADR movement did yield some ground. Some of the arguments raised against ADR could not be easily wished away. Unfettered enthusiasm for ADR therefore was met with more caution with newer recommendations for ADR noting some of the weakness. "As they faced critics from feminists and critical race theorists who argued that ADR harms women and minorities, for example, ADR proponents ceded to state adjudication conflicts that they saw as having public political interests. For those that they retained, formal legality was imported to address inequalities. But as they took legal formalism – a tool to regulate rather than up end existing social order- the more they failed to ask the role of ADR in adopting social transformation."[56] What they ended up with is a benign modern from ADR informed by legal formalising ostensibly to address the criticism brought against it.

By the 1990s, the modern ADR had developed into what was termed a major industry composed of professionals from fields as diverse as law, economics, psychology, political science, and religious movements.[57] The modem ADR clarion call was taken up by development institutions as part of their rule of law cause with a somewhat commercial tilt. Development organisations began including ADR as programmatic components in the 1990s. "International aid organisations began to urge foreign countries to adopt ADR as a means to modernise their legal systems and instil greater respect for the rule of law. Later efforts would include training of mediators and arbitrators, revision of laws to make them more supportive of ADR and training of judges. ADR was part of the broader scheme of access to justice."[58] In 1998, for example, USAID

[55] Yamamoto, Eric K. "ADR: Where Have All the Critics Gone?" (1996) Vol 36 *Santa Clara Law Review* 1055-1067 tracing the reduction of critics of ADR in the US Law Journal.
[56] Cohen, Amy J. "The Rise and Fall and Rise Again of Informal Justice Systems and the Death of ADR" (2022) 54 *Connecticut Law Review* 197-240 p. 212.
[57] Nader, Laura, and Elisabetta Grade "Current Illusions and Delusions about Conflict Management – In Africa and Elsewhere" *Law and Social Inquiry* 2002 pp 573-594 at 575
[58] Stenlight J. R "Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad" 56 *DePaul L. Rev* 596, 572 (2007)

published an ADR Practitioner's Guide.[59] In 2006 The IFC published a Commercial mediation manual.[60] These projects initially had a commercial twist: The 2006 IFC Manual for example states:

> An ADR project's board goal is to improve the business environment by providing business-friendly dispute resolution mechanisms.[61]

However, some argue that the true aim of ADR in development is access to justice for the poor.[62] Court annexed mediation and commercial ADR are good but are not the primary aim.[63] The 2008 Commission on Legal Empowerment of the Poor Report *Making the Law Work for Everyone* is an example of this approach. The report proposed 4 pillars for legal empowerment for the poor. These were access to justice and rule of law under which supporting ADR was a component. The other pillars were property rights, labour rights and business rights.[64] Currently Goal 16 of The United Nations Sustainable Development seeks to promote peaceful and inclusive societies, access to justice for all and the building of effective, accountable and inclusive institutions at all levels.[65] While these efforts claim to support the local non judicial mechanisms, the language of reform, control by and assimilation into the formal system is dotted

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[59] USAID "Alternative Dispute Resolution Practice Guide" Washington DC, USAID Center for Democracy and Governance, 1998.

[60] Rozdeizer, L and Aljando de la Capo. *Alternative Dispute Resolution Manual: Implementing Commercial Mediation* IFC Washington 2006

[61] Rozdeizer, L and Aljando de la Capo. *Alternative Dispute Resolution Manual: Implementing Commercial Mediation* IFC Washington 2006 p. vi

[62] Commission of Legal Empowerment of the Poor. "Making the Law Work for Everyone" 2008.

[63] Michel, James. "Alternative Dispute Resolution and the Rule of Law in International Development Cooperation" Justice and Development Working Paper Series 12/2011 Legal Vice Presidency the World Bank Washington 2011 p. 1 and 14

[64] Commission of Legal Empowerment of the Poor. "Making the Law Work for Everyone" 2008. Former US Secretary of State, Madeline Albright, and Peruvian Economist, Hernando de Soto chaired the Commission,

[65] *https://www.un.org/sustainabledevelopment/peace-justice/*

throughout the documents.[66] The result as one writer notes is that "… in the modern context, ADR [is] increasingly standardised to fit global hegemonies in a manner erases difference caused by diverse and competing cultural styles."[67]

This reform language is picked up in local reports. In July 2010 the Report of the Task Force on Judicial Reforms Chaired by Hon Justice William Ouko (The Ouko Report)[68] considered ADR as one of the strategies to reduce the backlog of cases in the courts. The Task Force received, and seemed to agree with, representations that a national regulatory body for ADR disciplines should be established, to oversee accreditation, standard setting, monitoring and enforcement through appropriate complaints and discipline procedures.

When the Constitution of Kenya 2010 was promulgated, it included ADR in the Constitution. Article 159(2)(c) of the Constitution requires Courts and Tribunals while exercising judicial authority to promote ADR.[69] ADR is not set out independently but as a subordinate aspect of the Court structure. It is the Courts which are mandated to promote ADR within the context of the set-up of the courts. The element of control is evident here where the ADR though elevated to the level of the constitution is controlled by the Judiciary. If it to be noted that earlier drafts for a proposed constitution also included explicit provisions of ADR. The earlier constitutional proposals were the "Bomas Draft" –The Draft Constitution of Kenya, 20004 which was prepared the Constitutional of Kenya Review Commission, and which was approved by a National Constitutional Conference held at Bomas of Kenya. The Bomas Draft provided at article 183(3)(d) that in applying the law the courts and tribunals shall be guided by several principles including that "reconciliation, mediation and arbitration

[66] See e.g., Commission of Legal Empowerment of the Poor. "Making the Law Work for Everyone" 2008. p. 64 Referring to need to link ADR to the formal enforcement and to ensure the systems do not operate totally outside the realm of the legal system.
[67] Nader, Laura. "The Globalisation of Law: ADR as "soft" Technology" Proceedings of the Annual Meetings American Society of Internal Law 1999 pp 304 – 311
[68] Government of Kenya *Final Report of the Task Force on Judicial Reforms* Government Printer Nairobi July 2010. p. 56
[69] art 159(2) (c) The Constitution of Kenya Government Printer Nairobi 2010.

between parties and the use of traditional courts, where appropriate, shall be promoted".[70]

The Wako Draft, which was prepared by adjustments made to the Bomas Draft by the Attorney General and a select committee of Parliament on Constitutional Review, retained the provisions on ADR. The Wako Draft at article 178(3)(d) repeated the wording of the Bomas Draft.[71] This draft was subjected to a referendum in November 2005 and rejected. It is noteworthy that neither the Bomas nor the Wako Draft placed the repugnancy limitation on traditional dispute resolution mechanisms.[72]

Immediately after the promulgation of the Constitution in late 2010, the influential Kenya Branch of the International Commission of Jurists in a 2011 Report asked how informal justice systems could be transformed into effective tools to supplement the formal justice system in delivery of justice for all. The wording comes even before the study is conducted. It suggests a view of the need to transform and to have the systems supplement and therefore seemingly be subordinate to the formal systems. The report is of the view that "uncoordinated and unregulated" informal justice systems will raise serious integrity concerns. Some of the recommendations reflect the language of reform, control, and assimilation. The report recommends for example that there is need for legislation to govern mediation, negotiation, conciliation, and adjudication. According to the report, the ADR mechanisms require to be "mainstreamed" to ensure they complement the formal justice system, and the magistrates and

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[70] Constitution of Kenya Review Commission Draft Constitution of Kenya, 2004 "Bomas Draft" adopted by the National Constitutional Conference on 15th March 2004 *https://s3-eu-west-1.amazonaws.com/s3.sourceafrica.net/documents/118273/Kenya-4-Draft-Constitution-Bomas-Draft-2004.pdf*

[71] Draft Constitution of Kenya, 2005 "Wako Draft" *https://academia-ke.org/library/download/kenya-wako-draft-constitution-2005/?wpdmdl=7755&refresh=646e1f44182ff1684938564*

[72] Article 159(3) of the Constitution of Kenya "Traditional dispute resolution mechanism shall not be used in a way that –(a) contravenes the bill of rights (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law."

lawyers should promote the use and establishing the framework for the use of ADR at the grassroots level. The Report advocated for regulation and a single licencing authority for major forms of ADR like arbitration, mediation, and conciliation.[73] The language of control of the ADR processes is evident. Little thought is given to the fact that the ADR mechanisms were in use and would continue to be used without mainstreaming and control by the judiciary.

When the first legislation to deal with accreditation of ADR practitioners was passed, the language of class and control is evident and is reflected in it. In 2012, after a pervious failed attempt, the Civil Procedure Act was amended to introduce court annexed mediation.[74] Section 59A establishes the Mediation Accreditation Committee to be appointed by the Chief Justice. The Mediation Accreditation Committee is amongst other things responsible for the accreditation of mediators for court annexed mediators. Its membership however suggests that it likely to be elites and conservative. The Committee comprises a) the chairman of the rules committee of civil procedure rules b) one member nominated the AG c) two members nominated by the LSK d) eight other members nominated by (i) CIArb (ii) Kenya Private Sector Alliance (iii) ICJ (iv) ICPA (v) ICPSK (vi) Kenya Bankers Ass (vii) FKE (viii) COTU. This group does not have representation from the average citizen. The approved training models for accreditation are western models.[75]

Even as national policy on ADR was developed, the language of western oriented ADR appears evident. A look at recently adopted National ADR Policy can serve as an illustration.

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[73] ICJ Kenya Report Interface Between Formal and Informal Justice Systems in Kenya June 2011 Research Problem at p 6 and Recommendations p. 37-38

[74] Section 59A – 59D of The Civil Procedure Act Statute Law (Miscellaneous Amendments) Act No 17 of 2012

[75] For example, the 40 Hour Mediation Training that is required for certification appears to be based on American standards.

The National ADR Policy

The National ADR Policy was approved by the Government in early 2023.[76] The policy justifies the basis for its development under the title rationale for policy. The policy then indicates what are termed the facts and realties that drove the development of the policy. The first of these is:

> 'An efficient ADR service in the Country especially serving the commercial sector is a catalyst of commercial activity, and foreign investment as evidenced by the significant improvement of Kenya's ranking on the World Bank's 'Ease of Doing Business Index' hence making it a more attractive investment destination as a result of the establishment of the Court Annexed Mediation by the Judiciary.'[77]

Clearly the policy is influenced by the needs of commercial activity, foreign investment, and Kenya's ranking in the, now discredited, World Bank 'Ease of Doing Business Index"[78]. This suggests that the trend of western led ADR still influences the development of ADR in the country today.

The Policy contains a draft Dispute Resolution Bill which proposes the establishment of the National Dispute Resolution Council. The language of control is also reflected in the proposed composition of the Council. The proposed National Dispute Resolution Council would comprise representatives of the same types of institutions as are from the Mediation Accreditation Committee.[79] Representatives of faith-based organisations, private sector and

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[76] National ADR Policy

[77] National ADR Policy p. 27 Clause 3(1)(a)

[78] The Doing Business Reports were discontinued in 2021 following allegation of manipulation of results. See e.g., Richard, Ian "The World Bank's 'Doing Business" report is out of business. So, what next?" *https://unctad.org/news/world-banks-doing-business-report-out-business-so-what-next*

[79] S. 5 Draft Dispute Resolution Bill Appendix iii National Alternative Dispute Resolution Policy. The National Dispute Resolution Council is proposed to comprise: (a) A chairperson qualified to be appointed a Judge of the High Court, with an expertise in Alternative Dispute Resolution appointed by the Cabinet Secretary; (b) A representative of the Judiciary; (c) A representative of the Attorney General; (d) A

consumer organisations are proposed as additions, but the very composition suggests a conservative, control, commercial driven ADR model.

The Alternative Justice Systems (AJS) Framework Policy is less obvious when examined for control and assimilation language.

The Alternative Justice Systems (AJS) Framework Policy

By the nature of the subject that it covers, the Alternative Justice Systems (AJS) Framework Policy is more accommodative of ADR approaches that are not informed by western ideas. The task force that developed the policy, to its credit, resisted the temptation to introduce regulation of AJS systems in Kenya.[80] The task force was of the view that introduction of regulated AJS would unduly distort AJS practice in Kenya, would be easily appropriated and would undermine rather than promote AJS in Kenya.[81]

The AJS Framework Policy is centred on a human rights-based approach to adoption of AJS.[82] This is informed by, amongst others, the provisions of article 159(2) (c) of the constitution which obliges the Judiciary to promote traditional justice systems an do the modes of ADR, article 11 of the constitution of culture and article 28 on the promotion of human dignity. The AJS human rights-based

representative of the Nairobi Centre for International Arbitration; (e) A representative of faith-based organizations; (f) A representative of the private sector; (g) A representative of an accredited consumer organization; (h) One member each nominated by the following bodies: i. Law Society of Kenya ii. Chartered Institute of Arbitrators (Kenya) Branch iii. Federation of Kenyan Employers iv. Board of Registration for Architects and Quantity Surveyors v. Federation of Women Lawyers (FIDA – Kenya) vi. Central Organization of Trade Unions (COTU - K) vii. Kenya Bankers Association

[80] Judiciary of Kenya Alternative Justice Systems Framework Policy. Judiciary, Nairobi, 2020. p. 8

[81] Judiciary of Kenya Alternative Justice Systems Framework Policy. Judiciary, Nairobi, 2020. p. 8

[82] Judiciary of Kenya Alternative Justice Systems Framework Policy. Judiciary, Nairobi, 2020. p. 7

approach is indicated to be based on respect, protection, and transformation.[83] Respect requires that AJS can function without unjustified interference from the Judiciary. The processes are to function from start to end without the judiciary stepping in except where required by a duty of scrutiny and then only to the extent permit by the Constitution and requires of human rights.[84] With regard to protection, the AJS policy indicates that AJS systems should be such that the protect vulnerable groups as required by the constitution. In line with Kenya's transformative constitution, the duty to transform requires that the Judiciary establish minimum criteria that can be adhered to by all state actors to ensure conformity with constitutional values.

The AJS Policy adopts the agency theory to determine what matters ought to be subjected to AJS. The Theory utilises a positive and a negative test. The positive test asks "if it can be objectively determined that the parties to a given dispute have consensually and voluntarily submitted themselves to the AJS mode of dispute resolution; and whether the consent of the parties can be objectively and credibly be determined to be informed, mutual, free and revocable."[85] If this answer is in the affirmative then the negative test considers ",..if there is no specific legislation or public policy ousting the jurisdiction of AJS mode of dispute resolution then the dispute is amenable to AJS mode of dispute resolution – whether the dispute is formally determined to be "civil" or "criminal".[86]

There can be little objection to the proposals by the AJS Policy by a neutral observer on the broad policy statements. However, when one looks at the Chapters in the Policy on Key Areas of Intervention and Implementation then

[83] Judiciary of Kenya Alternative Justice Systems Framework Policy. Judiciary, Nairobi, 2020. p. 7
[84] Judiciary of Kenya Alternative Justice Systems Framework Policy. Judiciary, Nairobi, 2020. Chapter 6 p. 59
[85] Judiciary of Kenya Alternative Justice Systems Framework Policy. Judiciary, Nairobi, 2020. p. 23
[86] Judiciary of Kenya Alternative Justice Systems Framework Policy. Judiciary, Nairobi, 2020. p. 23

the language of control is observed. For example, the AJS Policy in proposing a system of selection, election, appointment, and removal of AJS practitioners suggests that (aside from legal qualifications) AJS practitioners should have a similar skill set as require of judicial officers. Disciplinary grounds should be like those of judges and magistrates.[87] While the criteria themselves may not be objectionable the fact that these are used as a standard indicates the lingering tendency to control.

Financing the 'Modern' ADR Movement

Much of the ADR work in the judiciary and in civil society in Kenya is donor funded.[88] While the stated aims of donor funding may be altruistic, the funding always reflects the national political and economic philosophies and objectives of the donor.[89] Use of donor funding is not itself negative, it is a reality that the donors' priorities may have an influence on the outcome. Former Kenyan Chief Justice Willy Mutunga commenting on use of donor funding in the context of transformative constitutional reform notes that transformation can be funded "on condition that those who seek grants have a transformative agenda, understand the politics and interests of donors which are no homogeneous."[90] Given the history of the modern ADR movement the reformer should be introspective about their own agenda and the agenda of their intellectual and financial supporters. Critics of ADR informed by social conflict theories could provide useful lenses through which to examine proposed reform measures.

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[87] Judiciary of Kenya Alternative Justice Systems Framework Policy. Judiciary, Nairobi, 2020. p. 69

[88] See for example assistance to the Kenyan Judiciary by IDLO *https://www.idlo.int/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya*

[89] Finney, Lynne D. "Development Assistance-A Tool of Foreign Policy" 15 Case W. Res J. Int'l L. 213 (1983) p. 213.

[90] Mutunga, Willy. "In Search and Defence of Radical Legal Education: A Personal Footnote" Kabarak University Occasional Paper Series Vol 1, Number 1 (2022) p. 34

3. Social Conflict Theories and ADR

Social conflict theories argue that different social classes in a society have access to resources to varying extents. The group with access to material and non-material resources uses their power to exploit the less powerful group. Economic manipulation or brute force are the tools used by the powerful social class to achieve the domination.[91] At the core of conflict theories is the argument that competition over resources which are finite and limited are part and parcel of society. The ruling classes maintain social order through domination rather than agreement of the under classes.[92]

In recent years social conflict theories have fallen into ignominy and have even been shunned at some institutions.[93] It is argued though that they offer a plausible, robust, convincing perspective on the modern world. They remain capable of providing a viable social legal theory.[94]

The Social Conflict theorist distinguished between the economic structure of society (the "base"/ "infrastructure") and the "superstructure" which arises from this foundation.[95] The social conflict theorist is of the view that the totality of "relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which

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[91] Kalande, William. "Kenyan Land Disputes in the Context of Social Conflict Theories" FIG Commission 7 Annual Meeting and Open Symposium on Environment and Land Administration Verona Italy 11-15 Sept 2088 p. 1-5

[92] Kalande, William. "Kenyan Land Disputes in the Context of Social Conflict Theories" FIG Commission 7 Annual Meeting and Open Symposium on Environment and Land Administration Verona Italy 11-15 Sept 2088 p. 1-5

[93] Moxon, David "Marxism in Late Modernity" PhD Sheffield 2008 p.5 *https://etheses.whiterose.ac.uk/6101/1/489053.pdf* see also Mutunga, Willy. "In Search and Defence of Radical Legal Education: A Personal Footnote" Kabarak University Occasional Paper Series Vol 1, Number 1 (2022) p. 25, 69

[94] Moxon, David "Marxism in Late Modernity" Phd Sheffield 2008 p.5 *https://etheses.whiterose.ac.uk/6101/1/489053.pdf*

[95] Marx, K. "A Contribution to the Critique of Political Economy" 1859 Preface online version *https://www.marxists.org/archive/marx/works/download/Marx_Contribution_to_the_Critique_of_Political_Economy.pdf*

correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness."[96] The superstructure can be seen as the legal and political forms which express existing and real relations of production. It could also be viewed as forms of consciousness which express a particular class view of the world. Viewed this way, law would appear to be subsidiary to economic relations and a derivative of them.[97]

Social conflict theories argue that law is a false universal – it claims to articulate the interests of all in society, but it represents only one group the privileged classes.[98] Law, in the classical legal understanding, is the projection of everyone's reason but the social conflict theorist sees that law is merely the universalization of the particular will of these who benefit from the capitalist system.[99] The social conflict theorist argues that the ideas of the ruling class are in every epoch the ruling ideas therefore the class which is the ruling material force of society is at the same time its ruling intellectual force.[100] To the social conflict theorist, the development of the law may ostensibly appear to be for the greater good, but it is in fact protecting the interested of a particular segment of

[96] Marx, K. "A Contribution to the Critique of Political Economy" 1859 Preface

[97]Lloyd, Lord Lloyd of Hampsted and M.D.A. Freeman. Lloyd's Introduction to Jurisprudence. 5th ed Steven & Sons London 1985. p. 958-964 especially 959

[98] Lloyd, Lord Lloyd of Hampsted and M.D.A. Freeman. *Lloyd's Introduction to Jurisprudence*. 5th ed Steven & Sons London 1985. p. 958-964

[99] Marx, K *Communist Manifesto* (1848) Chapter II Marx K and F. Engels Selected Works III "...your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence of your class"

[100] Kalande, William. "Kenyan Land Disputes in the Context of Social Conflict Theories" FIG Commission 7 Annual Meeting and Open Symposium on Environment and Land Administration Verona Italy 11-15 Sept 2088 p. 1-5

society. [101] To the social conflict theorist "Bourgeois jurisprudence is but the will of the ruling class made into law for all."[102]

Viewed from a social conflict perspective, the modern ADR movement is sometimes faulted. It is argued that ADR solidifies control of capital and the state; it disadvantages the weaker party, expands state control; deflects energy away from collective action and promotes law without justice.[103] Various authors have argued that ADR is part of the machinery for domination.

Although not specifically social conflict oriented, Richard Abel, for example, presented some of early arguments against ADR from a social conflict lens. [104] Abel considers informal justice in pre-capitalist, fascist, welfare states and socialist states. Comparing informal legal systems in pre-capitalist and capitalist systems, he draws certain conclusions based on findings in the chapters of the book he is editing. Frist, he argues that in pre-capitalist informalism in the legal sphere is "embedded in and contingent" upon a social structure that is multiplex and continuous relationships, disputants are bound by cross cutting ties and reputation in face-to-face community engagement is prised. Western capitalism lacks these attributes and as such experiments with informal justice are unlikely to succeed. Because relationships are commodified

[101] Marx, K and F. Engels *The German Ideology* (1845-1846) Marx K and F. Engels Selected Works III pp 370

[102] Marx, K *Communist Manifesto* (1848) Chapter II Marx K and F. Engels Selected Works III

[103] Richard Delgado et al "Fairness and Formality: Minimising the Risk of Prejudice in Alternative Dispute Resolution" 1985 *Wis L. Rev 1359* (1985) p. 1391; Grade, Elisabetta "Alternative Dispute Resolution, Africa and the Structure of Law and Power: The Horn in Context" Journal of African Law Vol 43 No 1 (1999) pp 63-70

[104] Richard Abel. *The Politics of Informal Justice*. Academic Press, London. 1982 Vol II Introduction. But see critic of Richard Able in Barl Johnson Jr the Politics of Informal Justice 34 J. Legal Educ 334 (1984) which describes the views as "misguided and simplistic" but clearly representing the most concentrated assault on the concept and practice of non-judicial dispute resolution, at least form the left of the political spectrum. At one point nearly every conceivable objection is raised"

and individuals value their ability to terminate them, informal legal systems will not preserve relationships.[105]

Second, pre-capitalist legal systems have an implicit threat of violence either from man of from gods.[106] The capitalist state monopolises violence.[107] These informal systems under capitalism rely on the state for coercion. The mere existence of a coercive alternative to the informal justice system "colours dispute process". The reliance on state coercion leads to formalization of institutional processes.[108]

Abel argues that whereas pre-capitalist informal justice can function with rules that are largely implicit, vague, and uncertain as they draw from consensus, western capitalist systems require rules that are often viewed as unjust by one or other of the parties.

Cross- breeding of the pre-capitalist and capitalist systems will, in his view, be still born as it attempts to cross breed two distinct and contradictory systems. As a result:

> 'The upshot is that the state, in the name of informality, destroys indigenous, traditional informal justice and substitutes institutions that serve to extend central control, implement natural programs, enhance the legitimacy of the official legal system by appearing to improve access and undermine local community.'[109]

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[105] Richard Abel. *The Politics of Informal Justice*. Academic Press, London. 1982 Vol II Introduction

[106] Richard Abel. *The Politics of Informal Justice*. Academic Press, London. 1982 Vol II Introduction

[107] Richard Abel. *The Politics of Informal Justice*. Academic Press, London. 1982 Vol II Introduction

[108] Richard Abel. *The Politics of Informal Justice*. Academic Press, London. 1982 Vol II Introduction

[109] Richard Abel. *The Politics of Informal Justice*. Academic Press, London. 1982 Vol II Introduction p. 5

Viewed through these lenses ADR is a mechanism for social control and ADR like the formal law is embedded in individualism. ADR emphasis on neutrality as opposed to the questioning of power and structure, the quest for a supposed neutral third party and neglect of the original concern for the poor to access the law.[110] More than alternative to the courts, ADR represents an alternative to politics and community organisation that lacks any organs to connect to the community. It therefore emerges as another mechanism for social control.[111]

It has been argued that ADR institutions should be classified based on the class interests they represent or serve.[112] "Collective justice institutions where users share a working class identification – here users understand themselves as a collective subset with share problems that outclassed opponents and they peruse a broad range of strategies and process 'accountable to the collectively(class)they are from."[113] Cain distinguished collective justice from professional justice (which depends on formal liberal legal principles and serves professional class practice interests. Cain also distinguished between collective justice and incorporated justice (where an agency of the state or of capital displaces professionalised dispute resolution in ways that serves its own rather than the working class interest) In developing ADR systems there should be steered away from becoming vulnerable to professionalization or incorporation."[114]

The social conflict theorist offers us a challenging critic of ADR. Social conflict theory requires conflict in society. The argument is that law is a form of social control by the ruling classes over other groups.[115] The critic of ADR would be

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[110] Richard Abel. *The Politics of Informal Justice*. Academic Press, London. 1982 Vol II Introduction

[111] Scimecca, J.A. "Conflict Resolution and a Critique of 'Alternative Dispute Resolution"" Harold E Pepinsky and Richard Quenney ed *Criminology as Peacemaking* 1991 p. 263-279

[112] Maureen Cain. Beyond Informal Justice 9 Contep Crisis 335 (1985)

[113] Maureen Cain. Beyond Informal Justice 9 Contep Crisis 335 (1985)

[114] Maureen Cain. Beyond Informal Justice 9 Contep Crisis 335 (1985)

[115] Lloyd, Lord Lloyd of Hampsted and M.D.A. Freeman. Lloyd's Introduction to Jurisprudence. 5th ed Steven & Sons London 1985. p. 958-964 especially 959

that it is control by another means. Funding of the ADR Project is controlled by capital, training is expensive and elitist, arbitration and mediation are a club controlled by the bourgeoisie and comprador bourgeoisie so the argument would proceed.

Four major criticisms of ADR can be identified. First, it solidified control of capital and the state. Second, it is said that it disadvantages weaker parties. Third ADR is accused of expanding state control. It is also seen as deflecting energy away from collective action. ADR is also accused of promoting law without justice.

Those who argue that ADR solidifies the control of capital and the state argue that ADR inhibits social change by persuading people with a dispute to sacrifice their grievance for the sake of peace and cooperation. Therefore, there is a reinforcement of powerful authoritarian forces in society including wealth, capital, the state, and the formal legal system.[116] The ADR mechanisms neutralise conflict by responding to grievances in ways that inhibit their transformation into serious challenges to the domination of the state and capitalism.[117] Settlement helps society avoid hard decisions. Society may seek to thrive by masking and avoiding its basic contradictions.[118] ADR is thus accused of concealing the lack of consensus and thus curbing efforts by have nots to improve their position. It is also argued that informal systems are designed to channel discontent away from the courts and in so doing shield the

[116] Richard Delgado et al "Fairness and Formality: Minimising the Risk of Prejudice in Alternative Dispute Resolution" 1985 *Wis L. Rev 1359* (1985) p. 1391 for summary of arguments.

[117] Richard Delgado et al "Fairness and Formality: Minimising the Risk of Prejudice in Alternative Dispute Resolution" 1985 *Wis L. Rev 1359* (1985) p. 1391 for summary of arguments

[118] Fiss, Owen. "Against Settlement" 93 Yale L.J. 1073 (1984) p. 1075

courts confrontation and thus preserve their power.[119] Arguments based on the reduction of cost in by ADR have also been challenged by eminent scholars.[120]

While appreciating the arguments against ADR raised by social conflict theories, it is useful to note the very real objections to social conflict theories that have been raised. Critics first argue that the social conflict approach and view is as an oversimplification and overemphasis of the place of economic class when society is filled with other types of stratifications that cannot be grouped in the class theory.[121] The social conflict view of law as existing to exploit certain classes and promote the interests of ruling classes is also not borne out by the numerous functions that law plays. Society today is less exploitative than at the time that the society conflict ideas developed. Reforms of law and society cannot therefore be argued to be driven by exploitation. The social conflict theorist's response is that even if law plays other roles other than promoting the interests of the ruling classes, it does not do so for altruistic reasons but as part of its primary aim.[122]

The weaknesses in the social conflict theories notwithstanding the critical mind may be invited to consider them when any actions to transform society are undertaken. 'Modern' ADR could do well to consider some of the issues raised against it by the social conflict theorists.

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[119] Richard Delgado et al "Fairness and Formality: Minimising the Risk of Prejudice in Alternative Dispute Resolution" 1985 *Wis L. Rev 1359* (1985) p. 1394 summarising the arguments.

[120] The University of London International Programmes presents 'Mediation Developments in England', a law lecture delivered by Professor Dame Hazel Genn DBE, QC (Hon) on Wednesday 11 July 2012 at the Conrad Centennial Singapore. See *https://www.youtube.com/watch?v=775BXQDah6o* Professor Lady Dame Hazel Genn who argued that promotion of compulsory ADR justified by the need to reduce costs associated with litigation and providing courts is not a correct approach to take.

[121] Lloyd, Lord Lloyd of Hampsted and M.D.A. Freeman. Lloyd's Introduction to Jurisprudence. 5th ed Steven & Sons London 1985. p. 1003-1004

[122] Lloyd, Lord Lloyd of Hampsted and M.D.A. Freeman. Lloyd's Introduction to Jurisprudence. 5th ed Steven & Sons London 1985. p. 1003-1004

4. Conclusion

We have in this short piece traced the historical development of the modern ADR as it applies in Kenya. We have noted the developments of modern ADR and its western origins. It has been noted that "… in the modern context, ADR increasingly standardised to fit global hegemonies in an manner erases difference caused by diverse and competing cultural styles."[123] Writing about the place and function of native tribunal which were established to allow some application of indigenous justice systems within the colonial set up but which were abolished in 1967, Ghai and McAuslain noted:

> …most experiments with the tribunals has, as one underlying theme, a gradual movement away from traditional forms, methods, and personnel …so that tribunals increasingly took on the outward trappings of the English type court.[124]

As happened in the past, modern ADR appears be influenced by a heavy guiding arm of a western influenced oligarchy. The current ADR process is often informed by the needs of efficiency of the court system to promote the needs of the commercial world which may occur at the expense of other aspects of access to justice. It has been cautioned that neoliberalism globalises rule of law but the law that is being globalised is one that promotes values of a neoliberal regulatory order it is oiled and serviced by a transnational legal intelligentsia.[125]

Social conflict theories warn that this uniformity of thought hides underlying class interests that the law and by extension the law's use of ADR may be playing to. There is a warning that current ADR may be a western ADR informed by the needs of elite groups. "ADR [has] created its own market for

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[123] Nader, Laura. "The Globalisation of Law: ADR as "soft" Technology" Proceedings of the Annual Meetings American Society of Internal Law 1999 pp 304 – 311

[124] Ghai, Y.P and J.P.W.B McAuslan *Public Law and Political Change in Kenya*: *A study of the legal framework of government form colonial times to the present* Oxford Univ Press Nairobi 1970 p. 151.

[125] Issa Shivji "Lawyers in Neoliberalism: Authority's Professional Supplicants or Society's Amateurish Conscience?" CODESRIA No 3 & 4 2006 p. 15-25

professional expertise and industry best practice. It is now a commodity to be bought and sold. This commodification has taken a significant toll on the field."[126] Commodification then means that reform may be based on group interests rather than the actual needs of access to justice. It is worth introspection as to what is really driving the expansion and development of ADR locally. If the ultimate reason is only the needs of the market economy this would fall short. All proposals must therefore be subjected to intense scrutiny irrespective of the source and, after debate, unpalatable proposals rejected even if this does damage to national rating in some global ADR league table.

[126] Cohen, Amy J. "The Rise and Fall and Rise Again of Informal Justice Systems and the Death of ADR" (2022) 54 Connecticut Law Review 197-240 p. 212.

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Assessment of The Impact of Court Procedural Rules in Implementation of the Court Annexed Mediation Programme (Camp) in Kenya

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Abstract

The paper discusses the role of Mediation procedural rules in the implementation of court annexed mediation in Kenya. It shows the procedural provisions that have helped in the implementation process and argues that although the procedural rules introduce formality to the mediation process, they allow for certainty, authority and the possibility of enforcement of mediation settlement agreements. Procedural justice is an important component of Court Annexed Mediation (CAM). It contributes toward a positive perception of access to justice by the public through the Judiciary's alternative dispute resolution mechanisms. Procedural justice and extrajudicial conflict resolution exemplified through court mediation is therefore a facet of change in court culture and provides a more multi-disciplinary approach to dispute resolution.[1]

1.0 Introduction

The Kenya Judiciary Court Annexed Mediation Pilot project commenced at the Milimani Law Courts in the Family and Commercial divisions of the Milimani Law Courts in Nairobi. It was an effort to embrace ADR mechanisms by the

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[1] 'Deason - Procedural Rules for Complementary Systems of Liti.Pdf' <*https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1369&context=ndlr*> accessed 6 January 2021.

Judiciary as enshrined under Article 159(2) of the Constitution of Kenya, 2010. The pilot project was also aimed at providing a mechanism for the reduction of case backlog in the courts and to facilitate expeditious people-focused delivery of justice. Mediation can be defined as a voluntary, informal, consensual, and confidential dispute resolution mechanism in which parties play an active and participatory role. The parties submit to a neutral third party to assist them reach an amicable solution.[2] It is the most prominent component of successful alternative dispute resolution in established judicial programmes.[3]

The Kenya Judiciary through the Mediation (Pilot Project) Rules, 2015, initiated the pilot phase of the Programme which ran from April 2016 to July 2017.The rules were made pursuant to sections 59A and 59B of the Civil Procedure Act. These provide for the establishment of the Mediation Accreditation Committee and reference of cases to mediation.[4] An evaluation of the pilot project indicated that the settlement rates in the Family and Commercial Division were 55.7 percent and 53 percent respectively releasing approximately Kshs.1.4 Billion back to the economy. This contributed to Kenya's ranking at position three in Sub-Saharan Africa as a country where there is ease of doing business.[5]

An Alternative Dispute Resolution (ADR) Taskforce was thereafter gazetted by the then Hon. Chief Justice with the mandate of overseeing the national roll-out of court annexed mediation. The Mediation (Pilot Project) Rules of 2015, were

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[2] Kariuki Muigua, 'Baseline Assessment, Situational Analysis &Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal &Policy Framework with the Aim to Deepen ADR for Access to Justice and Commercial Disputes'.2018. p.27.

[3] Steve Gizzi, 'Judging Mediation' (2004) 10 John F. Kennedy University Law Review 135 <*https://heinonline.org/HOL/Page?handle=hein.journals/jfku10&id=137&div=&collection=*>.

[4] 'CAP. 21' <*http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2021*> accessed 6 January 2021.

[5] World Bank Group, *Doing Business 2017: Equal Opportunity for All* (Washington, DC: World Bank 2016) <*http://hdl.handle.net/10986/25191*> accessed 6 January 2021.

amended through Gazette Notice Number 5214 of 2017 resulting in the High Court of Kenya, Family and Commercial and Tax Division Nairobi Practice Directions on Mediation, 2017. Gazette Notice Number 7263 of 2018 further amended the 2017 Practice Directions by expanding the scope of application to the Environment and Land Court (ELC), the Employment and Labour Relations Court (ELRC), subordinate courts, tribunals and other courts designated by the Chief Justice.

The Mediation (Pilot Project) Rules, 2015 were instrumental in the operationalisation and roll out of the programme although they raised the question as to whether they act as a mechanism of promotion or hindrance of implementation of mediation. They provided a framework within which the different actors in the programme could participate to reach mediation settlements. The framework included referral of cases, notification and case allocation to mediators, time limits, commencement and attendance, compliance, and settlement agreements.[6]These largely guided the process and outcomes of court annexed mediation in its initial phases.

As at the year 2017, the pilot project was a key indicator of the role of procedural law exemplified in issues such as timelines for filing case summaries.[7] There was 31% compliance by Plaintiffs and 14% by defendants on this procedural requirement. Mandatory referral of cases to mediation was also a key procedural requirement and component of the pilot phase and its subsequent roll-out. There has been relatively positive feedback despite the mandatory nature with 28.5% of cases which were mediated being settled.[8]The mediation

[6] 'Kenya Law | Kenya Gazette' <*http://kenyalaw.org/kenya_gazette/gazette/volume/MTUxOQ--/Vol.CXIX-No.70/*> accessed 6 January 2021.
[7] Achere Ibifuro Cole, 'External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts.' May 2017
[8] Ibid.

rules therefore played an important role in the implementation process and outcomes.

The need to safeguard the tenets of the mediation process is critical while applying procedural law.

The paper seeks to critically assess the contribution of Mediation (Pilot Project) Rules, 2015 with subsequent amendments in 2017 and 2018, their effect on the implementation process, gaps, comparative analysis and recommendations in light of their effect on implementation of Court Annexed Mediation.

2.0 General legal framework for the practice of Court Annexed Mediation in Kenya

The professional practice of mediation in Kenya has no singular governing statute. However, there are various constitutional and statutory provisions which stipulate and encourage the use of mediation. The legislative framework can be discussed under the following constitutional and statutory and procedural provisions.

2.1 The Constitution of Kenya, 2010

Article 159 (2) (c) of the Constitution provides an anchor for the legal framework, use and application of mediation. It recognizes the application of ADR methods such as reconciliation, by the Judiciary as a guiding principle in the exercise of judicial authority. Mediation is further recognized by the Constitution as essential for the resolution of disputes between the Senate and National Assembly in the law making process as explained below.

Resolution of Disputes between the Senate and the National Assembly

Articles 112 and 113 of the Constitution provide for dispute settlements relating to Bills on county governments through mediation by the National Assembly and the Senate. The provisions were reaffirmed by the Supreme Court of Kenya through an advisory opinion issued in the case of The *Speaker of the Senate and*

another v Attorney General and 4 others.[9]The Court advised on the need of establishment of the said mediation committee. The Constitution as the supreme law of Kenya therefore upholds the necessity, use and promotion of mediation in disputes at the government level and those subject to the judicial process.

2.2 Statutory Provisions

2.2.1 The Civil Procedure Act, Cap 21 Laws of Kenya

Article 159(2) (c) of the Constitution is statutorily effected under the Civil Procedure Act.[10] Section 59A of this Act establishes the Mediation Accreditation Committee (MAC). Its functions are stipulated as among others determination of criteria for certification of mediation, proposal of rules for the certification of mediators, maintenance of a register of qualified mediators, enforcement of a code of ethics included in the Pilot Program Rules, 2015 and the setting up of appropriate training programmes for mediators.

The mandate of MAC is limited to court annexed mediation and as such does not extend to out of court mediation. However, section 59D of the Civil Procedure Act provides for the power of courts to enforce private mediation agreements. They should be in writing and be registered. There however remains a statutory gap in enforcement of such agreements since the mediation process does not originate from a judicial process.

2.2.2 The Nairobi Centre for International Arbitration (NCIA) Act

The NCIA Act is a statute which establishes a regional centre for international commercial arbitration, an Arbitral Court and the promotion of other ADR mechanisms. Its functions are enumerated under section 5(d) with specific

[9] 'Advisory Opinion Reference 2 of 2013 - Kenya Law' <*http://kenyalaw.org/caselaw/cases/view/91815/*> accessed 4 April 2022.
[10]'CivilProcedureAct.Pdf' <*http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/CivilProcedureAct.PDF*> accessed 4 April 2022.

reference to the development of rules encompassing conciliation and mediation processes as one of the functions. In so far as this mandate is concerned, the NCIA has formulated mediation rules to govern its mediators. Their application is however limited, as it does not govern mediation practice in entirety. Parties must have opted to resolve their dispute through the NCIA.

2.2.3 The Court Annexed Mediation Practice Directions of 2015, 2017 & 2018

Court Annexed Mediation is largely anchored on Article 159(2) of the Constitution, section 59A of the Civil Procedure Act and the provisions of the Court Annexed Mediation Rules which form the backbone of the procedural aspects. The first set of Mediation (Pilot Project) Rules of 2015, were amended through Gazette Notice Number 5214 of 2017 resulting in the High Court of Kenya, Family and Commercial and Tax Division Nairobi Practice Directions on Mediation, 2017.

The 2017 Practice Directions were amended vide Gazette Notice Number 7263 of 2018 which expanded the scope of their application to the Environment and Land Court(ELC), the Employment and Labour Relations Court(ELRC), subordinate courts, tribunals and other courts designated by the Chief Justice. The Court Annexed Mediation Practice Directions 2018, which culminated from the amended 2017 and 2015 Mediation Rules, formed the legal procedural framework for the practice and settlement of agreements under the Court Annexed Mediation Programme until late last year.

3.0 General overview of the Court Annexed Mediation Programme Practice Directions, 2018

A general overview of the provisions of the Court Annexed Mediation Programme Practice Directions, 2018 is necessary as an assessment tool for the role of the procedural legal framework from the pilot project to the year 2022. Key provisions in the Practice Directions necessary for the proper conduct of mediation are discussed in light of their contribution to the implementation of CAM.

3.1 Jurisdiction and Application

Practice Direction 1(b) provided for the scope and jurisdiction of the Practice Directions, 2018.The scope of their application was the High Court and Courts with similar status to it pursuant to Article 162(2) of the Constitution. These are the ELC and the ELRC. Additionally, Court Annexed Mediation can be used in subordinate courts, tribunals and other courts designated by the Chief Justice by gazette notice. In comparison to the 2017 and 2015, the Practice Directions widened the scope of applicability and possibility of enhanced access to justice through promotion of mediation in civil actions in more courts.

3.2 Referral to Mediation

Practice Direction 3 provided for referral. Notification of the parties about the referral by a Mediation Deputy Registrar was to be done within seven days of completion of screening. It makes screening of matters a prerogative for Mediation Deputy Registrars (MDRs). However, the attribute of voluntariness of parties in mediation seemed diminished. The screening and referral to mediation impliedly makes it mandatory for parties to attempt resolution of the dispute through court annexed mediation before any judicial intervention.

3.3 Mediators

Practice Direction 4 provided for the conduct of mediation. The person had to be registered as a mediator by MAC. The amendment of Practice Direction 4(b) in 2018, allowed the MDR, Magistrate or Kadhi, to appoint a mediator from a Register of accredited mediators which is maintained by MAC. This was a departure from initial provisions which allowed parties to nominate a mediator from a list of three according to their preference. The nomination by parties often resulted in delays and reluctance by parties to settle on a mediator. In practice however, parties not satisfied with the appointed mediator can still delay the process hence the need for a balance of interests.

3.4 Time Limit

Practice Direction 5 provided for the time limit for court annexed mediation proceedings and conclusion as sixty days from the date of referral. Extension could be provided but not exceeding ten days. Consideration was to be given to the parties involved and the complexity of issues with the consent of parties being a mandatory prerequisite.

The objective of the provision was to ensure enhanced access to justice through resolution of disputes without undue delays. It however required the good will of parties and the mediator, often an arduous task that requires that the end of the mediation is the amicable dispute resolution and settlement agreement by and for the parties.

3.5 Commencement of Mediation

Practice Direction 6 provided for the fixing of a date for the initial mediation. The appointed mediator was required to notify the parties within seven days. The mediator was also expected to prepare and file a notice to the parties indicating the place, date and time of mediation indicating that the mediation is mandatory. Although the provision was aimed at reducing case back log in courts, the mandatory aspect diminished the key characteristic of the voluntary nature of mediation. It was necessary to educate and sensitize parties that the attempt at court annexed mediation if unsuccessful did not do away with their right to dispute resolution through the judicial system.

3.6 Attendance at the Mediation

Practice Direction 7 provided for the requirement of attendance of mediation sessions by parties with their advocate or representative. For parties the other than individuals, a duly authorized officer able to represent and bind them could attend. Attendance of mediation sessions by appropriate parties posed a challenge especially for persons other than individuals. This is because settlement agreements could be reached but could not be signed because of attendance by inappropriate parties. Mediators often face a challenge of

ensuring that parties have the capacity to reach a binding settlement agreements.

3.7 Statement of Understanding

The statement of understanding aimed at allowing a mediator to read and explain to parties the rules for the conduct of the proceedings. These provided an overview of the mediation process to the parties as well an appreciation that they remain central to the resultant settlement agreement outcome.

3.8 Non-compliance

Practice Direction 9 provided that failure by a party to comply with directions or to attend the mediation session could warrant the filing of a certificate of non-compliance. The matter could then be referred back to Court. Options available to parties by court included attendance of further mediations on terms set by court, the striking out of pleadings, and payment of costs by defaulting party. Compliance needs the good will and intention by parties to reach an agreement. Although the provision allowed for courts to make varied orders, the referral of a matter back to court respected the underlying principle of voluntariness in mediation whether court annexed or not.

3.9 Confidentiality and Inadmissibility

The confidential nature of mediation was safeguarded under Practice Direction 10 which stipulated that all communication during mediation was confidential. Mediation communication is hence non-admissible as evidence in current or subsequent litigation proceedings. There were however exceptions for disclosure which included a requirement by law or relation to criminal or illegal purposes such as child abuse, defilement, or domestic violence.

In addition to the communication, Practice Direction 10(c) exempted the mediator or persons present at mediation sessions from being summoned or compelled to testify or provide records of the mediation in court proceedings.

This was a legal safeguard for both the mediators and parties relating to disclosure.

3.10 Mediator's Report

Practice Direction 11 required the mediator to file a mediation report within ten (10) days of completion of the mediation and provide parties with a copy of the filed mediation report.

3.11 Agreement

Practice Direction 12 provided that agreements which resolve all or some of the issue in dispute, be filed within ten days after conclusion of the mediation. These had a prescribed form and could be adopted and enforced as an order or judgment. The provision provided a legal basis for the recognition and enforcement of settlement agreements reached through court annexed mediation. Parties however needed knowledge on the enforcement process and mechanisms proper to the agreements they reach so that there is compliance.

3.12 Appeals Against Settlement

Practice Direction 14 provided that no appeal is allowed against a court order or judgment resulting from mediation. However, it generally limited the right of access to justice stipulated under Article 48 of the Constitution. The right of appeal is envisioned as forming part of the right and of allowing parties to seek another forum in the quest for justice.

3.13 Immunity

Practice Direction 15 stipulated the provision of immunity and protection to mediators similar to judicial officers and judges. Although the provision was aimed at ensuring that mediators conduct their affairs without fear, in practice the protection and immunity granted to them is with regard to their work and not necessarily material benefits often given to judicial officers and judges.

3.14 Payment of Mediators

Payment of mediators is currently facilitated by the Judiciary through a small token for the conclusion of every mediation. However, this has proved unsustainable because the Judiciary heavily relies on donor funding notably the World Bank and other development partners for payment. In addition, mediators are not employees of the Judiciary and payment to them is subject to the cases and conclusion of matters assigned to them.

The 2018 Practice Directions provided a basis for the commencement and continued efficacy of the court annexed mediation programme. The framework provided guidance for courts, parties to the dispute and the mediator. The above assessment of their provisions indicates that they significantly impact the mediation process from commencement, during proceedings and at conclusion. However, there were notable gaps in the procedural rules which ultimately affect ed effective mediation.

These related to referral to mediation by consent of parties, the criteria for screening of matters, the conduct of mediation with the possibility of either physical or virtual sessions, persons who may attend the mediation, adoption of full settlement agreements and partial agreements, enforcement and setting aside of settlement agreements, payment for mediators and the remuneration of advocates who are mediators.

4.0 General Analysis of Gaps in the Court Annexed Mediation Practice Directions, 2018

An analysis of gaps in the 2018 procedural framework for court annexed mediation is key in understanding the impact and role of procedural rules in effective implementation. The gaps identified below indicate that improving the procedural framework can

4.1 Lack of a Clear Screening Criteria

The 2018 Practice Directions recognised the discretionary power of the Mediation Registrar to refer cases to mediation. However, the rules did not give a clear criterion for this determination. This posed a challenge and possibility of arbitrary referrals. A need to have a criteria stipulated in the rules which takes into account factors such as the age of the case, the nature of the subject matter, the issues for determination and whether they are pure points of law, public interest matters and whether the benefits of referral to mediation outweigh non-referral. It would also be important that the rules clearly stipulate that court annexed mediation screening for referral only applies to civil proceedings.

The inclusion of clear tenets for screening of matters is a therefore a procedural component that could enhance implementation of CAM.

4.2 Lack of Clarity on Mediation Files

The procedural framework was not clear on distinguishing between court files and mediation files once screening and referral has been done. In order to build confidence among mediating parties, it was necessary that the procedural rules clearly stipulate the purpose, content and documentation of mediation files by courts. This would provide clarity on the fact that the mediation file does not do away with the court file but rather, is opened and maintained during the pendency of mediation proceedings. Parties would also be assured of non-interference of the court file as mediators will only handle the mediation file and its documentation.

4.3 Delays in Obtaining Case Summaries

The 2018 Practice Directions provided for filing of case summaries by the parties with the mediator on notification of referral to mediation. The pre-requisite of proceeding with mediation subject to case summaries posed a huge challenge for mediators. Mediators experience difficulty in obtaining them from the parties and these largely occasion delays for the courts. Clarity in the procedural framework would help reduce delays in commencing the mediation process.

4.4 Party Notification Through Service of Process

The procedural framework in the 2018 Practice Directions did not provide for service to parties. Introduction to the framework for purposes of ensuring proper notification of relevant parties and the commencement of the mediation process would enhance implementation. Additionally, parties can determine whether they need their respective legal representatives and the scope of their duties and rights. It will promote inclusion and ensure that the outcomes of mediation processes are not jeopardised due to non-attendance by key parties to the process.

4.5 Criteria for the Appointment of Mediators and Allocation of Cases

The 2018 framework generally provided for the appointment of mediators by the court and allocation of cases. There were however been numerous complaints on favouritism in the process. Clarity would provide for a general criterion for allocation of cases as this largely depends on the availability of mediators and their expertise in the areas. A proposal could be allocation of cases in a chronological way unless allocation is limited to a particular mediator because of particular knowledge or expertise. This should be backed with proper documentation in the Mediation Register.

In general, appointment and allocation should be done in accordance with the skills, performance, experience and availability of mediators. This will promote transparency among mediators and allow for courts to tap into the diversity of registered court annexed mediators.

4.6 Necessity of Court Mentions

One of the main challenges in implementation of court annexed mediation has been the lack of conviction of parties to disputes that the process is anchored in law and the role of the court is to safeguard of rights of parties. This may be affirmed by the court at the early stages of mediation possibly after the appointment of the mediator. A court mention attended by relevant parties

allows the court to explain its direction, referral and allocation of the case for mediation.

It can also be used to explain to the parties and mediator the general conduct during the mediation including attendance and participation in good faith and the consequences of non-compliance. Court mentions are useful in ensuring attendance by parties of the mediation sessions and commencement of the process at about 85% following the survey outcome responses.

4.7 Representation and Attendance in Mediation Proceedings

Attendance of parties or their representatives in mediation proceedings is key in binding the parties following outcomes of the process. The 2018 framework posed a challenge as the provision on attendance is general and did not clarify elements such as the need for disclosure by the representative parties at the first meeting. This will ensure that only parties to the dispute together with their advocates or representatives shall have the right to attend mediation sessions.
Prior consent of all the parties should be required to allow other persons to attend the mediation sessions notably mediators under CAMP who are under mentorship as they are often attached to the appointed mediator for purposes of gaining experience and exposure.

4.8 Confidentiality and Inadmissibility

Confidentiality of proceedings is key in mediation. Although the 2018 framework provided for and recognised the safeguard all communication during the mediation process, there was need to strengthen it. The execution of a confidentiality agreement stipulating that parties be bound by the rules of confidentiality in the process would promote accountability and respect for this element.

4.9 Role of Advocates in Mediation

The 2018 procedural framework generally allowed advocates as representatives of parties to mediation although their role has been contentious. There have

been numerous complaints about the lack of cooperation by advocates in the mediation process leading to lack of settlements for many mediations as well as a general lack of understanding on the nature of mediation.

Clarity that the parties rather than their representatives should be allowed to take a lead role in the mediation process will allow mediators to conduct the process without unnecessary undermining by the advocate whose role in the mediation largely advisory.

4.10 Non-compliance and Filing of Certificates of Non-compliance

There have been varied opinions on the understanding of non-compliance leading to the filing of a certificate of non-compliance by mediators. In some instances, there has been non-payment of mediators occasioned by the court's declaration that there had been no sufficient effort by the mediator to reach a settlement by parties to the dispute. This has been a cause of frustration on the part of some mediators who objectively make reasonable efforts.

Outlining the consequences of non-compliance to parties at commencement in the procedural rules can ensure parties respect the process and approach it in good faith.

4.11 Mediation Settlement Agreements

The 2018 legal procedural framework provided for full settlement agreements but difficulty in the adoption and enforcement of partial agreements which are most often reached by most mediators. Clarity in enforcement of partial agreements has the potential reduce backlog and issues for determination by courts of law. The procedural rules should clearly stipulate the contents of partial agreements should: what parties were able to agree upon and which issues remain unresolved. In addition, the parties should state what directions or assistance they would like the court to grant for expeditious resolution of the remaining issues. It is also important that the framework stipulates the role of

the court in adoption and execution of a partial settlement agreement in the same way as a full settlement.

4.12 Time Frame for Conclusion of Mediation

The 2018 procedural framework provided that mediations should be conducted and concluded within sixty (60) days from the date of referral. This was subject to extension by the MDR, there is need for further clarity on the scope of time. It would be more effective that the procedural rules expressly stipulate that pending the conclusion of mediation proceedings, the time limits applicable under all procedural rules of court shall not apply once the case has been referred to mediation.

Additionally, it would be more practical that the time frame commences from the date that an appointed mediator is notified of appointment to handle the case. This accommodates both the mediator and the parties by allowing reasonable time for notification of referral and mentions if any prior to the mediation proceedings. It would also allow for the court to act upon requests by the mediator and parties to extend the period for a further ten days in light of the number of the parties or complexity of the issues.

4.13 Setting Aside an order or Decree Arising Out of a Settlement Agreement

The setting aside of orders and decrees from settlement agreements was not provided for in the court annexed mediation procedural framework of 2018. This could be addressed through clear rules and stipulation of grounds such as misconduct, collision, misrepresentation fraud or a fundamental mistake by the mediator, the parties or witnesses who took part in the proceedings that materially affected the outcome. An application for setting aside should additionally be filed with the leave of court.

4.14 Lack of Clarity on Remuneration of Advocates

There is increased involvement of advocates in mediation proceedings. There was lack of clarity on their payment for representation of parties during

mediation under the procedural rules. This is the mandate of the Chief Justice under section 44 of the Advocates Act which allows for the prescription and regulation of the remuneration of advocates. This is also important for the parties for purposes of determination of the fees already charged by an advocate at the time of referral of the case to mediation, and fees which may be charged by the advocate should the case be referred back to the court for disposal.

4.15 Private Mediation Agreements

CAM has contributed toward a greater embracing of mediation in dispute settlement outside courts. This has been notable in civil disputes where parties reach a settlement agreement and seek enforcement by the courts. The 2018 procedural framework was limited to court annexed mediation settlement agreements. However, it is important that the rules clarify and distinguish the registration, adoption and enforcement of private mediation agreements. Guidelines on registration, adoption and enforcement of private mediation settlement agreements can help courts in addressing this.

4.16 Recognition and Registration of Qualified Mediators

The procedural rules were silent on recognition of mediators notably those from other institutions apart from those accredited by MAC. Recognition and registration by MAC is necessary in ensuring that there is a proper data base and publication of qualified mediators for purposes of gauging training, experience, expertise and geographical location. Provision for suspension of qualification status of mediators by MAC for reasons such as criminal charges and disciplinary action they may have before any professional body or tribunal. This will be useful in ensuring compliance with the Mediators' Code of Conduct and the exercise of professionalism by mediators.

4.17 Registration of Out of Court Mediation Settlement Agreements

The framework was silent on registration of settlement agreements reached by parties outside court through the assistance of a qualified mediator. This can be addressed by allowing parties to present them before court for registration and

adoption. This will help to promote their enforceability and execution subject to the respect for the tenets of mediation.

The rules should also provide for the requirements for the registration of a settlement agreement. The court should ascertain among other things that:

a) The mediation was conducted by a qualified and properly accredited mediator;

b) The settlement agreement relates to a dispute that is not subject of a pending court case;

c) It relates to a dispute capable of being resolved by mediation under Kenyan law and;

d) The agreement resolves all the issues in dispute and is enforceable under Kenyan law.

4.18 Adoption and Enforcement of International Mediation Agreements

The framework was silent on international mediation agreements yet in practice, there is a rise in attempts to enforce them. Mediation Settlement agreements concluded outside Kenya's jurisdiction could be included for purposes of registration and enforcement. This should however be subject to requirements such as:

a) The agreements should be valid in the countries where they were made and signed;

b) Have been conducted by qualified and recognised mediators;

c) Relate to a subject matter situate within Kenya;

d) At least one of the parties to the dispute must be a Kenyan citizen or ordinarily residing within Kenya.

To safeguard the above provisions, the framework could provide that where the mediator does not meet stipulated procedural requirements, the mediator will first be required to apply for such recognition and certification of his qualification status by the Committee by filing the agreement in court.

4.19 Virtual Mediations

There is acknowledgment by stakeholders in CAMP that there is increased and evolving use of technology in court proceedings. These have in the recent years promoted access to justice and been a mechanism of adaptation to the needs of society. In light of the provisions of the accordance with the Civil Procedure Act, the procedural framework should incorporate the conduct of mediations virtually in addition to the option of physical proceedings at the court premises or such other places as the parties may agree.

From the foregoing, parties generally embrace mediation once there is reassurance that there is formal recognition by the courts and settlement agreements can be enforced. The general compliance with the procedural rules is a useful tool in promoting mediation although ultimately it does not translate into settlement agreements which remain within the domain of the parties. The focus on the procedural rules and gaps analysed above in light of gaps exemplify the important role of procedural rules and the need to equip the stakeholders involved with knowledge on compliance while safe-guarding the informal nature of mediation.

Procedural rules enhance the implementation of CAM when they provide clarity on knowledge on criteria for screening for purposes of referral to mediation; compliance on the requirement for submission of case summaries by parties before commencement of mediation; the role of court mentions in ensuring attendance by parties of the mediation sessions and commencement of

the process; understanding of the role of advocates in court annexed mediation proceedings; filing of mediation settlement agreements within stipulated time periods; and levels of enforcement and execution of the mediation settlement agreements on completion of mediation. However, it is important that the procedural rules do not make the mediation process more complex.

5.0 Comparative Analysis of Court Annexed Mediation in Uganda, South Africa and Malaysia

A comparative analysis is important for purposes of examining the role of procedural rules in the effective implementation of CAM in other jurisdictions. The focus is on the reasons for adoption of CAM, a general overview of the legal anchorage, similarities or key differences in comparison to Kenya's framework and the efficacy achieved in light of the role of procedural rules. The countries are Uganda, South Africa and Malaysia. Uganda and Malaysia share with Kenya the similarity of the English Common Law while South Africa has been ranked second after Uganda in implementing CAM although it commenced in subordinate courts.

5.1 Uganda

Court Annexed Mediation was introduced in Uganda through a compulsory two-year pilot programme in its Commercial Courts in the year 2003.[11] The pilot project was anchored on the Commercial Court Division (Mediation Pilot Project) Rules 2003, S.1. No. 71 of 2003.[12]After completion of the pilot project, new rules were introduced. These were the Judicature (Commercial Court Division) (Mediation)Rules 2007, S1. No. 55 of 2007.[13] The 2007 rules effectively made mediation a permanent feature of the Commercial Court processes as

[11] '(PDF) The Current Status of Mediation in Uganda Written by | Helga Akao - Academia.Edu' <*https://www.academia.edu/49497110/THE_CURRENT_STATUS_OF_MEDIATION_IN_UGANDA_Written_by*> accessed 30 September 2022.

[12] Kobusingye Ruth, 'An Examination of the Impact of Mediation as A Dispute Resolution Mechanism, A Case Study of Uganda' 51.

[13] Ibid.

well as a multi-door court house. Parties to disputes are therefore mandatorily required to attempt mediation before any fixing of the case for hearing. Uganda therefore preceded Kenya in the introduction of mediation into its judicial system.

The aim of the introduction of CAM in Uganda just like Kenya was the promotion of efficient and effective dispute resolution and disposal of cases at the commercial courts. Uganda boosts of good practices in mediation and as the end of the year 2012, the completion rate of cases referred to mediation at the commercial courts was at 26%.[14] There was a roll out of mediation to all courts following the initial success culminating in the development of Mediation Rules,2013 which are now applicable for the conduct of CAM in the High Court and in subordinate courts.[15]

5.1.1 General Overview of the Legal Framework for CAM in Uganda

Court Annexed Mediation in Uganda is governed by the Judicature (Mediation) Rules (MOJCA, 2013) pursuant to the Judicature Act,1996 which mandates Uganda's Judiciary Rules Committee to formulate rules for the practice and procedure of courts.[16] The Rules generally incorporate the basic principles of mediation. Parties to civil disputes are statutorily mandatorily required to undertake mediation in all civil matters except those subject to the small claims procedure.[17]Mediation is therefore a mandatory statutory legal requirement in civil proceedings. Parties however retain autonomy over the process and the attempt to reach as settlement agreement once there has been referral of civil dispute to mediation.

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[14]'*Https://Www.Jlos.Go.Ug/Index.Php/about-Jlos/Projects/Alternative-Dispute-Resolution-Adr/Mediation-Rules'*<*https://www.jlos.go.ug/index.php/about-jlos/projects/alternative-dispute-resolution-adr/mediation-rules*> accessed 30 September 2022.

[15] Kobusingye (n 12).

[16] Ibid.

[17]'*Https://Www.Jlos.Go.Ug/Index.Php/about-Jlos/Projects/Alternative-Dispute-Resolution-Adr/Mediation-Rules' (n 53).*

The Judicature (Mediation) Rules, 2013 of Uganda generally have similar provisions as the framework in Kenya which include the time limit of sixty days for completion of the mediation process after commencement. However, there is an exception to the effect that where there is an agreement for extension of time, it should not exceed ten (10) days where there is a likelihood of settlement. The role of mediators is similar including scheduling mediation sessions, setting up suitable mediation venues, exchange of relevant documents between parties and the general administration of the process.[18] Parties are obliged to attend the mediation sessions pursuant to sanctions stipulated under Rule 11 which requires the party who fails to attend the mediation session without good cause to pay the other party.[19]Parties often conclude the mediation with a consent agreement and where the matter has not been resolved, the court trial process continues.

In addition to the Judicature (Mediation) Rules, 2013, CAM in Uganda is also governed by the Mediation Guidelines which form the second schedule of the Judicature (Mediation) Rules.[20] The Guidelines are the equivalent to Kenya's CAMP Mediators' Code of Conduct. The Guidelines provide an ethical guide the mediators and also outline principles for the conduct of mediation and the promotion of confidence in mediation for dispute resolution.

One of the main differences between the conduct of mediation in Kenya and Uganda is that unlike Kenya, mediations in Uganda are conducted by judicial officers or any person accredited by court as a mediator as well persons selected by parties who possess both experience and qualifications as stipulated under Rule Nine of the Judicature Mediation Rules,2013. The scope of mediators in

[18] Ibid
[19] Kobusingye (n12).
[20] '(PDF) THE CURRENT STATUS OF MEDIATION IN UGANDA Written by | Helga Akao - Academia.Edu' (n 50).

Uganda hence extends to judicial officers unlike Kenya where judicial officers simply facilitate the process but are not the mediators.

The Court Annexed Mediation Programme in Uganda and its implementation can therefore be summarised into four phases: two years of the pilot stage, two years of evaluation, the institutionalisation of the mediation at the Commercial Court and the final roll out to the High Court and Magistrates Courts.[21]

Kenya's roll out of CAM was similar to Uganda's approach and phases although the notable difference is that there is a hybrid system of judicial and non-judicial officers who comprise the mediators. Procedural Rules have been key in Uganda's implementation of CAM. These included the initial pilot rules culminating in the Judicature (Mediation)Rules, 2013 expanding the jurisdiction and scope of Courts in civil mediation. Uganda exemplifies the need to safeguard the tenets of mediation especially the autonomy of parties in reaching a settlement agreement, while providing formality for purposes of instilling confidence in parties and enforcing agreements reached. In comparison to Kenya, the procedural rules components relating to the referral process and the role of mediators who include judicial officers pose a challenge to the effective implementation of CAM in Uganda.

5.2 Malaysia

The introduction of court annexed mediation in Malaysia was occasioned and driven by the need to help in the reduction of case backlog in subordinate courts and the High Court. The implementation commenced with the introduction of Practice Directions on Mediation in the year 2010.It was clear from the onset that the court annexed mediation programme was integrated into the civil litigation

[21] '(PDF) THE CURRENT STATUS OF MEDIATION IN UGANDA Written by | Helga Akao - Academia.Edu' (n 50).

court process.[22] In addition to the programme, the Kuala Lumpur Court Mediation Centre (K.L.C.M.C) was established and launched to help in encouraging the formality of the mediation process. This was helpful in promoting trust in the process by parties. The K.L.C.M.C is now referred to as the Court-Annexed Mediation Centre Kuala Lumpur (C.M.C.K.L) and has its own facilities and infrastructure.

5.2.1 General Overview of the Legal Framework for CAM in Malaysia

Malaysia like Kenya has no express statute on court annexed mediation. There is reliance on the Rules of Court,2012 equivalent to Kenya's Civil Procedure Act.[23]There is reliance on various Orders stipulated in the Rules of Court notably the provision of the exercise of the court's discretion in considering relevant methods for dispute resolution including mediation. Court annexed mediation is hence guided by the Practice Directions of 2010 which encompass mediation rules, guidelines. procedures and the Rules for Court Assisted Mediation.

In addition to the above legal provisions, the Rules of Court Assisted Mediation, 2011 guide mediators who are judicial officers. These stipulate the roles and responsibilities of judicial officers, the mediation process, the effect of a successful mediation and guidelines for the termination of mediation. The rules elaborate the function of the mediator as facilitator and evaluator at the first and second stages of mediation respectively. This is a safeguard impartiality and neutrality. The Practice Directions and Rules of Court Assisted Mediation,2011 have proved sufficient in the absence of a primary statutory legislation.[24]

[22] Choong Yeow Choy, Tie Fatt Hee and Christina Ooi Su Siang, 'Court-Annexed Mediation Practice in Malaysia: What the Future Holds' (2017) Vol 1 University of Bologna Law Review 271.
[23] Adnan Yaakob and Malaysian Current Law Journal Sdn. Bhd (eds), *Alternative Dispute Resolution: Law & Practice* (CLJ Publication 2020).
[24] Yeow Choy, Fatt Hee and Ooi Su Siang (n 22).

In Malaysia, the use and promotion of free court-annexed mediation encompasses current sitting judges and judicial officers as mediators through the C.M.C's established.[25] Mediations are undertaken by both part-time and full time mediators .[26]The role of the judges or judicial officers as mediators is emphasized as providing assistance to litigating parties to enable parties reach a settlement. The advantage of this is that the judges act as mediators on a part-time basis and due to their training, there is a perception of impartiality. However, the downside of this is that parties may feel obliged to accept directions of the judge-mediator because of the position of authority that they hold.

Court annexed mediation practice in Malaysia was summarily sanctioned by O. 34 r. 2(a) of the Rules of Court ,2012[27]. The procedure is currently provided for under the Practice Direction 2016 for all cases, save for accident cases which are governed by Practice Direction No. 2 of 2013. Private mediations on the other hand have well stipulated regulatory, procedural, enforceability and liability provisions anchored on the Mediation Act, 2012 (Act 749).[28]

There has been establishment of more court-annexed mediation centres in other locations as a way of promoting the use of mediation by parties in dispute resolution. The legal framework in Malaysia requires that a case must first be filed in court before registration for mediation as a pre-requisite. There is exclusion of running down matters which are referred to mediation under separate directions. There has been a general increase in case dispute resolutions following the formalisation of mediation into the Malaysian court system.[29]

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[25] Ibid.
[26] Ibid.
[27] 'Yaakob and Malaysian Current Law Journal Sdn. Bhd - 2020 - Alternative Dispute Resolution Law & Practice.Pdf' <*http://irep.iium.edu.my/78642/13/78642_Mediation%20court%20annexed.pdf*> accessed 19 August 2022.
[28] Yeow Choy, Fatt Hee and Ooi Su Siang (n 22).
[29] Adnan Yaakob, *Alternative Dispute Resolution: Law & Practice* (CLJ Publication 2020).

Judge-led mediations in Malaysia are a notable distinction between Malaysia's and Kenya's mediators. However, there have been calls for necessary training so that the conduct of mediation is not equated to court settlement conferences. They should also be subject to standards and code of conduct of full-time mediators.

Notable gaps in the Malaysian court annexed mediation procedural framework in comparison to Kenya include lack of consistency and standardization of the procedures, governance, the assessment and competence of mediators for mediation proceedings, the lack of clear standards and ethics for the conduct of mediators during the mediation process; the generality of the Rules and Practice Directions; the negative perception of court officers who act as mediators and the fact that judicial officers are only part-time mediators. These pose a challenge in the implementation process.

Malaysia exemplifies the impact and role of standardized rules of procedure and a code of conduct in effective implementation of court annexed mediation especially because of the hybrid mediators involved. They enhance the validity and formality of mediation while upholding the central role of parties in reaching a settlement agreement.

5.3 South Africa

Court annexed mediation in South Africa commenced in the year 2014 following the promulgation of the Amended Magistrates' Court Rules. It commenced as a pilot project in twelve courts: nine in Gauteng and three North-West. After four years, in 2018, it was extended to regional divisions of the magistrates' courts and later to all provinces in regional divisions of the magistrates' courts in the Eastern Cape.[30] It was aimed at promoting faster and cost-effective dispute

[30] EC Muller and CL Nel, 'A Critical Analysis of the Inefficacy of Court - Annexed Mediation (CAM) in South Africa – Lessons from Nigeria' (2021) 46 Journal for Juridical Science 26.

resolution and notably preceded Kenya's pilot project. The key distinction between Kenya and South Africa is that the pilot project in South Africa commenced in subordinate courts and rolled out to the Higher Courts. Although South Africa's model is different from Kenya's the objectives of mediation are the same.

5.3.1 General Overview of the Legal Framework for CAM in South Africa

South Africa's Amended Magistrates' Court Rules, 2014 provide for voluntary submission by parties of their civil disputes to mediation. Matters are therefore referred to mediation before or after commencement of the litigation process. Where the referral is after commencement of litigation, mediation should be conducted either before commencement of trial or before a judgment is rendered. Mediation is also guided by the general principles of practice.

The Amended Magistrate's Court Rules are similar to those in Kenya and Uganda as they outline the mediator's role and affirm his facilitative role. The mediator is an impartial third party who helps parties in dispute reach an autonomous settlement agreement. Mediators are required to be court-accredited and affiliated to an approved institution as in Kenya as means of ensuring professionalism in the conduct of mediations.

Settlement agreements are binding and enforceable and can result in a court order. Parties are therefore required to request the court that their settlement agreement be converted into an Order of the Court this is not an automatic result of reaching a settlement agreement. Where parties do not reach a mediation settlement agreement, they are allowed to resume litigation proceedings.

South Africa already has a good existing legal framework for court annexed mediation and adoption by parties voluntarily is advantageous. However, there is need for acknowledgement the inclusion of a time frame for completion from the time of filing or commencement, the use of simplified language to allow

enforcement of settlement agreements and the need to pilot at the High Court since this will instil confidence in parties and courts of the validity of mediation.

South Africa exemplifies the role of procedural rules for effective CAM implementation as well as their need for promotion of validity and enforceability of mediation settlement agreements. Procedural rules however need to be balanced with the tenets of mediation especially party autonomy.

Notable distinctions between the mediation guiding Rules in Kenya and South Africa are that there is no statutory completion period of the mediation proceedings in South Africa and parties are required to pay the mediator according to rates provided by the government. The uptake of the CAMP in South Africa has been low in comparison to Uganda and Kenya low largely due to budgetary constraints and fund appropriation. The slow uptake can largely be attributed to the lack of clarity in the procedural rules on the requisite time frames for conclusion of mediation.

The comparative analysis between Kenya and the three countries in terms of commencement of implementation, models and the impact of procedural rules indicate that the countries share similar objectives for the adoption of court annexed mediation. The implementation models are similar except for South Africa where the pilot project begun at subordinate courts. The roll-out was also phased with pilot projects and continued roll out to other jurisdictions and courts.

There has been considerable success especially in Uganda which is headed toward possible introduction of mediation in the appellate courts. South Africa's challenge remains implementation and proper financial appropriation to encourage uptake. The legal procedural framework provisions are similar aimed at promoting legitimacy of the process and enforceability without diminishing the general tenets and the informal nature of mediation. The

procedural rules however pose challenges especially relating to referral and time frames for conduct and completion of mediation proceedings.

This paper has examined the role of procedural rules in promoting the implementation of CAM. Although, they introduce formality to the process which is inherently informal, they allow for legitimacy and confidence by parties thus promoting certainty, authority and the enforceability of mediation settlement agreements. Procedural law is therefore an important component in the implementation of CAM as well as an indicator toward possible positive mediation outcomes.

Procedural justice through the use of procedural law is therefore an important component of court annexed mediation and largely contributes toward a positive perception of access to justice by the public through the Judiciary's alternative dispute resolution mechanisms. The frameworks discussed, gaps identified in the procedural rules and the comparative analysis indicate that compliance with procedural guidelines positively contribute toward better implementation of CAM as well as positive outcomes in the conclusion of mediations, filing and enforcement of settlement agreements.

There are other factors apart from procedural rules which could contribute toward better implementation of CAM including: continuous awareness creation on mediation among stakeholders; training of judicial officers and court registry staff on mediation and development of infrastructure to facilitate the conduct of mediations.

5.4 Recommendations

Recommendations for better implementation of CAMP in Kenya in light of the gaps identified in the study and other non-procedural factors. These are as below.

5.4.1 Procedural Law Amendments

The evolving nature of dispute resolution requires continuous awareness and amendments to provide clarity on provisions relating to criteria for screening and referral of cases, submission of case summaries, better appointment and case allocation, the role of advocates as well as their remuneration, conclusion of settlement agreements, recognition and enforcement. These amendments should not however make the mediation process more complex but ease the initiation of the process by the court, party proceedings leading to an agreement, the conclusion and enforcement of settlement agreements. This requires synergy among relevant stakeholders among them court annexed mediation registry staff, judicial officers, mediators, parties involved in the mediation process and members of the public and initiation by the Mediation Accreditation Committee (MAC). The Civil Procedure (Court-Annexed Mediation) Rules, 2022 are a step toward improving the 2018 framework although their effectiveness can only be measured after their use for a reasonable period of time.

5.4.2 Precedents

Court Annexed Mediation settlement agreements generally vary. One of the shortcomings of the process is that at present, there are no precedents for future reference. The Judiciary may study how to best utilize the settlement agreements for purposes of guiding parties and also reporting on the outcomes from the mediation process. The implementation can be done development of guidelines by MAC in conjunction with the Judiciary.

5.4.3 Other factors that may contribute toward better implementation of CAMP in Kenya

5.4.3.1. Infrastructure

The conduct of CAM has largely been within court premises which on one hand has contributed toward the promotion of legitimacy of the process. However, infrastructure is essential in ensuring proper documentation and a conducive

environment especially for mediators and parties to disputes. This requires commitment and action from the Judiciary for the continued success of the implementation of CAMP in Kenya.

5.4.3.2 Funding

CAMP in Kenya has generally been supported by the recurrent budget allocated to the other organs of Judiciary. The operationalization and implementation of the Judiciary Fund may allow the Judiciary to improve on the infrastructure, payment of mediators and documentation of mediation documents which in addition to the procedural framework will contribute to better realization of the objects of CAM. This can be implemented by MAC in conjunction with Mediation Registries preparing relevant work plans and prudent justification for allocation of funds.

6.0 Conclusion

Court Annexed Mediation in Kenya is primarily anchored on Article 159 (2) (c) of the Constitution which encourages use of ADR methods by the Judiciary as a guiding principle in the exercise of judicial authority. The implementation has been through the use of Procedural rules which over the years have been amended to address the issues of scope, jurisdiction and better implementation. Kenya has evidently made progress in reducing case backlog with the introduction of CAMP. The procedural rules have been a key positive tool for effective implementation. They give legal validity to the mediation process and promote confidence by parties. They should however be used in tandem with the general tenets of principles of mediation.

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'(PDF) THE CURRENT STATUS OF MEDIATION IN UGANDA Written by |Helga Akao - Academia.Edu'<*https://www.academia.edu/49497110/THE_CURRENT_STATUS_OF_MEDIATION_IN_UGANDA_Written_by*> accessed 30 September 2022

Reforming Virtual Court Sessions in Kenya to Enhance Access to Justice: Addressing the challenges

By: ***Alexandra Akinyi Ochieng****

Abstract

As a country, we are in an era where everything has to conform to the adapting technological advancements. This is an aim to ensure a wider market outreach to meet expectations of growing businesses in the market industry.[1] This is not an exception when it comes to the delivery of justice in Kenya. The onset of the COVID-19 pandemic compelled courts and other quasi-judicial bodies to hear matters listed before them virtually which was contrary to the norm of physical court attendance and procedures revolving around paper use.[2] However, even with the subsidence of the pandemic through the years, digitization of proceedings in courts has persisted due to the efficacy and efficiency it has brought with it such as equal participation of persons from remote geographical areas.[3] Every cloud has a silver lining; likewise, the advancement in the use of technology in the realization of access to justice subject to Article 48 of the Constitution, 2010. Digitization has resulted in challenges in the delivery of justice that need to be addressed promptly.

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[1] Harlem World Magazine, 'Why Adapting to Technological Advancements Is Essential for Business Growth' (*Harlem World Magazine*, 22 May 2023) <*https://www.harlemworldmagazine.com/why-adapting-to-technological-advancements-is-essential-for-business-growth/*> accessed 14 August 2023

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[3] 'Virtual Courts' (The Judiciary) & lt; *https://judiciary.go.ke/virtual-courts-3/#:~:text=The%20Kenya%20 Judiciary's%20 adoption%20of, participate%20in%20 legal%20 proceedings%20 seamlessly. >* accessed 14 August 2023

This paper opines the problems of digitization in the field of justice with regard to virtual open court attendance. In doing so, this discourse offers a brief introduction, outlines the legal framework, outlines the successes of virtual courts, gives an analysis of the problems from digitization of courts, suggests possible recommendations and a conclusion. The author argues that unless these challenges are dealt with first, the virtual proceedings may not achieve much in the realization of the access to justice.

1. Introduction

The COVID-19 pandemic turned the whole world upside down and there was a need to ensure life goes on regardless of everything being put to a halt. This was evidently seen in the measures taken by way of periodic lockdowns to ensure restricted movement of persons and reduction of social interaction to curb the spread of the virus.[4] The pandemic disrupted court operations thus, leading to delays in the administration of justice. This was observed through the closure of court stations to help curb the spread of the virus and protect old litigants from being infected. Furthermore, cases of urgency were the only ones prioritized which was disadvantageous to other court users.[5] However, in response to these challenges, the Judiciary adopted virtual court proceedings as a means of ensuring continued access to justice while observing social distancing measures like social isolation to mitigate the spread of the virus.[6] The implementation of virtual courts in Kenya is a significant milestone in granting

[4] Obulutsa G and Fick M, 'Kenya's President Orders New Lockdown to Curb Covid-19 Wave' (Reuters, 26 March 2021) <*https://www.reuters.com/world/middle-east/kenyas-president-orders-new-lockdown-battle-covid-19-wave-2021-03-26/>* accessed 14 August 2023

[5]Mercy Muendo   Lecturer, 'Kenya Is Struggling to Deliver Justice Online: What Needs to Be Done' (The Conversation, 15 May 2023) & lt; *https://theconversation.com/kenya-is-struggling-to-deliver-justice-online-what-needs-to-be-done-139675>* accessed 14 August 2023

[6] Hwang T-J, 'Loneliness and Social Isolation during the COVID-19 Pandemic' (International psychogeriatric, October 2020) < *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7306546/#:~:text=In%20the%20era%20of%20social, helpful%20to%20 defend%20against%20 loneliness. >* accessed 14 August 2023

court users further access to court that was previously limited to physical appearances.[7]

There has been an installation of ICT services from the onset of the COVID-19 pandemic evidently in 10 High Courts across the country as of 2022.[8] Efforts are being put to ensure the number increases countrywide. Some of these efforts include the Government's move of making available 5,000 of its services online and implementing technology in its departments to increase delivery of service.[9] The introduction of virtual courts has proven to be effective in the handling of matters and brought about privileges for vulnerable groups. Expectant mothers, persons with disabilities and the general public have been able to access justice through its implementation without having to travel to the physical courts and relevant government offices.[10] Virtual courts have also been effective in determining sensitive matters e.g. Survivors of trauma have access to witness protection and the privacy from narrating their experience in open court.[11]

The Retired Chief Justice, David Maraga put in place an e-filing to enable the efficiency in filing of documents and management of cases by litigants.[12] Persons detained were also able to attend virtual courts in prison via virtual links for

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[7] Supra, note 4.
[8] "Meet Martha Koome: Kenya's Chief Justice Harnessing Tech to End Gender-Based Violence" (*UN WOMEN AFRICA*) <*https://africa.unwomen.org/en/stories/feature-story/2023/03/meet-martha-koome-kenyas-chief-justice-harnessing-tech-to-end-gender-based-violence*> accessed March 17, 2023
[9] Writer G, 'Opinion: How Gov't Adoption of Technology Could Bring Transformation to the Country' (Citizen Digital, 14 August 2023) < *https://www.citizen.digital/opinion-blogs/opinion-how-govt-adoption-of-technology-could-bring-transformation-to-the-country-n325219>* accessed 14 August 2023
[10]"E-Courts: It's a Digital Game Changer for Kenyan Judiciary" (*The Standard*2022) <*https://www.google.com/amp/s/www.standardmedia.co.ke/amp/article/2001424716/it-s-a-digital-game-changer-for-kenyan-judiciary*> accessed March 17, 2023
[11] See supra note 2
[12] Murrey V, "New Dawn for Judiciary as Maraga Launches Court's e-Filing System" (*KahawaTungu*July 1, 2020) <*https://www.kahawatungu.com/cj-maraga-launches-courts-e-filing-system/*> accessed March 25, 2023

plea taking and hearing of bails and bonds. This was through the guidelines on virtual court sessions drafted by the LSK[13], prior to the adverse effects of the pandemic.[14]

In spite of the benefits accrued from virtual court sessions, it is important to address the challenges that have ensued as a result of the implementation. This paper focuses on the problems arising from the implementation of virtual courts in Kenya and suggests how they can be tackled by suggesting recommendations.

2. The Legal framework on Virtual court sessions

Kenya lacks a comprehensive statute to govern the regulation of virtual court attendance. This is due to lack of a statute to cater for all aspects pertaining to virtual court attendance. Nonetheless, there are a number of regulations from various statutes that can cater for virtual court attendance as follows: The Constitution, LSK Draft on guidelines for virtual courts, The Practice Directions 2022, The Evidence Act of Kenya and the Practice Directions on Electronic Case Management, 2020.

a) The Constitution of Kenya, 2010[15]

The Constitution is the supreme law of the land as it binds State organs and all persons.[16] State organs including the Judiciary, are bound by the national principles and values i.e. the rule of law, social justice, equality, inclusiveness, human rights, non-discrimination, integrity, transparency and accountability for purposes of this paper.[17] The court is obligated in the application of the Bill of Rights to ensure the development of the law in a manner that does not affect the fundamental rights and freedoms while adopting a favorable interpretation

[13] Draft LSK Guidelines for Virtual Court and Online Court Sessions 2020
[14] See supra note 2
[15] The Constitution of Kenya, 2010.
[16] Ibid Article 2(1)
[17] Ibid Article 10(1) read together with Sub-Article (2).

of the enforcement of rights.[18] Moreover, courts should uphold the national values on the basis of a democratic society founded on equity and human dignity as well as equality.[19]

Judicial authority is exercised by tribunals and courts in addition to being derived from the people of Kenya.[20] Courts are to adhere to the principles outlined in Article 159(2) in their business. Additionally, ADR is a form of dispute resolution mechanisms adopted by courts in exercising their judicial authority as long as they are not repugnant to justice and morality & contradictory to the Bill of Rights.[21] Courts in Kenya are categorized into superior courts and subordinate courts. Superior courts include the Supreme Court, Court of Appeal, High Court & Specialized courts.[22] Subordinate courts comprise of The Magistrate courts, Kadhis courts, Courts Martial and other Tribunals.[23] The rules for court proceedings should be based on the criteria elaborated in Article 22.[24]

Courts have been granted the authority to uphold the Bill of Rights through their various jurisdictions.[25] Privacy and confidentiality, being important aspects of court sessions, are guaranteed through the prohibition from infringement of the privacy of communications as well as concealment of the private affairs inclusive of the family affairs of persons.[26] The right to rebut a decision made by a court is granted by the right to fair administrative action.[27]The State has a duty to ensure parties to a matter have access to justice

[18] Ibid Article 20.
[19] Ibid Article 20(4).
[20] Ibid Article 159(1)
[21] Ibid Articles 159(2)(c) & 3
[22] Ibid Article 162(10.
[23] Ibid Article 169(1).
[24] Ibid Article 22.
[25] Ibid Article 23
[26] Ibid Article 31.
[27] Ibid Article 47.

with reasonable fees where necessary without impediment to the same.[28] For arrested parties in a matter, they are to be in communication with an advocate[29] and be arraigned in court within 24 hours of arrest or at the end of the next court day where the arrest was outside court hours.[30] Parties to a matter are entitled to a fair hearing before an impartial tribunal or court[31] subject to additional rights in a fair trial[32] inclusive of the interpretation in a language comprehensible by the parties.[33]

b) Draft LSK Guidelines for Virtual and Online Court Sessions[34]

These guidelines were enacted during the onset of the COVID-19 pandemic resulting from the court sessions shifting from physical hearings to virtual in accordance with the social distancing measures put in place. Court participants are required to be audible and visible[35] while ensuring their microphones are muted to minimize background noise that would cause disruptions to the sessions.[36] For purposes of clarity, the participants are to ensure they do not face a source of light[37] and turn on their videos while addressing the court[38] when called upon. They are to raise their hands if they need to speak.[39] It is mandatory for them to log in with their official names as reflected in the pleadings and National Identity cards.[40] The participants are to be dressed officially[41] and advocates to be in robes where it is required of them by the law.[42]

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[28] Ibid Article 48.
[29] Ibid Article 49(1) (c).
[30] Ibid Article 49(1) (f).
[31] Ibid Article 50(1).
[32] Ibid Article 50(2).
[33] Ibid Article 50(3).
[34] Draft LSK Guidelines for Virtual Court and Online Court Sessions 2020
[35] Ibid Section 1
[36] Ibid Section 2
[37] Ibid Section 4
[38] Ibid Section 5
[39] Ibid Section 8
[40] Ibid Section 6
[41] Ibid Section 9
[42] Ibid Section 10

Access to strong internet connectivity is to be upheld with uninterrupted power back-up[43] and participants granted access to shared documentation by parties to the matters through screen sharing.[44] Time management is of great essence[45] and intake of foods & drinks highly discouraged during the court sessions.[46] Law firms are to share their databases with the Judiciary and ensure they are registered with the LSK. The databases consist of their names as entailed by the Business Registration Service with the names of all advocates in the firms, their contacts, physical and email address of the firms.[47] The LSK is obligated to carry out test runs for their members' familiarity through mock court sessions.[48] The official mediums of conducting the virtual court sessions are Microsoft Teams and Zoom.[49] For remote proceedings, the levels of cyber security and security technology are to be considered in advance.[50] Furthermore, both parties are advised to appear remotely if it is mandatory for one to do so for equality purposes.[51] The applicability of regular court rules and formalities bind parties in a virtual court as well.[52]

With regard to procedures taken for documentation in virtual courts, it is provided for under Section 30.[53] Confidentiality and privacy are serious concerns in virtual courts. The technology being used should ensure security of the parties relative to their disclosure of information.[54] Access to the hearings is strictly limited to the participants allocated the virtual rooms. There is a need

[43] Ibid Section 13
[44] Ibid Section 12
[45] Ibid Section 15
[46] Ibid Section 16
[47] Ibid Section 17
[48] Ibid Section 20
[49] Ibid Section 19
[50] Ibid Section 24
[51] Ibid Section 15
[52] Ibid Section 27
[53] Ibid Section 30.
[54] Ibid Section 31(1).

for the law to specify and set out regulations to ensure strict adherence to the privacy of individuals concerned in various cases.[55]

The names of parties and other participants related to a matter should be shared with the parties in advance and the roles each of them plays.[56] The participants are to be in separate physical rooms from those not involved in the matter.[57]Headsets can be used to attend the sessions for privacy and for audibility purposes.[58] Parties to a matter are entitled to request for the assurance of privacy in the proceedings of their matters.

c) Practice Directions 2022[59]

The Practice Directions 2022, were enacted in relation to High Court procedures with an aim to ensure access to justice through: the facilitation of timely disposal of cases, enhancing the use of technology in court sessions and ascertaining uniformity in court.[60] It encompasses the conduct of all court participants in virtual court attendance. Herein, the advocates and litigants are expected to have logged into the court session at least fifteen minutes prior to the session.[61] Advocates are to be properly dressed in robes or suitable professional dressing.[62] Discipline is to be upheld during the sessions where no one has permission to speak unless allowed to do so by the court.[63] The microphones are to be muted and cameras are to be turned on when guided to do so.[64] Advocates while addressing the court should do so in a steady manner with intermittent

[55] Ibid Section 31(2).
[56] Ibid Section 31(3).
[57] Ibid Section 31(4).
[58] Ibid Section 31(5).
[59] Practice Directions on standardization of Practice & Procedures in the High Court 2022
[60] Ibid Section 4
[61] Ibid Section 30(b)
[62] Ibid Section 30(c)
[63] Ibid Section 30(e)
[64] Ibid Section 30(f)

pauses.[65] Concision and precision should be adhered to in the submission of documents in court.[66]

Witnesses in attendance should ensure they have access to reliable internet connectivity[67] with no interruption and only join the court session with guidance from the court[68]; subject to the rules of admissibility in testimonies given.[69] It is crucial for them to state their physical locations and verify they are in solitude at that moment.[70] Where they have to attend the court sessions with an advocate, they should be placed in separate rooms from the Advocate.[71] The witnesses' camera settings should enable clear visibility for the court's confirmation of non-reception of communication and assistance of any manner.[72]

Court participants will receive directions from the Court on communication or raising issues during virtual sessions. A witness can only be in the same room with other persons with the court's approval and notification as long as they log in separately and use one microphone at a time.[73] Such is the case for an interpretation in relation to the witnesses' case. Where there is more than one witness, they shall be separated from the one testifying at that moment.[74] Parties being remanded are to be free from any disadvantages at all times relating to the practice directions.[75]

[65] Ibid Section 30(g)
[66] Ibid Section 30(h)
[67] Ibid Section 31(a)
[68] Ibid Section 31(b)
[69] Ibid Section 31 (c)
[70] Ibid Section 31(d)
[71] Ibid Section 31 (e)
[72] Ibid Section 31 (f)
[73] Ibid Section 31(i)
[74] Ibid Section 31(k)
[75] Ibid Section 30

Virtual proceedings are recorded by Court and other parties/counsels can only record with the leave of court.[76] The recordings are part of the official records of sessions and transcripts of the latter are available through request and payment of necessary fees for access.[77] Rulings and Judgments are made in virtual court sessions as well upon notification to the parties and counsels involved on the dates issued.[78] In consideration of the nature of virtual court sessions, judgments and rulings are delivered through reading of the decision arrived at while the full delivery is sent to the parties electronically upon request and payment of the necessary fees.[79]

d) The Evidence Act[80]

Electronic evidence is catered for in the Evidence Act.[81] Messages in electronic form together with digital materials are admissible in court without denial unless they are not obtained in their original form.[82] The strength of the aforementioned evidence is dependent on the manner in which: they are gathered and stored; the integrity in maintaining the evidence and the identification of the evidence.[83] Electronic evidence is admissible without further proof in circumstances where direct evidence would be admissible.[84]

An electronic evidence in form of computer output is admissible if it meets the following criteria: the production of the output over a period used to process and store the information by the lawful authority; the generation of information was on a regular basis in the ordinary course of business; the information was generated in the ordinary course of business and the computer used in

[76] Ibid Section 33(a)
[77] Ibid Section 33
[78] Ibid Section 35(b)
[79] Ibid Section 35 (c)
[80] Evidence Act, CAP 80.
[81] Ibid Section 78A (1)
[82] Ibid Section 78A (2)
[83] Ibid Section 78A (3)
[84] Ibid Section 106B (1)

generating the information was working properly & where it wasn't it had no impact on the output.[85]

Circumstances where information was stored for electronic record using a combination of computers or different computers, the devices used will be construed as a single entity for the purpose of admissibility of the evidence.[86] A statement of electronic evidence is admissible if: it addresses the identification of the electronic record with the statement, deals with matters of the computer output, elaborates the particulars of the devices that produced the record and if it is signed by a person in the managerial position dealing with gathering information on the electronic recording.[87]

An electronic signature certifying an electronic record must be proved for production of the evidence.[88] Moreover, this electronic signature must be verified by the owner or an expert on certification services related.[89]In relation to electronic messages produced in court, there is a presumption of their validity if they were sent by the sender via e-mail to the addressee and they correspond with the message received on the addressee's end. The exception to this presumption is on the identity of the sender.[90]

e) Practice Directions on Electronic Case Management[91]

It was established by Retired Chief Justice David Maraga, to address matters related to electronic management of cases and only applies to matters after its commencement. However, a party can apply for the conversion of their case to be under this statute's directions upon which the court will order for the

[85] Ibid Section 106B (2)
[86] Ibid Section 106B (3)
[87] Ibid Section 106B (4)
[88] Ibid Section 106C
[89] Ibid Section 106D
[90] Ibid Section 106I
[91] Electronic Case Management Practice Directions, 2020

scanned copies of the case records.[92]The use of alternative technology is granted by the judge where one is unable to access any form of electronic media through oral application in collaboration with leave of court.[93]

The aim of the enactment of this statute is to provide guidance on the implementation of ICT in court proceedings to cater for electronic diary, signature & stamping, filing and serving of documents, case search, payment & receipt, exchange of necessary documents and the registration of cases in addition to the recording of proceedings.[94]The forms of technology used in court proceedings are inclusive of: computers, video conferencing, audio conferencing, and e-filing, e-serving of necessary documents, real time transcription and digital display resources.[95] The aforementioned are to assist in enhancing the efficiency of the proceedings to ensure expedite delivery of justice.

Parties to a matter and advocates are required to register their cases before filing them and it should contain the particulars mentioned in Section 7(3).[96] The procedure for filing documents electronically is outlined in Section 7(4).[97]

In most cases, a clerk is in charge of the reception of documents through the e-filing system. The clerk in this case has limited powers in making slight corrections to errors on the case entry regardless of the parties having knowledge of the same or not and can only notify the parties where necessary.[98]The e-filer is obligated to update the corrections within two working days and failure to which grants the clerk powers to reject the

[92] Ibid Section 2
[93] Ibid Section 4(3)
[94] Ibid Section 5
[95] Ibid Section 6(3)
[96] Ibid Section 7(3)
[97] Ibid Section 7(4)
[98] Ibid Section 12

filing.[99]Documents filed electronically are subject to the requirements stipulated under Sections 8 and 9.[100] Persons exempted from the requirements without orders from court as previously mentioned are accused persons in criminal matters, persons in custody and minors in Juvenile.[101]The Court may exempt anyone from the e-filing requirements if satisfied the persons lacked access to internet on an appropriate device.[102]

There are provisions for the exchange of court documents between the parties at all stages. The relevant parties are expected to come to an agreement on the format for the documents, the methods of e-service of documents and any other conditions they deem suitable.[103] This service should be upon anyone entitled to by the law in relation to the matter.[104]A licensed court process server is mandated to serve documents where it is not by electronic means.[105]All documents to be served whether electronically or not are bound to be within the set deadline usually by 11:59 p.m. Kenyan time.[106]These documents are the requisite statements and pleadings of the parties with reference to the laws applicable.[107]

Parties are required to pay for filing fees prior to filing[108] upon which they are issued with an e-receipt containing particulars of the party's name or their advocate's with their contacts, the amount paid & references, the unique code of the Judiciary for identification purposes, list of documents or items paid for,

[99] Ibid Section 12(3)
[100] Ibid Section 8
[101] Ibid Section 11
[102] Ibid Section 10(1)
[103] Ibid Section 16(5)
[104] Ibid Section 13(2)
[105] Ibid Section 13(7)
[106] Ibid Section 14(2)
[107] Ibid Section 16(2)
[108] Ibid Section 17(1)

contacts of the customer, date of payment, case number and the Judiciary's address.[109]

Documents filed in court are subject to stamping and the indication of the time and date of filing.[110] The production of evidence electronically in court is not bound to be converted to paper form as long as they are inspected and their original names changed to Identification numbers. The documents should also be generated in electronic lists.[111]This digitized information should be used to inspect hard copy documents to equip the parties to the matter on the documents being presented to court.[112]

Documents filed electronically are to be affixed by a signature for purposes of their admissibility and validity.[113] The signatures are to be in the form of: computer tablet signatures, login & passwords if the person is registered on the system but must be signed electronically.[114] The electronic signatures are to be accompanied by details of the person's name, postal address, name of the law firm, contacts and email address.[115] The exception to this is in cases involving victims and other persons in need of protection; they are allowed to exclude their addresses and contacts.[116] Where a document lacks an electronic signature, it ought to be scanned for purposes of filing.[117]

The access to a diverse range of information stored in the e-filing system is limited based on the statutory and user conditions in connection with directions from the court.[118]It is mandatory for the Judiciary to consistently be in

[109] Ibid Section 18(2)
[110] Ibid Section 19
[111] Ibid Section 20(1)
[112] Ibid Section 20(2)
[113] Ibid Section 22(2)
[114] Ibid Section 22(2)
[115] Ibid Section 21(3)
[116] Ibid Section 21(4)
[117] Ibid Section 21(2)
[118] Ibid Section 24(1)

maintenance of a backup system with guidance from the Chief Justice on its location.[119]

3. The advantages of virtual courts in Kenya

Virtual courts have immensely improved the quality of justice in Kenyan courts and the world in general. This is the main reason courts have continued to adapt the virtual court proceedings even post the COVID-19 pandemic. The following are some of the ways virtual courts have been useful in the access to justice:

i. Cost effectiveness

Cost effectiveness has been observed through parties attending courts from their various localities without necessarily having to travel to court stations. There are no travel expenses and less worries on the security of witnesses as they don't risk having physical contact with the defendant.[120]The amount of paperwork has reduced in most courts as documents are submitted electronically. The amount of money used in purchasing papers and documents have been reduced thanks to virtual courts. This has also helped to curb cases where court files would go missing. Virtual courts save on time due to parties being able to attend the session at the scheduled time in most cases, where time would have been wasted in traffic and also the formalities of air and railway transport. Kenyans living outside the country and abroad are able to attend court from their locations without necessarily traveling.[121]

ii.Transparency and accountability

Virtual courts have brought about the enhancement of transparency and accountability in the justice system. Implementation of virtual courts has renewed the public's hope in the judicial system. The public are able to attend

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[119] Ibid Section 24(2)

[120] Bailey RS, "Advantages and Disadvantages of Virtual Court Hearings" (*Bailey & Greer* January 6, 2021) <*https://www.baileygreer.com/advantages-and-disadvantages-of-virtual-court-hearings/*> accessed March 17, 2023

[121] *https://www.the-star.co.ke/news/big-read/2021-12-07-access-to-justice-amid-the-covid-19-pandemic/*

court sessions from any part of the country through joining courts using virtual links posted in the cause lists.[122] The digitization of records has also enhanced accountability through the e-filing system.[123]

iii. Introduction of the e-filing system

The introduction of the e-filing system by Retired Chief Justice David Maraga was to accelerate the access to justice through rapid resolution of disputes.[124] This has lessened the burden of filing of documents physically that brought about wastage of paper and many cases of files missing.[125] Case management was harder with physical courts due to the disappearance of case files that delayed justice making it hard for advocates to ensure and uphold client satisfaction. There were many cases of acquittals due to missing files and high cases of corruption involving court officers 'misplacing' court records.[126]The e-filing system has established an intermediary between courts and advocates in conjunction with the automation of filing and serving of documents applicable to all courts except for the Supreme Court.[127]Litigants are able to access files upon completion of documents filed by advocates resulting in the generation of

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[122] Editorial, "Virtual Courts Aiding Justice" (*Nation* December 11, 2021) <*https://nation.africa/kenya/blogs-opinion/editorials/virtual-courts-aiding-justice-3649848*> accessed March 17, 2023

[123] Ibid

[124] Vidija P, "E-Courts: It's a Digital Game Changer for Kenyan Judiciary" (*The Standard* September 28, 2021) <*https://www.standardmedia.co.ke/article/2001424716/it-s-a-digital-game-changer-for-kenyan-judiciary*> accessed March 17, 2023

[125]Maseh E, "Managing Court Records in Kenya" (*Research Gate* April 2015) <*https://www.researchgate.net/publication/289995703_Managing_Court_Records_in_Kenya*> accessed March 17, 2023

[126] Kinuthia K, "Justice Denied as Number of Missing Files, Exhibits Jump 80pc" (*Business Daily* September 20, 2020*)* <*https://www.businessdailyafrica.com/bd/data-hub/justice-denied-as-number-of-missing-files-exhibits-jump-80pc-2280648*> accessed March 17, 2023

[127] Juma G, "Embracing Electronic Court Case Management Systems: Lessons from the Kenyan Experience during COVID-19" (*Lexology*November 4, 2020) <*https://www.lexology.com/library/detail.aspx?g=6ba35bfa-5993-4d1f-8912-530a14dbec4c*> accessed March 17, 2023

a comprehensive court file.[128] Parties are able to be informed of the progress of their matters through this system. The issue of court fees has been made easier through this system as it keeps a record of all fees paid and issuance of receipts. This has abated corruption cases and promoted accountability.[129] Judges are also finding it easy to deliver rulings and judgements online with consent from the parties via email which saves the court time as well.[130]

4. Challenges facing virtual courts in Kenya

We have been able to see the benefits of virtual courts since its implementation. However, to be able to ensure the efficiency of their operation, it is important to address the challenges arising from the same as below:

a. Deterioration on the quality of justice

During the onset of the COVID-19 pandemic, there was a deterioration in the quality of justice delivered in virtual courts. This was by virtue of the courts only hearing matters that were considered urgent thus, excluding matters outside this criteria.[131]Additionally, there are no clear guidelines on what makes a matter urgent when handled in virtual courts[132] unlike in physical courts or rather where there are guidelines, they are too rigid to incorporate more crucial

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[128] Ibid

[129] Juma G, "Embracing Electronic Court Case Management Systems: Lessons from the Kenyan Experience during COVID-19" (*Lexology* November 4, 2020) <*https://www.lexology.com/library/detail.aspx?g=6ba35bfa-5993-4d1f-8912-530a14dbec4c*> accessed March 17, 2023

[130]Juma G, "Embracing Electronic Court Case Management Systems: Lessons from the Kenyan Experience during COVID-19" (*Lexology* November 4, 2020) <*https://www.lexology.com/library/detail.aspx?g=6ba35bfa-5993-4d1f-8912-530a14dbec4c*> accessed March 17, 2023

[131] Muendo M, "Kenya Is Struggling to Deliver Justice Online: What Needs to Be Done" (*The Conversation* August 9, 2020) <*https://www.google.com/amp/s/theconversation.com/amp/kenya-is-struggling-to-deliver-justice-online-what-needs-to-be-done-139675*> accessed March 17, 2023

[132] "Procedural Challenges-Bias in urgent matters" (*An analysis of virtual courts in Africa* February 8, 2021) <*https://lawyershub.org/media/virtual_courts_report.pptx*> accessed March 24, 2023

matters that need urgent attention of the court. This has still amounted to the continuation of the backlog of cases heard virtually instead of eradicating this backlog.

The legal system in Kenya still poses rigidity on the adaptation to change in the incorporation of new modes of operation.[133] Moreover, the e-filing system established poses a challenge till date, to lay persons as it was developed in a litigant-friendly manner. This basically means that to use the system effectively, one needs to be an advocate or a law firm on top of preparation; uploading of the necessary legal documents and payment of court filing fees. The burden is heavier on lay persons as they cannot fathom the legalese used in drafting of documents unless they are represented by an advocate.[134] There are many cases of parties in remand being denied access to justice. Others complain of police officers not taking them to court when it is expected of them and some are kept in remands with poor health conditions. There are violations of the rights of arrested persons[135] and detainees[136] that ought not to be there especially with the implementation of virtual courts.

b. Submission of evidence

Submission of evidence virtually posed questions of credibility during the onset of the COVID-19 pandemic. This was a challenge with all the safety measures put in place like the lockdown of various hotspots in the country.[137]Moreover, the Evidence Act contains guidelines on the admissibility of electronic

[133] "Social Challenges-Rigid legal systems" (*An analysis of virtual courts in Africa* February 8, 2021) <*https://lawyershub.org/media/virtual_courts_report.pptx*> accessed March 24, 2023
[134] Ibid.
[135] Article 49 of the Constitution, 2010
[136] Article 51 of the Constitution, 2010
[137] Rao S, "What Challenges Were Faced Due to Virtual Hearings in the Pandemic?" (*Law Insider India* October 15, 2021) <*https://www.lawinsider.in/columns/what-challenges-were-faced-due-to-virtual-hearings-in-the-pandemic#:~:text=Due%20to%20 pour%20 connectivity%2C%20 echoes, the%20process%20of%20the%20 justice.*> accessed March 17, 2023

evidence[138] subject to scrutiny by an expert. However, it is not clear the manner in which the expert carries out the authentication of the same in exception of verification of the signature affixed on the electronic records.[139] Section 106 B and Section 78A have contradictory opinions on electronic evidence. Conditions for admissibility are set out in Section 106B and utilizes a certificate as evidence of authenticity for the evidence to be rendered admissible in court.[140] Whereas, section 78A allows for the admissibility of electronic evidence without emphasis on the availability of a certificate.[141] This has amounted to cases of contradictory rulings and judgements. In Republic v Mataguda,[142] a Compact Disk (CD) made from CCTV footage was not admissible in court due to lack of a certificate[143] based on the Evidence Act. Such certification ought to be accompanied by a signature from a person in the position of managing the device.[144]In another case, the verifying affidavit was not considered a certificate thus the CD produced as evidence was considered inadmissible.[145]On the contrary, the courts have ruled in favor of a party lacking certificates for verification. This was the predicament in Masoud Salim's case, [146]where the CD video was admissible in court in the absence of a certificate for his footage as was expected in Section 106B (4) of the Evidence Act. An email print is inadmissible in court if the Defendant satisfies the court that there was tampering of the Plaintiff's email account.[147]The ultimatum is in a recent case where it was stated that in the interests of justice, the respondent to be allowed to produce the certificate and for the court in its own discretion deal with the evidence.[148]

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[138] Section 106B of Evidence Act, CAP 80
[139] Section 106D of Evidence Act, CAP 80
[140] Section 106B (4) of the Evidence Act, Cap 80
[141] Section 78A (2) of the Evidence Act, Cap 80
[142] Republic v Barisa Wayu Mataguda (2011) eKLR
[143] Section 106B (4) of the Evidence Act, Cap 80
[144] Section 106B(4)(d) of the Evidence Act, Cap 80
[145] William Odhiambo Oduol v IEBC & 2 Others (2013) eKLR
[146] Masoud Salim Hemed & Another v DPP & Others (2014) eKLR
[147] Harleys Limited v Metro Pharmaceuticals Limited (2015) eKLR
[148] George Gabriel Kiguru & Another v Republic (2022) eKLR

c. Credibility of the proceedings

Credibility of the proceedings. This has been witnessed in cases where both witnesses are present when giving testimony which is contrary to what is expected. The inclusion of more than one witness in a proceeding, at a go, leads to the complicity of the testimony and collusion of the evidence.[149]Furthermore, it is difficult for a judge to perceive the character traits of the defendants in criminal matters thus, a question arises of whether virtual courts are suitable for all cases brought before them.[150]There is lack of uniformity in handling various proceedings which ends up impeding access to justice as there are no clear specific guidelines to deal with specific matters.[151] Into the bargain, most of the matters are handled generally even when special measures are to be taken e.g. in sensitive matters where there are issues of violation of privacy.

d. Violation of privacy

Violation of privacy is the greatest challenge facing virtual court sessions. It is easier for one to access the recordings of the court sessions including all the evidence procured through hacking into the platforms used to record the sessions. Virtual courts are not the best option for hearing sensitive matters involving children, family matters and even sexual offenses proceedings. This is on account of anyone who can masquerade as an existing law firm by logging into the sessions without the knowledge of the court participants. Parties having privileges to attend court sessions at the comfort of their homes may face threats

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[149] Odhiambo D and Mugenyu C (*Cliffe Dekker Hofmeyr - the future of litigation in Kenya: Virtual or hybrid?* October 19, 2021) <*https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Dispute/dispute-resolution-alert-19-october-the-future-of-litigation-in-kenya-virtual-or-hybrid-.html*> accessed March 17, 2023

[150] Juma G, "Embracing Electronic Court Case Management Systems: Lessons from the Kenyan Experience during COVID-19" (*Lexology* November 4, 2020) <*https://www.lexology.com/library/detail.aspx?g=6ba35bfa-5993-4d1f-8912-530a14dbec4c*> accessed March 17, 2023

[151] "Procedural Challenges-Lack of uniformity" (*An analysis of virtual courts in Africa* February 8, 2021) <*https://lawyershub.org/media/virtual_courts_report.pptx*> accessed March 24, 2023

of privacy violations as video conferencing exposes the identity of their locations. This is possible by using image processing algorithms of artificial intelligence.[152] Information shared in the sessions is prone to security breaches through internet glitches that can pick up private conversations between parties even when the microphone was initially muted. The issue of logging into the sessions with official names; [153]there are no regulations put in place to determine the validity of the identity of court participants. This makes it easy for anyone to masquerade as a party to the matter or a law firm to attend the court session. This is detrimental to the privacy and security of the individuals especially in sensitive matters like sexual and family matters.

The law is not clear on which cases require strict attendance of the parties and those that allow the general public to take part in. The availability of court links to the general public enables accountability and transparency of the proceedings. However, this raises issues of breach of confidentiality in the hearings of sensitive matters. It is not a shock that the reality in practice is that there are non-parties who attend the aforementioned proceedings, in spite of not being a party to the matter.

e. Reliance on technology

Overreliance on technology has been disadvantageous to the older litigants as they struggle getting access to it in addition to having knowledge on how to use it e.g. the E-case management system.[154] Most of them are not tech-savvy yet they have to use the various platforms in their ordinary course of legal business. Furthermore, most of them lack the finances to afford and maintain access to

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[152] Pascu L, "Biometrics Enable Researchers to Identify Individuals from Exposed Video Conference Data: Biometric Update" (*Biometric Update* |July 14, 2020) <*https://www.biometricupdate.com/202007/biometrics-enable-researchers-to-identify-individuals-from-exposed-video-conference-data*> accessed March 17, 2023

[153] Section 16 of Draft LSK Guidelines for Virtual Court and Online Court Sessions 2020

[154] "Technical Challenges-Lack of skills for operating the system" (*An analysis of virtual courts in Africa* February 8, 2021) <*https://lawyershub.org/media/virtual_courts_report.pptx*> accessed March 24, 2023

Wi-Fi connectivity and regular purchase of internet bundles.[155]Most of the litigants lack the IT literacy to construe what is expected of them when handling electronic gadgets. In addition, Kenya is still working on expanding its territories in relation to the field of technology. Majority of the population is computer illiterate besides lacking basic literacy skills due to high rates of poverty and unemployment. The introduction of technology needs the accompaniment of the skills on its utilization as well as the facilitation of its sustenance.

Reliance on technology entails being prepared to deal with the frequent power outages with few backup systems set up in the counties. Rural areas are the most affected as some don't even have access to electricity to facilitate their access and sustenance in various forms of technology. There is insufficient provision and escalation of computer security seen in the inadequate access to internal audiovisual systems.[156]

f. Abuse of the court process

There is abuse of the court formalities in virtual courts. Most litigants and lay persons believe virtual court sessions lack the level of 'seriousness' that is usually in physical courts.[157] There have been instances where litigants have appeared before court in the comfort of their bedrooms being improperly dressed and not adhering to the code of ethics bestowed upon them as legal professionals. This was the case for an advocate who identified herself as

[155]Bocska R, "Virtual Court: Pros and Cons" (*Shulman & Partners LLP* May 25, 2022) <*https://shulman.ca/technology-and-social-media/virtual-court-pros-and-cons/*> accessed March 17, 2023.

[156] "Internet Penetration Rate in Africa- Power Outages" (*An analysis of virtual courts in Africa* February 8, 2021) <*https://lawyershub.org/media/virtual_courts_report.pptx*> accessed March 24, 2023

[157] Ibid.

'Matoke'. She appeared before the court for a mention in her bed with an unidentified man.[158]

g. Inadequate infrastructure

Dilapidated infrastructure is evident in the quality of internet connectivity in Kenya generally. There is uneven distribution of the internet across the country which inconveniences persons living in the rural areas where electricity and internet connectivity is an issue.[159]This also disrupts the court process due to the technical hitches and echoes from network malfunctions.[160]People living in these areas may have limited access to virtual courts, making it difficult for them to participate in legal proceedings. It can also lead to inequitable representation, particularly for those who cannot access virtual courts due to poor connectivity. They are denied the chance of access to justice as a result on the contrary to those who can. Some people may not be able to afford the technology necessary to participate in virtual court proceedings. Generally, most Kenyans are struggling to access online governmental services due to inadequate funds.[161]

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[158] Gitonga N, "Drama as Female Lawyer Appears in Virtual Court Session While in Bed with Unidentified Man" (*K24 TV* July 23, 2022) <*https://www.k24tv.co.ke/news/female-lawyer-court-session-bed-72141/*> accessed March 17, 2023

[159] Muendo M, "Kenya Is Struggling to Deliver Justice Online: What Needs to Be Done" (*The Conversation* August 9, 2020) <*https://www.google.com/amp/s/theconversation.com/amp/kenya-is-struggling-to-deliver-justice-online-what-needs-to-be-done-139675*> accessed March 17, 2023

[160] Rao S, "What Challenges Were Faced Due to Virtual Hearings in the Pandemic?" (*Law Insider India* October 15, 2021) <*https://www.lawinsider.in/columns/what-challenges-were-faced-due-to-virtual-hearings-in-the-pandemic#:~:text=Due%20to%20 pour%20 connectivity%2C%20 echoes, the%20process%20of%20the%20 justice.*> accessed March 17, 2023

[161] Ogemba P, "Civil Society Wants the Government Compelled to Provide Free Internet" (*The Standard* June 14, 2022) <*https://www.standardmedia.co.ke/national/article/2001447879/civil-society-wants-the-government-compelled-to-provide-free-internet*> accessed March 17, 2023

h. Credibility of a witness

Credibility of a witness is a challenge. The reality of the matter is that it is hard for a judge to decipher the solitude of a witness while testifying in virtual courts. This makes it hard to verify the credibility of cross-examination due to the risks of witness tampering. It is easier for a judge to observe the body language and non- verbal cues of a witness in physical court which cannot be the case in virtual courts.[162] There are high chances of witness tampering because a witness can be receiving guidance on what to testify during the session as they may not necessarily maintain eye contact and take lengthy durations before answering a question posed.[163] The poor internet connectivity drops calls and the video lags make cross examination of witnesses difficult in terms of the accuracy. A witness can intentionally tamper with their connectivity to buy time to seek guidance on their testimony.

In conclusion, virtual courts in Kenya pose a number of challenges that ought to be addressed in the spirit of access to justice as accorded by the Constitution.

5. Recommendations

The advent of virtual courts in Kenya has presented new opportunities for the country's justice system particularly in improving access to justice and enhancing the efficiency of court processes as has been discussed above. However, the implementation of virtual courts has posed a number of challenges as previously discussed. To address these challenges and maximize the benefits of virtual courts, there is a need for comprehensive reforms. This section explores some of the key recommendations for reforming virtual courts

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[162] Bailey RS, "Advantages and Disadvantages of Virtual Court Hearings" (*Bailey & Greer* January 6, 2021) <*https://www.baileygreer.com/advantages-and-disadvantages-of-virtual-court-hearings/*> accessed March 17, 2023

[163]- RT, "Problems That Arise in Virtual Cross-Examination Especially in an Arbitration Proceeding" (*iPleaders*February 10, 2021*)* <*https://blog.ipleaders.in/problems-arise-virtual-cross-examination-especially-arbitration-proceeding/#:~:text=One%20of%20the%20 shortcomings%20due, direct%20contact%20with%20the%20 camera.*> accessed March 17, 2023

in Kenya to make them more accessible, efficient and effective. Based on the challenges facing virtual courts in Kenya, the following recommendations can be made:

a. Development of Infrastructure

The Government needs to ensure all parts of the country have access to electricity at reasonable rates considering the current state of living standards. The cost of living in Kenya is becoming a burden and it was clearly demonstrated from the intensity of protests held to campaign against it.[164] It is for this reason that any expenses to be incurred for electricity ought to be at reasonable rates for its efficacy. In addition, it should invest in the development of necessary infrastructure such as stable internet connectivity and technological equipment in a proportional manner across the country due to the increase of internet users with Kenya leading in the whole of East Africa.[165] In areas where internet connectivity poses a challenge, it can invest in forms of technology that focus on delivery of high internet speed through telephone lines as it is affordable.[166]This will ensure that virtual court proceedings can be carried out seamlessly without disruptions.

b. Capacity Building

Adequate training on use of technology should be offered to litigants, relevant stakeholders and the general public whether they have an interest in court

[164] 'Death Toll Rises as Kenya's Cost-of-Living Protests Continue' (The Guardian, 21 July 2023) <*https://www.theguardian.com/global-development/2023/jul/21/death-toll-rises-as-kenyas-cost-of-living-protests-continue>* accessed 14 August 2023

[165] Kamau G, 'Kenyans Are the Most Online Users in Africa' (Techweez, 6 March 2023) <https://techweez.com/2023/03/06/kenyans-extremely-online-africa/> accessed 14 August 2023

[166] Reolink, "How to Get High-Speed Internet in Rural Areas" (*Reolink* February 6, 2023) <*https://reolink.com/blog/internet-in-rural-area/#:~:text=One%20option%20you%20may%20want, just%20need%20a%20 DSL%20 modem.*> accessed March 17, 2023

matters or not. This is for ease in delivery of service by the Judiciary.[167] The training should be advertised on all social media platforms as well as made a segment in the Daily News due to the societal preference for visual representation of content being advertised.[168] This should be carried out in a manner that is comprehensible to all consumers of information. There should be collaborations between both national & county governments with the Judiciary to ensure all the necessary information useful to the public is made available for public participation in court proceedings.[169] There is a need for judges to be in collaboration with the prosecution when defendants fail to appear before virtual courts to find out the justifications for their absence, considering the nature of the proceedings that don't require them to be transported to courts. This is because with the implementation of virtual courts, people do not have to physically attend court[170] but this makes the court participants too comfortable to not attend court with the seriousness it deserves.

c. Legal framework

A comprehensive legal framework should be established on the existing guidelines put in place for virtual court sessions. Reference can be made to the Singapore guidelines on virtual courts that have extensively addressed measures on virtual court attendance.[171]These guidelines were first adopted in subordinate courts with an aim of minimizing risks resulting in the moderate

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[167] Wanyonyi M, 'Leveraging on Digital Technology in Administration of Justice' (KIPPRA, 1 July 2021) <*https://kippra.or.ke/leveraging-on-digital-technology-in-administration-of-justice/>* accessed 14 August 2023

[168] 'Kenya - Selling Factors and Techniques' (International Trade Administration | Trade.gov) <*https://www.trade.gov/country-commercial-guides/kenya-selling-factors-and-techniques>* accessed 14 August 2023

[169] 'Public Participation Framework' (Government of Makueni County, 13 April 2018) <*https://makueni.go.ke/public-participation-framework/&gt*; accessed 14 August 2023

[170] Edwards B, 'Virtual Court: Are Remote Hearings the Future of Law?' (Raconteur, 11 November 2022) <*https://www.raconteur.net/digital-transformation/virtual-court-hearings>* accessed 14 August 2023

[171] "Guidelines for Use of Video or Telephone Conferencing for Hearings ..." (*SG Courts*) <*https://www.judiciary.gov.sg/docs/default-source/attending-court-docs/fjc_guidelines_video_or_telephone_conferencing_hearings.pdf*> accessed March 17, 2023

expansion to the other courts over the years.[172]Likewise, they have data analytics models for effective allocation of resources for prediction of caseload that is useful in preparation of trials together with justice scorecards for tracking performance of courts.[173]The establishment of specialized internet courts in China[174] can be implemented in Kenya to deal with matters of sensitive nature and other categories of proceedings suitable for virtual courts. The use of artificial intelligence tools to manage cases and processes in proceedings in China[175] can also be implemented in Kenya.

Likewise, the legal framework should address matters pertaining to the privacy, security and credibility of the procedures involved. The requirement on power backup in the Practice Directions on Electronic Case Management[176] should be amended. It should be redrafted to include the safeguarding of this system from any form of tampering and to be subjected to frequent checks for renovation where necessary. It is important to have provisions on the particular statutes governing virtual courts specifically outlining cases suitable to be handled through virtual courts and those that should permanently retain physical court sessions. There is a need for the law to set guidelines on ascertaining the credibility of oral witness statements in virtual courts. This is because it is difficult to ascertain whether a witness is telling the truth[177] thus, it is necessary to have regulations on confirming the same. Where there are more than one witness it is important for them to be in the presence of a credible judicial officer

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[172] "Replicable best Practices and Opportunities-Singapore" (*An analysis of virtual courts in Africa* February 8, 2021) <*https://lawyershub.org/media/virtual_courts_report.pptx*> accessed March 24, 2023
[173] Ibid.
[174] "Replicable best Practices and Opportunities-China" (*An analysis of virtual courts in Africa* February 8, 2021) <*https://lawyershub.org/media/virtual_courts_report.pptx*> accessed March 24, 2023
[175] Ibid.
[176] Section 24(2) of the Practice Directions on Electronic Case Management.
[177](Credibility of oral witnesses | practical law) <*https://uk.practicallaw.thomsonreuters.com/w-010-2794? contextData= (sc. Default) >* accessed 13 August 2023

in the same room to ensure a fair hearing free from witness tampering.[178] Witnesses ought to testify in virtual courts in the absence of the defendant in sensitive matters and where their security is at stake. This is an important means of witness protection to enable the witness to testify freely.[179]

The Evidence Act provisions In Section 78A[180] and Section 106B[181] need to be amended to give rise to a valid provision on the admissibility of electronic evidence. It is necessary to prioritize the presumption of admissibility under section 78A, to address the various problems associated with using certificates such as tampering by computer software.[182] The law should also be amended to be clearer on guidelines for logging into court. Guidelines should be set on the criteria used to determine the suitable technology for use that upholds the security of information disclosed by parties considering hackers can find their way into the databases of the courts and tamper with the recordings. A similar scenario occurred in an American Court where hackers got access to all the recordings and transcripts of trials held in that particular court.[183]

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[178] Mugenyu DO and C, 'The Future of Litigation in Kenya: Virtual or Hybrid?' (*Cliffe Dekker Hofmeyr*, 19 October 2021) <*https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Dispute/dispute-resolution-alert-19-october-the-future-of-litigation-in-kenya-virtual-or-hybrid-.html*> accessed 14 August 2023

[179] 'Procedural Protection' (Good practices protection of witnesses - United Nations Office on drugs ..., January 2008) <*https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings_Involving_Organized_Crime.pdf>* accessed 13 August 2023. p.31

[180] Section 78A of the Evidence Act, CAP 80

[181] Section 106B of the Evidence Act, CAP 80

[182] Nagosky DP, 'Admissibility of Digital Photographs in Criminal Cases- Abstract' (*Admissibility of Digital Photographs in Criminal Cases | Office of Justice Programs*, 2005) <https://www.ojp.gov/ncjrs/virtual-library/abstracts/admissibility-digital-photographs-criminal-cases> accessed 14 August 2023

[183] 'The Court Has Been Hacked!' (*American Bar Association*) <*https://www.americanbar.org/groups/judicial/publications/judges_journal/2021/fall/the-court-has-been-hacked/*> accessed 14 August 2023

d. Accessibility

Efforts should be made in the provision of affordable access to technology for attending the court sessions to ensure faster access to justice that would have been tedious with paper procedures and expenses.[184] This can be through making low-bandwidth internet connections available and mobile devices that have access to the internet. This can be done through collaborations between the Government and M-KOPA that has made it easy for people to purchase smartphones with stable internet access on flexible payment plans.[185] The government can also set up hotspots as well as virtual court branches in each county to specifically cater for court attendance. This can be done through investing in provision of stable and free WI-FI in all court stations.[186]

e. Establishment of a stable power backup

To combat the issue of power failures due to the unstable power system in Kenya perceptible by numerous complaints against KPLC, a power backup should be established by the KPLC specifically for the Judiciary.

f. Establishment of a user-friendly e-filing system

The e-filing system should be reformed to be friendly for use by lay persons. This can be through adaptation of plain English in the drafting of documents as well as adding a segment to the Kenya Law e-portal on tutorials for drafting pleadings and how to submit them in court. The e-filing system should also be reformed by strengthening it from cyber-attacks with reference to the UK and

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[184] Kant A, 'Technology Could Make Justice Delivery Efficient and Affordable' (*mint*, 12 August 2020) <*https://www.livemint.com/opinion/online-views/technology-could-make-justice-delivery-efficient-and-affordable-11597244653331.html*> accessed 14 August 2023

[185] M-Kopa, 'About: M-Kopa' (*M*, 7 July 2023) <https://m-kopa.com/about/> accessed 14 August 2023

[186] Bwana J, 'Poor Litigants to Get Free WIFI at Mombasa Court to Access Virtual Proceedings' (*The Standard*, 26 July 2020) <*https://www.standardmedia.co.ke/coast/article/2001380097/poor-litigants-to-get-free-wifi-at-mombasa-court-to-access-virtual-proceedings*> accessed 14 August 2023

USA's e-filing systems.[187] Where it is extremely difficult to do so, free legal aid can be offered to parties to a matter who opt for self-representation to get guidance on what is expected of them in a virtual court session.

f. Institutional framework

It is necessary for a body to be established within the Judiciary to be in charge of all matters pertaining to virtual court attendance. This makes it easier to handle issues arising from the procedures involved and more attention given to the parties involved in ensuring they get access to justice without delay. The staff involved are tasked with the obligation of sending the necessary information, court links and guide parties on the documents mandatory to be presented in court for those who choose to self-litigate. This body would also be in charge of monitoring the software used in the proceedings and regularly carry background checks to ensure its efficiency.[188]

g. Spreading awareness on Information Technology (IT)

Information ought to be spread on the development of technology globally more so, in Kenya. Majority of Kenyans are not tech-savvy. Children as young as toddlers are curious about technology thus, they needed to be well-equipped with the necessary skills in IT at a young age to enable them to become experts by the time they attain teenage years. Early exposure to technology aids in computer literacy skills and better coordination between the touch & sight senses.[189] It is no wonder that third-world countries are highly developed as

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[187]Muendo M, "Kenya Is Struggling to Deliver Justice Online: What Needs to Be Done" (*The Conversation* August 9, 2020) <*https://www.google.com/amp/s/theconversation.com/amp/kenya-is-struggling-to-deliver-justice-online-what-needs-to-be-done-139675*> accessed March 17, 2023

[188] Muendo M, "Kenya Is Struggling to Deliver Justice Online: What Needs to Be Done" (*The Conversation* August 9, 2020) <*https://www.google.com/amp/s/theconversation.com/amp/kenya-is-struggling-to-deliver-justice-online-what-needs-to-be-done-139675*> accessed March 17, 2023

[189] 'Children and Technology: Positive and Negative Effects' (Maryville Online, 8 February 2022) < *https://online.maryville.edu/blog/children-and-technology/#:*

they focus on equipping their children with IT skills as part of their education system. Likewise, Kenya should do the same. The CBC curriculum has incorporated a more comprehensive system that now includes Technology studies under the STEM segment.[190] This will come in handy in ensuring the growth of a new tech-savvy generation. For the older generation and professionals, they should be exposed to programs that educate them on basic IT skills and the development of IT and its utilization in their course of business as CPD training respectively.

6. Conclusion

In conclusion, virtual courts have presented an opportunity for the Kenyan justice system to improve its efficiency and accessibility. However, the implementation of virtual court proceedings as illustrated above, has not been without its challenges. To ensure the effective functioning of virtual courts in Kenya, it is imperative that the government invests in reforming the virtual court system in order to fully live up to their potential in providing Kenyans with a fair, efficient and accessible justice system.

~:text=Early%20access%20to%20technology%20 teaches, language%20and%20problem%2Dsolving%20skills. > accessed 14 August 2023.

[190] Muchunguh D, 'Here's All You Need to Know about Competency-Based Curriculum' (*Nation*, 11 February 2021) <*https://nation.africa/kenya/news/education/education-your-cbc-queries-answered-3286928#:~:text=Under%20the%20Social%20 Sciences%20 Pathway, and%20 Careers%20and%20Technology%20 Studies.*> accessed 14 August 2023.

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area/#:~:text=One%20option%20you%20 may%20want, just%20need%20a%20 DSL%20 modem.> accessed March 17, 2023

'The Court Has Been Hacked!' (American Bar Association) <*https://www.americanbar.org/groups/judicial/publications/judges_journal/2021/fall/the-court-has-been-hacked/*> accessed 14 August 2023

'Virtual Courts' (The Judiciary) &lT; *https://judiciary.go.ke/virtual-courts-3/#:~:text=The%20Kenya%20 Judiciary's%20 adoption%20of, participate%20in%20 legal%20 proceedings%20 seamlessly. >* accessed 14 August 2023

Reflections on Human Rights in Arbitration

By: ***Hon. Dr. Kariuki Muigua****

Abstract

The paper offers a critical reflection of the place of human rights in arbitration. It also examines the efficacy of arbitration in managing disputes concerning human rights abuses. The paper asserts that human rights are integral in arbitration proceedings. It evaluates attempts to enshrine the place of human rights in arbitration. The paper further explores some of the human rights concerns in arbitration. Finally, it offers recommendations towards embracing human rights in arbitration.

1.0 Introduction

Arbitration is one of the Alternative Dispute Resolution (ADR) Mechanisms[1]. ADR refers to a set of mechanisms that are utilized in management of disputes without resort to adversarial litigation[2]. These mechanisms are recognized at the global level under the *Charter of the United Nations* which stipulates that parties to a dispute shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, *arbitration*, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice[3]. Further in Kenya, the Constitution mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, *arbitration* and traditional dispute resolution mechanisms[4]. ADR mechanisms have been hailed for their advantages which include privacy, confidentiality, flexibility, informality,

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[1] Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers, 4th Edition, 2022
[2] Ibid
[3] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI
[4] Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi

promoting party autonomy and the ability to foster expeditious and cost effective management of disputes[5]. ADR mechanisms are thus viable in enhancing access to justice.

Arbitration has been defined as a dispute management mechanism where parties through an agreement submit their dispute to one or more neutral third parties who make a binding decision on the dispute[6]. It has also been defined as a private consensual process where parties in dispute agree to present their grievances to a third party for resolution[7]. Arbitration has emerged as the preferred mode of management of disputes especially those that are transnational in nature[8]. In the face of globalization, the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions has not only become desirable but also invaluable[9]. At the international level, arbitration has a transnational applicability and guarantees neutrality in the determination of disputes by addressing differences that may arise as a result of multiple legal systems[10]. It also guarantees enforcement of decisions through the *New York Convention* which provides a harmonized legal framework for the recognition and enforcement of foreign awards in arbitration[11]. International Commercial

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[5] Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-STRATHMORE-CONFERENCE-PRESENTATION.pdf* (Accessed on 28/06/2023)

[6] World Intellectual Property Organization., 'What is Arbitration' Available at *https://www.wipo.int/amc/en/arbitration/what-is-arb.html* (Accessed on 28/06/2023)

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

[8] Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA.pdf* (Accessed on 28/06/2023)

[9] Ibid

[10] Moses, '*The Principles and Practice of International Commercial Arbitration*' 2nd Edition, 2017, Cambridge University Press

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

Arbitration has thus been widely embraced as the preferred mechanism of managing global commercial disputes.

However, despite the efficacy of arbitration, its practice raises several human rights concerns. It has been argued that since arbitration is a private and confidential process, it can potentially breach fundamental human rights due to the waiver of the right of access to courts among other reasons[12]. On this basis, it has been asserted that the conduct of arbitral proceedings should meet expectations under international human rights law on due process, procedural fairness and the right to a fair trial[13]. Further, the ability of arbitration to manage human rights disputes has also been questioned due to power imbalances and differences in approaches towards human rights across jurisdictions among other reasons[14]. The relationship between arbitration and human rights is thus worth reflecting upon.

The paper seeks to critically examine the place of human rights in arbitration. It argues that human rights are fundamental in arbitration proceedings and thus need to be upheld and promoted. The paper analyses some of the human rights concerns in arbitration and measures adopted towards addressing them. It proposes solutions towards embracing human rights in arbitration in order to enhance its viability as a preferred mechanism for managing national, regional and global commercial disputes.

2.0 The Place of Human Rights in Arbitration

Human rights have been defined as fundamental universal and inalienable entitlements inherent to all human beings which they should be accorded without any form of discrimination[15]. Human rights are inherent to every

[12] Chukwuemerie. A., 'Arbitration and Human Rights in Africa.' *African Human Rights Law Journal*, No. 7 of 2007.
[13] Agius. M., 'Human Rights in International Arbitration.' *The European Arbitration Review*, 2023
[14] Ibid
[15] The Office of the High Commissioner for Human Rights., 'What are Human Rights.' Available at *https://www.ohchr.org/en/what-are-human-rights* (Accessed on 28/06/2023)

human being by the virtue of existence and are not granted by any state[16]. Every person is thus entitled to fundamental human rights without discrimination based on grounds such as sex, religion, nationality, race, ethnicity, colour, religion among others. The importance of human rights across the globe received prominence following the adoption of the *Universal Declaration of Human Rights*[17] (UDHR) by the General Assembly of the United Nations on 10th December, 1948. The UDHR stipulates fundamental human rights to be universally protected and common standards for achievement of these rights for all people[18]. According to the UDHR 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[19].

Since the adoption of the UDHR, many legal instruments, measures and policies have been embraced towards promoting human rights in the political, economic, social and environmental spaces among others. The *International Covenant on Economic, Social and Cultural Rights (*ICESCR) was adopted in order to enhance the protection and fulfilment of economic, social and cultural rights across the globe[20]. Further, the *International Covenant on Civil and Political Rights* (ICCPR) was adopted in order to foster the realization of civil and political rights in the world[21]. These are among numerous legal instruments that have been adopted towards fostering human rights in the world. The concept of human rights has evolved into a pertinent topic both in academic debate and in political decision-making[22]. Human rights continue to shape the political, economic,

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[16] Ibid
[17] Universal Declaration of Human Rights., Available at *https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf* (Accessed on 28/06/2023)
[18] Ibid
[19] Ibid
[20] United Nations., 'International Covenant on Economic, Social and Cultural Rights.' Available at *https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch_iv_03.pdf* (Accessed on 28/06/2023)
[21] United Nations., 'International Covenant on Civil and Political Rights.' Available at *https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf* (Accessed on 28/06/2023)
[22] Hannam. M., 'On Human Rights.' Available at

social, environmental and legal agendas across the globe[23]. Countries have increasingly adopted the concept of human rights and undertaken measures towards fostering their attainment including embracing human rights in their constitutions[24].

The Constitution of Kenya is devoted towards protection of human rights. It recognizes the aspirations of all Kenyans for a government based on the essential values of *human rights*, equality, freedom, democracy, social justice and the rule of law[25]. It further enshrines human rights as among the national values and principles of governance that bind all persons[26]. Chapter four of the Constitution contains the Bill of Rights which stipulates fundamental rights and freedoms which all Kenyans are entitled to[27]. According to the Constitution, the Bill of Rights applies to all and binds all state organs and all persons[28]. The Bill of Rights in Kenya thus equally applies to the private sphere including arbitration proceedings. Among the fundamental right enshrine under the Bill of Rights in Kenya is the right of access to justice[29]. It has been asserted that arbitration alongside other ADR mechanisms can foster attainment of the right of access to justice in Kenya[30]. Human rights are thus integral in arbitration.
Human rights guide arbitral proceedings in International Commercial Arbitration by prescribing procedural safeguards[31]. Human rights can also be considered in commercial arbitration, through reference to trade practices involving the corporate responsibility to respect human rights[32]. Further, in

https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=4f2fdd2bf949c6521b433897da4e1f16 9eba9e90 (Accessed on 28/06/2023)
[23] Boyle. A., 'Human Rights and the Environment: Where Next' *The European Journal of International Law,* Vol. 23 no. 3
[24] Ibid
[25] Constitution of Kenya, 2010., 'Preamble.'
[26] Ibid, Article 10 (2) (b)
[27] Ibid, Chapter four
[28] Ibid, Article 20 (1)
[29] Ibid, Article 48
[30] Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Op Ci
[31] Agius. M., 'Human Rights in International Arbitration.' Op Cit
[32] Ibid

investor-state arbitration, there may be allegations of state or investor human rights abuse[33]. Consequently arbitral tribunals are increasingly considering human rights issues[34].

The Hague Rules on Business and Human Rights Arbitration[35] further provide a set of rules for the arbitration of disputes related to the impact of business activities on human rights. In furthering human rights, the Rules stipulate that the arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expenses and to provide a fair, efficient, culturally appropriate and rights-compatible process for resolving the parties' dispute, including in particular by giving due regard to the urgency of addressing the alleged *human rights* impacts[36]. The Rules further enshrine the need for proper and informed consent as the cornerstone of business and human rights arbitration[37]. The Rules are vital in furthering human rights through arbitration. In addition, the *UNCITRAL Model Law on International Commercial Arbitration* embraces the concept of equal treatment of parties and provide that parties shall be treated with equality and each party shall be given a full opportunity of presenting their case[38]. This is integral in fostering the human right of access to justice through arbitration.

The place of human right in arbitration is thus well enunciated. However, there are several human right concerns in arbitration.

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[33] ACERIS Law., 'Human Rights Law and Investment Arbitration.' Available at *https://www.acerislaw.com/human-rights-law-and-investment-arbitration/* (Accessed on 28/06/2023)

[34] Ibid

[35] The Hague Rules on Business and Human Rights Arbitration., 'Available at *https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf* (Accessed on 29/06/2023)

[36] Ibid, Article 18

[37] Ibid

[38] UNCITRAL Model Law on International Commercial Arbitration., 'Available at *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf* (Accessed on 29/06/2023)

3.0 Human Rights Concerns in Arbitration

Arbitration raises several human rights concerns. It has been observed that in International Commercial Arbitration, the purpose of arbitration is to enhance expediency and privacy in management of disputes to enable parties preserve their commercial interests[39].Thus, if human rights goals such as transparency, disclosure and victim participation become too dominating in arbitration, they might threaten the priorities of parties by delaying the management of disputes and further exposing them to the public space since human rights are most often a public concern[40]. Parties may thus adopt defensive approaches such as restricting contracting terms to eliminate the consideration of any human rights issues in arbitration[41].

In addition, the transnational nature of arbitration may hinder effective application of human rights standards due to differences in approaches towards human rights across different jurisdictions[42]. Thus, international arbitral tribunals may find themselves in conflict with host states for enforcing human rights standards that may not be appreciated in such states[43]. Cases have been highlighted where arbitrators have been prosecuted and imprisoned for applying human rights standards that are not welcome in particular states[44]. On this basis, it has been asserted that human rights concerns such as reliable freedom from unjust imprisonment of arbitrators may influence the decision of arbitrators to work in given country[45]. It is thus essential to adopt a uniform approach and guarantee human rights in order to ensure the success of arbitration especially in transnational disputes.

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[39] Moses, *'The Principles and Practice of International Commercial Arbitration'* Op Cit

[40] Stanaro. K., 'The Evolving Role of Human Rights in International Arbitration.' Available at *https://aria.law.columbia.edu/the-evolving-role-of-human-rights-in-international-arbitration/?cn-reloaded=1* (Accessed on 29/06/2023)

[41] Ibid

[42] Besson. S., 'Arbitration and Human Rights.' ASA Bulletin, Volume 24, Issue 3 (2006)

[43] Ibid

[44] Stanaro. K., 'The Evolving Role of Human Rights in International Arbitration.' Op Cit

[45] Ibid

Further, it has been asserted that the flexibility of arbitration can potentially hinder its effectiveness in addressing human rights concerns[46]. Arbitration is a power based system and in some instances there is unequal bargaining power between the parties[47]. The process is premised on the agreement of parties to submit present or future disputes to be managed through arbitration[48]. Thus, parties with higher bargaining power such as large organizations and multinational corporations may be unwilling to subject themselves to arbitration in cases involving human rights violations but are more likely to arbitrate disputes that are in their favour such as contractual disputes for the supply of goods among others[49]. This problem has largely been witnessed in international investment law where multinational corporations especially in Africa have been accused of violating human rights such as the right to a clean and healthy environment, the right to health among others[50]. However, progress has been made towards addressing this concern such as the emergence of the concept of human rights in investment treaty arbitration[51].

Court involvement in arbitration can also potentially raise human rights concerns. Despite existing outside the judicial court system, arbitration still relies on courts on aspects such as grant of interim measures of protection and enforcement of awards[52]. Courts can also intervene in arbitration through

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[46] HSF., 'Arbitration, Business and Human Rights.' Available at *https://hsfnotes.com/publicinternationallaw/2021/07/21/arbitration-business-and-human-rights/* (Accessed on 29/06/2023)

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

[48] Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Op Cit

[49] HSF., 'Arbitration, Business and Human Rights.' Op Cit

[50] Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' available at *http://kmco.co.ke/wpcontent/uploads/2018/11/International-Investment-Law-and-Policy-in-Africa-AILA-Conference-Paper-5-11-2018.pdf*

[51] Franck. S., 'Development and Outcomes of Investment Treaty Arbitration.' *Harvard International Law Journal.,* Volume 50, No. 2. (2009)

[52] Muigua. K., 'Role of the Court Under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya.' Available at

setting aside of arbitral awards[53]. Court intervention in arbitration proceedings through setting aside of awards can interfere with parties procedural human rights such as the right of access to justice[54]. This creates the notion of arbitration as an inconclusive process that may hinder parties from effectively attaining their fundamental rights[55]. There is need to address the concern of court involvement in arbitration in order to enhance the relationship between arbitration and human rights.

From the foregoing, it is evident that arbitration raises several human rights concerns. It is necessary to deal with these concerns in order to embrace human rights in arbitration.

4.0 Way Forward

In order to attend to the concerns raised above, it is essential to promote human rights in arbitration. Human rights are fundamental entitlements in international law and reflect the inherent dignity and equality of all human beings[56]. Thus, it is pertinent for arbitral tribunals to ensure that arbitration proceedings comply with human rights standards as enunciated in human rights instruments such as the UDHR, ICESCR, ICCPR and state Constitutions[57]. Such rights include the right of access to justice, the right to a fair hearing before an impartial tribunal and the right to adequate and effective remedies[58]. By adhering to appropriate human rights standards, the place of human rights in arbitration will be elevated.

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http://kmco.co.ke/wpcontent/uploads/2018/08/080_role_of_court_in_arbitration_2010.pdf (Accessed on 29/06/2023)

[53] Ibid

[54] Krumins. T., 'Arbitration and Human Rights: Approaches to Excluding the Annulment of Arbitral Awards and Their Compatibility with the ECHR.' Available at *https://link.springer.com/book/10.1007/978-3-030-54237-5* (Accessed on 29/06/2023)

[55] Ibid

[56] Universal Declaration of Human Rights., Op Cit

[57] Besson. S., 'Arbitration and Human Rights.' Op Cit

[58] Ibid

Further, it is imperative that we embrace arbitrability of human rights disputes[59]. Arbitration has the ability to ensure greater attainment of justice for complaints and victims through its ability to foster flexibility, expeditious and cost effective management of disputes[60]. Progress has been made towards fostering the arbitrability of human rights disputes through the formulation of *The Hague Rules on Business and Human Rights Arbitration*[61]. Parties should adopt these rules in order to enhance the arbitration of human rights disputes. Further, it is necessary to continue refining investment treaty arbitration in order to promote arbitration of human rights disputes emanating from investment activities such as environmental pollution[62].

In addition, it is essential to limit court intervention in arbitration proceedings to a basic minimum in order to enhance its viability to manage various kinds of disputes including those concerning human rights[63]. Court interference in arbitration can hinder the growth of International Commercial Arbitration and inhibit its ability to manage disputes including those concerning violation of human rights[64]. It may discourage investors from subjecting disputes to arbitration in particular countries due to the likelihood of court interference[65]. This could potentially result in continued human rights violation pending determination of such disputes through other mechanisms such as litigation at the expense of arbitration that could foster expeditious management of the

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[59] Chukwuemerie. A., 'Arbitration and Human Rights in Africa.' Op Cit
[60] Ibid
[61] 'The Hague Rules on Business and Human Rights Arbitration.,' Op Cit
[62] Franck. S., 'Development and Outcomes of Investment Treaty Arbitration.' Op Cit
[63] Muigua. K., 'Nurturing International Commercial Arbitration in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2021/10/Nurturing-International-Commercial-Arbitration-in-Kenya.pdf* (Accessed on 29/06/2023)
[64] Kariuki. F., 'Challenges Facing the Recognition and Enforcement of International Arbitral Awards within the East African Community.' Available at *http://kmco.co.ke/wpcontent/uploads/2018/08/Paper-on-Recognition-and-Enforcement-of-Foreign-Arbitral-Awards.pdf* (Accessed on 29/06/2023)
[65] Ibid

disputes[66]. Thus, court intervention in arbitration should ideally be limited to processes aimed at enhancing the viability of arbitration such as granting of interim measures of protection and enforcement of arbitral awards[67]. This will ensure the growth of International Commercial Arbitration and further enhance its viability to manage disputes including those concerning violation of human rights.

Finally, there is need for compliance with the Sustainable Development agenda especially by multinational corporations in the investment sphere[68]. The activities of multinational corporations in Africa have often resulted in concerns such as environmental degradation and violation of human rights such as the right to health and labour rights[69]. It is vital for them to adhere to the principles of Sustainable Development in order to foster human rights and environmental protection[70]. Sustainable Development is an important part of the international investments law regime[71]. Thus, multinational corporations should foster Sustainable Development in order to ensure respect for human rights.

5.0 Conclusion

Human rights are fundamental entitlements that reflect the inherent dignity and equality of all human beings[72]. They are applicable in all spheres of life including arbitration proceedings[73]. However arbitration raises several human rights

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[66] Krumins. T., 'Arbitration and Human Rights: Approaches to Excluding the Annulment of Arbitral Awards and Their Compatibility with the ECHR.' Op Cit

[67] Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Op Cit

[68] Bello.I & O.M., 'Multinational corporations and Sustainable Development Goals Examining Etisalat Telecommunication Intervention in Nigeria's Basic Education' *International Journal of Educational Management*, August 2019

[69] Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' Op Cit

[70] Ibid

[71] Bello.I & O.M., 'Multinational corporations and Sustainable Development Goals Examining Etisalat Telecommunication Intervention in Nigeria's Basic Education' Op Cit

[72] Universal Declaration of Human Rights., Op Cit

[73] Constitution of Kenya, 2010., Article 20 (1)

concerns related to due process, procedural fairness and the right to a fair trial[74]. Further, the ability of arbitration to manage human rights disputes has also been questioned due to power imbalances and differences in approaches to human rights across jurisdictions among other reasons[75]. There is need to address these challenges by promoting human rights in arbitration, embracing the arbitrability of human rights disputes, limiting court intervention in arbitration and fostering Sustainable Development. Through these measures, the relationship between arbitration and human rights will be ideal.

[74] Agius. M., 'Human Rights in International Arbitration.' Op Cit
[75] Ibid

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Hannam. M., 'On Human Rights.' Available at *https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=4f2fdd2bf949c6521b433897da4e1f16 9eba9e90*

HSF., 'Arbitration, Business and Human Rights.' Available at *https://hsfnotes.com/publicinternationallaw/2021/07/21/arbitration-business-and-human-rights/* (Accessed on 29/06/2023)

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Resolving Multiparty Construction Disputes by Arbitration. The Challenges and Solutions

By: ***Hazron Maira*** *

Abstract

Due to the consensual nature of arbitration, the joining to the arbitral proceedings by third parties or consolidation of a dispute with another one from a separate contract to a pending or upcoming arbitration would require the consent of the parties to the dispute resolution agreement. Failure to get consent is likely to lead to multiplicity of proceedings with potential for separate tribunals issuing inconsistent decisions. This paper reviews the resolution of construction disputes where more than two parties are involved or there are several contracts that have a bearing on the matters in dispute. Based on the contexts that are likely to lead to multiparty construction disputes, the paper identifies from case law the challenges raised by parties opposed to multiparty arbitrations and how the courts dealt with them. The discussion finds that the most appropriate way of avoiding such challenges is for the parties to include in their dispute resolution agreements provisions allowing inclusion of third parties or consolidation of disputes with bearing to the issues to be arbitrated when circumstances require them to do so.

1. Introduction

In a traditional/conventional construction contract, the design and construction processes are separate with the owner or developer of the project (employer) having separate contractual relationships with the design team and the contractor.[1] The contractor in turn subcontracts various parts of the works to

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different parties, some of whom may be nominated by the employer.[2] Based on the foregoing contractual set-up and the fact that an arbitration agreement is a contract in its own right,[3] the doctrine of privity of contract which provides that "only a party to the contract could enforce the contract"[4] prevents the formation of any kind of implied contractual relationship between the employer and the sub-contractors, and between the contractor and the designers.[5] Thus, where there is a causal link between breach of contract during construction of a project and the acts or omissions of a subcontractor, the employer is entitled to seek remedy from the contractor, who would in turn seek to pass the liability to the subcontractor,[6] although there is no assurance the contractor would recover equal or the same damages paid to the employer from the subcontractor in

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[1] The Joint Contracts Tribunal (JCT) (2021), Procurement Methods. Available at; *https://corporate.jctltd.co.uk/products/procurement/traditionalconventional/.* [Accessed on 26 Oct 2022]

[2] See: Wong, W F and Cheah, C Y J (2004) Issues of contractual chain and sub-contracting in the construction industry, in, Khosrowshahi, F (Ed.), 20th Annual ARCOM Conference, 1-3 September 2004, Heriot Watt University. Association of Researchers in Construction Management, Vol. 1, 671-80, 672.
Nominated subcontractors are selected by the employer to carry out part of the main contract works (mostly specialist works, e.g., electrical works, installation of lifts etc) and the main contractor is required to enter into subcontracts with them, usually on subcontract standard form selected by the employer.

[3] *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (Re "Newcastle Express") [*2022] EWCA Civ 1555, para 43

[4] *Alfred McAlpine Construction Limited v. Panatown Limited* [2000] UKHL 43

[5] *Lafarge Redlands Aggregates Limited v. Shephard Hill Civil Engineering Limited* [2000] UKHL 46

[6] See *Independent Broadcasting Authority v EMI Electronics Limited and BICC Construction Limited* (1980) 14 BLR 1. "It is now well recognised that in a building contract for work and materials a term is normally implied that the main contractor will accept responsibility to his employer for materials provided by nominated sub-contractors. The reason for the presumption is the practical convenience of having a chain of contractual liability from the employer to the main contractor and from the main contractor to the sub-contractor…."

separate legal proceedings.[7] However, a different arrangement would apply when the breach of contract is attributable to both the designers and the contractor because the doctrine of privity of contract requires the employer to pursue claims against each party separately.

Where different parties in separate contractual relationships pursue similar or almost similar claims involving the same project in different arbitral proceedings,[8] certain issues come into play, first, there is no guarantee the facts or the legal basis for any decision that are submitted in one dispute resolution forum would be made available in the second forum to facilitate consistent decisions. Secondly, an arbitral award from one dispute resolution forum cannot be used as evidence in another arbitration because the arbitrator in each arbitration is appointed to decide the disputes in that arbitration between the particular parties to that arbitration.[9] Underpinning this proposition are the implied obligations of privacy and confidentiality of the arbitral proceedings.[10] Thirdly, in the event of the party which is not a party to the second arbitration agreeing for the decision in the first arbitration to be submitted as evidence in the second proceedings, the party that was not party to the first proceedings can claim the decision in the first proceedings was arrived at against it beforehand or without it having an opportunity of being heard in the case.[11]

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[7] S. I. Strong, Intervention and Joinder As of Right in International Arbitration: An Infringement of Individual Contract Rights or A Proper Equitable Measure?, 31 Vand. J. Transnat'l L. 915 (1998), 983.

[8] For example, in scenario 1, employer v contractor, and contractor v subcontractor, or in scenario 2, employer v designer, and employer v contractor.

[9] *Sun Life Assurance Company of Canada & Ors v The Lincoln National Life Insurance Co* [2004] EWCA Civ 166, para 68

[10] See *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, para 84: "The common law … obligation of privacy and confidentiality … extends it to notes of evidence and other documents disclosed or generated in arbitration because of the implied agreement that such documents can only be used for the purpose of the arbitration. Further, privacy may be violated by the publication or dissemination of documents deployed in the arbitration or information relating to the conduct of the arbitration."

[11] *Abu Dhabi Gas Liquefaction Co. Ltd. v. Eastern Bechtel Corp.* (1983) 21 BLR 117

An appropriate way of dealing with these issues is to allow for multiparty arbitral proceedings. However, because of the complexity of rights and liabilities, in most jurisdictions, most construction contracts are based on standard forms in order to avoid the shortcomings of bespoke contracts.[12] For the standard forms that have attempted to include a coordinated dispute resolution provisions in both the main contract and the subcontract, for example, attempt by FIDIC in Clause 21 of the 2017 FIDIC Conditions of Contract, and Clause 20 of FIDIC Conditions of Subcontract, both for Construction for Building and Engineering Works Designed by the Employer (popularly referred to as the Red Book), provisions in those Clauses do not go far enough.[13] The two Clauses remain separate and distinct and the default Clause 20 of the Subcontract provides for a harmonised dispute resolution process only during the Dispute Adjudication Board phase, and the referral of a dispute to the engineer (or contractor) and the arbitration procedure remain parallel procedures under the main contract and subcontract without any possibility of multiparty proceedings.[14]

In certain circumstances, where parties to a domestic or international construction contract have also agreed to resolution of disputes by arbitration, the need to have multiparty proceedings when a dispute arises has been found appropriate, and this paper examines such circumstances. The discussion focusses on the challenges raised by parties opposed to inclusion of additional parties or contracts to the arbitral proceedings and the available options for avoiding such challenges. Following this introduction, the second part of the paper reviews multiparty arbitration and on the third part discusses the context and challenges that have been raised by parties in multiparty construction

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[12] Prof. Peter Hibberd, *The Place of Standard Forms of Building Contract in the 21st Century*, A paper based on a talk given at a Society of Construction Law conference in Wakefield, UK on 11 March 2004.
[13] Stavros Brekoulakis and Ahmed El Far (2019), *Subcontracts and Multiparty Arbitration in Construction Disputes*, in Global Arbitration Review, The Guide to Construction Arbitration – 3rd Edition, Law Business Research Ltd, at p. 197/8.
[14] *Ibid*

dispute proceedings. The fourth part identifies ways of avoiding the challenges before concluding on the fifth part.

2. Multiparty arbitration

Multiparty arbitration has been "defined as an arbitration involving a confrontation between more than two parties with opposing interests. … It presupposes an act of free will by the parties in dispute, and agreement between all such parties."[15] In other words, there should be consent from all the parties. In *Bay Hotel and Resort Ltd. v. Cavalier Construction Co. Ltd.*, it was held that consent is not a source of jurisdiction, but a restriction of jurisdiction, in that it presupposes relevant agreements to arbitrate, which would be the source of any jurisdiction that exists, and it imposes conditions on the exercise of any powers of including other parties that may otherwise flow from such agreements.[16] Where parties agree to inclusion of institutional arbitral rules in their arbitration agreement, it has been argued that they are taken to have impliedly consented to the multiparty arbitration rules contained in the rules, together with the consequences arising from their operation.[17]

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[15] International Chamber of Commerce (ICC), Final Report on Multiparty Arbitrations, ICC International Court of Arbitration Bulletin Vol. 6 No. 1, May 1995, para 7/8. Available at: *https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0007.htm?l1=Bulletins&l2=ICC+International+Court+of+Arbitration+Bulletin+%E2%80%A6.* [Accessed on 07 October 2022]

[16] *Bay Hotel and Resort Ltd. and another v. Cavalier Construction Co. Ltd. and another* [2001] UKPC 34, para 47.

[17] Smith, Gordon. 'Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules'. *Journal of International Arbitration* 35, no. 2 (2018): 173–202. See also William W. Park, *Non-Signatories and International Arbitration: An Arbitrators Dilemma*, in Multiple Party Actions in International Arbitration 3 (Belinda Macmahon ed., 2009). Available at: *https://scholarship.law.bu.edu/faculty_scholarship/2305*. "Arbitral jurisdiction based on implied consent involves a non-signatory that should reasonably expect to be bound by (or benefit from) an arbitration agreement signed by someone else, perhaps a related party."

Multiparty arbitration is appropriate where there are several parties to one contract or where there are several contracts with different parties that also have a bearing on the matters in dispute.[18] It aims at preventing separate proceedings by different parties to one contract or in related contracts because of the potential risk of appointment of different tribunals, or the evidence or arguments may differ in each with the separate tribunals reaching different conclusions on common questions of fact or law.[19] In addition, a party with back to back contracts risks incurring additional time and costs, for example, legal and tribunal fees, enabling expenses etc, if different tribunals are constituted.[20] Multiparty arbitration can be constituted through joinders and consolidations, with both processes facilitating the hearing and determination of related factual and legal issues, thus enabling the decision maker acquire a more complete and contextual understanding of the parties' rights and obligations.[21]

2.1 Joinder

A joinder has been described "as being when a party to the arbitration agreement is joined as a party to existing arbitration proceedings, either by the intervention of the additional party itself, or by an application by a participant party in the existing arbitration proceedings."[22] One exception to the concept of consent in joinders is where there is a "forced joinder", which "refers to a third party consenting to be joined as a party to an ongoing or upcoming arbitration proceedings on the application of one of the arbitrants *despite* objections to the joinder raised by *the other arbitrant(s)*."[23] Therefore, the impression given by the

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[18] Nigel Blackaby, *et al*, Redfern and Hunter on International Arbitration (6th Edition), Sept. 2015, Oxford University Press, para. 2.213.

[19] CIArb (2011), Practice Guideline 15: Guidelines for Arbitrators on how to approach issues relating to Multiparty Arbitrations. Available at: *https://www.ciarb.org/media/4220/2011-multiparty-arbitrations.pdf*. [Accessed on 25 Oct 2022]

[20]Born, Gary & Prasad, Dharshini. 'Joinder and Consolidation'. *BCDR International Arbitration Review 5*, no.1 (2018): 53–84, 55

[21] Ibid at 56

[22] Smith, Gordon (n.17)

[23] *CJD v CJE* [2021] SGHC 61, para 4

phrase "forced joinder" does not in fact refer to forcing a third party to join an arbitration against its wishes. "Forced joinder" does not have an all-round positive effect to the arbitral process. Thus, in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BVl*,[24] the Singapore Court of Appeal said that forced joinder of non-parties to an arbitration is a major derogation from the principle of party autonomy[25], which is of foundational importance because all arbitrations must proceed *in limine* from an agreement to arbitrate. In addition, even where the joined parties are connected to the subject matter of the arbitration, there has been no election of arbitration as the specific dispute resolution mechanism with them. This is not without prejudice to the arbitrating parties, who are presumptively precluded from recourse to the courts in relation to the dispute with the joined parties, and who may find themselves subject to a final award which determines a deeper if not a larger pool of issues and legal liability.

2.2 Consolidation

Consolidation is the combination of related disputes into a single arbitration. Two caveats apply for consolidation to be appropriate, first, the separate agreements must provide for arbitration before the same arbitral body and second, consolidation must make commercial sense and not compromise a party's rights to effectively present its case, for example, in an engineering, procurement and construction (EPC/Turnkey)[26] contract being carried out by a consortium, in the arbitration with the employer, the parties to the consortium may not want to expose their differences which may assist the employer's case

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[24] *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2013] SGCA 57; [2013] SGCA 57, para 188

[25] Party autonomy denotes the freedom of the parties to decide how their arbitration should be conducted. See Nigel Blackaby, *et al*, Redfern and Hunter on International Arbitration (*op. cit*.), para 6.07

[26] See Damian McNair (2016), EPC Contracts in the power sector. Available at: *https://www.pwc.com.au/legal/assets/investing-in-infrastructure/iif-6-epc-contracts-power-feb16-3.pdf.* [Accessed on 07 Dec 2022]. "Under an EPC Contract a Contractor is obliged to deliver a complete facility to a Developer who need only turn a key to start operating the facility, hence EPC Contracts are sometimes called turnkey construction contracts."

to their detriment.[27] There are instances where consolidation may be inappropriate, for example, in a traditional construction contract where there are no sufficient common factual and legal issues in both the main contract and subcontract arbitrations, and consolidation would unnecessarily prolong the subcontract arbitration and increase its costs disproportionately.[28]

Where consolidation has taken place and depending on the circumstances of the parties, the arbitral tribunal may have to issue a single award determining all the issues involving all the parties.[29] Alternatively, the tribunal may hold concurrent proceedings which involves hearing the evidence and legal submissions of the different arbitrations and at conclusion issues separate awards.[30] Consolidation could be partial, i.e. where part of related arbitration could proceed separately.[31] Implied consent for consolidation may be inferred from the patterns in the concluded contracts. Thus, in the United States case of *Gavlik Construction. Co. v. H.F. Campbell Co*., 526 F.2d 777, 787 (3rd Cir. 1977), a number of contractors involved in disputes with a common employer were deemed to have consented to joint arbitration by having contracted with the understanding that all of their contracts contained identical arbitration clauses.[32] Some of the pitfalls of such an implication include deprivation of a party of its right to an orthodox bipartite arbitration with the other party, and violation of privacy and confidentiality of the arbitral proceedings.

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[27] David Kiefer and Adrian Cole (2019), *Suitability of Arbitration Rules for Construction Disputes*, in Global Arbitration Review, The Guide to Construction Arbitration – 3rd Edition, Law Business Research Ltd, at p. 173/4.
[28] *Alpha Building Construction Ltd v. Best Partner Ltd* [2007] HKCFI 481
[29] CIArb (2011) (n.19)
[30] *Ibid*
[31] Ten Cate, Irene, Multiparty and Multi-Contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreements Under U.S. Law (2004). American Review of International Arbitration, Vol. 15, p. 133, 2004, Marquette Law School Legal Studies Paper, Available at SSRN: *https://ssrn.com/abstract=1845838.* [Accessed on 14 October 2022]
[32] See Stipanowich, Thomas, Arbitration and the Multiparty Dispute: The Search for Workable Solutions (1987). Iowa Law Review, Vol. 72, p. 473, 1987, Available at SSRN: https://ssrn.com/abstract=2061797, at p.499

3. Contexts and challenges that may lead to multiparty construction disputes

The contexts that are likely to lead to multiparty constructions disputes as identified in various case law include, (1) "Chain" contracts, (2) Traditional / conventional contracts, and (3) Consortiums and Joint Ventures

3.1 "Chain" contracts, i.e., where the employer enters into a contract with the contractor and the contractor enters into subcontracts with other parties

In a dispute between an employer and the contractor and the cause can be inferred from the acts or omissions of the subcontractor who was selected and approved by the employer, the contractor may seek to have the subcontractor enjoined in the dispute resolution proceedings commenced by the employer. In *Trafalgar House Construction (Regions) Ltd v Railtrack Plc*,[33] the main contractor entered into two separate subcontracts (NSC/4) and each contained an arbitration agreement (clause 38.2.1). The relevant provision provided that if the dispute to be referred to arbitration raised issues which were substantially the same as or connected with issues raised in a related dispute between the contractor and the employer under the main contract, and if the related dispute had already been referred for arbitration, that dispute should be referred to the Arbitrator appointed to determine the related dispute. Following delays in the project, both the subcontractors, who were nominated issued extension of time claims to the main contractor, who in turn issued a similar claim to the employer and an arbitrator was appointed. The main contract arbitration provision (clause 41.2.1) was on similar terms as the subcontracts' arbitration clauses and the main contractor then issued a notice to both the nominated subcontractors requiring both the subcontracts' disputes be referred to the arbitrator appointed under the main contract arbitration clause.

The appointed arbitrator issued four sets of procedural orders and the first one was predicated on the basis that there was one arbitration, the quadripartite arbitration, and the other three on the basis that there were three separate arbitrations, and in all cases the date for commencement of the arbitrations were

[33] [1995] 75 BLR 55

the same. The employer objected to the inclusion of the subcontractors arguing that the arbitrator had no jurisdiction to issue the order. Another issue in court was whether it was an arbitration between the employer and the contractor or a multiparty arbitration that included the two subcontractors. The court dealt with the issues by first giving a guidance of the extent of the arbitrator's powers in multiparty arbitrations and said that notices of dispute are not normally preceded by careful analyses of the true issues and are usually quite general. Noting that the notices given by Trafalgar House and the sub-contractors were typical, the court said that a general connection of the subject matter of the dispute is not what the contracts required but rather an identity or convergence of issues. The Judge then set out the approach to construing both the main contract and subcontract arbitration clauses and said:

> *Although both clause 41.2.1 and clause 38.2.1 should have been much clearer, as a matter of construction and if necessary implication they must in my judgment be read together as part of a group of contracts which are on their face commercially directly related to each other and as a matter of law to be read in conjunction with each other so that, whilst recognising that they remain separate agreements, effect is nevertheless to be given to the arrangements that they have in common. Thus the agreement in clause 41.2.1 means, first, that neither the employer nor the contractor can object if, at the instance of the other, a third party is introduced with whom there is a related dispute which by reason of the provisions of NSC/4 (for example) is to be referred for determination by the same arbitrator as appointed under the main contract, and secondly, that each consents to the dispute under the main contract and the related dispute being linked with the other if the arbitrator were to decide to treat a party as a co-defendant or third party in the other arbitration."*
>
> *The same interpretation should be given to clause 38.2.1 of NSC/4. In my judgment there is no material distinction between the provisions of clause 41.2.1 of the main contract conditions and clause 38.2.1 of NSC/4, even though there are some differences in the text and in layout. Accordingly, a party to NSC/4 may require the dispute of which notice has been given under clause 38.1 to be*

> *referred to the arbitrator appointed under the main contract provided of course that the sub-contract dispute raises issues which are substantially the same as or connected with the main contract dispute and provided that this is done before an arbitrator has been agreed or appointed to determine the sub-contract dispute.*"

Dismissing the employer's application, it was held that since either the employer or the contractor under the main contract would have required the use of NSC/4, neither can object to the introduction of the sub-contractor or to the exercise of the arbitrator's powers under clause 41.2.1, whereby a party may be made a co-defendant or third party in either arbitration. The court also noted that multiplicity of proceedings was likely to lead to different tribunals reaching different conclusions on the same facts and thus resulting to substantial injustice.

3.2 *Traditional / conventional contracts, i.e., where the employer has entered into separate contracts with the designers (or project managers) and the contractor*

Where the designers (or project managers) and the contractor are both contracted by the same employer, *albeit* separately, it makes commercial sense for the employer to allow for a coordinated multiparty arbitration clause in the separate contracts, if a dispute arises that concern the three parties. Such was the approach adopted by the employer in *City & General (Holborn) Ltd. v AYH Plc*[34] and the case gives an insight of one of the challenges that comes with such an arrangement and consequences of not complying with the multiparty arbitration clause. The main issue in court was on the appointment of an arbitrator pursuant to section 18 of the English Arbitration Act 1996. In brief, the employer, *City & General (Holborn) Limited* ("CG") appointed *AYH Plc* ("AYH") to act as project manager for the development where *Kier Regional Limited* (Kier) was the main contractor.

[34] [2005] EWHC 2494 (TCC)

Both the contract between CG and Kier, and CG and AYH had multiparty arbitration clauses formulated on almost similar terms as those in the *Trafalgar House Construction* case. Following a dispute between CG and Kier that concerned claims related to extensions of time, an arbitrator was appointed. Separately, CG took the view that AYH had failed in the performance of its contractual duties in a number of respects and that the breaches of contract had caused much of the delay and the increased costs. CG then issued a notice of arbitration to AYH and proposed to refer the disputes to the arbitrator already appointed to determine the dispute between it and Kier. AYH objected and CG applied to the court for the appointment of the same Arbitrator appointed to deal with the dispute between it and Kier. In court, AYH contended that some of the items in the letter that had listed the issues identified by CG did not fall within the arbitration clause of either deed of its appointment, and the issues between CG and Kier and CG and AYH were neither substantially the same, nor were they connected and, therefore, the multiparty arbitration clause was not triggered.

Having reviewed all the issues contended by CG as having amounted to a breach of contract and/or duty of care owed by AYH, and which had caused CG to incur substantial losses on the project, the court dealt with the question of whether there was such a convergence of issues in the two arbitrations as to trigger the multiparty arbitration clauses of the two deeds of appointments. Emboldened by the principles in *Trafalgar House Construction* case, the court initially disregarded the facts of the case and postulated two disputes: namely, dispute A, which has already been referred to arbitration, and dispute B, which is about to be referred to arbitration. On the question of what degree of convergence of the issues in dispute A and dispute B is required in order to trigger the multiparty arbitration clause, the court in its judgment held that it was not necessary for every single issue in dispute B to be substantially the same or connected with an issue in dispute A.

Turning to more difficult question of what proportion of the issues in the two arbitrations must converge in order to trigger the multiparty clause, the court

noted the language of the clause left that matter unclear. In those circumstances, it was proper to have regard to the commercial purpose of the clause, which was to avoid multiplicity of proceedings, which (as is well known) generate excessive costs and carry the risk of inconsistent findings. In the context of that commercial objective, it was not the view of the court that the threshold of the multiparty arbitration clause should be set too high. It was not necessary that the majority of issues in dispute B should be the same as or connected with issues in dispute A. It was held that it was sufficient if a material portion of the issues in dispute B have that characteristic, and once a material portion of the issues in dispute B are the same as, or are connected with, issues in dispute A, then it makes obvious commercial sense for both disputes to be dealt with by the same tribunal.[35]

The court noted that four issues would arise in CG's arbitration against AYH, which are substantially the same as, or connected with, issues arising in the arbitration with Kier, first, the actual cost of the building works as executed, secondly, any information issued late to Kier, thirdly, what delay to the progress of the works was caused by that late information, and fourthly, what loss and expense within the provision of the building agreement did Kier incur by reason of the late information.

Looking at the matters more generally, the court observed that the issues in dispute between CG and Kier overlap to a material extent with the issues in the dispute between CG and AYH. If the disputes were to be referred to different arbitrators, both the court costs and the management time devoted to dispute resolution would greatly increase. CG would be a party in both arbitrations; AYH would be a party in one arbitration and, in the other, its staff would be called as witnesses. In addition to these considerations, there was also a substantial chance of inconsistent findings being made in the two arbitrations. All of this was the mischief against which the multiparty clause was directed.[36]

[35] *Ibid,* paras 46/47
[36] *Ibid,* para 57

3.3 Consortiums and Joint Ventures

A consortium has been defined "as an arrangement between a number of firms in which each firm contributes an equity stake in the form of risk capital or payment in kind in order to qualify as a member. Remuneration of consortium members may be calculated as a percentage share of the net profits of the consortium."[37] On the other hand, "a joint venture is characterised by a number of firms collaborating on a project or a number of distinct projects with a view to sharing the profits net of interest, each firm being paid on the basis of its agreed contribution in kind or in financial terms."[38] The projects executed under Consortiums and Joint Ventures are ordinarily huge, complex and mostly involve multinational construction companies.[39] In these types of contracts, it is typical for contracting parties to agree to a dispute resolution clause under international arbitration institutions rules.

The challenges that arise in cases from construction consortiums and joint ventures may be categorised under three sub-headings, although there could be more.

3.3.1 Joinder of parties

The concept of consent is thrown into focus when a party to an arbitration agreement makes an application for a joinder. The Singapore case of *CJE V. CJD*[40] concerned two of the five parties to a joint venture agreement (JVA) that

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[37] Gruneberg, S and Hughes, W (2004) Construction Consortia: do they serve any real purpose? *In:*
Khosrowshahi, F (Ed.), *20th Annual ARCOM Conference*, 1-3 September 2004, Heriot Watt University. Association of Researchers in Construction Management, Vol. 1, 343-52 at p.345

[38] *Ibid*

[39] See for example, Business Daily (04 June 2021). Available at: *https://www.businessdailyafrica.com/bd/economy/building-of-sh160bn-nairobi-mau-summit-highway-september-3425254*. [Accessed on 26 Oct 2022]. The article is on the proposed Sh160bn Nairobi-Mau Summit highway which is a 233-kilometre contract that was awarded to a French consortium made up of Vinci Highways SAS, Meridian Infrastructure Africa Fund, and Vinci Concessions SAS.

[40] [2021] SGHC 61

was agreed for the purpose of developing a mixed-use residential/commercial tower, hotel and/or service apartments complex in a place called Narnia. Pursuant to the JVA, a Joint Venture Company was established between CJE and CJD and both owned equal number of shares. The second defendant in the case was CJF, a limited liability company which owned 100% of the issued shares in CJE. CJF was not a party to the Arbitration but was a signatory to the JVA.

The JVA provided for disputes to be finally resolved by Arbitration in accordance with the London Court of International Arbitration 2014 Rules (LCIA Rules) and the arbitration was to be seated in Singapore. Following a dispute between CJD and CJE in 2018, CJE commenced arbitration proceedings in Singapore against CJD, under the auspices of the LCIA, pursuant to the provisions of the JVA. In 2019, CJD filed three applications in the arbitration, and the relevant one for this paper was a "Joinder Application" that sought to join CJF as a party to the Arbitration pursuant to Article 22 of the LCIA Rules. The Arbitral Tribunal rejected the Joinder Application, holding that it did not have the jurisdiction to join CJF to the arbitration on the following grounds:

1. From the wording of Article 22 of the LCIA Rules, the threshold requirements for a joinder were that an existing party applies for joinder and the third-party consents in writing to be joined, and that such consent may be given in the arbitration clause itself, or in a document made after the arbitration has commenced. The Tribunal did not consider these threshold requirements had been met,

2. Merely because CJF had signed the JVA did not mean that it had consented to be joined into the arbitration.

3. The Tribunal would have expected express wording to have been used if the Joinder Respondent was agreeing to be joined.

To recapitulate, Article 22.1(viii) of the LCIA Rules 2014 provided that the Arbitral Tribunal had powers to allow one or more third persons to be joined in the arbitration as a party provided ***any such third person and the applicant party have consented to such joinder in writing*** following the Commencement Date or (if earlier) in the Arbitration Agreement; and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.[41]

The court agreed with the Tribunal's reasoning and noted that the rule provided for a "forced joinder",[42] and noted that Article 22.1(viii) used the term "third persons" to refer to the joining party and places no restrictions on the class of persons who may be joined to the arbitration, so long as both the applicant and proposed joinder party have consented to the joinder in writing. There was no requirement that the proposed joinder party must also be a party to the arbitration agreement under which the arbitration was commenced.[43]

Secondly, the requisite "consent" in Article 22.1(viii) of the LCIA Rules 2014 could be established in the following three situations: (a) where the third person and applying party have consented to such joinder in writing after the Commencement Date, (b) where the third person and applying party have consented to such joinder in writing earlier in the arbitration agreement; or (c) where the written consent of the third person and the applying party to such joinder involves applying a combination of (a) and (b).[44]

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[41] *Ibid,* para 43

[42] Citing Gary Born, International Commercial Arbitration (Wolters Kluwer, 2nd Ed) ("Gary Born") at p 2601–2602, and *PT First Media* (n. 24) at [176] in the context of Article 22.1(h) of the LCIA Rules 1988

[43] Citing Shai Wade, Philip Clifford and James Clanchy, A Commentary on the LCIA Arbitration Rules 2014 (Sweet & Maxwell) ("LCIA Commentary") at para 22-028 and *PT First Media* (n. 24) at [174]

[44] fn. 24, para 46

Thirdly, the court disagreed with the argument that simply by being a signatory and party to the Joint Venture Agreement and therefore, the arbitration agreement, was sufficient in and of itself to constitute consent by the CJF in writing to being joined in any arbitral reference involving any of the other parties to the JVA.

Fourthly, the court cited from the *PT First Media TBK* case the doctrine of "*double separability*", which distinguishes between the original arbitration contract between the parties and the separate contract that arises between the parties to a dispute in a particular arbitration reference.[45] The court noted it would be applicable in the case because, despite CJF already being a party to the arbitration agreement, it was not a party to the instant arbitration reference and therefore its consent to being joined in an arbitration between CJD and CJE would still be required.[46]

It appears that LCIA took note of the judgment and in its 2020 Rules, Article 22 (x) provide that the Arbitral Tribunal may "*…allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented expressly to such joinder….*". For parties to a JVA incorporating LCIA Rules in their arbitration agreement, the revision has sorted the challenges encountered by the joinder party in the *CJE V. CJD* case, but the principles in the case would be valid if other adopted rules in an arbitration do not have such an express provision.

3.3.2 Consolidation of arbitrations

The Hong Kong case of *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (otherwise known as Pertamina)[47] concerned enforcement of an arbitration award made in Geneva and some of the issues before the court concerned the decision by the Tribunal to consolidate proceedings. The case

[45] *Ibid,* para 59
[46] *Ibid,* para 62
[47] [2003] HKCFI 390

involved two contracts, the first was a Joint Operation Contract ("JOC") between *Karaha Bodas Co LLC* (KBC) and Pertamina which was an Indonesia state-owned oil and natural gas exploration company. By the JOC, Pertamina appointed KBC as the sole contractor for the exploration and development of geothermal energy and also required KBC to build, own and operate electricity generating facilities. The second contract was an Energy Sales Contract, ("ESC") and was made between *P.T. PLN (Persero)* ("PLN"), which was also owned by the Indonesian Government, on the one hand and Pertamina and KBC on the other. By the ESC any energy that was developed by the exploration would be sold to PLN. Both contracts were governed by the laws and regulations of Indonesia, contained almost identical broad arbitration clauses, requiring the parties to arbitrate any disputes in Geneva, Switzerland under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"). The tribunal was to comprise of three arbitrators, with the parties appointed one each, and the two were to appoint a chairman.

Following suspension of the project by the government of Indonesia, KBC initiated arbitration proceedings and appointed an arbitrator. Pertamina did not appoint an arbitrator within the thirty days provided in the arbitration clause. The JOC and ESC both provided that if a party failed to appoint an arbitrator within thirty days, the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID") was to make the appointment. After notifying Pertamina, PLN, and the government of Indonesia, the ICSID appointed the second arbitrator. As specified in the JOC and ESC, the two appointed arbitrators then selected the chairman.[48] In the Final Award, the Tribunal found that under the JOC and the ESC, Pertamina and PLN had accepted the risk of loss arising from a "Government Related Event." The Tribunal interpreted the contracts as "putting the consequences of a Governmental decision which prevents the performance of the contract at

[48] *Ibid*, para 31

Pertamina's sole risk." The Tribunal awarded KBC huge sums of money, and the stakes were high. [49]

KBC sought and was granted leave, *ex parte,* to enforce the arbitration award in the same manner as a judgment of the court and on the same day, Pertamina applied to set aside the Court Order and by its summons, it contended that enforcement should be refused, and for the purpose of this paper, the following two grounds are relevant:

1. *No written agreement that allowed consolidation*

Pertamina argued that the UNCITRAL rules did not provide for consolidation, the contracts had different parties and different timetables for performance and contained no provisions for consolidated arbitrations. In addition, there was no consolidation in the sense that two arbitrations were heard together. The Tribunal merely ruled that one notice of arbitration was sufficient for disputes arising from both contracts.

Having cited the probable configuration of how disputes were likely to arise among the parties, the Arbitral Tribunal singled out the one as between KBC on the one hand and Pertamina and PLN on the other as more probable as both Pertamina and PLN were owned by the Indonesian Government and, thus, had common interests. The Tribunal then noted that the question to solve was only whether KBC could validly act against Pertamina and PLN in a single arbitration pursuant to the two arbitration clauses included in the two contracts. It accepted submission by KBC that a party may act against several parties bound by different but similar arbitration clauses, and further noted that the validity of such a single action depended on the connexity of the claims and of

[49] There were enforcement proceedings in other countries; see for example: *Karaha Bodas Co v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* United States Court of Appeals, Fifth Circuit, Nos. 02-20042, 03-20602 (March 23,2004). It was reported in the US judgment that the Tribunal awarded KBC $111.1 million, the amount KBC had expended on the project, and $150 million in lost profits.

appropriateness.[50] However, the positions of the parties in the disputes remained independent as to the substance of the claims. Consequently, KBC's action in a single arbitration was admissible due to the connexity of the legal relations between KBC and Pertamina on the basis of the JOC on one hand, and between KBC, Pertamina and PLN on the basis of the ESC on the other hand. However, the use of the word connexity to describe the relationship between the JOC and the ESC was an understatement and in reality, the two contracts were integrated.[51]

The Court agreed with the Tribunal's finding that the contracts were integrated[52] and noted the concluding term of the ESC expressly stated that "[t]he terms of this Contract and the Joint Operation Contract constitute the entire agreement between the Parties."[53] In addition, the fact that both Pertamina and PLN were represented by the same lawyers in the arbitration further supported the "connexity" or integrated nature of the two contracts. The case against Pertamina was further strengthened by the fact that once the decision was made to have a single arbitration, they did not seek redress in court and only revived that issue in the enforcement proceedings.

2. *The arbitrators were not properly appointed*

In dealing with this issue, the starting point was section 8.2 of the ESC that contained a provision for the appointment of arbitrators, and provided "that

[50] *Ibid*, the US court noted the word "appropriateness" was in reference to UNCITRAL Arbitration Rules at Art. 15(1) which permit a tribunal to conduct an arbitration "in such manner as it considers appropriate."
[51] Hong Kong judgment (n.47), Para 22
[52] The US Court (n.49) also accepted the Tribunal's finding that the two contracts were integrated and said that "Courts and arbitration tribunals have recognized that claims arising under integrated contracts may be consolidated into single arbitrations."
[53] Hong Kong Judgment (n.47), para 27. See also *Barclays Bank Plc v Unicredit Bank Ag & Anor* [2014] EWCA Civ 302 at para 27: "The use of the phrase "constitute the entire agreement …" is intended to exclude any evidence or argument to the effect that the terms of the contract are to include any mutual understanding that is not recorded in the contract."

PLN, on the one hand, and KBC and Pertamina, on the other hand, would each appoint one arbitrator within 30 days after the date of a request to initiate arbitration." The court observed that the ESC provision was plainly intended for disputes between KBC and Pertamina on the one hand and PLN on the other, the two contracting parties being KBC and Pertamina on the one hand and PLN on the other. However, in the arbitration KBC and Pertamina were on opposite sides. In that context, the court found the Tribunal's decision that section 8 was not applicable in the case, and therefore the UNICTRAL rules for the appointment of arbitrators were to be applied was entirely logical and correct. The court also cited the *lex arbitri*, Swiss Law Article 179(1) Private International Law Act providing that: "*The arbitrators shall be appointed removed or replaced in accordance with the agreement of the parties*."

In the decision, the court noted or made some crucial observations, first, the Tribunal's observation that Pertamina and PLN did not decline the invitation to nominate an arbitrator on the basis that they were requested to make a joint nomination. Secondly, Pertamina and PLN did not object to the arbitrator who was appointed by ICSID, and neither did they seek to challenge the Preliminary Award on the issue to the supervisory court. Thirdly, the court agreed with the submission, that, having been ruled against on a preliminary issue, remaining silent thereafter until the enforcement stage may be construed as a waiver.

3.3.3 Equality of parties in appointing arbitrators

Two cardinal principles of international commercial arbitration are party autonomy[54] and equal treatment of parties[55].[56] Where there is a conflict between the two concepts, an issue arises as to how fairness can be exercised, and the

[54] See n. 25
[55] Failure to observe this requirement could lead to a refusal to recognise or enforce an award - see New York Convention Article V.1 (b)
[56] See Nigel Blackaby, *et al*, Redfern and Hunter on International Arbitration ((*op. cit.*), para. 6.10: "If party autonomy is the first principle to be applied in relation to procedure in international arbitration, equality of treatment is the second—and it is of equal importance."

case of *BKMI Industrienlagen GmbH et Siemens AG v Dutco Construction Co*.[57] that concerned construction of a cement factory in Oman brought into focus that issue. Briefly, following an agreement between *BKMI Industrienlagen GmbH* (BMKI) and an employer, BMKI subsequently entered into a consortium agreement with Siemens AG (*Siemens*) and *Dutco Construction Co. Ltd* (Dutco) for execution of different parts of the works. The consortium agreement had an International Chamber of Commerce (ICC) arbitration clause providing for disputes to be resolved by a tribunal of three arbitrators, with the claimant appointing one arbitrator, the respondent appointing the other one, and the two arbitrators were to appoint the president. Dutco alleged separate breaches of contract on the parts of both BMKI and Siemens and subsequently initiated an arbitration. ICC instructed Dutco to appoint one arbitrator, and both BMKI and Siemens to appoint the second one. BMKI and Siemens objected and argued that Dutco should have started two separate arbitrations, with the two respondents each appointing an arbitrator.

ICC stood by its instruction holding there would be a single proceeding and warned they would invoke the then Article 2.4 of the 1988 ICC Rules that gave the ICC Court powers to nominate an arbitrator if a party failed to nominate one. BMKI and Siemens agreed to ICC instruction and appointed an arbitrator under protest and the tribunal was constituted. Before the tribunal, Siemens argued the tribunal lacked jurisdiction but by an interim award, the arbitral tribunal ruled it had jurisdiction. BMKI and Siemens took the matter to the Cour d'appel de Paris for the annulment of the interim award alleging irregularity in appointment of the tribunal and violation of public policy, but the appeal failed. An appeal was filed at the French Supreme Court, the Cour de Cassation which disagreed with the appellate court and held that "*the principle of equality of the parties in the appointment of arbitrators is a matter of public policy, that can only be waived after the dispute has arisen*."

[57] *Sociétés BKM et Seimens v. Société Dutco*, Cour de cassation, Judgment of January 7, 1992, 1992 Rev. Arb. 470, 18 Y.B. Com. Arb. 140 (1993) (English Translation)

The decision by the Cour de Cassation was widely commented on,[58] and with specific reference to its effects on party autonomy and equality of parties, it has been argued that by invalidating an advance waiver of the right to participate in the tribunal's constitution ignored the parties' agreed arbitral procedures, which may be difficult to reconcile with Articles II and V(1)(d) of the New York Convention.[59] Another reason that has been advanced was that the French Cour de Cassation elevated the principle of equal treatment over party autonomy by suggesting that a party could not waive its right to appoint an arbitrator prior to the dispute.[60]

In addition to the reservations expressed by some commentators, the decision by the Cour de Cassation prompted a universal response from the leading International Arbitration Institutions which amended their rules to reflect the *Dutco* principle while limiting the number of arbitrators to one or three.[61] In general, almost all the current rules provide that where there are multiple claimant(s) and/or respondent(s), parties must jointly nominate arbitrators; and failing the joint appointment by either side, the respective institution would

[58] See examples in Ricardo Ugarte and Thomas Bevilacqua, Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions, *Journal of International Arbitration* 27(1): 9–49, 2010, at p. 11/12

[59] Scherer, Maxi and Prasad, Dharshini and Prokic, Dina, The Principle of Equal Treatment in International Arbitration (September 3, 2018). Available at SSRN: https://ssrn.com/abstract=3377237 or http://dx.doi.org/10.2139/ssrn.3377237 [Accessed on 28 Oct 2022]

[60] *Ibid*

[61] See discussions in: Ricardo Ugarte and Thomas Bevilacqua (n. 58), Petrit Elshani and Arnis Dumani, *Dutco Revisited: An Institutional Analysis of the Appointment Process of Arbitrators in Multi-Party Cases*, in, Journal of Alternative Dispute Resolution in Kosovo, Vol 3 Nov. 2016, 22-40.

appoint the tribunal.[62] The current French codes also reflect the procedure adopted by International Arbitration Institutions.[63]

The issue of equality of parties in the appointment of arbitrators recently returned to the French Cour de Cassation in the non-construction case of *PT Ventures v Vidatel and others*,[64] where the four parties in the case had an arbitration agreement providing for a five-member arbitral tribunal, with each party appointing one member, and the four appointed arbitrators to appoint the fifth. Following a dispute, *PT Ventures* proposed the arbitral tribunal be composed of three arbitrators instead of five, with it appointing one and the other three parties appointing one, in order to respect the principle of equality of the parties in the constitution of the tribunal, taking into account the converging interests of the defendants. ICC intervened and invoked Article 12(8) of its 2021 Rules which allows it to appoint arbitrators "... *where all parties are unable to agree to a method for the constitution of the arbitral tribunal."* Without any reference to the *Dutco* case, the French Cour de Cassation upheld the decision by ICC saying it was justified in "... *appointing all the members of the arbitral tribunal, so that, since all parties were deprived of the right to choose their arbitrator, equality between them was preserved*."

4. Ways of avoiding challenges in multiparty construction arbitral proceedings

One way of avoiding challenges in multiparty construction arbitral proceedings is for the parties to enter into an agreement for a joinder or consolidation after the dispute has arisen. However, this is considered to be a long shot for the simple reason that a party opposed to consolidation or joinder may cite one or

[62] See for example NCIA Arbitration Rules, 2015, Revised Version (2019), Rule 7(12), ICC 2021 Arbitration Rules, Article 12(8), LCIA 2020 Arbitration Rules, Article 8.

[63] See Articles 1453 and 1506 (2) of the French Code of Civil Procedure. Available at: *http://www.parisarbitration.com/wp-content/uploads/2014/02/French-Law-on-Arbitration.pdf.* [Accessed on 03 Mar 2023]

[64] French Court of Cassation Appeal No. 21-17.203, 9 November 2022. Available at: *https://www.courdecassation.fr/en/decision/636b6d1067b11ddcd1c423b8.* [Accessed on 03 Mar 2023]

more of the challenges already identified to decline participation in multiparty proceedings.

The following are two effective ways of avoiding or substantially reducing chances of challenges in multiparty arbitrations.

4.1 Dispute resolution agreement

It is axiomatic that dispute resolution clauses in most construction contracts are multi-tiered, with the first tier in most standard forms requiring parties to first refer disputes for adjudication. Having established earlier that one of the commercial objectives of consolidations and joinders is to avoid multiplicity of proceedings in order to avoid inconsistent decisions, such an outcome must also be avoided in adjudication decisions. Therefore, provisions for consolidations and joinders should be coordinated for all the tiers in the dispute resolution agreement.

The narrow sets of circumstances identified that would make the contractual solution plausible include the need to have symmetry between the relevant dispute resolution agreements.[65] The adjudication provisions should identify the same adjudicator(s) and rules. For the arbitration clauses, there should be symmetry as to the seat of arbitration, applicable law, appointment mechanisms and procedural rules.[66] In addition and in order to affirm there is consensus on the power to order consolidation or joinders, the respective arbitration agreements must each empower a tribunal to assume jurisdiction over other disputes and other parties.[67]

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[65] OECD (2006), "Consolidation of Claims: A Promising Avenue for Investment Arbitration?", in International Investment Perspectives 2006, OECD Publishing, Paris, *https://doi.org/10.1787/iip-2006-9-en.*
[66] *Ibid*
[67] *Ibid*

4.2 Institutional arbitration rules

Arbitration is dynamic and continuously evolve in order to meet the emerging challenges. In this context, both domestic and international arbitration institutions regularly update or amend their rules, and in order to deal with challenges especially those that relates to consent or whether the relevant proceedings arise out of the same arbitration agreement, international arbitration institutions have regularly sought to enhance the efficiency of arbitral process by adopting rules that permit a more permissive approach to joinder and consolidation.[68] As an example, what follows is a review of some provisions in the ICC 2021 Arbitration Rules relating to consolidation and joinder, with the objective of giving an insight of how challenges already identified are to be dealt with.

Under Article 7 (Joinder of Additional Parties), Article 7(5) permits for a Request for Joinder to be made after the confirmation or appointment of the tribunal and is subject to the additional party accepting the constitution of the arbitral tribunal and agreeing to the Terms of Reference, where applicable. When making the decision, the tribunal should consider all relevant circumstances, which may include whether the arbitral tribunal has *prima facie* jurisdiction over the additional party, the timing of the Request for Joinder, possible conflicts of interests and the impact of the joinder on the arbitral procedure. Any decision to join an additional party is without prejudice to the arbitral tribunal's decision as to its jurisdiction with respect to that party.

It has been argued that whereas Article 7(5) allows a Respondent to join a willing co-respondent without the express agreement of the Claimant party (providing the Tribunal considers it appropriate in the circumstances), if the party to be joined refuses to consent to the constitution of the tribunal or the Terms of Reference, the issues that existed from the old Rule which provided

[68] Bernd Ehle & Sam Moss (2021), The 2021 ICC Arbitration Rules –what revised joinder and consolidation rules mean for construction disputes. Available at: *https://www.lalive.law/publications/.* [Accessed on 31 Oct 2022]

that no additional party could be joined after the confirmation or appointment of the Tribunal unless all parties, including the additional party agreed remain.[69] Another challenge that has been identified is that by eliminating the requirement for all parties to agree to a joinder after the constitution of the tribunal, the requirement potentially permits the respondent to give the arbitration a different shape by joining additional parties the claimant would not have named out of its own volition.[70]

Under Article 10 (Consolidation of Arbitrations), ICC may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

(b) *all of the claims in the arbitrations are made under the same arbitration agreement or agreements*

(c) *the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.*

[69] Craig Tevendale, *et al*, The New ICC Rules 2021: What you need to know. Available at: https://hsfnotes.com/arbitration/2020/10/09/the-new-icc-rules-2021-what-you-need-to-know/. [Accessed on 31 Oct 2022]

[70] Martha E. Vega-Gonzalez, *et al*, New York Arbitration Week Revisited: The Challenges of Multi-Party and Multi-Contract Issues in International Arbitration and the Anticipated ICC Rules Changes, December 5, 2020. Available at *http://arbitrationblog.kluwerarbitration.com/2020/12/05/new-york-arbitration-week-revisited-the-challenges-of-multi-party-and-multi-contract-issues-in-international-arbitration-and-the-anticipated-icc-rules-changes/.* [Accessed on 04 Jann 2023]

It has been argued that the above provisions "adopt a more liberal approach to consolidation, with the compatibility of the relevant arbitration agreements becoming even more important."[71]
Interestingly, the issue of equality of parties, as it was enunciated in the *Dutco* case, is dealt with by Article 12(9) of the ICC Rules as follows:

> "*Notwithstanding any agreement by the parties on the method of constitution of the arbitral tribunal, in exceptional circumstances the Court may appoint each member of the arbitral tribunal to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award.*"

It has been argued that this provision when read in conjunction with Article 42 which requires the Court and the arbitral tribunal "**...** *make every effort to make sure that the award is enforceable at law*", effectively ensures that the Court is able to balance party autonomy and ensuring the enforceability of the award.[72] However, the recent decision by French Cour de Cassation in the *PT Ventures*[73] (approving invoking of Article 12(8)) leaves the question of how or when to apply Article 12(9) unanswered.

5. Conclusion

The main objective of multiparty dispute resolution proceedings is to eliminate the risks of inconsistent decisions by avoiding separate tribunals from making separate decisions on common factual and legal issues. In the construction industry, it is not uncommon to have more than two parties having a commercial interest to a project and for those parties to enter into separate contracts with different parties. Depending on the contractual arrangements the parties have agreed to, where the subject matter of the dispute touches on more than two parties or it has a bearing on more than two contracts, decided cases

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[71] Michael Polkinghorne & Andrew de Lotbinière McDougall KC (2020), New 2021 ICC Arbitration Rules, White & Case LLP. Available at: *https://www.whitecase.com/insight-alert/new-2021-icc-arbitration-rules.* [Accessed on 31 Oct 2022]
[72] Martha E. Vega-Gonzalez, *et a*l (n. 70)
[73] n. 64

in both domestic and international arbitration show it is appropriate to have it resolved by multiparty arbitration. The challenges by parties opposed to multiparty arbitration have been identified as falling in three broad categories, first, the arbitral tribunal did not have jurisdiction because there was no consent for joinder or consolidation or appointment of the arbitral tribunal, secondly, the arbitral tribunal was not properly appointed, and thirdly, there was no equality of parties in the appointment of the arbitrators.

To overcome these challenges, it is appropriate for the parties to agree and include in advance, preferably by the time of concluding contracts, express terms in their dispute resolution agreements with adequate provisions permitting joinders and consolidations. An alternative would be to include in the arbitration agreement and depending on their circumstances, rules of domestic or International Arbitration Institutions that are deemed to sufficiently cover joinders and consolidations. Application of these rules would be on the basis that parties impliedly accept all the consequences that arise from adoption of such rules.

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Addressing Constitutional Issues Arising Out of Arbitrable Commercial Disputes: The Bia Tosha and Kenya Breweries Limited Cases

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Abstract

Kenyan courts have grappled with jurisdictional tensions where parties institute petitions notwithstanding the existence of arbitration clauses in commercial agreements. Specifically, it has been unclear whether an arbitral tribunal has jurisdiction to determine commercial disputes intertwined with constitutional issues. These tensions have been addressed in the cases between Bia Tosha Distributors Limited and Kenya Breweries Limited, from the High Court to the Supreme Court, which finally settled the debate. This case review examines the cases, particularly the Supreme Court decision, and its impact on arbitration and Alternative Dispute Resolution (ADR) practice.

1.0. Introduction

Arbitration is widely regarded as the most preferred method of resolving commercial disputes.[1] In contrast to litigation, arbitration offers numerous benefits, such as expeditious resolution of disputes, finality of the outcome, transnational enforcement, privacy and confidentiality, as well as party autonomy to control the process.[2] Arbitration is based on the consent of the

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[1] Queen Mary University of London, *International Arbitration Survey: Adapting Arbitration to a Changing World* (2021). *See also* Queen Mary University of London, *International Arbitration Survey*, (2018) 2.

[2] Gary Born, 'International Commercial Arbitration,' (3rd edn, Wolters Kluwer 2021) 180.

parties expressed through an arbitration agreement.[3] It follows that unless parties have agreed to arbitrate, there is no obligation to arbitrate.[4] When parties agree to arbitrate their disputes, they relinquish their right to resolve those disputes before a court, opting instead for the benefits offered by arbitration and a final determination by an arbitral tribunal.[5] It is the arbitration agreement that confers authority upon arbitrators to adjudicate disputes and delineates the extent of their jurisdiction.[6]

Although parties are free to have their disputes resolved through arbitration, certain disputes are incapable of settlement through arbitration, even when they are included in arbitration agreements.[7] Disputes of this nature inherently encompass matters of public policy and frequently fall within the exclusive jurisdiction of courts.[8] They include criminal offences, patent validity, bankruptcy, certain intellectual property matters, consumer claims, constitutional disputes, and domestic relations matters.[9] Broadly speaking, almost all commercial disputes can be settled through arbitration. However, the nature of commercial relations is so dynamic that ensuing disputes may fall beyond those envisaged in the agreements by transcending the commercial

[3] Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 17. See also Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter, *Redfern and Hunter on International Arbitration*, (6th edn, Oxford University Press 2015)71.
[4] Gary Born, *International Commercial Arbitration* (6th edn, Wolters Kluwer 2021) 1545.
[5] Ali Khan, 'Arbitral Autonomy' 74(1), *Louisiana Law Review*, 2013.
[6] Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010) 33.
[7] Emmanuel Gaillard and John Savage, *Fouchard Gaillard & Godman on International Commercial Arbitration,* (Kluwer Law International 1999) 312.
[8] Robert French, 'Arbitration and Public Policy' (2016) 24 *Asian Pacific Law Review*, 13.
[9] Gary Born, *Non-Arbitrability and International Arbitration Agreement* (Kluwer Law International 2014) 944. See also Simon Greenberg, Christopher Kee, and Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2011)186.

sphere into the constitutional sphere.[10] In practice, following the promulgation of the Constitution, which is heralded as a transformative document with a robust Bill of Rights, Kenya has witnessed a surge of cases where constitutional issues are raised in commercial disputes between parties.[11]

Arguably, every commercial claim can be anchored on the provisions of the Constitution. However, uncertainty arises as to whether an arbitral tribunal or the court should decide and determine a commercial dispute within the scope of an arbitration agreement that involves constitutional concerns. This is because the High Court has original jurisdiction to interpret and apply the Constitution as well as determine allegations of rights and freedoms violations under the Bill of Rights.[12] Conversely, it is arguable that an arbitral tribunal can decide a dispute based on the law of contract and award private law remedies without interpreting and applying the Constitution. Besides, Article 159(2)(c) of the Constitution obligates courts to promote ADR mechanisms, including arbitration. One of such ways includes ordering a stay of legal proceedings and referring parties to arbitration where there is a valid arbitration agreement.[13] Be that as it may, contractual arrangements may give rise to disputes that may require a determination by the High Court as to whether a right or fundamental freedom has been infringed upon or violated.[14] The controversy lies in determining the appropriate forum for determining commercial disputes, which are ordinarily arbitrable under the arbitration agreement but involve

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[10] Katherine Van Wezel Stone, 'The Bold Ambition of Justice Scalia's Arbitration Jurisprudence: Keep Workers and Consumers out of Court' (2017) 21 *Employee Rights & Employment Policy Journal* 189, 192.

[11] Morris Mbondenyi and John Osogo Ambani, *The New Constitutional Law of Kenya: Principles, Government, and Human Rights* (Chairpress Limited 2012) See the cases of *Jambo Biscuits(K) Limited & 3 others v Jambo East Africa Limited & 3 others [2021] eKLR, Lipisha Consortium Limited & another v Safaricom Limited* [2015] eKLR, *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others* [2014] eKLR, *TSJ v SHSR* [2019] eKLR, and *Papinder Kaur Atwal v Manjit Singh Amrit*, Petition No. 236 of 2011.

[12] Constitution of Kenya, Articles 23(1) and 165(3)(b) and (d).

[13] Arbitration Act (Act No. 4 of 1995), s 6.

[14] (n 12).

constitutional issues. Moreover, Article 159(2)(c) of the Constitution neither limits the scope of the arbitrator's jurisdiction nor precludes the settlement of constitutional issues through arbitration.[15]

The definition of a constitutional issue is not provided in the Constitution, thereby necessitating the courts to determine its meaning and scope. Basically, a constitutional issue is one that directly arises from the court's application and interpretation of the Constitution.[16] According to case law, constitutional issues must include disputes as to whether any law or conduct is consistent with the Constitution.[17] In addition, constitutional matters not only pertain to the status, powers, and functions of a state organ, but also confront the various rights laid down in the supreme law.[18] When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful.[19] Rather, the question is whether the argument forces the court to interpret, apply, and consider constitutional rights and values.[20] For this reason, courts require parties to plead the alleged constitutional provisions violated, the acts or omissions complained of, and the alleged manner of violation with reasonable precision.[21] It follows that it is not sufficient to merely cite provisions of the Constitution alleged to have been

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[15] *Lipisha Consortium Limited & another v Safaricom Limited* [2015] eKLR.
[16] *Mokoosio & another v Vadera & 3 other*s (Petition 13 of 2020) [2021] KEHC 56 (KLR) (21 September 2021) (Judgment). See also *John Harun Mwau v Peter Gastrow & 3 Others* [2014] eKLR.
[17] *Benard Ambasa v Institute of Human Resource Management & 3 others; Lilian Ngala Anyango* (Interested Party) [2021] eKLR, para 35. See also *Fredericks and Others v MEC for Education and Training Eastern Cape and Others* (CCT 27/01) [2001] ZACC 6.
[18] Ibid. See *Dhow House Limited v Kenya Power and Lighting Company* (Constitutional Petition E058 of 2021) [2022] KEHC 11840 (KLR). See also *Benard Murage v Fine Service Africa Limited* [2015] eKLR.
[19] *Renita Choda v Kirit Kapur Rajput* (Unreported) Nairobi Petition No. E406 of 2020, para 38.
[20] Ibid.
[21] *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, paras 38 and 44.

infringed.[22] On the contrary, it is imperative for a party to clearly and succinctly articulate the manner in which the provisions were violated.[23] Even when constitutional issues are raised, there is no guarantee that courts will entertain a matter, especially where there is an alternative recourse and remedy.[24]

This case review examines the effect of constitutional issues arising in commercial disputes that parties have agreed to refer to arbitration. The contentions arose in the cases between Bia Tosha Distributors Limited (Bia Tosha) and Kenya Breweries Limited (KBL) before the High Court in *Bia Tosha Distributors Limited v Kenya Breweries Limited & 3 Others* [2016] eKLR, the Court of Appeal in *Kenya Breweries Limited & another v Bia Tosha Limited & 5 Others* [2020] eKLR, and the Supreme Court case of *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 Others* (Petition 15 of 2020) [2023] KESC 14 (KLR). The case review is divided into seven parts. Part I is a brief introduction to arbitration and constitutional issues. Part II lays out the factual background to the dispute between Bia Tosha Distributors Limited (Bia Tosha) and Kenya Breweries Limited (KBL). Parts III, IV, and V summarise the proceedings before the High Court, Court of Appeal, and Supreme Court, respectively. Part VI of the case review analyses the Bia Tosha decisions and their implications, while Part VII concludes the case review.

2.0. Factual Background of the Dispute

The primary parties to the dispute were Bia Tosha, KBL, East African Breweries Limited, Diageo PLC, Congo Ventures Limited, and UDV (Kenya) Limited. The secondary parties were Kamahuha Limited and Four Winds Trading Company Limited. At its inception, the contractual relationship entailed Bia Tosha, at the

[22] *Anarita Karimi Njeru v Republic* [1979] eKLR.
[23] *Leonard Otieno vs Airtel Kenya Limited* [2018] eKLR. See also the cases of *Manase Guyo & 260 Others v Kenya Forest Services* [2016] eKLR and *Apheth Ododa Origa v Vice Chancellor University of Nairobi & 2 Others* [2018] eKLR.
[24] See the cases of *Uhuru Muigai Kenyatta v Nairobi star Publications Limited* [2013] eKLR, *Muiruri v Credit Bank Limited* [2006] 1 KLR 385, and *Kyalo & 3 Others v Central Church Council* (Petition 4 of 2021) [2022] KEHC 386(KLR).

time operating through its sister company Bia Yetu Agencies Limited, who were appointed as the sole distributors of KBL's products through a distributorship agreement executed in 1997.[25] They were to operate in the general areas of Kiambu, specifically encompassing Gachie, Mwimuto, Kanunga, Kiambaa, Banana, Karura, Gathanga, Ndenderu, Ndumberi,Tinganga, Riabai, Kanguya, Wangige, and Ridgeways.[26]

In 2000, KBL offered Bia Tosha new distribution territories comprising Baba Dogo, Kariobangi North, Dandora I, and Dandora II on condition that Bia Tosha make a non-refundable goodwill payment of KES. 6,630,000/-.[27] Bia Tosha agreed to the conditions and remitted the payment.[28] Fast forward to 2006, when Bia Tosha was offered a larger distribution area comprising Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong Road, Hurlingham, Kawangware, Satelitte, Dagoretti, UDV A, UDV B, and UDV C. In relation to these territories collectively called Bia Tosha Territory, Bia Tosha was asked to pay good will amounting to KES. 31,668,000/- out of which it paid KES. 27,300,000/-.[29]

Controversy arose when KBL repossessed the distribution areas of Baba Dogo, Dandora I and II, and Kariobangi North from Bia Tosha which forced the latter to demand a refund of the good will paid.[30] However, KBL rejected this request, citing that the amounts in question were non-refundable and that it had discretion to appoint other distributors as the distribution agreement with Bia Tosha was non-exclusive. The refusal by KBL to refund the goodwill and the appointment of other distributors in some of the areas that Bia Tosha used to

[25] *Bia Tosha Distributors Limited v Kenya Breweries Limited & 3 others* [2016] eKLR, para 3.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid para 5.
[30] Ibid para 7.

cover compelled it to initiate legal proceedings by filing a petition in the High Court.[31] The petition was filed concurrently with an *ex-parte* application seeking conservatory orders in the form of an injunction to restrain the respondents and their agents from interfering with the exclusive control of distributorship of the respondents' products in the territories comprising: Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong Road, Hurlingham, Kawangware, Satellite, Dagoretti, UDV A, UDV B, and UDV C.[32]

3.0. Proceedings Before the High Court

The High Court certified the application urgent and issued *ex-parte* interim conservatory orders pending an *inter partes* hearing of the application.[33] KBL was named as the 1st respondent in the petition; UDV (Kenya) Limited, East African Breweries Limited, and Diageo PLC were named as the 2nd, 3rd, and 4th respondents, respectively. On 20 June 2016, the respondents applied to the court, seeking to vacate or discharge the *ex parte* conservatory orders.[34] On the same day, the court ruled that there was no sufficient reason for it to interfere with or vacate its *ex-parte* orders but pronounced that the parties could argue the grounds raised at the *inter partes* hearing of the application for conservatory orders on 28 June 2016.[35] Following requests and applications by the parties to fast-track the petition and application, the court re-fixed them for hearing on 22 June 2016.[36] Two issues arose for determination before the High Court: namely, whether the court had jurisdiction to entertain the petition, and secondly, whether the petitioner was entitled to the conservatory orders sought.

[31] Ibid para 15.
[32] Ibid para 21.
[33] Ibid para 15.
[34] Ibid para 16.
[35] Ibid para 19.
[36] Ibid para 20.

3.1. Whether the Court had jurisdiction to entertain the Petition

3.1.1. Petitioner's Arguments

The petitioner argued that the issues raised by the petition were not arbitrable and were outside of the ambit of the arbitration agreement as they involved public policy issues.[37] It also contended that the court's jurisdiction to hear and determine constitutional violations could not be taken away by the parties' arbitration agreement.[38] It was the petitioner's further contention that on paying the amount of KES. 38,298,000/=, it acquired proprietary rights from the respondents over the areas and goodwill, a form of property under Article 40 of the Constitution.[39] Further, the petitioner averred that the acquired goodwill could only be appropriated in the manner contemplated under the Constitution.[40] In its view, the routes or areas that were the subject matter of the goodwill payments could not be taken away unless an equal payment for the value was made.[41] For this reason, the petitioner argued that the conduct of KBL resulted in the arbitrary deprivation of property occurred in a manner not contemplated by the constitution and was tantamount to unjust enrichment.[42]

3.1.2. Respondents' Arguments

The respondents submitted that the court had been divested of its jurisdiction through the parties' agreement to refer their disputes to arbitration.[43] According to them, the court had no alternative but to stay the proceedings pending arbitration in conformity with Section 6 of the Arbitration Act because there was an arbitration agreement.[44] The respondents also asserted that the petitioner could not claim a refund of the goodwill paid as all agreements pursuant to

[37] Ibid para 44.
[38] Ibid para 45.
[39] Ibid para 24.
[40] Ibid para 27.
[41] Ibid.
[42] Ibid.
[43] Ibid para 31.
[44] Ibid.

which the payments were made, expressly provided that Bia Tosha was barred from claiming any refund.[45] Additionally, the respondents advanced that the petitioner did not acquire exclusive rights to the areas in respect of which the payments of goodwill were made.[46] To illustrate, they claimed that the Competition Act prohibited any arrangement that would have conferred exclusivity on the petitioner.[47] Furthermore, the respondents maintained that both issues of restitution of goodwill payments and accrued proprietary rights were arbitrable since they were purely commercial disputes. Accordingly, the respondent urged the court to exercise the doctrine of constitutional avoidance and refuse to assume jurisdiction.[48]

3.1.3. Analysis and Determination by the Court

In determining the issue, the court declined to refer the parties to arbitration, holding that while there existed commercial agreements between the parties, certain proprietary rights were alleged to have been acquired and the same rights were alleged to have been deprived.[49] Therefore, in the court's view, only a court can determine whether what had been identified as constituting proprietary interest is "property" within Article 40 of the Constitution and whether the same has been arbitrarily expropriated or whether the expropriation is, if at all, justified.[50] The court also observed that since an interested party had joined the proceedings, it could not refer the parties to arbitration because they were not parties to the arbitration agreement.[51] Thus, the court held that it had the jurisdiction to entertain the petition.

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[45] Ibid para 34.
[46] Ibid para 35.
[47] Ibid para 36.
[48] Ibid para 59.
[49] Ibid para 93.
[50] Ibid para 97.
[51] Ibid para 100.

3.2. Whether the Petitioner was entitled to the conservatory orders sought

3.2.1. Petitioner's Arguments

The petitioner asserted that it had a *prima facie* case with a likelihood of success, arguing that all contracts had to adhere to constitutional values and principles and could be examined for any inconsistency. Additionally, the petitioner asserted that it would be unjust if the respondents could transfer property for valuable consideration and thereafter repossess the properties without any compensation to the petitioner.[52]

3.2.2. Respondents 'Arguments

The respondents argued that they were equally entitled to the protection of the law and asserted that Article 19(3) of the Constitution recognizes the right to freedom of contract.[53] They also cited Section 21 of the Competition Act on the prohibition of restrictive trade practices to advance their argument that the petitioner was infringing on the rights of other distributors by seeking exclusivity.[54] Lastly, the respondents rejected the claim that the petitioner had established a *prima facie* case with a likelihood of success.[55]

3.2.3. Analysis and Determination by the Court

The High Court began by establishing the foundation for its powers to grant conservatory orders under Article 23(3) of the Constitution and Section 7 of the Arbitration Act, which empower it to grant interim measures of protection before or during arbitral proceedings.[56] It then considered the principles that govern courts in granting conservatory orders, namely, that an applicant must demonstrate a *prima facie* case with a likelihood of success and that they are likely to suffer prejudice as a result of the violation.[57] Secondly, the grant of the

[52] Ibid para 47-50.
[53] Ibid para 61.
[54] Ibid para 62.
[55] Ibid paras 64-66.
[56] Ibid paras 103-104.
[57] Ibid para 108.

conservatory order ought to enhance constitutional values and objects specific to the rights and freedoms in the Bill of Rights.[58] Third, the grant of a conservatory order should ensure that the petition or claim is not rendered nugatory.[59] Lastly, there must be public interest in favour of the grant of a conservatory order.[60] In applying the test, the court observed that by paying KES.33,930,000 to acquire goodwill over certain distribution routes or areas of KBL's products, the petitioner had established a *prima facie* case with a likelihood of success, when it stated that it acquired goodwill for value, which the respondents had arbitrarily taken away without any compensation.[61] The court was also satisfied that the petition may be rendered nugatory if the stated territory is disturbed before the ultimate determination of the petition, as goodwill dissipates when interfered with.[62] Ultimately, the court granted the conservatory orders in favour of the petitioner, exclusively preserving its Bia Tosha territory under the area of operation arrangement obtaining as of 2 February 2006.[63]

4.0. Proceedings Before the Court of Appeal

Following the High Court's ruling, the respondents filed the appeal. The appellants were KBL and UDV (Kenya) Limited, with the respondents being Bia Tosha, Congo Ventures Limited, East African Breweries Limited, and Diageo PLC, named as the 1st, 2nd, 3rd, and 4th respondents, respectively. Kamahuha Limited and Four Wind Trading Company Limited were interested parties but

[58] Ibid para 109.
[59] Ibid.
[60] Ibid.
[61] Ibid paras 112-117.
[62] Ibid para 118.
[63] Ibid para 132.

named as the 5th and 6th respondents, respectively, as the Court of Appeal Rules did not at the time[64] make a specific provision for interested parties.[65]

The appellants challenged the High Court's ruling for granting the application for conservatory orders on the following grounds: elevating a purely commercial dispute to a constitutional dispute thus breaching the cardinal rule of party autonomy and freedom of contract; making a ruling that went contrary to the provisions of Section 21 of the Competitions Act; violating the appellants' right to property; misinterpreting provisions of Article 159(2)(c) of the Constitution; interfering with the dispute resolution procedure set out in the agreement between the 1st appellant and Bia Tosha; violating the appellants' fundamental freedom of contract; and for exceeding the court's jurisdiction by entertaining, hearing and determining issues raised by the 1st respondent in the application dated 14 June, 2016.[66] The appellants also sought a stay of execution of the High Court orders pending the hearing and determination of the appeal.[67] On 11 August 2016, the Court of Appeal ordered that the status quo be maintained pending the hearing of the appeal, in consideration of the long-standing special relationship between the parties and that the hearing of the appeal be fast-tracked.[68] Before the appeal could be heard, Bia Tosha filed a Notice of Motion application dated 23 August 2016 seeking to cite KBL and UDV Kenya Limited for contempt of the status quo orders issued by the court on 11 August 2016.[69] It also filed an application dated 7 December 2016 seeking to adduce additional evidence, while a third application for joinder was filed by

[64] Presently, Rule 2 of the *Court of Appeal Rules* 2022 defines 'interested parties' to mean a person or entity that has an identifiable stake, legal interest or duty in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation but has been allowed by the Court upon application, to appear as an interested party to address it in respect of a matter of law or fact.
[65] *Kenya Breweries Limited & another v Bia Tosha Limited & 5 others* [2020] eKLR, para 16.
[66] Ibid para 11.
[67] Ibid para 12.
[68] Ibid.
[69] Ibid.

the Chartered Institute of Arbitrators – Kenya Branch.[70] In a ruling dated 30 May 2017, the Court of Appeal *(Waki, Nambuye, and Kiage JJA)* directed that the appeal must proceed to its substantive hearing without being sidetracked by any pending applications and that all applications filed before the court be held in abeyance pending the hearing of the appeal.[71] The Court of Appeal's directions prompted Bia Tosha to file an application before the Supreme Court seeking a declaration that its constitutional rights had been violated by the Court.[72] However, the Supreme Court ruled that the petition before it failed to properly invoke the provisions of Article 163(4)(a) of the Constitution since the main petition before the High Court was still pending and the Court of Appeal was yet to exercise its appellate jurisdiction, thus there was no substantive decision from which the Bia Tosha could appeal.[73] Declining to exercise its jurisdiction, the Supreme Court remitted the matter to the Court of Appeal for hearing on a priority basis.[74]

The Court of Appeal identified three issues for determination that would dispose of the appeal. Firstly, whether the learned judge wrongly assumed jurisdiction and granted orders while ignoring party autonomy and freedom of contract in the face of an arbitration agreement. The second issue was whether the learned judge issued final orders which conferred rights not in the contract before the petition was heard and evidence tested. The third issue was whether the dispute was purely a commercial dispute elevated to a constitutional petition against established principles.[75]

[70] Ibid.
[71] Ibid para 13.
[72] Ibid para 14.
[73] Ibid.
[74] Ibid.
[75] Ibid para 31.

4.1. Whether the learned judge wrongly assumed jurisdiction and granted orders while ignoring party autonomy and freedom of contract in the face of an arbitration agreement

4.1.1. Appellant's Arguments

The appellants argued that there were distributorship agreements between the KBL and Bia Tosha as well as with the 5th and 6th respondents in which all the individual agreements expressly provided that the goodwill paid was non-refundable and specified the distribution areas. They submitted that under the distributorship agreement, arbitration was the agreed forum for resolution of any dispute arising out of the agreement, therefore, the court lacked jurisdiction to adjudicate on the matter.[76] Further, the appellants contended that goodwill did not constitute a proprietary right under Article 40 of the Constitution, and in any event, the issue fell within the realm of a commercial dispute and was not a violation of a constitutional right.[77] The court was urged to allow the appeal and refer the matter to arbitration.

4.1.2. Respondent's Arguments

The respondent argued that Article 159(2) did not require the matter to be referred to arbitration, as Article 165(3)(d) of the Constitution mandated the High Court to determine whether any act done is in contravention of the Constitution. Accordingly, the respondent submitted that the High Court had the mandate to interpret the constitution, and where a matter entails constitutional interpretation, it must be determined by the High Court.[78] It was also argued that the High Court was the proper forum for the determination of the issues as they concerned unfair, discriminatory, and exploitative trade practices.[79] The respondent concluded by asserting that the impugned orders of

[76] Ibid para 22.
[77] Ibid para 18.
[78] Ibid para 26.
[79] Ibid.

the High Court were not based on contract but had constitutional underpinnings, therefore, the issue of referral to arbitration did not arise.[80]

4.1.3. Analysis and Determination by the Court of Appeal

The court disagreed with the High Court's conclusion that the issues of constitutional rights were unsuitable for arbitration based on the grounds that they arose from the distributorship agreement. According to the court, the alleged infringement of constitutional rights cannot be divorced from the written agreements they are embedded in.[81] It noted that from the record in the High Court, the appellants had filed a motion under Section 6 (1) of the Arbitration Act seeking, *inter alia* a stay and/or dismissal of the court proceedings and that the dispute be referred to arbitration as per the arbitration agreement. In the court's view, the High Court should have stayed the proceedings and referred the parties to arbitration. Furthermore, the court reiterated the principle that parties are bound by the terms of their contract.[82] Therefore, the court opined that the learned judge had failed to give due consideration Article 159 (2) (c) of the Constitution that mandates courts to promote ADR mechanisms, including arbitration, by disregarding the arbitration clause contained in the distributorship agreement.[83]

4.2. Whether the learned judge exercised his discretion judicially when he granted the conservatory orders

4.2.1. Appellant's Arguments

The appellants submitted that the impugned ruling by the High Court created and preserved what they referred to as 'a Bia Tosha Territory' which was not part of the agreement between the parties. According to the appellants, KBL had the discretion to extend, reduce, or vary the distribution territory by serving a

[80] Ibid.
[81] Ibid para 41.
[82] Ibid.
[83] Ibid.

written notice on Bia Tosha, who, upon appointment, had to pay goodwill. Additionally, the appellants argued that in the impugned ruling, the High Court issued conservatory orders that were vague and preserved territories and routes despite the fact that the said routes were not included in the agreement.[84] The learned judge was also faulted for making orders that impacted the 2nd appellant, UDV (Kenya) Limited, which was not a party to the distributorship agreements.[85]

4.2.2. Respondent's Arguments

The respondent argued that the action by KBL to repossess 'Bia Tosha Territories' and at the same time refuse to refund goodwill paid was contrary to constitutional provisions, particularly Article 40(1) of the Constitution on the protection of the right to property.[86] It was also argued that the repossession of its exclusive territories had serious consequences for its business because the KBL had required them to secure its distribution business by acquiring its property at a cost of KES. 108,000,000/= in addition to the payment of goodwill for the routes they had acquired.[87] Additionally, the respondent claimed that since KBL had repossessed some territories and allocated them to other distributors who had also paid goodwill, they were not justified in the retention of their goodwill payment.[88]

4.2.3. Analysis and Determination by the Court of Appeal

The Court of Appeal began by acknowledging that the High Court can issue interim orders or conservatory orders and then refer a dispute for arbitration.[89] However, it faulted the learned judge's conclusion as arising from the failure to consider the respective interests of the parties and the fact that the Bia Tosha

[84] Ibid para 21.
[85] Ibid para 22.
[86] Ibid para 50.
[87] Ibid para 54.
[88] Ibid para 55.
[89] Ibid para 47.

would be entitled to damages and/or restitution as an alternative remedy.[90] According to the court, there were serious triable issues on whether the goodwill was refundable and whether the routes were exclusive to Bia Tosha, which required serious interrogation, evidence, and Bia Tosha's discharge of the burden of proof of ownership before a determination could be made.[91]Therefore, the High Court should not have granted the conservatory orders and concluded that there was goodwill.

The Court of Appeal also noted that the conservatory orders issued gave the appellant exclusive control over some disputed territories where there may be other distributors, locking them out of the market.[92] In its view, while Bia Tosha could suffer significant losses if it were not allowed to carry on with the distributorship, in which they had made substantial investments, allowing the conservatory orders to stand would occasion financial loss to other distributors.[93] As a result, the court set aside the conservatory order made on the 26 June 2016 and substituted it with one that stayed the proceedings before the High Court pending the dispute being referred to arbitration.[94] Consequently, the court ordered that the dispute between Bia Tosha and KBL be referred to arbitration per the respective parties' distributorship agreements.[95]

5.0. Proceedings at the Supreme Court

Aggrieved by the orders of the Court of Appeal, Bia Tosha filed a petition of appeal claiming among other grounds that the Court of Appeal erred: in making a final determination of the rights of the parties at an interlocutory stage; in making a final determination of the subject matter of the dispute rendering the

[90] Ibid para 58.
[91] Ibid paras 51 and 53.
[92] Ibid para 55.
[93] Ibid para 56.
[94] Ibid para 58.
[95] Ibid.

Court of Appeal's order to refer the matter to arbitration ineffectual; in not recognizing that the appellant's causes of action were outside the commercial contracts executed between the parties; and in accepting and adopting a novel jurisdictional granting competence to private arbitrators by expanding that jurisdiction to encompass constitutional determinations, public policy pronouncements and statutory declarations. For the orders, Bia Tosha mainly sought that the appeal be allowed and that the Court of Appeal decision dated 10 July 2020, be set aside in its entirety. It also prayed that the matter be remitted to the High Court for the determination of the parties' rights on merit and for the High Court orders of 29 June 2016 restored in full.[96] Bia Tosha was the appellant in the Supreme Court, while KBL, UDV (Kenya) Limited, Congo Ventures Limited, East African Breweries Limited, Diageo PLC, Kamahuha Limited, and Four Winds Trading Company were the 1st, 2nd , 3rd, 4th, 5th, 6th, and 7th respondents, respectively.[97]

Before the apex court could determine the appeal, the 1st, 3rd, 4th, and 5th respondents filed Notices of Preliminary Objections stating that the apex court had no jurisdiction to entertain the petition of appeal because it stemmed from an appeal on the conservatory order of the High Court, which does not involve the interpretation or application of the Constitution. The notices also indicated that the petition of appeal was brought without certification as required under Article 163(4)(b) of the Constitution, and as a result, it was fatally defective and should be struck out with costs. Further, the notices stipulated that the petition was hinged on contested factual matters that had not been the subject of determination by the High Court or the Court of Appeal. Therefore, in the circumstances, the issues raised in the petition were not ripe for determination by the Supreme Court.[98]

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[96] *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* (Petition 15 of 2020) [2023] KESC 14 (KLR) (Constitutional and Judicial Review) (17 February 2023) (Judgment), para 20.
[97] Ibid.
[98] Ibid para 22-23.

Having carefully considered the two preliminary objections and pleadings, the Supreme Court consolidated the issues formulated by the parties into three. The first issue was whether the court had jurisdiction to determine the appeal. The second issue was whether the Court of Appeal erred in declining to decide on pending applications, and lastly, whether the Court of Appeal erred in granting the reliefs contained in its judgment.[99]

5.1. Whether the court had jurisdiction to determine the appeal

5.1.1. Appellant's Arguments

The appellant argued that the court had jurisdiction because the Constitution granted the appellant a right of appeal to the court in appeals involving the application and interpretation of the Constitution.[100] To buttress this, the appellant asserted that while the matter may have originated from an interlocutory application, it arose from a constitutional petition that called upon the High Court to determine if it had jurisdiction to hear the appellant's grievances under Article 165(3)(c) as well as the importance of private personal agreements in view of Article 159(2)(c) of the Constitution.[101] Additionally, the appellant contended that the proceedings in the High Court did not arise under individual distributorship agreements but challenged the system of distribution, which, in their view, undermined enshrined constitutional rights. Therefore, the issues raised could not be addressed in proceedings before an arbitrator.[102] Further, the appellant maintained that the issues raised were unrelated to breach of contract and instead challenged the arbitrary, unfair, and extortionate nature of KBL's impositions, which could only be resolved through coercive orders of a court and not a private arbitrator, who would neither have jurisdiction over the matters raised nor the power to grant effective relief.[103]

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[99] Ibid para 63 and 64.
[100] Ibid para 66.
[101] Ibid para 54.
[102] Ibid para 49.
[103] Ibid para 52.

5.1.2. Respondent's Arguments

The 1st, 2nd, 4th, and 5th respondents argued that the court lacked jurisdiction under Article 163(4)(a) of the Constitution to hear the appeal and that it did not meet the threshold for the court to entertain it under that provision. Further, they submitted that the case stemmed from an interlocutory appeal challenging the exercise of discretion by the High Court, which did not call for the interpretation or application of the Constitution. Furthermore, the respondents submitted that the appellant had not identified any instance of interpretation or application of the Constitution in the judgement appealed from.[104] Moreover, the appeal had not been certified.[105] The 6th and 7th Respondents (Kamahuha Limited and Four Winds Trading Company Limited), however, submitted that the court had jurisdiction to hear and determine the appeal as it involved the interpretation and application of the Constitution.[106] That notwithstanding, they urged the court to set aside the judgement of the Court of Appeal.[107]

5.1.3. Analysis and Determination of the Supreme Court

In determining this issue, the Supreme Court began by observing that since the appellant approached it under Article 163(4)(a) of the Constitution, the issue of certification under Article 163(4)(b) did not arise because it could not exercise concurrent jurisdiction simultaneously under both provisions.[108] The court then evaluated the test that must be met when an appellant approaches it under Article 163(4)(a).[109] According to the court, it needs to ask itself the following questions: (i) What was the question in issue at the High Court and the Court of Appeal? (ii) Did the superior courts below dispose of the matter after interpreting or applying the Constitution? (iii) Does the instant appeal raise a

[104] Ibid paras 33 and 41.
[105] Ibid.
[106] Ibid paras 59-56.
[107] Ibid.
[108] Ibid para 66.
[109] Ibid.

question of constitutional interpretation or application that was the subject of judicial determination at the High Court and the Court of Appeal?[110]

Concerning the first question, the court noted that the appellant filed a petition under Article 22 alleging violation of certain articles of the Constitution, namely,19, 36, 27(2), and 40. It sought relief, for instance, that the goodwill paid by the appellant created protected property over the said routes under Article 40 of the Constitution, and the relief sought to declare the respondents' conduct in terminating the appellant's contract null for, *inter alia*, being discriminatory, unreasonable, and unfair. According to the court, while the petition was yet to be heard on the merits, it was evident that whatever determination that would be made by the High Court, a decision would eventually be made in relation to the right to property under the Constitution.[111] Such a decision would involve testing the evidence and arguments leading the court to either agree or disagree with the appellant.[112] In the Supreme Court's view, the decision would inevitably involve interpreting and/or applying the Constitution in the matter before the court. Further, the Supreme Court noted that in determining whether it had jurisdiction, the High Court established that the matter raised constitutional issues and questions that were not appropriate for arbitration.[113] On the second question, the court noted that the High Court's jurisdiction was challenged on account that the dispute was of a commercial and not constitutional nature.[114] The apex court also observed that despite the High Court's ruling being one on the grant of conservatory orders, the test was whether any interpretation or application of the Constitution could be readily identified from the pleadings and from the court decision.[115] Similarly, the court observed that the Court of Appeal, in overturning the decision of the High

[110] Ibid para 67.
[111] Ibid para 68.
[112] Ibid.
[113] Ibid para 69.
[114] Ibid para 70.
[115] Ibid para 71.

Court, addressed itself to, *inter alia*, whether the dispute was purely a commercial dispute elevated to a constitutional petition against established principles.[116] As a result, the court was satisfied that the second test was met.[117] The court was likewise satisfied that the third test was met since the appellant challenged the rationale for the Court of Appeal decision and its resultant effect on the infringement of rights.[118] This included a challenge to the preferred forum as directed by the Court of Appeal in the use of a private arbitrator to determine the arising constitutional questions, the attendant recourse by third parties to arbitration, and the principles for the grant of conservatory relief.[119]

The jurisdiction of the apex court was also challenged on the grounds that the appeal emanated from conservatory orders.[120] On this challenge, the court began by distinguishing between an appeal emanating from an interlocutory ruling, such as a decision emanating from an application under Rule 5(2)(b) of the Court of Appeal Rules 2022, and an appeal from a conservatory order.[121] According to the court, on the one hand, it would not ordinarily entertain an appeal emanating from a ruling of the Court of Appeal's exercise of its discretion since the substantive appeal at the Court of Appeal would still be pending.[122] Inversely, the Supreme Court reasoned that conservatory orders are not ordinary civil law remedies but are remedies enshrined under the Constitution, and therefore a decision on conservatory orders is appealable.[123] The Supreme Court reaffirmed that unlike interlocutory injunctions, conservatory orders are not linked to private-party issues like the prospects of irreparable harm and the

[116] Ibid.
[117] Ibid.
[118] Ibid para 75.
[119] Ibid.
[120] Ibid para 76.
[121] Ibid.
[122] Ibid para 77.
[123] Ibid para 81.

high probability of success.[124] On the contrary, conservatory orders are granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.[125] Furthermore, the court noted that since the appeal emanated from the learned judge's exercise of discretion under Article 23 (3) of the Constitution to grant a conservatory order and Rule 23 (1) of the Constitution (*Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012*) (Mutunga Rules), the matter involved the interpretation of the Constitution.[126] Subsequently, the court found that it had jurisdiction to determine the appeal and dismissed all the preliminary objections.[127]

5.2. Whether the Court of Appeal erred in its refusal to decide on the pending applications

In essence, there were three applications before the Court of Appeal. By way of background, KBL and UDV Kenya Limited applied for a stay pending appeal under Rule 5(2)(b) of the Court of Appeal Rules.[128] The Court of Appeal directed that the parties maintain the status quo. However, there were three other applications.[129] As earlier stated, the first one was an application by Bia Tosha citing KBL and UDV Kenya Limited for contempt of court of the status quo orders.[130] The second application was by KBL to adduce additional evidence, while the third one was for joinder of the Chartered Institute of Arbitrators-Kenya Branch.[131] None of the three applications was ever heard or determined in the eventual judgement.[132] In a ruling dated 30 May 2017, the Court of Appeal

[124]Ibid para 80. See also *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR.
[125] Ibid para 81.
[126] Ibid para 82.
[127] Ibid para 86.
[128] Ibid para 88.
[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] Ibid.

reiterated the directions given on 1st November 2016, regarding a priority hearing date to be given for the main appeal in lieu of all the applications.[133]

5.2.1. Appellant's Arguments

Bia Tosha faulted the decision of the Court of Appeal in refusing to decide the pending applications and argued that a court could not conclude on the main appeal and not decide on pending applications.[134]

5.2.2. Respondent's Arguments

The respondents submitted that the Court of Appeal did not err in not determining the interlocutory applications since the complaint was the subject of an application to the Supreme Court, which was ruled upon; therefore, the same was *res judicata*.[135] In the aforementioned ruling, the Supreme Court found that the ruling of the Court of Appeal did not involve the interpretation and application of the constitution and was not a pronouncement of the court but was instead an exercise of discretion aimed at giving procedural direction as to the conduct of the substantive matter before it.[136]

5.2.3. Analysis and Determination of the Supreme Court

The Supreme Court noted that the appellant was keen to prosecute its application for contempt of court at every available window of opportunity.[137] On the other hand, the other parties seemed satisfied with the directions of the Court of Appeal on focusing on the main appeal and did not make any effort to bring to the court's attention their desire to prosecute the applications.[138] The apex court found that the Court of Appeal fell into error by not making any determination on the application for contempt, both when the same was live

[133] Ibid para 89.
[134] Ibid para 24.
[135] Ibid para 43.
[136] Ibid para 34.
[137] Ibid para 90.
[138] Ibid para 91.

before it and in the judgement that disposed of the matter with finality.[139] In the court's view, just like a preliminary objection, when an issue of contempt of court arises, it is one that should be prioritised and determined as soon as it arises.[140] This is because the authority of the courts over a matter is an ongoing process that should be safeguarded during and after the court process.[141] In view of the foregoing, the Supreme Court invoked its exceptional jurisdiction[142] to correct jurisdictional wrongs since every litigant is entitled to a decision [143] and determined the application for contempt of court. The apex court found that the 1st and 2nd respondents were in contempt of status quo orders and directed the High Court to issue a suitable punishment for contempt of its orders.[144]

5.3. Whether the Court of Appeal erred in granting the reliefs contained in its judgment

5.3.1. Appellant's Arguments

The appellant faulted the Court of Appeal for deciding on the case based on contracts that were neither the subject matter of their case nor the High Court ruling.[145] It further challenged the impugned judgement for applying an arbitration clause retrospectively and, as a result, fell into error by formulating a dispute on *post facto* contracts and moving to compel the parties to abide by contracts that were not contemplated by the parties when they started their trading relationship.[146] The appellant argued that the Court of Appeal eroded with finality the appellant's rights as it overturned the High Court ruling,

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[139] Ibid para 93.
[140] Ibid para 98.
[141] Ibid.
[142] This was necessary as the issue had not been ventilated at the Court of Appeal, consequently, did not arise in the manner of an appeal through the court hierarchy.
[143] *Geoffrey M. Asanyo & 3 others v Attorney General* [2018] eKLR, para 62.
[144] *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* (Petition 15 of 2020) [2023] KESC 14 (KLR) (Constitutional and Judicial Review) (17 February 2023) (Judgment), para 130.
[145] Ibid para 25.
[146] Ibid para 25.

effectively denying the appellant an opportunity to present its evidence and call witnesses in order to establish whether goodwill could be categorized as property under Article 40 of the Constitution. The impugned judgement was also challenged to the extent that the Court of Appeal suggested that the decision of a private arbitrator could set a constitutional precedent.[147] Lastly, the Court of Appeal was faulted for formulating a 'contested facts' standard as the basis for granting or rejecting interim relief. According to the appellant, it was not the contestation of facts that was the material consideration in the grant of interim relief, as the facts are almost always contested in such applications.[148]

5.3.2. Respondent's Arguments

The respondents submitted that the issue of whether the Court of Appeal erred in determining the dispute based on contracts was a matter that was subject to determination by the High Court, and the Supreme Court could not render itself on disputed facts that were, at the time, before the High Court. Additionally, they argued that the Court of Appeal did not apply an arbitration clause retrospectively because an arbitration clause in a contract entered into after the conclusion of negotiations does not render the arbitration agreement inoperable.[149]

It was maintained by the respondents that the Court of Appeal exercised constitutional avoidance by arguing that a breach of constitutional rights was arbitrable because the reliefs sought by the appellant were in *personam*.[150] Furthermore, according to the respondents, the Court of Appeal was right in rejecting interim reliefs, as the court has jurisdiction to reappraise the facts and come to its own conclusion. Accordingly, they opined that the Court of Appeal decided to reject interim relief after considering the possibility of the appellant suffering losses weighed against the respondents' contention that goodwill was

[147] Ibid para 26.
[148] Ibid para 27.
[149] Ibid para 35.
[150] Ibid para 36.

non-refundable, and that the appellant did not have exclusive rights over the territory.[151]

5.3.3. Analysis and Determination by the Supreme Court

The apex court noted that the Court of Appeal judgement not only overturned the ruling of the High Court but also granted relief in favour of the respondents and adverse to the appellant, while at the same time denying the High Court jurisdiction over the dispute between the parties.[152] The Supreme Court observed that notwithstanding the underlying commercial transaction between the parties, there was no basis for the Court of Appeal to resolve the dispute based on contracts, which were neither the subject matter of the appellant's case nor the High Court ruling.[153] According to the court, in making the orders, the Court of Appeal completely changed the landscape of the dispute in three ways.[154] First, it deprived the appellant of its recourse since the distribution territories subject to the dispute were no longer available to the appellant but were instead granted to third parties.[155] Secondly, there were parties in matter that were not privy to the commercial transactions which would form the basis for the arbitration, and third, the decision inversely created obligations and rights of the parties, with the interim relief resulting to a finality of the rights of the parties.[156]

The court reasoned that in granting the conservatory orders, the High Court retained control over the dispute as it was seized of the case and all parties were before it without any recourse to arbitration.[157] In total contrast, the Court of Appeal, in overturning the conservatory orders and issuing further interim relief while referring the matter to the arbitrator, divested itself of control over

[151] Ibid para 37.
[152] Ibid para 101.
[153] Ibid para 102.
[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] Ibid para 103.

the case.[158] As a result, there was no further recourse by the parties on the interim orders available to them before the High Court, as it was equally bound by the decision of the Court of Appeal.[159] Yet, the Court of Appeal had, on its part, ceded its potential intervention in the matter to the arbitrator.[160] Further and most importantly, the court observed that the jurisdiction of arbitrators is limited by the arbitration agreement and largely operates with the consent, cooperation, and participation of the parties before it.[161] In its view, breaches, violations, and infringements of the Constitution do not fall within the jurisdiction of arbitrators, and such breaches cannot be the basis for setting aside arbitral awards.[162]

Furthermore, the court noted that there were parties in the matter who were not privy to the commercial transactions upon which arbitration would accrue.[163] In the court's view, while the dispute was initially between the appellant and the 1st and 2nd respondents (KBL and UDV), other parties had since been added to the suit through the pleadings filed.[164] The 3rd respondent (Congo Ventures) was purported to have taken over distribution of the 1st and 2nd respondents' products within the appellant's distribution area; the 4th respondent (EABL) is the holding company controlling the operations of the 1st and 2nd respondents; the 5th respondent (Diageo PLC) is the 1st, 2nd, and 4th respondents' controlling entity of these entities and their operations; and the 6th and 7th respondents (Kamahuha Limited and Four Winds Trading Co. Ltd) are distributors of the 1st and 2nd respondents.[165]

[158] Ibid para 103.
[159] Ibid para 104.
[160] Ibid
[161] Ibid.
[162] Ibid.
[163] Ibid para 105.
[164] Ibid.
[165] Ibid.

The court explained that while it has jurisprudentially insisted on exhaustion of local remedies, such remedies are only those set out in statutory provisions.[166] According to the court, the mandate of an arbitrator largely proceeds on the basis of the parties agreement and is tasked with the resolution of a dispute as set out in the arbitration agreement.[167] Where the dispute, however, transcends the commercial sphere and enters the constitutional sphere, every person is free to access the courts.[168] It emphasized that a court of law cannot turn a blind eye to alleged constitutional breaches in order to invoke the principle of party autonomy that binds parties to their agreements.[169] Nonetheless, the Supreme Court added that it does not mean that any person who sets out to petition the court alleging violation of fundamental rights and freedoms under the Bill of Rights must succeed, as cases are determined on their merits.[170]

For the reasons above, the apex court held that the Court of Appeal, by overturning the ruling by the High Court, erred in two ways.[171] This was first done by failing to appreciate and uphold that the dispute before the court related to a breach of constitutional rights.[172] Second, by issuing the relief countermanding that made by the High Court by referring the matter to the arbitrator while making a final determination on matters still pending before the High Court, the Court of Appeal fell into further error.[173] Hence, the court fully reinstated the High Court's orders of 29 June 2016 and stated that it should consider the consequences of any disobedience of those orders.[174] Finally, the

[166] Ibid para 106
[167] Ibid.
[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] Ibid para 107.
[172] Ibid.
[173] Ibid.
[174] Ibid.

court ordered that the matter be remitted to the High Court for disposal of the amended petition dated 20 June 2016 pending before it on a priority basis.[175]

6.0. Observations and Implications

6.1. The Limitation of the Doctrine of Competence-Competence

The High Court observed that even where parties raise constitutional challenges in a commercial dispute, the doctrine of competence-competence would still apply.[176] It is for the arbitral tribunal to determine whether the arbitration agreement is valid and whether the dispute or any issue is arbitrable or not.[177] According to the High Court, it would be improper for a court to determine what is arbitrable or not because it can only intervene when an arbitral tribunal assumes jurisdiction it does not have.[178] Ideally, the arbitral tribunal should be the first to pronounce itself as to whether it has jurisdiction; however, in practice, a court may decide jurisdictional issues before the arbitral tribunal. As rightly argued by Gary Born, a court may decide jurisdictional and arbitrability issues when seized with a claim by a party despite the alleged existence of an arbitral agreement.[179] The other party would then file an application to stay legal proceedings and request the court to refer parties to arbitration.[180] According to Section 6 of the Arbitration Act, a court must refer parties to arbitration unless it finds that the arbitration agreement is *null and void*, inoperative, or incapable

[175] Ibid para 134.
[176] *Bia Tosha Distributors Limited v Kenya Breweries Limited & 3 others* [2016] eKLR, para 92.
[177] Ibid. See also Arbitration Act (Act No. 4 of 1995), s 17.
[178] Ibid. See also *Zanele Investment Holding Limited v Alexander Forbes Emerging Markets (PTY) Limited* [2017] eKLR where the court held that the arbitral tribunal must render itself on whether or not it has jurisdiction.
[179] Gary Born, *International Commercial Arbitration* (6th edn, Wolters Kluwer 2021) 1754.
[180] Tony Cole and Pietro Otolani, *Understanding International Arbitration* (Routledge 2020)19.

of being performed.[181] In determining whether an arbitration agreement is *null and void*, a court may be required to determine whether a certain dispute is arbitrable or not.[182] This is exactly what happened in the Bia Tosha case before the High Court, as the court proceeded to determine whether the commercial dispute contained constitutional issues despite its observation on competence-competence.

6.2. A Commercial Dispute can become a Constitutional Dispute

The Supreme Court decision illustrates that a dispute can transcend the commercial sphere and become a constitutional dispute where a party alleges violations of their fundamental rights in the Bill of Rights and seeks constitutional remedies. Another instance is where third parties are enjoined to the dispute, making arbitration unsuitable. For this reason, the Supreme Court agreed with the High Court that since there were interested parties enjoined to the dispute, the court was the proper forum to resolve the dispute as third parties are not privy to arbitration agreements. This is in line with the general rule that an arbitration agreement only binds parties who have submitted to arbitration. Notably, the Kenyan Arbitration Act does not address the issue of joinder of parties.[183] Therefore, if there is an arbitration agreement concluded to extend its effect to third parties, their consent must be obtained.[184]

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[181] Arbitration Act (Act No. 4 of 1995), s 6. See also Article 16(1), UNCITRAL Model Law on International Commercial Arbitration, (United Nations Document A/40/17, Annex 17), as adopted by the United Nations Commission on trade and law on June 21, 1985.
[182] *Niazsons K Ltd v China Road & Bridge Corporation Kenya* [2001] eKLR.
[183] Paul Ngotho, *Lectures on Arbitration* (Homecoming Publications 2020) 195. The English Arbitration Act 1997 in limited circumstances allows for joinder and consolidation under ss 82(2) and 35. See also *Schiffahrtsgesellschaft Detlef Von Appen GmbH v Wiener Allianz Versichrungs AG & Voest Alpine Intertrading GmbH (The Jay Bola)* [1997] EWCA Civ 1420.
[184] Ibid.

6.3. Determining a Constitutional Issue

The Supreme Court underscored that determining whether a case discloses a constitutional question or not is a difficult task. For some cases, it is easy to identify constitutional issues and other underlying issues, while for others, it is almost impossible. In its view, on a case-by-case basis, a court has to critically evaluate the facts, evidence, and arguments. The authors agree with the Supreme Court that a case-by-case basis is a sound approach and courts should exercise discretion. For instance, despite allegations of violations of the right to a fair administrative action and property being reasonably pleaded with precision, the High Court in *Lipisha Consortium Limited & Another v Safaricom* exercised discretion and found the matter suitable for arbitration.[185]

6.4. Arbitrators cannot interpret the Constitution or grant Constitutional Remedies

The Supreme Court held that arbitrators cannot hear and determine allegations of constitutional breaches and violations of the Bill of Rights. According to the apex court, only the High Court, as a human rights and constitutional court, is entrusted with this mandate. This holding by the Supreme Court affirms its previous holding in *Hussein Khalid & 16 Others v Attorney General & 2 Others* [2019] eKLR and the High Court position in *Royal Media Services Limited v Attorney General & 6 Others*, wherein it was held that only the High Court and the equal status specialised courts have jurisdiction to hear and determine constitutional violations as well as interpret the Constitution.[186] Nonetheless, Parliament is empowered to grant subordinate courts jurisdiction to hear and determine applications for enforcement of constitutional applications.[187] In addition, the Mutunga Rules envision that there may be some appropriate

[185] [2015] eKLR.
[186] [2015] eKLR.
[187] See *Constitution of Kenya* 2010, Article 23(2); Magistrates' Courts Act (Act No. 26 of 2015), s 8.

circumstances where courts may refer matters to ADR.[188] However, courts have been reluctant to refer matters to ADR mechanisms where constitutional issues arise on grounds of inadequate remedies.[189] Yet it is arguable that the Constitution has expanded the scope of arbitrability to include matters that involve public policy; for instance, intergovernmental disputes, which by their nature involve constitutional issues, can be determined through arbitration.[190] Therefore, there must be less reliance on public policy as a ground to oust the jurisdiction of arbitrators.[191]

6.5. The Doctrine of Exhaustion is limited to Statutory Remedies

The Supreme Court clarified that the exhaustion of local remedies applies only to statutory remedies. As rightly observed by the court, arbitrators derive their authority from arbitration agreements and party autonomy. Therefore, in its view, the doctrine cannot be invoked to justify the exhaustion of arbitration as an alternative procedure before approaching court. Whereas the apex court's clarification appears logical, it fundamentally weakens the doctrines of constitutional avoidance and exhaustion which have historically laid a strong foundation for promoting ADR. Interestingly, the apex court has previously held that courts should not determine a constitutional issue when a matter may properly be decided on another basis.[192] As such, the court's pronouncement on the doctrine of exhaustion was unexpected. Even though constitutional issues

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[188] The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, r 31.

[189] *Benard Ambasa v Institute of Human Resource Management & 3 others; Lilian Ngala Anyango (Interested Party)* [2021] eKLR. See also *CIS v Directors, Crawford International School & 3 others* [2020] eKLR

[190] Constitution of Kenya, Article 189(4); *Intergovernmental Relations Ac*t (Act No. 2 of 2012), s 34(b)(ii) and
s 35.

[191] See Vianney Sebayiga, 'Resolving Intergovernmental Disputes in Kenya through Alternative Dispute Resolution (ADR) Mechanisms' 10(2) *Journal of Conflict Management and Sustainable Development*, 2023.

[192] *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* [2014] eKLR

may arise in commercial disputes, most times they are intertwined with commercial issues as a commercial issue can be crafted into a constitutional issue to mirror provisions of the Bill of Rights. To this end, the authors agree with the Court of Appeal that there is no way the infringement of the alleged constitutional rights can be divorced from the written agreements they are embedded in.[193] Accordingly, courts should not undermine arbitration as the method of resolving disputes solely because there are constitutional issues involved.[194] Moreover, the holding by the Supreme Court that the exhaustion of local remedies applies only to statutory remedies implicitly disregards the fact that arbitration is now a constitutionalised method of resolving disputes and is not restricted to the doctrine of exhaustion, which is limited to statutory remedies.[195] Moreover, the court has previously held that by requiring courts to promote "*alternative forms of dispute resolution including … arbitration*", Article 159(2)(c) of the 2010 Constitution entrenches arbitration in Kenya's legal system.[196]

6.6. Affirmation of Appellate jurisdiction under Article 163(4)(a) of the Constitution

The Supreme Court affirmed that its appellate jurisdiction under Article 163(4)(a) does not require certification of the appeal. According to the Constitution, the apex court is empowered to hear and determine appeals as of right in any case involving the interpretation and application of the constitution. In exercising its jurisdiction under this provision, it does not matter whether or not the decision of the Court of Appeal was interlocutory or not. The key factor is whether the issue on appeal took a trajectory of constitutional application and interpretation right from the High Court.[197] However, only cardinal issues of law that deserve the further input of the apex court are appealable. Therefore,

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[193] *Kenya Breweries Limited & another v Bia Tosha Limited & 5 others* [2020] eKLR, para 46.
[194] *Charles Nzioka Kanyaa v Cytonn Real Estate Project Notes LLP & 2 Others* [2021] eKLR.
[195] Constitution of Kenya, Article 159(2)(c).
[196] *Modern Holdings (EA) Limited v Kenya Ports Authority* [2020] eKLR, para 49.
[197] *Gatirau Peter Munya v Dickson Mwenda Kithinji* [2014] eKLR.

an appeal under Article 163(4)(a) must be founded on cogent and constitutional controversy.[198]

6.7. Caution on Ambiguous Status Quo Orders.

The apex court cautioned that courts must be careful when issuing conservatory and other interim reliefs to parties. It observed that while interim reliefs are intended to preserve the substratum of the case by way of status quo orders, courts must use the term *status quo* only when it is practical and should describe the exact position that they seek to preserve. In the Supreme Court's view, such an approach will prevent situations like in the Bia Tosha cases, where each party was left to its own perception as to what the court meant.

7.0. Conclusion

The obligation to arbitrate arising from arbitration agreements does not always translate to a willingness to arbitrate. Given the robust and transformative nature of the Constitution, parties can easily craft purely commercial issues as infringements upon fundamental rights and freedoms under the Bill of Rights so as to circumvent and frustrate the arbitral process. Recognisably, disputes arising out of commercial agreements with a pre-selected private mode of dispute are dynamic and can become constitutional disputes. While the High Court has original jurisdiction to hear and determine violations of rights and freedoms and interpret the Constitution, this mandate should not be used to oust the jurisdiction of arbitrators to resolve commercial disputes that may be intertwined with constitutional issues or affect fundamental rights and freedoms under the Bill of Rights. The High Court, when seized with a petition in the presence of a valid existing arbitration agreement, should critically scrutinise the arguments, pleadings, and merits of the case to determine whether genuine constitutional issues are raised or whether they are merely sprinkled on the pleadings as hooks to oust the jurisdiction of arbitrators. To conclude, the authors urge that even where constitutional issues are raised,

[198] *Member of Parliament, Balambala Constituency v Abdi & 7 others* (Petition 21 (E023) of 2020) [2021] KESC 9 (KLR). See also Supreme Court Act (Act No. 7 of 2011), s 15A.

courts should embrace the doctrine of constitutional avoidance and let disputes be resolved on a contractual basis as opposed to a constitutional basis. In doing so, the courts will be actively obeying their constitutional duty to promote ADR including arbitration. Overall, the effect the Bia Tosha decisions will have on parties' choice of forum for settling otherwise arbitrable disputes, the drafting of arbitration clauses, court intervention, and ADR remains to be seen.

Journal Review: Journal of Conflict Management and Sustainable Development volume 10(4)

By: ***Mwati Muriithi****

Published in June 2023, the Journal of Conflict Management and Sustainable Development Volume 10 Issue 4 is committed to providing a platform for established and upcoming scholars to engage in intellectual debate on key and pertinent themes in Conflict Management and Sustainable Development.

It is edited by Hon. Dr. Kariuki Muigua, Ph.D a member of the Permanent Court of Arbitration, who was awarded: the ADR Practitioner of the Year 2022, The African Arbitrator of the Year 2022; The Chartered Institute of Arbitrators (CIArb) (Kenya Branch) ADR Lifetime Achievement Award 2021; The ADR Publisher of the Year 2021 and The Law Society of Kenya (LSK) ADR Practitioner of the Year Award 2021.

His book, *Settling Disputes through Arbitration in Kenya, 4th Edition;* Glenwood publishers 2022, was awarded the Publication of the Year Award 2022. He is a member of the National Environment Tribunal which was awarded the best performing Tribunal in Kenya for handling the most cases.

The first article '*Safeguarding Human Health through Health in all Policies Approach to Sustainability*' by Hon. Dr. Kariuki Muigua makes a case for human health considerations while making policies in all sectors of the economy through adoption of the Health in All Policies approach to sustainability. The author argues that this approach will go a long way in incorporating human health considerations in decision-making processes across all sectors as a step towards achieving sustainability.

*** LLB (Hons) KU; Dip. In Law (KSL); ACIArb; Advocate of the High Court of Kenya; Legal Researcher.***

Michael Sang in his article *'The Case for the Independence of Kenya's Directorate of Criminal Investigations (DCI): Lessons from International Best Practices'* examines the lessons that Kenya can learn from the United States and the United Kingdom in establishing an institutionally independent Directorate of Criminal Investigations (DCI) and regulating its investigation powers.

'Governance at The Bottom of the Pyramid: Regulating Profit & Corporate Purpose in The Kenyan Bottom-Up Economic Model' by Jacqueline Waihenya captures the place of key Governance issues that may or may not impact uniquely upon MSMEs, particularly within the emerging dynamic focus on the bottom of the so-called pyramid.

Michael Sang in his paper *'Developing an Effective National Counter – Terrorism Strategy for Kenya: Lessons from Comparative Best Practices'* examines the development of an effective national counterterrorism strategy for Kenya through a comparative analysis of best practices in Canada, the United States of America, and South Africa.

'Fostering Efficient Management of Community Land Conflicts in Kenya for Sustainable Development' by James Njuguna critically discusses the concept of community land in Kenya. It defines community land. The paper further analyses the nature and causes of community land conflicts in Kenya and approaches towards management of such conflicts.

'Incorporating Environmental, Social and Governance in an Organisation' by Linda Namiinda discusses how to successfully introduce Environmental, Social and Governance (ESG) into organizations. The paper defines ESG and its applicability in Kenya. It then proceeds to look at the importance of incorporating ESG into an organization.

Hon. Dr. Kariuki Muigua has demonstrated his prowess and sound understanding of Sustainable Development in his paper *'Entrenching a Human Rights Based Approach to Sustainable Development'*. This paper discusses a Human

Rights Based Approach (HRBA) to sustainability as envisaged under the Sustainable Development agenda, and the related topics.

Anne Wairimu Kiramba in her paper *'Embracing Climate Technologies in Climate Change Mitigation and Adaptation for Sustainable Development'* postulates that there is need to embrace climate technologies for climate change mitigation and adaptation in order to foster Sustainable Development. The paper makes a case for the challenges and opportunities for climate technologies in climate change mitigation and adaptation towards Sustainable Development.

'Renewable Energy Transition: Powering a Sustainable Future with Solar, Wind, Hydro, and Geothermal Solutions' by Dr. Dynesius Nyangau delves into the critical topic of the renewable energy transition, focusing on the shift from fossil fuels to renewable energy sources such as solar, wind, hydro, and geothermal power. The paper analyzes the role of supportive policies in driving investment, research and development, and market adoption of renewable energy technologies.

Hon. Dr. Kariuki Muigua in his paper *'A Clarion call for Action: Realising True Sustainable Development'* argues that there is a need for all stakeholders to rise and take their places towards achieving sustainable development. The paper affirms that international cooperation is important in achieving sustainability.

'A Review of Kenya's National Strategy to Counter Violent Extremism: The Case for Reform' by Michael Sang reviews Kenya's National Strategy to Counter Violent Extremism and makes a case for reform.

Lastly, *'Climate Justice and Equity: Navigating the Unequal Impacts of Climate Change towards Equitable Solutions'* by Dr. Dynesius Nyangau focuses on the critical topic of climate justice and equity, shedding light on the unequal impacts of climate change on vulnerable communities and emphasizing the need for equitable solutions.

Construction Adjudication: Overcoming Challenges of Enforcement

By: ***Hon. Dr. Kariuki Muigua****

Abstract

The paper critically examines construction adjudication as a mechanism of managing disputes in the construction industry. It posits that adjudication is a viable tool for managing disputes in the construction industry. It highlights some of its advantages to this end. The paper further explores some of the concerns facing construction adjudication including challenges of enforcement. The paper further suggests solutions towards enhancing the viability of construction adjudication in managing disputes in the construction industry.

1.0 Introduction

The construction industry has been described as a complex and competitive environment in which participants with different views, talents and levels of knowledge of the construction process work together[1]. In such a complex environment with participants from various professions, it has been asserted that each party has its own goals and each expects to make the most of its own benefits[2]. It has been further observed that the construction industry entails multiple and complex processes guided by contracts whereby projects are usually conducted in phases, at times by different players with diverse interests

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[1] Cakmak. E & Cakmak. P.I., 'An analysis of Causes of Disputes in the Construction Industry Using Analytical Network Process.' *Social and Behavioral Sciences* 109 (2014) 183 – 187

[2] Ibid

and involve large sums of money[3]. Due to the diverse interests and difference in perceptions among participants, it has been pointed out that disputes in the construction industry are inevitable[4].

In construction projects, the most common disputes are likely to occur between the contractor and employer or sub-contractor and the main contractor[5]. Disputes can also occur involving consultants, clients, manufacturers, suppliers[6]. These disputes could be caused by factors such as delays in work progress, time extensions, financial failure of the contractor, technical inadequacy of the contractor, tendering and quality of works among others[7]. Disputes in the construction industry are undesirable and could potentially prevent successful completion of projects[8]. To this extent, it has been observed that protracted disputes in the construction industry that remain unsettled can negatively impact on the progress of a project and ultimately delay its delivery[9]. Further, such disputes can negatively impact on relationships which is an unfavorable situation in the construction industry since projects need teamwork in order to be implemented and delivered as planned[10]. Consequently, there is need for effective dispute management mechanisms in the construction industry.

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[3] The National Assembly of Sciences, *Reducing Construction Costs: Uses of Best Dispute Resolution Practices by Project Owners,* Proceedings Report, Federal Facilities Council Technical Report No. 149 (National Assembly of Sciences)

[4] Ibid

[5] *Muigua. K., 'Dealing with Conflicts in Project Management.' Available at http://kmco.co.ke/wp-content/uploads/2018/08/Dealing-with-Conflicts-in-Project-Management.pdf* (Accessed on 04/07/2023)

[6] Dancaster. C, 'Construction adjudication in the United Kingdom: Past, present and future,' *Journal of Professional Issues in Engineering Education and Practice, 134* (2), 204-208.

[7] Cakmak. E & Cakmak. P.I., 'An analysis of Causes of Disputes in the Construction Industry Using Analytical Network Process.' Op Cit

[8] Ibid

[9] Muigua. K., 'Dealing with Conflicts in Project Management.' Op Cit

[10] Ibid

Dispute management in the construction industry previously took the form of multi-tier processes involving determination by an impartial and independent engineer, followed by mediation, in the event a party was dissatisfied by the engineer's determination, and finally arbitration if agreement was not reached at mediation[11]. However, most of such disputes ended up in arbitration due to the ineffectiveness of the first two processes being the determination by an impartial and independent engineer and mediation[12]. However, arbitration which was touted to be an informal, fair, and swift form of justice in managing construction disputes has become too adversarial resulting in procrastination and cost escalation[13]. Managing construction disputes using an adversarial approach, such as modern arbitration, is considered to be in opposition to the maintenance of harmonious relationships between the parties[14]. Parties in construction disputes often prefer dispute management mechanisms that would preserve their business relationship in order to ensure timely and efficient completion of projects[15]. This gave rise to adjudication as the preferred mechanism of managing disputes in the construction industry[16].

The paper critically examines construction adjudication as a mechanism of managing disputes in the construction industry. It explores the opportunities and challenges for construction adjudication including concerns of enforcement. The paper further suggests solutions towards enhancing the viability of construction adjudication in managing disputes in the construction industry.

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[11] Dancaster. C, 'Construction adjudication in the United Kingdom: Past, present and future,' Op Cit

[12] Ibid

[13]Chau. K.W., 'Insight into Resolving Construction Disputes by Mediation/Adjudication in Hong Kong.' Available at *https://research.polyu.edu.hk/en/publications/insight-into-resolving-construction-disputes-by-mediationadjudica* (Accessed on 04/07/2023)

[14] Ibid

[15] Cheeks, J. R. 2003. "Multistep dispute resolution in design and construction industry." *J. Profl. Issues Eng. Educ. Pract.*, No. 129(2) of 2003, 84–91

[16] Ibid

2.0 Conceptualizing Construction Adjudication

Adjudication is one of the Alternative Dispute Resolution (ADR) mechanisms. ADR refers to a set of mechanisms that are used to manage conflicts without resort to courts[17]. These mechanisms include negotiation, mediation, arbitration, neutral evaluation, enquiry, expert determination, adjudication, traditional dispute resolution mechanisms and conciliation[18]. In Kenya, ADR mechanisms have been recognized under the Constitution which mandates courts and tribunals to promote alternative forms of dispute resolution[19]. ADR mechanisms have been hailed for their advantages including informality, privacy, confidentiality, flexibility and the ability to promote expeditious and cost-effective management of disputes which makes them a viable tool of enhancing access to justice[20].

Adjudication has been defined as a dispute management 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[21]. It involves the management of disputes by an independent specialist nominated or agreed upon by the parties, who acts as an expert in the determination of disputes referred to him/her[22]. The adjudicator is required to focus on pertinent issues in the dispute, hear evidence, and arrive at a prompt decision within 28 days of the appointment, relying on his/her own specialist knowledge of the subject matter of the dispute[23]. Adjudication has been

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

[18] Ibid

[19] Constitution of Kenya, 2010, article 159 (2) (c), Government Printer, Nairobi

[20] Muigua. K., 'Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Available at *http://kmco.co.ke/wpcontent/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-DisputeResolution-in-Kenya-Prospects-and-Challenges.pdf* (Accessed on 05/07/2023)

[21] Muigua. K., 'Dealing with Conflicts in Project Management.' Op Cit

[22] Chau. K.W., 'Insight into Resolving Construction Disputes by Mediation/Adjudication in Hong Kong.' Op Cit

[23] Ibid

described an informal process operating under very tight time scales wherein the adjudicator is supposed to reach a decision within 28 days or the period stipulated in the contract[24]. It is a 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[25]. The decision of an adjudicator is binding, unless and until the dispute is finally determined by legal proceedings or by arbitration[26].

Adjudication is a simple and efficient method of managing disputes without resorting to lengthy and expensive court procedure[27]. It has become the construction industry's preferred method of dispute resolution since it recognises the nature of the disagreements that arise within the construction sector[28]. Adjudication was developed to allow for construction contract disputes to be resolved on an interim basis more quickly and cost-effectively than resolution through arbitration or litigation[29]. Its aim is to provide a fast working solution to enable parties quickly resume or continue work under the contract[30]. Adjudication is thus a viable mechanism of managing disputes in the construction industry.

Dispute management in the construction industry can also take the form of Dispute Boards which are normally set up at the onset of a construction project

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[24] Riches. J & Dancaster. C., 'Construction Adjudication.' Available at *https://books.google.co.ke/books?hl=en&lr=&id=U1VavyBLfOsC&oi=fnd&pg=PR5&ots=5CK-Z3qN0_&sig=34PnMjcFfTY5mU0oVwQyxEt1E7I&redir_esc=y#v=onepage&q&f=false* (Accessed on 05/07/2023)

[25] Ibid

[26] Chau. K.W., 'Insight into Resolving Construction Disputes by Mediation/Adjudication in Hong Kong.' Op Cit

[27] Chartered Institute of Arbitrators, Kenya Branch., 'Adjudication.' Available at *https://ciarbkenya.org/adjudication/* (Accessed on 05/07/2023)

[28] Ibid

[29] Centre for Effective Dispute Resolution (CEDR)., 'Construction Adjudication.' Available at *https://www.cedr.com/alternative-dispute-resolution processes/adjudication/construction adjudication/* (Accessed on 05/07/2023)

[30] Ibid

and remain in place throughout its duration to assist the parties, if they so desire, in resolving disagreements arising in the course of the contract and make recommendations or decisions regarding disputes refereed to it by any of the parties[31]. A Dispute Board (DB) is a board of impartial professionals formed at the beginning of the project to follow construction progress, encourage dispute avoidance, and assist in the resolution of disputes for the duration of the project[32]. They are often found in large construction projects to assist parties in resolving or avoiding disputes and, ideally, preventing such disputes from escalating[33]. The primary function of Dispute Boards is to assist parties to a construction contract to avoid disputes by facilitating and improving communication, encouraging the resolution of contentious issues by the parties at the job level rather than allowing them to escalate into full blown disputes and if the issues cannot be resolved at job level, to assist the contracting parties to resolve disputes quickly and cost effectively without the need for arbitration or litigation[34]. Dispute Boards are an effective project management tool for avoiding and resolving disputes on complex projects efficiently and effectively[35]. They can be utilized in the construction industry for effective management of disputes.

The International Federation of Consulting Engineers (FIDIC) envisages the use of Dispute Boards in Construction projects. In its 2017 Red book, FIDIC allows the use of Dispute Avoidance and Adjudication Boards (DAAB) in managing and avoiding disputes arising from construction projects[36]. FIDIC stipulates that disputes shall be managed by a DAAB appointed by the parties within the time

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[31] Building Disputes Tribunal., 'Dispute Review Boards.' Available at *https://www.buildingdisputestribunal.co.nz/dispute-review-board-services/* (Accessed on 05/07/2023)

[32] The Dispute Resolution Board Foundation., 'Dispute Board Concept.' Available at *https://www.drb.org/* (Accessed on 05/07/2023)

[33] ACERIS LAW., 'Dispute Boards and International Construction Arbitration.' Available at *https://www.acerislaw.com/dispute-boards-and-international-construction-arbitration/* (Accessed on 05/07/2023)

[34] Building Disputes Tribunal., 'Dispute Review Boards.' Op Cit

[35] The Dispute Resolution Board Foundation., 'Dispute Board Concept.' Op Cit

[36] FIDIC., 'Construction Contract, 2nd Edition (2017 Red Book).

stipulated in the contract[37]. In terms of avoidance of disputes, FIDIC provides that parties may jointly request the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during performance of the contract[38]. It further provides that the decision of a DAAB shall be binding on both parties who shall promptly comply with it[39]. In case a party is dissatisfied with a decision of a DAAB which has not become final and binding, FIDIC allows such a dispute to be finally settled by international arbitration[40].

From the foregoing, it is evident that various approaches have been embrace towards efficient and effective management of disputes in the construction industry including the use of construction adjudication and Dispute Review Boards. However, the viability of construction adjudication in managing disputes in the construction industry has often been questioned. It has been argued that one of the most fundamental concerns in construction adjudication is the enforcement of adjudicators' decisions[41]. Consequently, there have been cases whereby parties attempt to avoid complying with decisions by adjudicators' such as those mandating them to make payments[42]. The paper critically examines challenges of enforcement in construction adjudication.

3.0 Enforcement in Construction Adjudication: Challenges

Despite the fact that the decision of an adjudicator is final and binding on parties, several challenges arise in enforcement of such decisions. FIDIC envisages the use of arbitration in managing construction disputes where a party is dissatisfied with the decision of a DAAB[43]. It has been pointed out that if a dispute previously referred to adjudication is subsequently the subject of

[37] Ibid, Clause 21.1
[38] Ibid, Clause 21.3
[39] Ibid, Clause 21.4.3
[40] Ibid, Clause 21.6
[41] Redmond. J., 'Adjudication in Construction Contracts.' Available at *http://site.iugaza.edu.ps/kshaath/files/2010/10/06320565172.pdf* (Accessed on 05/07/2023)
[42] Ibid
[43] FIDIC., 'Construction Contract, 2nd Edition (2017 Red Book).' Clause 21.6

litigation or arbitration, the new tribunal will not be dealing with an appeal from the adjudicator since a completely new process will be started in the same way as it would have been prior to the introduction of adjudication[44]. The adjudication process may have helped to refine issues and may affect the way in which parties present and argue their cases but it will otherwise have no effect on subsequent arbitration or litigation proceedings[45]. Thus, in situations where a dispute that was initially referred to adjudication ends up in arbitration or litigation, such a situation can result in delays and potential escalation of disputes which may ultimately damage business relationships and prevent timely completion of projects[46].

Further, challenges can emanate in respect of enforcing an adjudicator's award. In Kenya, courts envisage enforcement of an adjudicator's award through the same procedure adopted in enforcing arbitral awards under the Arbitration Act. This position was upheld in the case of *Republic vs Director General of Kenya National Highways Authority (DG) & 3 others Ex-parte Dhanjal Brothers Limited* where the court decided in part as follows:

> *'Further, the purported Adjudication Award has not even been registered with this High Court, pursuant to Section 36 of the Arbitration Act, Act No 4 of 1995 and therefore is incapable of being enforced in any proceedings as a civil claim[47].'*

Such a position can potentially subject an adjudicator's award to the challenges envisaged under the Arbitration Act. Further, where a construction dispute is finally settled through arbitration after initially being managed through

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[44] Redmond. J., 'Adjudication in Construction Contracts.' Op Cit
[45] Ibid
[46] Chau. K.W., 'Insight into Resolving Construction Disputes by Mediation/Adjudication in Hong Kong.' Op Cit
[47] Republic vs Director General of Kenya National Highways Authority (DG) & 3 others Ex-parte Dhanjal Brothers Limited (2018) eKLR

adjudication, then the resulting arbitral award can be challenged under the grounds set out in the Arbitration Act[48].

It has also been asserted that the decision of an adjudicator can be challenged in instances where adjudicator has acted beyond the scope of his/her jurisdiction[49]. Where an adjudicator acts beyond the jurisdiction conferred to him/her under the contract, then the decision may be subjected to critical scrutiny through arbitration and court proceedings[50]. Thus, in instances where an adjudicator did not have jurisdiction to decide the dispute, the decision will not be enforced[51]. Issues of jurisdiction in adjudication can arise where the dispute is not covered by an adjudication agreement and where the decision is outside the terms of reference in the notice of adjudication[52]. Thus, it is imperative for adjudicators to ensure that they have jurisdiction to hear and determine the disputes in question in order to render enforceable decisions.

Further, enforcement of an adjudicator's decisions can be challenged on grounds of breach of the rules of natural justice[53]. Thus, an adjudicator needs to ensure that each party is given enough opportunity to present their case in order to render enforceable decisions. To adhere to the rules of natural justice, the adjudicator needs to be impartial, act without bias and ensure that he/she does not have a personal interest in the dispute and give both parties fair opportunity to present their cases[54]. In instances where an adjudicator breaches the rules of

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[48] Arbitration Act, No. 4 of 1995, Laws of Kenya, S 35 & 37

[49] Vinden. G., 'Adjudication Enforcement: To Challenge, or Not to Challenge?' Available at *https://gateleyplc.com/insight/in-depth/adjudication-enforcement-to-challenge-or-not-to-challenge/* (Accessed on 07/07/2023)

[50] Redmond. J., 'Adjudication in Construction Contracts.' Op Cit

[51] Ibid

[52]Adjudicator jurisdiction across Jurisdictions.,' Available at *https://www.minterellison.co.nz/insights/adjudicator-jurisdiction-across-jurisdictions* (Accessed on 07/07/2023)

[53] Ibid

[54] Hassan. A.A et al., 'Challenges against Adjudication Decisions on Payment Disputes within the Construction Industry.' *Earth Environ. Sci,* No. 233 of 2019.

natural justice, the decision can be challenged and possibly set aside[55]. Compliance with the rules of natural justice is thus vital for the success of adjudication proceedings.

Finally, the enforcement in adjudication can be challenged on grounds that the decision was influenced by bribery or fraud[56]. Bribery and fraud can taint adjudication proceedings and the sanctity of an adjudicator's decisions[57]. Thus in cases where the making of an adjudicator's decision was influenced by bribery and fraud, such a decision can be challenged and possibly set aside[58]. Thus, it is important for adjudicators to ensure that they act in a professional manner and determine disputes based on the facts and evidence before them and avoid being influenced by fraud or bribery in order to guarantee the enforcement of their decisions.

From the foregoing, it is evident that several concerns can hinder enforcement of decisions in construction adjudication. Addressing these concerns is essential in guaranteeing the success of adjudication proceedings.

4.0 Way Forward

Since adjudication is flexible, fast, expeditious, cost effective and informal, it may be the way to go if effective project implementation and delivery is to be realized in the construction and building industry in Kenya and across the globe[59]. There is need to put in place governing laws and regulations on adjudication in countries such as Kenya which currently do not have such laws in place[60]. Such laws would enhance the viability of adjudication by providing parties access to adjudication, stipulating the procedural and substantive

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[55] Ibid

[56] Ibid

[57] Coulson. L.J., 'Principles of Enforcement.' Available at *https://academic.oup.com/book/41076/chapter-abstract/349875645?redirectedFrom=fulltext* (Accessed on 07/07/2023)

[58] Ibid

[59] Muigua. K., 'Dealing with Conflicts in Project Management.' Op Cit

[60] Ibid

elements of adjudication proceedings, ensuring that payments are made promptly and where disputes arise, ensuring that they are dealt with in a timely manner[61].

Further, it is imperative for parties in construction projects to strive towards conflict avoidance. This will ensure timely and efficient performance of obligations by eliminating conflicts or mitigating their effects to prevent them from escalating and affecting the construction project[62]. Thus causes of conflicts should be properly identified and managed to avoid unnecessary issues in construction projects[63]. FIDIC envisages the use of conflict avoidance in construction projects. To this extent, it provides that parties may request the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the contract[64]. Parties should thus adopt conflict avoidance strategies such as the use of DAAB in order to ensure efficiency during construction projects.

In addition, it is important for parties to ensure that they incorporate effective adjudication clauses in their contracts. Such clauses should be comprehensive and should stipulate pertinent issues such as the dispute management process including amicable management of disputes, appointment of an adjudicator, the jurisdiction of the adjudicator, applicable laws, timelines for managing disputes, binding nature of decisions and enforcement of decisions among others[65]. This will ensure the viability of adjudication in managing construction disputes.

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[61] Dancaster. C, 'Construction adjudication in the United Kingdom: Past, present and future,' Op Cit

[62] Gajaman. K et al., 'Conflict Avoidance in Construction Stage through Proper Practice in Pre Contract Stage.' *Proceedings of the International Conference on Industrial Engineering and Operations Management Bangkok, Thailand, March 5-7, 2019*

[63] Ibid

[64] FIDIC., 'Construction Contract, 2nd Edition (2017 Red Book).' Clause 21.3

[65] IPleaders., 'Drafting a Dispute Resolution Clause in Construction Contracts.' Available at *https://blog.ipleaders.in/drafting-a-dispute-resolution-clause-in-construction-contracts/* (Accessed on 07/07/2023)

Further, there is need to redefine the role of courts in adjudication in order to ensure consistent court decisions on enforcement of adjudication awards in order to promote the growth of construction adjudication[66]. It has been argued that the role of courts in other ADR mechanisms such as arbitration has hindered the growth of these mechanisms due to the lack of uniformity in aspects such as setting aside and enforcing decisions[67]. Thus, it is important to redefine the role of courts in adjudication in order to enhance its growth[68]. Courts should also adopt a uniform approach towards enforcement of decisions in order to promote consistency and certainty in construction adjudication[69].

Finally, it is paramount for adjudicators to ensure that their conduct is appropriate during adjudication proceedings. Adjudicators should act within jurisdiction and conduct the proceedings in a fair manner that aligns with the rules of natural justice[70]. They should also ensure that their decisions are appropriate and grounded in law and not influenced by bribery or fraud[71]. This will enhance the viability of adjudication and guarantee enforcement of decisions.

5.0 Conclusion

Construction adjudication is a viable mechanism of managing disputes in the construction industry[72]. It has the ability to provide expeditious, flexible and

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[66] Dancaster. C, 'Construction adjudication in the United Kingdom: Past, present and future,' Op Cit

[67] Kariuki. F., 'Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community.' Available at http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Recognition-and-Enforcement-of-Foreign-Arbitral-Awards.pdf (Accessed on 07/07/2023)

[68] LexisNexis., 'Role of the Court during the Adjudication.' Available at *https://www.lexisnexis.co.uk/legal/guidance/role-of-the-court-during-the-adjudication* (Accessed on 07/07/2023)

[69] Ibid

[70] Hassan. A.A et al., 'Challenges against Adjudication Decisions on Payment Disputes within the Construction Industry.' Op Cit

[71] Ibid

[72] Riches. J & Dancaster. C., 'Construction Adjudication.' Op Cit

cost effective management of disputes and restoration of relationships to enable parties quickly resume or continue work under the contract[73]. However, the viability of construction adjudication can be inhibited by challenges of enforcement. Factors such as reference of disputes to arbitration or litigation, lack of jurisdiction, failure to adhere to the rules of natural justice and influence of bribery and fraud on decisions can hinder enforcement of decisions in adjudication[74]. Measures that can be adopted in order to enhance the viability of construction adjudication include promoting conflict avoidance, enacting governing laws and regulations, ensuring that parties draft effective adjudication clauses, redefining the role of courts in adjudication and adoption of appropriate conduct by adjudicators[75]. Through these measures, the efficacy of construction adjudication in managing disputes in the construction industry will be strengthened. It is indeed possible to overcome the challenges of enforcement in construction adjudication.

[73] Chau. K.W., 'Insight into Resolving Construction Disputes by Mediation/Adjudication in Hong Kong.' Op Cit

[74] Hassan. A.A et al., 'Challenges against Adjudication Decisions on Payment Disputes within the Construction Industry.' Op Cit

[75] Gajaman. K et al., 'Conflict Avoidance in Construction Stage through Proper Practice in Pre Contract Stage.' Op Cit

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Arbitration Act, No. 4 of 1995, Laws of Kenya

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Cakmak. E & Cakmak. P.I., 'An analysis of Causes of Disputes in the Construction Industry Using Analytical Network Process.' *Social and Behavioral Sciences* 109 (2014) 183 – 187

Centre for Effective Dispute Resolution (CEDR)., 'Construction Adjudication.' Available at *https://www.cedr.com/alternative-dispute-resolution processes/adjudication/construction adjudication/*

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Chau. K.W., 'Insight into Resolving Construction Disputes by Mediation/Adjudication in Hong Kong.' Available at *https://research.polyu.edu.hk/en/publications/insight-into-resolving-construction-disputes-by-mediationadjudica*

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Resolving Conflicts Through Mediation in Kenyan Schools

By: ***Storm Thiaka****

Abstract

Children are defined as "individuals under the age of 18(or the majority)". This paper analyses bullying, drug abuse, burning of school property, poor performance and adolescent sexual activity as issues in the context of our society, making a case for mediation as a remedy. Bullying, sexual activity, arson and poor performance have significant impacts on the lives of children, obstructing their school life and breaking their connections to the community. Conflict resolution and knowledge of how a child works are important factors to be considered in attempting to address the issues identified. These skills are seemingly lacking in the education system of Kenya, particularly in the training curriculums of teachers. A solution is required that is cognizant of the legal and regulatory mandates of the Kenyan education system.

The solution proposed is child-focused mediation and child-inclusive mediation. Child-focused mediation involves the mediator steering a session to focus on the needs of a child while child-inclusive mediation involves giving a child the opportunity to give input in disputes that affect them. Both of these methods would allow the Kenyan education system to understand the perspective of children and enhance child participation in conflict resolution. Such a system would require only one mediator to be present at every primary and secondary school, that would handle a select number and type of issues, developed by specific regulatory bodies in Kenya. This mediator would require accreditation as a mediator and ideally be sourced from the population of teachers themselves. This would secure the children's interests and submit the mediator to a system of standards and codes applicable to both a teacher and mediator.

Keywords: children, child rights, education, mediation, child-inclusive mediation, alternative dispute resolution, family law.

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1. Introduction

Children, defined by the Children's Act, 2022 are individuals who have not attained the age of eighteen years[1]. The African Charter on the Rights and Welfare of the Child as well as the UN Convention on the Rights of a Child define a child in a similar way; a person under the age of 18[2]. Alternatively, the Merriam-Webster Dictionary defines a child to be a young person between infancy and puberty[3]. However, for purposes of this paper the definition in the Children's Act and respective International sources are the best place to start in analysing the nature of a child and the conclusions one can make from the actions and behaviours of children. These actions and behaviours are often misunderstood or misinterpreted by adults for numerous reasons, as will be demonstrated. This misinterpretation can often lead to undesirable results on both the side of adults and children.[4] This paper however, will focus only on the relationship between children and the education system as a whole.

Children naturally develop dependency on their parents from infancy and it is as they grow that they begin to develop independence as they explore the world around them.[5] Overprotection by parents tend to reinforce dependency and

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[1] Section 2, *Children Act* (Act No. 29 of 2022).

[2] Article 2, *African charter on the rights and welfare of the child*, 1 July 1990, CAB/LEG/24.9/49.

[3] Merriam Webster Dictionary, online dictionary – Definition | Child on 10 September 2022.

[4] Contextually, these misinterpretations are often a function of authoritarian parenting where parents pursue control of their children, disobedience of which is followed by harsh punishments that have shown to cause low self-esteem and depression as shown in these papers: Priyansha Singh Jadon and Shraddha Tripathi, 'Effect of Authoritarian Parenting Style on Self Esteem of the Child: A Systematic Review' (2017) 3 International Journal of Advance Research and Innovative Ideas in Education 909; Keith A King, Rebecca A Vidourek and Ashley L Merianos, 'Authoritarian Parenting and Youth Depression: Results from a National Study' (2016) 44 Journal of prevention & intervention in the community 130.

[5] Emanuel K Beller, 'Dependency and Independence in Young Children' [2012] The Journal of Genetic Psychology <*https://www.tandfonline.com/doi/abs/10.1080/00221325.1955.10532913*> accessed 20 July 2023.

undermine independence. Furthermore, the idea of child independence becomes a source of anxiety, reinforcing the need for dependency.[6] Mediation is one of several alternative methods of accessing justice outside the formal adversarial court system.[7] The Civil Procedure Act defines mediation as an informal non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute[8]. This paper will demonstrate how the two main aspects of this definition, non-adversarial and impartial, are the best fit for providing solutions to the ensuing issues facing children in schools and furthermore the education system as a whole.

2. Children and their Developmental Stages

Children experience very many complex changes of their biological and psychological makeup within the first few years of their lives.[9] Not only do children acquire 90% of their adult volume within the first six (6) years of life[10], but it is during this stage that they have the greatest capacity to learn and acquire information from the world around them that is both unfamiliar and complex. However, despite this general uniformity of growth, there is evidence to show that children are different, and grow differently.[11] These differences are described by psychologists as "stable", that is that individual children, compared to one another show clear differences in growth and developmental behaviour very early on in their lives[12].

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[6] Ibid 27.
[7] Kariuki Muigua and Francis Kariuki, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' (2015) 1 Strathmore LJ.
[8] Section 2, *Civil Procedure Act* (Cap 21).
[9] LaRue Allen and others, 'Child Development and Early Learning', *Transforming the Workforce for Children Birth Through Age 8: A Unifying Foundation* (National Academies Press (US) 2015) <*https://www.ncbi.nlm.nih.gov/books/NBK310550/*> accessed 20 July 2023.
[10] Timothy T Brown and Terry L Jernigan, 'Brain Development During the Preschool Years' (2012) 22 Neuropsychology Review 313.
[11] Koraly Pérez-Edgar and others, 'Individual Differences in Infancy Research: Letting the Baby Stand out from the Crowd' (2020) 25 Infancy : the official journal of the International Society on Infant Studies 438.
[12] William Kessen, 'Research in the Psychological Development of Infants - An Overview' (1963) 9 Merrill-Palmer Quarterly of Behavior and Development 83.

Research shows that school discipline is incredibly important in child performance in schools, as more authoritative schools that are both demanding and responsive demonstrate better results than schools that are perceived to be more indifferent about learner behaviour.[13] The following analysis, however, will bring out incidences that fall outside the normal behaviour off learners, demonstrating the gaps existing within the education system at every level save for tertiary education.

2.1. Primary School

The first issue in this stage is the impact that studies have on the child's wellbeing, psychologically and socially. Academic pressure is an issue that begins in primary school and follows every person even after they complete their tertiary studies.[14] Stress from home, unrealistic parental expectations and problematic children were noted to be issues arising on the part of the children[15]. Studies show that most of the reasons for a child's poor performance exists outside themselves, with minimal results faulting internal traits; consensus being that even those internal flaws are out of the child's hands.[16]

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[13] Chris Baumann and Hana Krskova, 'School Discipline, School Uniforms and Academic Performance' (2016) 30 International Journal of Educational Management 1003.

[14] Yu Hang, 'A Literature Review on the Students of Psychological Pressure of Postgraduates' (2016) 5 Asian Journal of Social Sciences & Humanities, Chikusei 23; Steve Bossy, 'Academic Pressure and Impact on Japanese Students' (McGill University 1996).

[15] Anne Wanjiru Mbwayo and others, 'Parents' and Teachers' Perceptions of Factors Affecting Learning in Kenya' (2020) 7 Global Social Welfare 245, 250–251.

[16] Ibid 250–251; John A Finger and Morton Silverman, 'Changes in Academic Performance in the Junior High School' (1966) 45 The Personnel and Guidance Journal 157, 157; Samer M Al-Zoubi and Mohammad A Bani Younes, 'Low Academic Achievement: Causes and Results' (2015) 5 Theory and Practice in Language Studies 2262, 2262; Lisa Flook, Rena L Repetti and Jodie B Ullman, 'Classroom Social Experiences as Predictors of Academic Performance.' (2005) 41 Developmental Psychology 319, 325.

School performance is seen as a significant factor that can cause psychological difficulties in children.[17] Some children, equipped with the tools to reorient themselves, can move forward and even improve their performance; most however, do not have the tools to do so.[18] There is little reprieve for these children. Poor performance has been shown to eventually result in bullying and drug use among other issues[19]. The fact that poor academic performance is presented to their peers as a bad example, does not lend any aid to the situation. Illustrated here is, once again, helplessness. A child who is not equipped nor able to self-motivate toward improving their own circumstances.[20]

While academic pressure is one of the highest priorities of schools and important in its own right, there are other issues just as pressing identified in children in primary such as bullying.[21] An American University undertook a study in middle schools where it noted that one of the most severe stressors to children was substance abuse[22]. Another study in Kenya found that 20.2 percent of primary school students have used at least one drug in their lifetime and that

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[17] *Development During Middle Childhood: The Years From Six to Twelve* (National Academies Press 1984) <*http://www.nap.edu/catalog/56*> accessed 21 July 2023.

[18] Termed as self-efficacy, this is a student's ability to address difficulties as noted in this study, John Lane, Andrew M Lane and Anna Kyprianou, 'Self-Efficacy, Self-Esteem and Their Impact on Academic Performance' (2004) 32 Social Behavior and Personality: an international journal 247.

[19] Samuel Tieku Gyansah, Rejoice Soku and Gabriel Esilfie, 'Child Delinquency and Pupils' Academic Performance in Fumesua Municipal Assembly Primary School in the Ejisu-Juaben Municipality, Ashanti Region, Ghana' (2015) 6 Journal of Education and Practice 107, 107; Catherine Spooner, 'Causes and Correlates of Adolescent Drug Abuse and Implications for Treatment' (1999) 18 Drug and Alcohol Review 453, 453.

[20] Flook, Repetti and Ullman (n 17) 325.

[21] Ken Rigby, 'Consequences of Bullying in Schools' (2003) 48 The Canadian Journal of Psychiatry 583.

[22] Maurice J Elias, Michael Gara and Michael Ubriaco, 'Sources of Stress and Support in Children's Transition to Middle School: An Empirical Analysis' (1985) 14 Journal of Clinical Child Psychology 112, 114.

this has affected class performance and leads to repetition of classes[23]. Substance and drug abuse show a lack of knowledge in the effects of drugs, inappropriate attitudes toward drugs and a lack of skills to reject drugs among other things.[24] The causes for substance abuse in children are few and are not so dissimilar to those causes seen in adults.[25] Five causes stand out in this paper's context: To rebel against parental and/or societal values, to feel as though they are mature, to feel something different, to destroy themselves and lastly, that drug abusers reflect the disfunction of the environment they are born into[26]. The common denominator in these is that children have a low self-image and turn to some external "medicine" to fill in the gap.

2.2. High School

2.2.1. Bullying

Bullying is defined by the American Psychological Association as aggressive behaviour in which someone intentionally and repeatedly causes another person injury or discomfort[27]. In Kenya, bullying is often perpetrated by groups of students, mainly from low to middle income homes against the general student body[28].

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[23] National Authority for the Campaign Against Alcohol and Drug Abuse & Kenya Institute for Public Policy Research and Analysis, '*Status of drugs and substance abuse among primary school pupils in Kenya*' 2019.

[24] Jirapa Siriwatanamethanon and others, 'Strategies to Prevent Drug Abuse among Primary School Students' (2012) 7 The Journal of Behavioral Science 59, 60.

[25] Ifeoma P Okafor, 'Causes and Consequences of Drug Abuse among Youth in Kwara State, Nigeria' (2020) 12 Canadian Journal of Family and Youth/Le Journal Canadien de Famille et de la Jeunesse 147, 149.

[26] Donald J Samuels and Muriel Samuels, 'Low Self-Concept as a Cause of Drug Abuse' (1974) 4 Journal of Drug Education 421, 31.

[27] 'Bullying' <h*ttps://www.apa.org/topics/bullying*> accessed 8 September 2022.

[28] Florence M Itegi, 'Bullying and Its Effects: Experiences in Kenyan Public Secondary Schools' (2017) 5 International Journal of Education and Research 25 <*https://ir-library.ku.ac.ke/handle/123456789/18209*> accessed 8 September 2022.

There are two ways of looking at bullying: direct and indirect bullying.[29] In girls' schools, it is more common to see indirect bullying; where lies are told at the expense of another or some other strategy such as blackmail[30] with a high percentage predisposed to playing "nasty tricks" on others[31]. Boys are more predisposed to direct bullying. This includes taking other students' belongings as well as physical aggression and assault, with greater prevalence in boarding schools than day schools[32]. There also exists a unique category of bullies that themselves are victims of bullying.[33] This data shows that at least two-thirds of the sample population of students has been the victim of some sort of bullying[34]. What are children to do when faced with such adversity? Article 53(1)(b) of the Constitution requires that all children be in school, and protects every person's right to education in article 43(1)(f). This places a duty on parents to find a school for their child and pay whatever fees are required. So, children are stuck in a school where they could very well be a victim of bullying for their entire stay, which is a realistic possibility according to Dr. David Ndetei *et al*[35].

2.2.2.Sexual Activity, Abuse and Harassment

In a study taken to analyse the factors associated with sexual activity in adolescents, the results showed that over 30 percent of adolescents reported having had sexual intercourse[36] and yet another study reported that more than

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[29] Ron Banks, 'Bullying in Schools. ERIC Digest.', *ERIC Digest* (Clearinghouse on Elementary and Early Childhood Education, Educational Resources Information Center 1997); Lopes Neto and Aramis A, 'Bullying: Aggressive Behavior among Students' (2005) 81 Jornal de Pediatria s164.

[30] Itegi (n 30) 26; David Ndetei and others, 'Bullying in Public Secondary Schools in Nairobi, Kenya' (2007) 19 Journal of Child and Adolescent Mental Health 49–50.

[31] Ndetei and others (n 32) 51.

[32] Ibid 49.

[33] An Yang and Christina Salmivalli, 'Different Forms of Bullying and Victimization: Bully-Victims versus Bullies and Victims' (2013) 10 European Journal of Developmental Psychology 723.

[34] Ndetei and others (n 32).

[35] Ibid.

[36] Caroline W Kabiru and Pamela Orpinas, 'Factors Associated with Sexual Activity among High-school Students in Nairobi, Kenya' (2009) 32 Journal of Adolescence 1023.

40 percent of students had engaged in sexual behaviour[37]. The most important factor causing this sexual behaviour for the purposes of this paper is, one, children from homes with both parents present are less likely to engage in sexual activity[38]. Secondly, children from poorer, more rural homes were at greater risk of sexual activity[39]. Lastly, it was noted that children, especially males, with low or no religious beliefs consisted 90 percent of those who did reported that they had engaged in sexual activity.

However, there are certain concerns presented by the studies, that show that most children engage in sexual activity before the age of 16; males engage in sexual activity at around 13 years. Females particularly tend to choose sexual partners that are about 18 years of age.[40] Sexual abuse and harassment of children, as was before, is still prevalent in Kenya. Over 57 percent of children in a study reported that they have faced sexual harassment[41]. They reported that the school was the second most unsafe place to be in which they encountered sexual harassment or abuse. In a 2014 survey, it was reported that 1 in 5 girls begun childbearing and that in Narok, 4 in 10 girls gave birth at a tender age[42]. Addressing the impacts of their own sexual behaviour is never done directly due to the guilt and shame that comes along with asking about sex due to children's perceived gender roles[43]. While schools ideally have some measure

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[37] Tammary Esho, Arun Datta and Samuel Muniu, 'Sexuality Experiences of Secondary School Students in Nakuru, Kenya: A Cross-Sectional Study' (2018) 18 African Health Sciences <*https://www.ajol.info/index.php/ahs/article/view/173561*> accessed 9 September 2022.

[38] Kabiru and Orpinas (n 38) 1032.

[39] Ibid 1031.

[40] Ibid 1029.

[41] Sara Jerop Ruto, 'Sexual Abuse of School Age Children: Evidence from Kenya' (2009) 12 Journal of international Cooperation in Education 177, 180.

[42] Ministry of Education, *National education sector strategic plan,* 2018, 27; Kenya National Bureau of Statistics, Ministry of Health, National AIDS Control Council, Kenya Medical Research Institute, National Council for Population and Development, DHS Program, ICF International, Kenya *Demographic and Health Survey* 2015 – <*https://dhsprogram.com/pubs/pdf/fr308/fr308.pdf*> on 10 September 2022.

[43] Kabiru and Orpinas (n 38) 1035.

of sexual education, it is reported that most children turn to their peers, and even their parents, before enquiring with their teachers[44]. So, children seek such information from their peers and the internet. This creates a myriad of issues that are not the present subject of this paper. However, children do seek out information that is supposed to "assist" them. However, with no authoritative regulation and oversight, this assistance only serves to push them further into sexual activity.

Bullying, poor academic performance, drug and substance abuse and early sexual activity are seemingly prevalent in our schools from primary to high school. However, these issues can be described as anomalies of normal and healthy childhood development. The remedies are mostly unavailable to caregivers and authority figures due to the poor child psychological information network in Kenya.[45] The result is that these issues are addressed poorly within schools and beyond. The next section will focus on how schools are failing to curb the issues described.

3. The Problem in Our Education System

Teachers are required to be trained in education from recognised training institutions.[46] Moi University's Bachelor of Education (Arts) teaches all the pre-requisite skills for teaching, including educational psychology, except for any course related to child psychology or conflict resolution.[47] Kenyatta University's Bachelor of Education Courses mainly focus on substantive educational study and unfortunately gives little additional information on the specific units taught

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[44] Esho, Datta and Muniu (n 39) 213; Ali Mehryar Karim and others, 'Reproductive Health Risk and Protective Factors among Unmarried Youth in Ghana' (2003) 29 International Family Planning Perspectives 14, 17.

[45] Dorcas N Magai, Jamil A Malik and Hans M Koot, 'Emotional and Behavioral Problems in Children and Adolescents in Central Kenya' (2018) 49 Child Psychiatry & Human Development 659, 669.

[46] The Teachers Service Commission Code of Regulations for Teachers, 2015 s20.

[47] 'Bachelor of Education Arts' (*Moi University, School of Education*) <*https://education.mu.ac.ke/index.php/k2-categories/undergraduate/bachelor-of-education-arts*> accessed 20 July 2023.

each semester[48]. From the superficial research done, it is only Early Childhood bachelor programmes and few universities such as the University of Nairobi that offer more in-depth units on child development and psychology[49].

There is a distinct difference between parents and other caregivers.[50] Caregivers do not necessarily have a familial relationship with the child and need only relate to the day-to-day decisions made concerning a child.[51] Parents, for one, do not go to any classes to learn how to raise a child.[52]. From observation of practice in schools, the general remedies adults and the education system tend to prefer include: some marginal unchanging education on the particular vice being discouraged, negative criticism, beating, shame, or some form of "additional" work or responsibility intended to occupy them and remove the possibility that the child would have anything to do except "fix" his/her problem in the specific manner that the educator decides. Children do not trust adults to assist them with their problems in fear of the consequences of doing so.[53]

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[48] 'Bachelor of education (arts) and bachelor of education (science)' (*Kenyatta University School of Education*) – <*http://education.ku.ac.ke/index.php/academic-programs/undergraduate/94-programmes/undergraduate/227-bachelor-of-education-arts-and-bachelor-of-education-science*> on 11 September 2022.

[49] 'Bachelor of education (early childhood education)' (*Kenyatta University School of Education*) – <*http://education.ku.ac.ke/index.php/academic-programs/undergraduate/94-programmes/undergraduate/223-bachelor-of-education-early-childhood-education*> on 11 September 2022; 'BACHELOR OF EDUCATION (ARTS) | Department Of Educational Studies' (*University of Nairobi Department of Educational Studies*) <https://edustudies.uonbi.ac.ke/bachelor-education-arts> accessed 11 September 2022.

[50] Children Act 2022 s 2 Contrasting the definition of a parent and that of a person give 'care and control'.

[51] Ibid.

[52] Section 11, *Children Act* (Act No. 29 of 2022).

[53] Ndetei D and others, 'Bullying in public secondary schools in Nairobi, Kenya', 46; de Wet C, 'Bullying rife in FS schools' News24, 2 June 2005 – <*https://www.news24.com/News24/Bullying-rife-in-FS-schools-20050602*> on 13 September 2022; New Zealand Ministry of Education, 'Why kids don't talk' Bullying Free NZ – <*https://bullyingfree.nz/parents-and-whanau/why-kids-dont-talk/*> on 13 September 2022; Committee for Children, 'Why don't kids report bullying?' Committee for Children, 7

Much like the underlying reasons for a tantrum, children tend to deal with their issues problematically to fight against an "oppressor threatening to take away their liberties"[54]. Parents especially endeavour to curb this by displaying rejection as noted in a paper by Peter Peretti and others, that results in children that develop attention-seeking behaviours.[55] Is this a reasonable and justifiable trade-off for the damage done to school property and the lives lost in the cases of school arson as well as the mental repercussions of complete ignorance of a child's emerging needs?

4. Existing Frameworks and their Failure

4.1. Legal and Constitutional Framework

The Constitution of Kenya provides for the rights of a child under article 53 which include the rights to: education, nutrition, shelter and health care, protection from harm, not to be detained and that their best interests are secured. Article 22(3) further stipulates that the Government should address the needs of children. The Convention on the Rights of a Child affirms most of these rights as it provides for the rights to: education, have their best interest prioritised and those responsible held accountable, life, survival and development, protection from violence, health, water, food and environment and protection from harmful work.[56]

The Children's Act, 2022 has adopted a significant number of rights also provided by the Convention. It provides for the rights of a child to: have their best interests prioritized, education, leisure, recreation and play, healthcare,

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September 2016 – <*https://www.cfchildren.org/blog/2016/09/why-dont-kids-report-bullying/*> on 13 September 2022.

[54] Susan Isaacs, 'Temper Tantrums in Early Childhood in Their Relation to Internal Objects' (1940) 21 International Journal of Psycho-Analysis 280.

[55] Peter O Peretti, Denise Clark and Pat Johnson, 'Affect of Parental Rejection on Negative Attention-Seeking Class Room Behaviours' (1983) 25 Indian Journal of Psychiatry 185.

[56] Articles 28, 3, 6, 19, 24, 32, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

protection from child labour, abuse, harmful cultural practices and drugs, freedom from torture and right to assemble, which includes a right to express views on those things affecting them.[57]

In addition to this, the Act establishes various offices that are concerned with the welfare, administration and management of children and child services[58] as well as other offices intended to manage child services within the Counties. It provides for independent charitable children's institutions, children's courts, custody and maintenance regulations, guardianship, judicial intervention, children in need of care, foster care, adoption and children in conflict of the law.[59] With regard to teachers, the Teachers Service Commission (Code of Conduct and Ethics for Teachers) Regulations[60] provides the code of conduct by which teachers must abide. These standards position a teacher in a fiduciary relationship to children and the public.

From the foregoing issues identified, there is a very apparent gap that exists where these laws and regulations seem to be absent within the school system and only seem to apply to charitable children's institutions and remand centres. Admittedly, the school system does have a few remedies it attempts to lay out to deal with these issues, but these are mostly inadequate or failing as is. These remedies and their failures will be analysed in the subsequent part of this paper.

4.2. Remedial programmes within the curriculum

There are various resources online that provide assistance to parents and really any caregiver, to curb bullying. However, the school administration has an obligation to create a child-friendly environment that ensures internal harmony

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[57] Sections 8, 13, 14, 16, 18, 22, 23, 24, 25, 27, 28, *Children Act* (Act No. 29 of 2022); Articles 3, 12, 13, 15, 16, 31, 33, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3; See also Article 18(3), *African Charter on Human and Peoples' Rights,* 27 June 1981, 21 ILM 58.

[58] Part IV, *Children Act (Act No. 29 of 2022).*

[59] Parts VII–XV, *Children Act* (Act No. 29 of 2022).

[60] *Teachers Service Commission (Code of Conduct and Ethics for Teachers) Regulations* (Legal Notice No. 162 of 2015).

as well as external protection[61]. One of the ways the education system has endeavoured to maintain internal harmony is through the presence of student leaders.[62] The titles of these student leaders change from one school to another; however, their main role is to maintain law and order among students, some even involved in decision making[63]. However, the power given to these leaders has evidently facilitated more bullying[64]. Other remedies for bullying have been: expulsion or suspension, transfers and corporal punishment. Guidance and counselling is another strategy used by schools that has since failed because teachers are intended to be the counsellors but are too busy being teachers rather than psychologists[65].

Academic performance, on the other hand is treated with more direct attention. While corporal punishment is still used to date to deal with unfinished homework, lateness to classes, poor test results and a plethora of issues, school systems also attempt to increase class time either for all students or a select few.[66] The law empowers school administrations to make decisions relating to the academics of students.[67] Notably, while extra classes are not permitted[68] some parents do not mind the extra classes because their

[61] Joyce MA Lugulu and Joseph Katwa, 'Bullying in Public Secondary Schools in Uasin-Gishu County, Kenya: Appraisal of Administrative Interventions' (2020) 12 Journal of African Studies in Educational Management and Leadership 41, 43.
[62] Onditi Kennedy, 'Managing Student Discipline through Student Leadership in Kenyan Secondary Schools' (2018) 6 European Journal of Research and Reflection in Educational Sciences Vol.
[63] Lugulu and Katwa (n 63) 45.
[64] Ibid.
[65] Ibid 46.
[66] Le Thuc Duc and Bob Blauch, 'Do Extra Classes Improve Cognitive Test Scores: Evidence from Vietnam' [2012] Young Lives 15.
[67] Basic Education Act 2013 On the roles of the Board of Management.
[68] 'Ban on Remedial Tuition Still in Place, PS Jwan – Kenya News Agency' (14 March 2022) <https://www.kenyanews.go.ke/ban-on-remedial-tuition-still-in-place-ps-jwan/> accessed 20 July 2023.

children out of the house[69]. This is despite the anxiety and depression more school time would produce.

4.3. Corporal Punishments

The Constitution of Kenya(COK) provides a myriad of protections for children against corporal punishment. Article 29(e) of the COK explicitly protects every person from corporal punishment, while article 29(f) speaks of protection from punishment of a degrading manner. Article 25(a) provides that this particular right cannot be limited in any way. The Bill of Rights binds every person to its provisions, and does not make any exclusion of its applicability[70], and in this case article 24 does not apply either. The recently passed Children Act of 2022, states that any person that metes out corporal punishment is guilty of an offence under the prevention of torture act[71].

However, corporal punishment is still widely used around the country. The depths of social media are filled with videos of school children being beaten, at times brutally, all in the name of discipline. Various studies have shown that corporal punishment is still very present within the country since the promulgation of the 2001 Children Act to date[72]. Teachers turning to corporal punishment has been linked to lack of accountability, attempts at maintaining discipline and punishing poor academic performance among others[73]. Teachers

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[69] Lewis Nyaundi, 'Schools Forcing 6-Year-Olds to Attend Saturday Classes — Parents' *The Star* (Nairobi, 25 February 2021) <*https://www.the-star.co.ke/news/2021-02-25-schools-forcing-6-year-olds-to-attend-saturday-classes--parents/*> accessed 14 September 2022.

[70] Constitution of Kenya 2010 art 20(1).

[71] Prevention of Torture Act 2017 s 7.

[72] Lorine Achaya, 'The Return of Corporal Punishment in Schools' *Standard Entertainment* (Nairobi, 2017) <*https://www.standardmedia.co.ke/entertainment/news/article/2000224085/the-return-of-corporal-punishment-in-schools*> accessed 3 September 2022; Maureen Mweru, 'Why Are Kenyan Teachers Still Using Corporal Punishment Eight Years after a Ban on Corporal Punishment?' (2010) 19 Child abuse review 248, 248.

[73] N Kimani Gerald, M Kara Augustine and Teresa B Ogetange, 'Teachers and Pupils Views on Persistent Use of Corporal Punishment in Managing Discipline in Primary Schools in Starehe Division, Kenya' (2012) 2 International Journal of Humanities and

and even parents have stated that without corporal punishment schools would devolve into chaos[74]. Indeed, some parents attribute the recent arsons of schools to the lack of corporal punishment[75].

Corporal punishment is seen to cause physical injuries, emotional and psychological harm, poor performance in school, bullying, disobedience and even social disorders[76]. There is no argument in support of such treatment of children that does not simultaneously present children as "lesser" humans that must be forced to listen by inflicting bodily harm or intimidation. This is despite the fact that numerous research papers have shown that corporal punishment leads to overwhelmingly high chances of development of the same undesirable traits that it is supposed to curb[77].

4.4. Other disciplinary measures

Other disciplinary measures used by schools as they attempt to move away from corporal punishment are not so different from it. In fact, it can be said that it is truly torture. Students are forced to do things that cause them a progressive amount of pain and told to stop just before the pain becomes visibly unbearable to the teacher. Students have been reported being told to stand in the hot sun with their arms up outstretched for several hours, others are asked to kneel on the ground for an equally considerable amount of time[78].

Social Science 269; 'Human Rights Watch World Report 1999 - Kenya' (Human Rights Watch 1999).

[74] Gerald, Augustine and Ogetange (n 75); 'UNESCO Institute of Education: Annual Report 2000-2001' (UNESCO Institute of Education 2000) Programme and Meeting Document.

[75] Mweru (n 74); Standard Team, 'Why Students Are Burning Schools Again' *The Standard* (2018) <*https://www.standardmedia.co.ke/counties/article/2001287405/revealed-why-students-are-burning-schools*> accessed 14 September 2022.

[76] Mweru (n 74) 249.

[77] Elizabeth Thompson Gershoff, 'Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review.' (2002) 128 Psychological bulletin 539, 539.

[78] Gerald, Augustine and Ogetange (n 75) 269.

4.5. Student protest

Article 37 of the COK confers a right on every person to demonstrate and present petitions to public authorities. The repealed Children Act, 2001 had no such provision allowing students to protest or assemble for such a common cause. However, the Children Act, 2022 expressly provides that children be allowed to peacefully assemble for the purpose of presenting their complaints to public authorities.[79]

Much like a lot of protests in Kenya, the results of student protests are teargas and a newspaper article[80]. Even in the face of serious allegations such as breaches to the integrity of the school premises by intruders, school administrations seem to care very little about the issues[81]. Unlike labour protests, students are usually at a loss when they protest as they lose time for their classes and earn the ire of the teachers and administration.[82]

4.6. Dropping out

There are many reasons children end up dropping out of school. The most significant being that parents are unable to pay school fees. However, the reality is that lack of fees ranked low on the reasons for dropping out. For boys, the greatest influence that causes them to drop out is to find work, followed by cultural practices. Most boys state that they cannot take instructions from female

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[79] Children Act s 28.

[80] Stephen Astariko, 'County High School Students Demonstrate, Want Principal Out' *The Star* (North Eastern, May 2022) <*https://www.the-star.co.ke/counties/north-eastern/2022-05-13-county-high-school-students-demonstrate-want-principal-out/*> accessed 15 September 2022.

[81] Brian Kisanji, 'Keveye Girls High on the Rampage, Protest Sexual Assaults by Intruders' *The Standard* (December 2021) <*https://www.standardmedia.co.ke/western/article/2001427794/keveye-girls-on-the-rampage-say-school-treating-their-security-lightly*> accessed 15 September 2022.

[82] Job Mwangi, 'The Dynamics of Violent Protest in High Schools by David Alelah' (*Zizi Afrique Foundation*, 6 October 2021) <*https://ziziafrique.org/the-dynamics-of-violent-protest-in-high-schools-by-david-alelah/*> accessed 13 July 2022.

teachers, and effectively drop out[83]. For girls, the greatest influence was pregnancy followed by looking for work[84]. In either case, the trade-off is quite serious. Education is a basic right for which all parents must provide for.

4.7. Burning of schools

In the past few years numerous schools have been visited by arsonist children that are determined to destroy school property even with the risk of ending their schoolmates' lives. Many reasons have been given as to why children burn schools: Drug addiction and a lack of discipline, exam stress, stringent rules, interference of politics, disagreements with administration are but a few[85]. The apparent consensus is that students are having some fundamental disagreement with their circumstances and turn to burning schools to remedy their undesirable circumstances.[86]

How could any circumstance be so unpleasant that putting one's life and the lives of those they spend majority of their lives with in danger is more appealing than anything? Two possible reasons appear. One, children want to call attention to themselves and change the state of the environment that they are in.[87] Two, that children are isolated in their peer groups and have issues not addressed within safe spaces.[88] The next section of this paper will demonstrate why mediation is the catch-all solution to the very unique space in which all these issues are presented.

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[83] Abel Nyamesa Morara and Bernard Chemwei, 'Drop out among Pupils in Rural Primary Schools in Kenya: The Case of Nandi North District, Kenya' 5 <*http://ir.kabarak.ac.ke/handle/123456789/1071*> accessed 15 September 2022.

[84] Ibid 6.

[85] Team (n 77).

[86] Hildah Bochere Oburu, 'Social Representations of the Burning of Boys Secondary Schools in Kenya in 2016' (PhD Thesis, Stellenbosch: Stellenbosch University 2020) noting that there are a number of reasons external to the students that are possible causes of arson.

[87] Glenn Collins, 'NEW STUDY ON CHILDREN WHO SET FIRES' *The New York Times* (1 October 1984) <*https://www.nytimes.com/1984/10/01/style/new-study-on-children-who-set-fires.html*> accessed 20 July 2023.

[88] Ibid.

The first part of this paper has outlined an extensive list of issues in a contextual perspective, laying out children's experiences and the vices or undesirable circumstances created therefrom. It then outlines the manner in which the education system reacts to these issues, and further sets out the response that law and regulation and the school system presents to remedy these issues. Finally, it sets out a selection of emergent issues that occur due to the failures of these interventions. The next section of this paper will present the solution proposed that aims to alleviate the burden on all parties and create an informal yet organised system on which both the education system and children can rely on to assist them.

5. Recommendations

Notwithstanding these considerations, teachers should not be obligated to care for children the same way that parents are capable of doing so. The lesser attachment exhibited in teachers despite the significant power and control they hold on children should be offset by an organizational culture within the education system that allows their fundamental participation in the things that affect them.[89] This is according to the provisions outlined above of the Act, the Constitution and the various international documents. This paper argues that the organised system that is best suited to solve these issues is mediation.

Mediation is defined as a method of alternative dispute resolution where an impartial third party to a dispute assists two parties to reach an agreement.[90] With regard to children, the procedures and complexity of formal dispute resolution mechanisms would impair their ability to freely express themselves.[91]

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[89] Svein Arild Vis and Sturla Fossum, 'Organizational Factors and Child Participation in Decision-Making: Differences between Two Child Welfare Organizations' (2015) 20 Child & family social work 277.

[90] James Ndungu Njuguna, 'Mediation as a Tool of Conflict Management in Kenya: Challenges and Opportunities' (2020) 5 Journal of Conflict Management and Sustainable Development 120.

[91] The Office of the High Commission for Human Rights notes that children are often not aware of their rights or any claim arising thereof <*https://www.ohchr.org/en/children/children-and-justice-system#:~:text=Children%20can%20come%20into%20contact,position%20to%20claim%20their%20rights*> accessed on 20 July 2023.

Hence the informality of mediation and its necessarily conversational approach to solving disputes is the best way of restoring amicability between students and their schools.[92] For this purpose, two methods of mediation are proposed: Child-Focused Mediation[93] and Child-Inclusive Mediation.[94] Both of these methods will be addressed in an in-depth analysis of their unique solutions to the specified issues above.

5.1. Mediation as a Solution

As stated, mediation positions an impartial third party with no decision-making power between two people in a dispute with a view to mending the relationship and reaching a mutually beneficial agreement.[95] As such, the framework of a mediation agreement or the mediation process is very unique to allow parties to reach this mutually beneficial settlement. The mediator draws from a number of strategies influenced by their past experience, expertise in their field, and expectations of the probable success of certain techniques among other strategies[96].

Other considerations the mediator makes is the impact of the strategies have on the dispute, in that, even strategies that merely reduce the opposition between the parties could be more appealing than attempting to solve the dispute all at once. These strategies that facilitate conversation that are relevant to this study are: clarify the situation, make parties aware of relevant information, rehearse appropriate behaviour, separate parties(caucus), pick up hints on concession points, strike a power balance, speak for the weaker side, arrange informal

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[92] David Milward, 'Children Need Families, Not Courtrooms: Alternatives to Adversarial Litigation in Child Welfare' (Office of the Children's Advocate Manitoba 2016) Special Report outlining the major benefits of mediation, communicating a theme of conversation and dialogue as well as less formal structures.

[93] Jennifer E McIntosh, Yvonne D Wells and Caroline M Long, 'Child-Focused and Child-Inclusive Family Law Dispute Resolution: One Year Findings from a Prospective Study of Outcomes' (2007) 13 Journal of Family Studies 8, 10.

[94] Ibid.

[95] Njuguna (n 92) 120.

[96] James A Wall and Ann Lynn, 'Mediation: A Current Review' (1993) 37 Journal of Conflict Resolution 160, 162.

conferences and substantive face saving.[97] All things considered, these tools are used, and have shown to be successful in improving the interaction between disputants.[98] It is upon these points that the following analysis will be founded.

5.2. Child-Focused Mediation

Child-focused mediation (CFM) is a form of mediation in which the mediator is intentionally non-neutral, assuming the position of a child in a dispute, in order to advocate for their interests.[99] The mediator utilizes the experience they have in law and the psychology of children to make plans that serve the best interest of the child.[100] The standard way of holding such a mediation is to have the child absent but maintain a child-focused approach to the conversations between parents, as this is primarily used in custody agreements.[101]

5.2.1.CFM for Primary

The academic issues identified above can be solved with mediation. This section will only address two possible disputes that may arise as a result of academic pressure. One, that a student is failing a subject and requires that the student attend remedial classes after school hours. In view of section 28 and 14 of the Children Act, it would be illegal to deprive a student their leisure, possibly affecting their mental health contrary to sections 8 and 16, without the input of the child.

As such, if a child feels that they do not desire to attend remedial classes, they would be provided the option to have the issue mediated between their parents and the designated mediator of the school. During this mediation, the mediator would listen to both the parent's side of the story and the teacher's side and advocate for the child's interests in their absence, by steering conversation appropriately. The mediator would ensure that both parties are reminded of the

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[97] Ibid 166–167.
[98] Ibid 171.
[99] Hadeel al-alosi, 'Will Somebody Please Think of the Children?! Child Focused and Child Inclusive Models in Family Dispute Resolution' 11.
[100] McIntosh, Wells and Long (n 95) 107.
[101] al-alosi (n 101) 11.

child's rights, and that the teacher does not use academic pressure to further stress the child into choosing to attend remedial classes. This process may be done in a joint session or a caucus if there are any reasons the parties would be adversely affected by the joint session.

This process would alleviate much of the academic pressure that children feel, steer decision-making toward securing their interests. The structured characteristics of the mediation would allow the parties to predict the outcome or at least feel validated. It has been shown that even when mediation is unsuccessful, it tends to improve the relationship of the parties.[102]

The second dispute is where a particular teacher seems to make the students dislike their subject. The Teacher's Code of conduct stipulates that teachers are to be held to a certain standard[103], while the Basic Education Act provides that the education system must maintain a reasonable quality of education, a part of this being provision of lessons that allow students to gain the tools to better themselves.[104] If a student or multiple students complain that a teacher's method of teaching makes a subject more difficult to learn, this paper argues that mediation can be a useful tool to mend the relationships between teacher and student, considering the foregoing considerations.

As will be discussed in a subsequent section and as is done in practice, the mediator designated for a field, particularly child custody mediation, is best equipped when they have specialized qualifications such as in law and social sciences.[105] Therefore, a mediator within this context should be qualified as both a teacher and knowledgeable of child psychology to a sufficient extent. As such, the mediator is able to articulate the ways in which the child's brain operates to

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[102] Wall and Lynn (n 98) 171.
[103] Teachers Service Commission (Code of Conduct and Ethics for Teachers) Regulations 2012 s 41(3).
[104] Basic Education Act pt IX and functions of various offices and bodies such as the Board of Management.
[105] Bobby Marzine Harges, 'Mediator Qualifications: The Trend toward Professionalism' [1997] BYU L. Rev. 687.

the teacher to enable them to better re-orient themselves and be more receptive to the needs of the student.[106] Additionally, the mediator will be able to communicate the perspective of the teacher as it relates to his/her particular method of teaching.[107]

5.2.2.CFM for High School

As regards to bullying, studies show that children are more likely to be victims to other children of their own gender.[108] This would allow mediation to occur on a more equal footing, as the mediator can find consensus in their common needs as boys or as girls.[109]Therefore, it is suggested that rather than mediating between a bully and their victim, the more standard practice would be for a mediator familiar with the peculiar aspects of child social dynamics to bridge the gap between the school administration and the child's parents.[110]

Unfortunately, the literature on such an approach is sorely lacking. However, this paper will attempt to posit an ideal structure of the process. The mediator would be tasked with either seeking reports of bullying from students or coming up with a strategy to improve communications between themselves and the students. The mediator would then undertake to facilitate dialogue about the incident with the school administration and concerned parents who would give adequate gravity to the issues experienced by the students. If the extent of bullying is significant enough, where an individual is reported by a certain number of students, the mediator would engage the parents on both sides if

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[106] Madelene De Jong, 'Child-Focussed Mediation' (Juta 2009) 117 <*https://uir.unisa.ac.za/handle/10500/21645*> accessed 20 July 2023.

[107] De Jong (n 108) Noting that child-focused mediation within divorce settlement agreements facilitate self-determination.

[108] Ndetei and others (n 32) 46; R Gofin, H Palti and L Gordon, 'Bullying in Jerusalem Schools' (2002) 116 Public Health 173, 175 both noting that boys experience bullying more than girls.

[109] Wall and Lynn (n 98) 165 on proposing agreement points.

[110] This skill is a result of certain specialized training that allows a mediator to have broad knowledge of a topic Harges (n 107) 693–694.

possible in order to come to a mutual agreement that would be in the best interests of the children.

5.3. Child-Inclusive Mediation

Child Inclusive mediation is a method of mediation where a third party "assists [an adult] to reflect and agree upon avenues for providing a secure emotional base for…children, [including] consultation with school-age children about their experiences"[111]. This type of mediation is mostly used to solve some of the problems arising out of the process of divorce, especially custody discussions[112]. For this purpose, the standard approach is to separate the entire process into two parts. In one part, the child meets with a trained child interviewer. The parents, in the complementary part would meet with a mediator. Both parts may occur simultaneously. The process then follows four stages: Mediator facilitate parents to focus and identify the needs of the children, children are consulted directly by specially trained mediators, the two sets of mediators present the input of the child and finally the child's needs and views are integrated into the negotiations.[113]

Transposing this process to the subject of this article, certain trade-offs can be made. For one, there may be no need for two separate mediators. Additionally, the child may not need to be absent in the mediation process. With this, this technique of mediation is well suited for the purposes of the two issues this part will address. These mostly regard either cases where a school is bound by law to limit some right or freedom of the child. These specific circumstances are presented in the issues identified in the First part of this paper.

Middle-age children in primary are capable of coordinating their actions, evaluating their progress and modifying their plans and strategizing to a certain

[111] McIntosh, Wells and Long (n 95) 107.
[112] Ibid 106.
[113] Jennifer McIntosh, 'Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study' (2000) 18 Mediation Quarterly 55, 57–59.

extent.[114] This should allow them to understand their position in a dispute to a certain extent and evaluate their actions or opportunities for resolution.[115] This would mean that they are able to receive information, compare that information to their own knowledge and then make a choice either affirming the phenomenon or changing their position to accept a better course of action.[116] This obviously does not mean that they are capable of understanding most of the complexities of life, but it does show that they are not just empty receptacles. Studies have shown that children are entirely competent to give consent to decisions affecting them, even medical conditions.[117] However, the regulating body may choose to decide those disputes in which an adult should be present.

5.3.1.CIM for drug and substance abuse

A child observed using an illegal substance, would ideally initiate the mediation process with the consent of the parent and child jointly. The parent of the child would be called to the mediation. The mediator would then guide the parent in expressing their views and wishes for the next steps for the child. This would allow the parent to give consent to surrendering the child to the custody of the police, as well as to choose to handle the issue within the school without police intervention. The mediator would then have a separate conversation with the child to gather the child's reasons for their actions as well as their views on what would be the best outcome for them. The mediator would then present these

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[114] Eccles J, 'The development of children ages 6 to 14' 9(1) *The Future of Children* 1999, 33.

[115] Amelia Church, Angie Mashford-Scott and Caroline Cohrssen, 'Supporting Children to Resolve Disputes' (2018) 16 Journal of Early Childhood Research 92, 93.

[116] Ala Samarapungavan, 'Children's Judgments in Theory Choice Tasks: Scientific Rationality in Childhood' (1992) 45 Cognition 1 The paper describes that while there are certain judgments that very young children cannot make, they can use criteria provided and available to them to make certain judgments proximate to the scientific rationality present in scientists.

[117] *Gillick versus Norfolk and Wisbeck Area Health Authority* [1986] AC 112 (House of Lords); Stephen B Billick, 'Developmental Competency.' [1986] Bulletin of the American Academy of Psychiatry & the Law; Trian Fundudis, 'Consent Issues in Medico-Legal Procedures: How Competent Are Children to Make Their Own Decisions?: *Original Article: Medico-Legal Procedures*' (2003) 8 Child and Adolescent Mental Health 18.

views to the parent, and finally facilitate the child and parent to come to an agreement on the final agreement in a peaceful and organised manner.

While the use of illegal substances is a criminal offence punishable by law[118], in line with article 159(2)(c), it may be more prudent to utilize this alternative method of solving this dispute. As per the decision in Mohamed Abdow, the parents may opt to appeal to traditional dispute resolution(TDR) mechanisms[119]. In this case, either the mediation process or the TDR process arising thereof or both may be sufficient to remedy the situation. However, if the school administration, the other party in the mediation, chooses to submit the issue to the police regardless of the results of the meditation, the parents may appeal to the Director of Public Prosecutions (DPP) to consider either or both proceedings and use his/her discretion under article 157 to refrain from pursuing the case.

5.3.2.CIM for sexual activity, abuse or pregnancies

Both consensual sexual activity and sexual abuse may lead to pregnancy, which as identified above leads to girls dropping out of school to take care of the child; some never return.[120] For general sexual activity between adolescents, this paper argues that it may be more effective to have DCM with student leaders or representatives so that the students themselves regulate each other and are provided the space to ask for programmes or assistance in maintaining their sexual and mental health. Adolescents generally have a strong grasp of their sexuality and only need assistance in a few issues beyond their mental and

[118] Section 242A, *Penal Code* (Act No. 81 of 1948); Section 28, *Alcoholic Drinks Control Act* (Act No. 4 of 2010); Section 26, *Pharmacy and Poisons Act* (Cap 244); Section 15, *Tobacco Control* (Act No. 4 of 2007); *Narcotic Drugs and Psychotropic Substances (Control) Act* (Act No. 4 1994).

[119] *Republic v Mohamed Abdow Mohamed* (2013) eKLR.

[120] Ruto (n 43) Children that are victims of sexual abuse by teachers drop-out and only 1% were seen to re-join.

environmental scope.[121] This approach to mediation can be applied to involve students in any discussion or change to improve education in the schools.

Non-consensual sex, i.e. rape, sexual harassment or defilement requires the presence of the child's guardian or parent within a mediation session. Again, the parents or guardians may opt to utilize their traditional dispute resolution mechanisms to seek justice for their children against the offender.[122] Mediation proceedings would lend to assuring the DPP that the issue was resolved fairly, and according to the provisions of the Constitution[123].

5.4. Legal Framework

In order for this mechanism to be successful, a framework must be developed that is legally and procedurally sound. There are a number of bodies that are required to these ends: The Teachers Service Commission (TSC), the Charted Institute of Arbitrators (CIArb), the Mediation Accreditation Committee (MAC), the Secretary of Children Services (SCS), the National Council for Children's Services (NCCS), the County and Subcounty Children Advisory Committees (CCAC, ScCAC) and finally Charitable children's institutions (CCI).

To begin with, as noted above, the education courses in a number of tertiary institutions are in need of reform.[124] Conflict resolution and child psychology

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[121] Sunday E Adaji and others, 'The Attitudes of Kenyan In-School Adolescents toward Sexual Autonomy' (2010) 14 African Journal of Reproductive Health.

[122] Julia Pfeiffer, 'Traditional Dispute Resolution Mechanisms in Afghanistan and Their Relationship to the National Justice Sector' [2011] Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America 81 While the Constitution does protect traditional dispute resolution mechanisms, there is no legislative framework for TDRM. The mechanism has been shown to be detrimental to children, and so in Afghanistan, a policy exists that provides special provision for the protection of children.

[123] Constitution of Kenya art 47, 50, 159.

[124] 'Bachelor of Education Arts' (n 48); 'BACHELOR OF EDUCATION (ARTS) AND BACHELOR OF EDUCATION (SCIENCE)' (*Kenyatta University School of Education*) <*http://education.ku.ac.ke/index.php/academic-programs/undergraduate/94-programmes/undergraduate/227-bachelor-of-education-arts-and-bachelor*-of-education-

must be knowledge that all teachers should have at all levels of education.[125] Having completed studies that are inclusive of these units, the next step for a teacher would be training to be a mediator.

The CIArb would manage the training of teacher-mediators. The MAC would manage the accreditation of the teacher-mediator. The TSC would be charged with cooperating with the CIArb to distribute teacher-mediators to different schools under its mandate in the Teacher Service Commission Act, 2012. The CIArb would be mandated to provide regulations for school mediation, while the TSC would manage the conduct of the teacher-mediators outside the mediation procedure. Each school would have one mediator that manages specific types of cases provided by the CIArb. However, legislation may be the best way to entrench these regulations.

Under the Children Act, the SCS is charged with identifying, formulating and developing programmes to mitigate children facing hardship and even promote family reconciliation and mediate disputes[126]. It is argued in this paper that this latter role be delegated to the teacher-mediators and that the Secretary formulate a program to actualise the initiation of this mechanism in schools. The SCS is bound to suggest this program to the NCCS which would ideally approve, evaluate and monitor the implementation of the program with the assistance of the CCAC and the ScCAC and any committees appointed.[127]

Ideally, the program would be funded by the sources, and in accordance with the procedure, outlined in the Act[128]. However, there is also the alternative that a charitable children's institution manages the implementation of this

science> accessed 11 September 2022; 'BACHELOR OF EDUCATION (ARTS) | Department Of Educational Studies' (n 50) mostly absent of conflict-resolution mechanisms despite the conflicts that clearly arise.

[125] Kathryn L Girard, 'Preparing Teachers for Conflict Resolution in the Schools. ERIC Digest.'

[126] Section 38 *Children Act* (Act No. 29 of 2022).

[127] Sections 42, 47, 54, 55 *Children Act* (Act No. 29 of 2022).

[128] Part V *Children Act* (Act No. 29 of 2022).

program[129]. Such an institution would be charged with organising subsidies for teacher-mediators and reporting on the progress of the program. The Institution would manage the discipline of the teacher-mediators through a committee with the membership of a representative from both the TSC and CIArb.[130] Notwithstanding this framework as outlined, the details of how to implement such a program is left to these institutions all of which, as per this paper have a responsibility to cater to children's needs.

5.5. Benefits

Firstly, the presence of the mediator would allow the two parties to concede control to the mediator to guide the mediation, which would prevent emotions from getting too high.[131] Secondly, a mediator who regularly clarifies the situation would be able to remind the parties of the main issue of discussion and further validate the inputs of both parties, allowing the child to feel heard, improving their ability to express themselves.[132] Thirdly, making both parties aware of relevant information would allow parents to understand their children's rights and the things they can claim and those they cannot.[133]
Fourthly, rehearsing appropriate behaviour would improve the communication lines between the parties and eliminate much of the conflict inherent in familial relationships.[134] Fifth, separating the parties and striking a power balance would

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[129] Sections 2, 65, 67 *Children Act* (Act No. 29 of 2022).
[130] This would entrench the constitutional values of participation and representation embodied in multiple provisions such as Chapter Six.
[131] mtieastafrica, 'Dealing with Emotions During Mediation' (*Mediation Training Institute East Africa*, 24 February 2022) <*https://mtieastafrica.org/dealing-with-emotions-during-mediation/*> accessed 21 July 2023.
[132] 'Child Inclusive Mediation – Mid Mediation' <*https://www.midmediation.org.uk/sample-page-2/familymed/child-inclusive-mediation/*> accessed 21 July 2023.
[133] Brianna L Nelson, 'Divorce Mediation and Its Impact on Children' describing that parents benefit from being educated about information vital to understanding the child's point of view and that the best interests of the child are considered.
[134] Brittany Rudd and others, 'Child-Informed Mediation Study Follow Up: Comparing the Frequency of Re-Litigation Following Different Types of Family Mediation' [2015] Psychology Public Policy and Law 2.

equalise the apparent differences in power and knowledge of any two parties, allowing both to provide their input and outline their interests to the mediator and allow the mediator to present it in the form that serves the best interests of the child.[135]

In the studies conducted on child inclusive mediation, parents reported that the mediation process benefited them a great deal.[136] Further, the children reported that the process of mediation allowed them to freely express their views separate from their parents, and that they were glad their parents could be told about how they feel and that it might help them.[137] The mediators themselves reported that the mediation process fostered, among other things, honesty, benefit for the children, reduction of blame and that it reinforced care in the family system.[138]

5.6. Shortcomings of Mediation as a remedy

One, while the mediator is supposed to strike a power balance, this may not always be possible; a more powerful party may maintain that power even in mediation.[139] Two, this mechanism creates a new basket into which public or private funds must be used to maintain the mediator and the mediation process.[140] Thirdly, while mediation is intended to solve conflict, with particular view to divorce mediation, it has been shown that the long-term relationships of the parties are not significantly improved.[141] The shortcomings identified in

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[135] Amy Holtzworth-Munroe and others, 'Child Informed Mediation Study (CIMS): Incorporating the Children's Perspective into Divorce Mediation in an American Pilot Study' (2010) 16 Journal of Family Studies 116, 117.

[136] Robert E Emery, David Sbarra and Tara Grover, 'DIVORCE MEDIATION: Research and Reflections' (2005) 43 Family Court Review 22.

[137] Felicity Bell and others, 'Outcomes of Child-Inclusive Mediation' (2013) 27 International Journal of Law, Policy and the Family 116, 124–125.

[138] McIntosh (n 115) 61–67.

[139] Mary F Radford, 'Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters' (2000) 1 Pepp. Disp. Resol. LJ 241, 245.

[140] Carol J King, 'Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap' (1999) 73 . John's L. Rev. 375.

[141] Wall and Lynn (n 98) 177.

the studies are that: the adults would not make productive use of the children's input, particularly heated disputes may spiral and destroy the process and finally, that the mediation process may not be needed for some disputes it is made for.[142]

6. Conclusions

From the foregoing analysis, it is clear that children face numerous problems, most of which have not been addressed in this paper, but are equally as important and worth considering. These issues tend to be precursors to a number of subsequent incidents that have seen teachers turning to corporal punishment among other mostly unhelpful methods to "tame" the children's behaviour.[143] Not only do these remedies do little to solve the issues, they further exacerbate an already dire situation, causing a lot of the issues we have seen in schools with children burning schools and protesting.[144]

The paper suggests that mediation is the solution to this. Not only does this method reduce tensions and create a more conducive environment for dialogue, it promotes the use of alternative dispute resolution mechanisms and gives children more power over their lives.[145] An extensive framework is required to entrench this mechanism in Kenyan schools, but surely if such a framework were to be implemented it would alleviate a large amount of worry and anxiety attached to the Kenyan education system.

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[142] McIntosh (n 115) 67.

[143] Sasha-Lee Heekes and others, 'A Systematic Review of Corporal Punishment in Schools: Global Prevalence and Correlates' (2022) 23 Trauma, Violence, & Abuse 52 noting that a prevalence of other disciplinary measures increases risk of corporal punishments.

[144] As noted by Ndetei, Morara and other authors described in the foregoing analysis, as children engage in bullying, drug abuse, drop out of school and burn their schools for various reasons outlined.

[145] De Jong (n 108) 128.

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Judicial Overreach and The Backlash from Elected Institutions

By: ***Wamuti Ndegwa****[*]

Abstract

Judicial overreach is the term used to describe the phenomena where Courts exercise judicial power in a manner that interferes with legislative and executive domains without any or any proper backing of the law or the Constitution.[1] *Courts do so in the name of judicial and constitutional review as well as protecting human rights.*[2] *Judicial overreach undermines democracy and separation of powers by transforming the judicial role of adjudicating and interpreting the law into that of legislating and policy making.*[3] *Thereby, judiciary encroaches on the functions of parliament and executive respectively. It transforms democratic systems to juristocracies where Judges have the final word on major decisions in social, economic, political, matters and other matters affecting the people.*[4] *This paper argues that judicial overreach is unconstitutional, unjustified, threat to majoritarian democracy and unsustainable in any event. The paper points out that in democratic countries the people and their elected representatives in the legislature and executive are bound to push back against the overreach. Protests by politicians, media and other entities against judicial decisions, personalized attacks against judicial officers involved in decisions and even attempts to overhaul entire court systems are signals that the people reject rule by judges.*[5] *In fact, this paper was triggered by the mass protests currently going on in Israel over efforts by the Parliament and Government of Israel to give the Israeli Parliament power to overturn judgments of the Israeli Supreme court*

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[1] *Mian Irfan Bashir v The Deputy Commissioner (D.C.), Lahore and others* (PLD 2021 SC 571).

[2] Aileen Kavanagh, *Constitutional Review, the Courts, and Democratic Skepticism. Current Legal Problems* (2009) 62(1):102.

[3] *Mian Irfan Bashir* (n 1).

[4] Leslie Friedman Goldstein, 'From Democracy to Juristocracy' (2004) 38 Law & Society Review 611 JSTOR.

[5] Emily Bazelon, 'How Much Power Should the Courts Have?' *The New York Times Magazine* (New York, 14 April 2023)
< *https://www.nytimes.com/2023/04/14/magazine/courts-power-government.html*>

which declare Acts of Parliament unconstitutional.[6] *The reforms also propose to give Parliament and Government power to reject interpretations of the Constitution by the Supreme Court.*[7] *The paper concludes by advising courts to take heed of the signal and change course.*

Introduction

This paper was triggered by the mass protests currently going on in Israel over the attempt by the Government of Israel to reform the judiciary.[8] The reforms propose to give the Israeli Parliament power to overturn judgments of the Israeli Supreme court which declare Acts of Parliament unconstitutional and to reject interpretations of the Constitution by the Supreme Court.[9] They also propose to reduce the powers of courts to undertake judicial review and strike down legislation passed by Parliament or the public policy of the executive[10]. The government argues that unelected judges have excessive control over public policy and legislation and that courts often abuse their power to undermine government policy and legislation. In short, they accuse the courts of judicial overreach[11]. It turns out that the attempt in Israel to control the judicial review is not isolated. Similar efforts have been made in other countries.[12]

This paper discusses the overreach of judicial authority whereby courts interfere with decisions that are reserved for other arms of government in the separation of powers. The paper makes a case that judicial overreach is unconstitutional, unjustified, a threat to majoritarian democracy and unsustainable in any event.

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[6] Tania Krämer, 'Protests against Israel's judicial changes grow' *Deutsche Welle (DW)* (Berlin, 1 August 2023) < *https://www.dw.com/en/growing-protests-against-judicial-changes-israel/a-66410859*>

[7] Ibid.

[8] Ibid.

[9] The Judiciary (Amendment – Strengthening the Separation of Powers) Bill 2023. Also, the Courts Bill (Amendments – Provisions on the Judges Selection Committee) 2023. <*https://main.knesset.gov.il/en/news/pressreleases/pages/press13223e.aspx*>

[10] Ibid.

[11] Ibid.

[12] Elliott Abrams, 'Israel and the Debate Over the Role of the Judiciary in Democratic Government' [2023] Council on Foreign Relations.

It highlights a few instances of the now commonplace efforts by perfectly democratic parliaments and governments in various countries to control judicial overreach. It points out that the protests against judicial decisions, attacks against judicial officers and even attempts to overhaul court systems are signals that the people reject rule by judges. The paper concludes by advising courts to take heed of the signal and change course.

The Supreme Court of Pakistan defined judicial overreach as exercising judicial power in a manner that interferes with legislative and executive domains without any or any proper backing of the law or the Constitution[13]. It manifests itself in judicial determinations that are not anchored or sufficiently anchored in law or the Constitution.[14] The Pakistan Supreme court explained that judicial overreach undermines democracy and separation of powers by transforming the judicial role of adjudicating and interpreting the law into that of legislating and policy making thereby encroaching on the functions of parliament and executive respectively[15]. Judicial overreach threatens the integrity of democracy and the judiciary as well.

In most democratic countries, courts play a commendable role in ensuring that the elected leaders govern in accordance with constitutions.[16] Courts also play the crucial role of protecting fundamental rights.[17] However, in the course of performing those roles, courts have recently developed a tendency of taking over powers that are reserved for the people and their democratically elected leaders.[18] One of the most disturbing aspects of this development is the claim by

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[13] *Mian Irfan Bashir v The Deputy Commissioner (D.C.), Lahore and others* (PLD 2021 SC 571).
[14] Ibid.
[15] Ibid.
[16] Madhav Khosla, Mark Tushnet, Courts, Constitutionalism, and State Capacity: A Preliminary Inquiry, *The American Journal of Comparative Law*, Volume 70, Issue 1, March 2022, Pages 95–138, <*https://doi.org/10.1093/ajcl/avac009*>
[17] Sonnevend, P., 'The Responsibility of Courts in Maintaining the Rule of Law: Two Tales of Consequential Judicial Self-Restraint.' (2021) available at <*https://doi.org/10.1007/978-3-662-62317-6_7*>.
[18] Abrams (n 12). <*https://www.cfr.org/article/israel-and-debate-over-role-judiciary-democratic-government*>

courts that they have a monopoly of interpreting the meaning of the constitution and that their interpretation is final and must be obeyed by everyone else, including the other arms of the state, the people and their democratically elected leaders. The upshot is a fundamentally flawed constitutional framework in which the unelected judges have a final word in social, economic, moral, political and all things that matter in the life of the people.

This is what some chide as judicial supremacy, supremacy of the supreme courts, rule by judges or juristocracy[19]. Whatever name is used, the judicial juristocracy rides on the dubious idea that all persons and institutions including the executive and parliament have an unqualified duty to obey court orders in all cases and at all times. Like monarchy, autocracy and anarchy, juristocracy threatens majoritarian democracy and majoritarian constitutions[20]. The irony, as noted by Professor Smith, is that juristocracy does not have any legal or social basis, except a mythical assumption by the public and the other arms of government that judges are morally and intellectually superior to politicians, the people, the elected representatives and every other organ of the state, and that they are not influenced by politics[21].

Courts justify their superintendence over other arms of government on their constitutional mandate to review the actions of other arms of government to ensure that they conform to the constitution and to protect fundamental rights.[22] It is alright and even desirable for courts to superintend within the scope of legitimate constitutional review and protection of fundamental rights.

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[19] Goldstein (n 4).

[20]Susanne Baer, 'The Rule of—and Not by Any—Law. On Constitutionalism' (2018) 71 Curr Leg Probl 335.

[21]Professor Eivind Smith, Judicial Supremacy, *The Role of Courts in a Democracy;* Report and Analysis of a Workshop and Public Debate Held at Magdalen College, Oxford February, The Foundation for Law, Justice and Society: The Centre for Social –Legal Studies; University of Oxford (2021) p.3.

[22] Bhatkoti, Romil. "Human Rights and Judicial Activism in India." *The Indian Journal of Political Science*, vol. 72, no. 2, 2011, pp. 437–43. *JSTOR*. <*http://www.jstor.org/stable/42761429*>. Accessed 10 Aug. 2023.

However, the so called constitutional review and protection of fundamental rights has gone overboard. It no longer respects the people and their democratically elected representatives or the other organs of the state, including parliament and the executive. Just like the people rose against other forms of undemocratic governments, the people and their elected leaders are likely to rise against the rule by judges. The rebellion may be by constitutional or unconstitutional means.[23]

In UK, the latest manifesto of the Conservative party undertakes to prevent judicial review from degenerating into 'politics by another means'[24]. David Blunkett, then Home Secretary, had dismissed judges in certain judgments as 'unaccountable and unelected judges usurping the role of parliament, setting the wishes of the people at naught and pursuing a liberal politically correct agenda of their own'[25]. Sweet, in a book whose title 'Governing with Judges' is quite telling, notes that there is a growing political momentum to fight the new-found political supremacy of the Supreme Court[26]. The problem with courts riding rough-shod over the people and their elected leaders is that judicial officers do not enjoy the representative mandate enjoyed by the elected political leaders. By wading into and overruling elected leaders on political, social, economic, moral and religious policies, judges undermine the very constitutions they are supposed to protect, the goodwill of the people and their elected leaders and the moral high ground requisite for the authority of the court. Jeremey Bentham foresaw the problem of government by the courts way back in 1988 when he warned that 'give the judges the power of annulling Acts (of Parliament) and you transfer the supreme power from the assembly which the

[23] Abrams (n 12).

[24]Raphael Hogarth, 'Is Judicial Review "Abused to Conduct Politics by Another Means"? | Institute for Government' (5 October 2020) <*https://www.instituteforgovernment.org.uk/article/comment/judicial-review-abused-conduct-politics-another-means*> accessed 6 March 2023.

[25]Comment, Daily Mail, 20 February 2003.

[26] A. Stone Sweet, 'Governing with Judges: Constitutional Politics in Europe' (Oxford University Press 2000)

people have had some share, at least in choosing, to a set of men in the choice of whom they have not had the least imaginable share'.[27]

The danger that judicial overreach poses to judiciary was explained by Justice Davis in the South African case of *Mazibuko, Leader of the Opposition in the National Assembly v Sisulu MP, Speaker of the National Assembly and Others*. The judge warned that,

> 'I regret the need to emphasize this point but it appears to be vital to the future integrity of the judicial institution. An overreach of the powers of judges , their intrusion into issues which are beyond their competence on intended jurisdiction or which have been deliberately and carefully constructed legally so as to ensure that the other arms of the state deal with these matters can only result in jeopardy for our constitutional democracy'[28].

At this stage, it is important to understand the main legal avenues that judges use overreach to undermine the constitutional authority of the other arms of government. These are the trio processes of judicial review, constitutional review and protection of fundamental rights. In the following part, I demonstrate the nature of the process.

Nature of Constitutional Review

Constitutional review means the judicial process by which courts examine the actions or decisions of the other arms of government to determine whether they conform to the Constitution[29]. There are three major avenues in the common law system. The first is the mainstream constitutional review. Here courts review the political and administrative decisions of elected leaders, including

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[27] Jeremy Bentham, 'Fragment on Government' (Cambridge, 1988) ch. IV, para 3.

[28]*Mazibuko, Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly and Others* (21990/2012) [2012] ZAWCHC 189.

[29]Tate, C. Neal. "judicial review". Encyclopedia Britannica, 5 Jan. 2023, *https://www.britannica.com/topic/judicial-review*. Accessed 6 March 2023.

parliament and the executive, ostensibly to determine whether the decision violates the Constitution[30]. If it does, courts declare the action to be unconstitutional and a nullity. The other avenue is the protection of fundamental rights. Here courts review the political decision or action to determine whether it violates fundamental rights and freedoms[31]. Again if it does, courts declare the action to be unconstitutional and a nullity. I will refer to this as 'protection of human rights'. The third avenue is judicial review. Here, courts examine the action or decisions, mostly of the executive, to determine whether the action or decision is within the legal powers conferred upon the public authority[32]. Courts nullify the action or decision if they deem it ultra-vires. The three avenues provide a very potent legal framework for protecting the constitution, human rights and keeping public institutions within the confines of their legal bounds. However, courts often abuse the avenues by unduly interfering with legitimate exercise of power by the executive, legislature and independent commissions. The part below discusses the means by which courts abuse their mandate of constitutional review, judicial review, and protection of human rights to overreach and usurp the powers of the other organs of government.

Converting constitutional/ judicial review into overreach

Ekins and Forsyth say that in the course of constitutional and judicial review, courts use various instruments to undercut the decisions of the executive and Parliament and privilege their own views about how things should be done[33]. They state that the common method is where courts deliberately misinterpret the constitution or the statutes and give it an artificial meaning that is far from the meaning intended by Parliament. Ekin says that by so doing, courts basically rewrite the constitution or statutes. The second way, he says, is by excessively intrusive judicial review, whereby judges second guess the policy decisions of

[30]De Smith and others, *Judicial Review of Administrative Action* (7th edn, Sweet & Maxwell 2013) 9.

[31]CF Forsyth and William Wade, *Administrative Law* (Oxford University Press 2014) 13.

[32] n. 91 p.31.

[33] Richard Ekins and Christopher Forsyth, Judging the Public Interest, Rule of Law Vs. Rule of Courts, Judicial Power Project (Policy Exchange 2015).

the executive about how best the executive should exercise executive powers. As observed in the South African case of *Malema and Another v Chairperson of the National Council of Provinces*, courts forget that judicial review is not a warrant for them to unlawfully substitute their opinion for that of parliament and the executive[34]. These explanations are correct but they overlook the third route, which is the tendency of the courts to judicialize matters that are not justiciable. Non-justiciable matters are matters that cannot be suitably resolved by applying the law. Such matters include merits of political decisions such as impeachment of elected leaders, economic and social policies, morality, religion, proroguing parliament, setting of maximum and minimum sentences etc.[35] Whichever route courts use, they end up unduly interfering with political and policy discretion of the other organs of government. They supplant rule by the courts in the democracy. Judicial interference shifts legislative, executive, and political power from the legislature and executive to courts.[36]

The intermeddling is politically dangerous since decisions on political, policy or managerial matters require huge political or managerial discretion.[37] They ought to be left to the politics of Parliament and policies of the executive. Traditionally, courts acknowledged the non-justiciable character of such matters and avoided interfering. It is not so now. Courts are not only intervening but are also claiming the final word.[38] Hirsch argues that in politics, judicialisation is marked by politics relying on courts in what he refers to as mega politics going into the 'core moral predicaments, public policy questions and political controversies and matters of outright and utmost political

[34] *Malema and Another v Chairman of the National Council of Provinces and Another* (12189/2014) [2015] ZAWCHC 39.

[35]Allan, T.R.S., 'Justiciability and Jurisdiction: Political Questions and the Scope of Judicial Review', *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford, 2003; online edn, Oxford Academic, 1 Jan. 2010), *https://doi.org/10.1093/acprof:oso/9780199267880.003.0006*, accessed 5 Mar. 2023.

[36] Z Payvand Ahdout, 'Enforcement Lawmaking and Judicial Review' (2022) 135 Harv L Rev 937.

[37] *Malema and Another v Chairman of the National Council of Provinces and Another* (12189/2014) [2015] ZAWCHC.

[38] Mark Movsesian, 'Does the Court Have the Final Word?' [2020] Law & Liberty.

significance that often define and divide polities.' Tate contends that judicialisation of non-legal disputes occurs when courts assume jurisdiction over a wide variety of policy processes that are traditionally the responsibility of the majoritarian institutions of Parliament and the executive[39]. Commenting on the situation in Philippines, Ciencia noted that though judicialisation claims to be founded on the rule of law, it produces the opposite effects of political and legal uncertainty as well as instability[40]. Having seen the methods by which courts overreach judicial authority to undermine the authority of the people and the elected leaders, I will now highlight a few incidents of Kenyan judges undermining the political, policy and managerial decisions of the democratically elected leaders.

Overreach of judicial authority in Kenya

A litany of court decisions demonstrates that in Kenya, courts make policy decisions amounting to literally dictating how government ministries and public institutions should run. For instance, it is the courts that decided whether the safety of pedestrians should be secured by erecting speed bumps or bridges in construction of highways[41], the public health measures necessary to stop spread of covid-19 pandemic[42], the procedure to be followed in appointing Vice Chancellors of public universities[43], whether recruits into the police service are suitable for pass-out parade and employment into the police force[44], whether

[39]Tate, C. N. (1994). The Judicialization of Politics in the Philippines and Southeast Asia. International Political Science Review, 15(2), 187–197. *https://doi.org/10.1177/019251219401500210,* accessed March 5, 2023.

[40] Alejandro N. Ciencia, Jr. From Judicialisation to Politicization of the Judiciary: The Philippine Case. Law Explorer. (2016) *(https://lawexplorers.com/category/adminstrative - law/)* Accessed July 19, 2021.

[41]*Republic v Nairobi City County Government & 6 others Ex Parte Mike Sonko Mbuvi* [2017] eKLR.

[42] The Standard, 'Court Orders hunt for 239 Chinese travelers and suspended flights', (Nairobi 29th February 2020).

[43]*Olive Mwihaki Mugenda v Okiya Omtatah and others* (Court of Appeal (Nrb) Civil Appeal No. 3 & 11 of 2016).

[44]*Republic v Deputy Inspector General of National Police & 32 others* [2013] eKLR.

government should provide public toilets along highways[45], the terms of career progression schemes for teachers employed by the Teachers Service Commission[46], when employers may retrench[47], whether employees will be reinstated into employment after dismissal[48], sufficiency of grounds and evidence of impeaching political leaders[49], approval or disapproval of County Executive Officers by County Assemblies[50],timelines for Parliament to enact legislation, whether persons are morally suitable to be appointed into public office[51]and kindred non-justiciable matters. Currently, the High Court is in the process of hearing a petition seeking to restrain Parliament and the Executive from adopting the national budget for the 2021 and 2022 financial year[52]. In another case, the High Court is waiting to hear and determine whether Kenya's education system and the Competency Based Curriculum (CBC) in primary and high schools is constitutional![53] It will be interesting to see how far the courts will wade into budget making and education policy.

The common thread in most of these disputes is that they require the political, administrative, and managerial discretion, all of which are reserved for the executive and legislative arms of government. In the concept of separation of powers and the text of the Constitution of Kenya 2010, the discretion in those matters belongs to the executive and legislature. These matters cannot be decided by courts since the constitution and the statutes leave the decision to the discretion of the executive, legislature and other institutions. Professor

[45]*Adrian Kamotho Njenga v Council of Governors & 3 others* [2019] eKLR.
[46]*Kenya National Union of Teachers v Teachers Service Commission* [2019] eKLR.
[47]*Aviation and Allied Workers Union v Kenya Airways Limited & 3 others* [2012] eKLR.
[48] Ibid.
[49]*Martin Nyaga Wambora v County Assembly of Embu & 37 Others* [2015] eKLR.
[50]*John Kipng'eno Koech & 2 others v Nakuru County Assembly & 5 others* [2013] eKLR.
[51]*David Mutinda Mumo v Cabinet Secretary For Education (Dr.Fred Matiang'i) & 2 others* [2017] eKLR.
[52]*Local Empowerment for Good Governance & 6 others v Community Executive Committee Member Finance & Economic Planning - County Government of Mombasa & 2 others* [2021] eKLR.
[53]*Esther Awuor Adero Ang'awa v Cabinet Secretary Responsible for Matters Relating to Basic Education & 7 others; John Diro & 6 others (Intended Interested Parties)* [2021] eKLR.

Kelemen observes that judicialising policy decisions distorts the policy making process and makes it difficult and costly for policy makers to implement government policies[54]. What is palpably undemocratic about judicialising policies is that in democratic countries, politicians get elected by selling their policies to the people, only for courts to purport to have the final word and in the process often delaying, derailing and wreaking havoc on contractual timelines and budgets for major national infrastructure projects.

One of the decisions that lay bare the notion of judicial supremacy is *Kenya Human Rights Commission v Attorney General*[55]. The decision exposes the flawed ideology of the Kenyan courts that their power is inherent, unlimited, and not amenable to any limitation even by the constitution or an Act of Parliament. The matter petitioned the High Court to declare certain sections of the Contempt of Court Act unconstitutional for allegedly exempting the Speaker of the National Assembly from contempt of court proceedings in respect of decisions, rulings, and directions given in the performance of the official functions of the Speaker. The statute codified the substance, procedure and punishments for contempt of court. In annulling the statute, the High Court held that the power to punish for contempt is inherent to the court and the provisions of the constitution only recognize the pre-existing situation[56]. Accordingly, that the attempt by Parliament to codify the categories of contempt and punishments thereof is an attempt to limit the otherwise inherent and unlimited power of the court and is therefore unconstitutional[57]. Stretched to its logical conclusion, the assertion means that courts can declare any act or omission to be contempt, try it by such procedure as they deem fit and punish it as they wish, including by death sentence, using the alleged inherent, unlimited, illimitable, extra-constitutional power. The notion that courts have unlimited power to punish for what is either crime or civil wrong stands in stark contrast with other statutes which establish

[54]Professor Dan Kelemen, 'The Rise of Eurolegalism and Its Implications for Democracy in Europe', *The Role of Courts in a Democracy*, Rutgers University (2011) p.13.
[55] [2018] eKLR para 57.
[56] (2018) eKLR para 67.
[57] (2018) eKLR para 51, 54, and 60.

criminal and civil wrongs and prescribe the procedure for trials and punishments. The notion that courts have inherent unlimited powers is reflected in other decisions of the courts in Kenya.

In *Francis Karioko Muruatetu v R,* the Supreme Court held that courts in Kenya have unlimited authority to sentence beyond or below the unambiguous sentences prescribed by the penal code Chapter 63 Laws of Kenya. It held that the mandatory nature of the death sentence for murder prescribed by section 204 of the Penal Code is unconstitutional, allegedly because it deprives courts legitimate inherent jurisdiction to exercise their inherent discretion on the sentence depending on the circumstances of the murder[58]. Section 204 of the Penal Code states in unequivocal terms that 'Any person convicted of murder shall be sentenced to death'. The court did not declare the provision to be unconstitutional or to be violating a fundamental right. It does not matter whether the Supreme Court is right or wrong in deciding that a statute must provide courts discretion to vary the sentence according to the degree of murder. What matters is that the power to decide whether to give the courts that discretion belongs to Parliament. The authority of the court is limited to applying the law enacted by Parliament. By holding that courts have legitimate jurisdiction to exercise discretion against an unambiguous provision of an Act of Parliament which is not declared to be unconstitutional or violating a fundamental right, the court rewrote the statute. Thereby, the Court placed its alleged inherent discretion above the policy choices of Parliament. Worse, the court removed the rule of law and replaced it with the rule of judicial discretion. These incidents of overreach and the notion of judicial supremacy are not restricted to Kenya. Other countries have had their incidents and continue to experience juristocracy in one form or the other. I will therefore examine notions of juristocratic overreach in other countries.

[58]*Francis Karioko Muruatetu & Another v Republic & 6 Others*, Supreme Court of Kenya, Petition No. 15 & 16 of 2015.

Judicial overreach in other countries

In South Africa, the Constitutional Court in the case of the *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* ordered the National Assembly to legislate rules for impeaching the president under Section 89(1) of the constitution of South Africa.[59] The National Assembly was accused of failing to scrutinize and oversee the actions of the executive, and to hold the President to account in relation to complying with court orders in earlier cases. These were the *Economic Freedom Fighters v Speaker of the National Assembly* and the *Democratic Alliance v Speaker of the National Assembly and others* cases, which directed the President to refund certain monies incurred by the state in renovating his private residence. The court directed the National Assembly to without any delay make rules for impeaching the President. This obvious judicial overreach was noted by the Chief Justice of South Africa who disagreed with the court on what he termed as overreaching too far into the domain reserved for Parliament. In *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another,* Chief Justice Mogoeng in his dissenting opinion described the judgment as a 'textbook case of judicial overreach and an unconstitutionally impermissible intrusion by the judiciary into the exclusive domain of Parliament'[60].

In the recent case of *State of Washington and State of Minnesota v Trump*, the U.S District Court of the Western District of Washington nullified the policy of the government of President Trump, under which the government would deny immigration visas to nationals of certain Islamic Countries[61]. Angered by the judicial intermeddling, President Trump contemptuously protested that the policies for ensuring the security of the United States are the preserve of the Federal Government.

[59][2016] ZACC 11.
[60]*Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11.
[61]847 F.3d 1151 (9th Cir. 2017).

In the U.S, judicial overreach has often elicited sharp reactions from the executive and Congress. In *Lynch v United States*, the Supreme Court struck down the 'new deal', legislation and other measures taken by President Roosevelt to pull the Country's economy out of the 1929 Wall Street Crash and the Great Depression of the 1930's.[62] Part of the legislation was the Economy Act. The Act introduced deep salary cuts in both private and public sectors, including on salaries and pensions of serving and retired judges of the Supreme Court. The President considered the legislation crucial to his program of economic recovery. Irritated, by the striking down of the statute at the core of his recovery plan, the President warned that judicial intermeddling with policy decisions was endangering the constitution and the judicial system, and that it was time for politicians to intervene to save the constitution from the courts and the courts from themselves. He said,

> 'The courts have cast doubt on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions… The court has been acting not as a judicial body, but as a policy-making body... we have therefore reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself'.[63]

True to his threat, Roosevelt attempted to reconstitute the Supreme Court in his favor. He promulgated the Judicial Procedures Reform Bill of 1937. The bill came to be known as 'Court Packing plan' since it sought to give the President power to change the composition of the Supreme Court by giving him power to appoint a Justice to the Supreme Court for up to a maximum of six, for every judge of the Supreme Court who reached the retirement age of seventy years and failed to retire[64].

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[62][1934] 292 U.S. 571.
[63] Roosevelt FD (1937) Fireside Chat on Reorganization of the Judiciary.
[64] Judicial Procedures Reform Bill of 1937.

It does not come as a surprise, then, that the U.S. Congress has over time enacted or attempted to enact legislations to control intermeddling by courts in policy or political matters. For example, in 2005, Congress introduced the HR 3073 Bill. The Bill proposed that Congress may with a two thirds majority overturn a decision of the Supreme Court[65].

Roosevelt's idea of appealing decisions of the Supreme Court to the Constitution itself or common sense was not new. Way back during the time of slavery in the United States, Frederick Douglas, an abolitionist, proposed that 'we can appeal from this hell-black judgment of the Supreme Court to the court of common sense and common humanity'[66]. Fredrick was reacting to the decision of the Supreme Court of the Southern Region in *Dred Scott v Sandford*, where the Court made a decision protecting slavery at a time when the government was pursuing the policy and political decision of abolishing slavery. In the decision, then Chief Justice Roger Taney made the infamous remark that black Americans 'had no right which the white man was bound to respect'[67].

In United Kingdom, the Supreme Court in the case of *R(Miller) v The Prime Minster and others* made an evidently political decision by holding that the Prime Minister was not entitled in law to prologue the House of Commons[68]. Justice Burnett, Sir Terence Etherton MR, and Dame Victoria wrote strong dissenting judgements holding that the matter was a political question that could not be resolved judicially. In rejoinder, the Prime Minster declared in Parliament that the decision whether to prorogue or not to prorogue Parliament was a purely political decision for politicians. He asserted that it was not for courts to decide politics. The Prime Minister made it clear to Parliament that his

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[65]H.R.3073 - Congressional Accountability for Judicial Activism Act of 2005, available at <*https://www.congress.gov/bill/109th-congress/house-bill/3073/text?s=1&r=1* >.

[66] Matt Karp, How Abraham Lincoln Fought the Supreme Court, Jacobin,09/19/2020 Jacobinmag.com/2020/09/Abraham-lincoln-supreme-court-slavery <accessed July 20,2021>.

[67]Chief Justice Roger Taney in *Dred Scott v Sandford* [1857] 60 U.S. 393.

[68]*R (Miller) v The Prime Minister and Others* (2019) EWHC 2381

Government did not agree with the decision but would respect it purely due to the absence of an alternative. In the parallel case of *Cherry v Advocate General for Scotland* in Scotland, Lord Doherty (dissenting) was also of the view that the question of proroguing Parliament was not justiciable[69]. He pointed out that,

> 'I am not persuaded that any of the matters relied upon by the petitioners or the Lord Advocate result in the claim being justiciable. In my view, the advice given in relation to prorogation decision is a matter involving high policy and political judgement. This is political territory and decision-making which cannot be measured against legal standards but only by political judgements. Accountability for the advice is to parliament and ultimately, the electorate and not to the courts'.

In a swift follow up, Parliament constituted the 'Faulks Commission'(the Independent Review of Administrative Law commission) to examine the appropriate constitutional place of judicial review, including examining whether certain types of executive decisions should be protected and the appropriate tests of justiciability[70]. The commission observed that in the last 40 years, courts have increasingly disregarded the separation of powers and purported to adjudicate controversies of high policy that are otherwise plainly not justiciable[71]. With emphasis demonstrated by bold letters in the report, the Commission stated that,

> 'We are of the firm view that it is entirely legitimate for Parliament to pass legislation making it clear what sorts of exercise of public power or issues relating to that exercise should be regarded as non-justiciable'.

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[69]*Cherry v Advocate General for Scotland* (2019) CSOH 70 at 26.

[70]'Independent Review of Administrative Law' (*GOV.UK*) <*https://www.gov.uk/government/groups/independent-review-of-administrative-law*> accessed 9 March 2023.

[71] Lord Edward Faulks QC. The Independent Review of Administrative Law, Chapter 2 paragraph 2.94-2.102, March 2020 'Independent Review of Administrative Law' <*https://www.gov.uk/government/groups/independent-review-of-administrative-law*> Accessed on January 18, 2022.

Accordingly, the commission advised UK Parliament to place in the statutes certain no-go areas for courts by legislating what is not justiciable. In fact, Article 9 of the Bill of Rights of the UK provides that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.'[72] Clause 3 of The Draft Fixed Term Parliament Act 2011 provides for what it refers to as 'non-justiciability of revived prerogative powers'. It specifies that 'a court of law may not question

a. The exercise or purported exercise of the powers referred to in this section,
b. Any decision or purported decision relating to exercise of those powers, or
c. The limits or extent of those powers'.

The powers referred to in clause 3(a) are basically the powers to prorogue or recall parliament. Commenting on other attempts by courts to expand judicial power beyond its legitimate territory, Kavanagh notes that the UK has a long tradition of rejecting expansion of judicial power particularly where the expansion is disguised as protecting human rights[73]. Kavanagh argues that this resistance should be shared by all who believe in democracy since the core of democracy is that it is a government of the people by the people for the people'[74]. In Germany, the German Federal Constitutional Court caused an uproar when it nullified various legislations enacted to control terrorism at a time when Europe was suffering frequent terrorist attacks[75]. As if to provoke the citizens, the same court decreed that the refugees who were suspected to be sympathetic to and harbor the terrorists in disguise were entitled to be provided with certain minimum conditions of living at the expense of the German tax payer[76]. Those

[72]Bill of Rights 1688.
[73] Aileen Kavanagh, Constitutional Review, the Courts, and Democratic Skepticism. Current Legal Problems (2009) 62(1):102.
[74]Ibid.
[75] BVerfG, Judgment of the First Senate of 20/4/2016-1 BvR 966/09- www.bverfG.de
[76] BVerfG, Judgment of the First Senate of 18 July 2012- BvL 10/10 (Asylum Seekers Benefits).

opposing the courts had a legitimate objection that it was not for courts to decide the steps required to be taken for the security of the country or the help, if any, that the state was to provide to the refugees. These, they contended, were matters of policy to be decided by elected leaders or by the electorate directly.

In the European Union, Baer notes that the European Court of Justice is often accused of forcing member states to implement the EU law beyond the limits accepted by politics and political constituents. Sweet notes that it is common to hear complaints that the European Court of Human Rights in Strasbourg is overstepping its legal bounds and engaging in outrageous interventions in the domestic affairs of member states[77]. The accusation is not farfetched since there are numerous instances of the EU Court of Justice intermeddling in matters that evidently belong to policy or outright politics. For instance, the EU Court of Justice crafted and imposed on Europeans a right of prisoners to vote notwithstanding objections by majority of member states including Britain, then a member state[78].

In India, courts have made decisions prescribing the criteria for admitting children into nursery schools[79], criteria for supplying free water into schools[80], requirements for establishing world class hospitals for burns[81], the quality of air to be breathed in New Delhi[82] and such other matters that clearly belong to

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[77] Susane Baer, The Rule of –and not by any-Law. On Constitutionalism, Current Legal Problems (2018) 71:335.

[78]Ben Quinn, 'Prisoners' Voting Rights: Government Loses Final Appeal in European Court', *The Guardian* (12 April 2011) <*http://www.theguardian.com/politics/2011/apr/12/prisoners-vote-government-loses-appeal*> accessed 9 March 2023.

[79]*Kendriya Vidyalaya Sangathan v Elna Chinchu,* W.A. Nos. 760 and 771 of 2022.

[80]*Shashi Bhushan Sonhadra v Govt. (NCT of Delhi*) [2019] SCC OnLine Del 11409.

[81] Richard Banka, 'Delhi High Court Bench Orders Special Fund for to Help Burn Victims' Hindustan Times, *https://www.hindustantimes.com/cities/delhi-high-court-bench-orders-special-fund-to-help-burn-victims/story-dcDlCvvzsortL9K2jhrEXK.html* >accessed8May 2023.

[82]TNN & Agency, 'Let People of Delhi Breathe Clean Air, Says Supreme Court', *The Times of India* (New Delhi, 21 October 2022)

policy makers[83]. The judgment in *Vishakha v State of Rajasthan* spelt out detailed guidelines for protecting women from sexual harassment at the place of work[84]. The Court basically legislated. In *Olga Telis v Bombay Municipal Corporation*, the court held that the constitutional right to life includes the right to work and accommodation[85]. The most outrageous is the decision in *Advocate Association On Record v Union of India,* in which the Supreme Court of India created the collegium system under which judges gave themselves exclusive authority to appoint, promote and transfer judges[86]. The system is so secretive that it is often accused by judges themselves of lacking transparency, promoting nepotism, and even corruption[87]. In India judges overreach even in matters of divinity, faith and religion. In *Venkatarama Devaru v State of Mysore*,[88] the Supreme Court of India purported to interpret the text of the Hindu holy book to determine the essence of Hinduism, while in *Adhitayan v Travancore Devasam Board*,[89] the court determined whether the faith required it to appoint priests from the Brahimin religion only. In *Mohamed Ahmed Khan v Shah Bano Begun and Others*, the court, constituted entirelyof Hindu judges, purported to interpret the text of core principles of the Quran[90].

In Pakistan, a High Court in Lahore while adjudicating a dispute involving the legality of signboards erected on the Mall Road, digressed on its own motion to deal with the co-existing problem of motorcyclists who were accused of plying the road without wearing helmets. On its own motion and despite the problem of the motorcyclists not being an issue in the proceedings before it, the court directed that petrol stations in the area should not sell petrol or other fuel to

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<*https://timesofindia.indiatimes.com/city/delhi/let-people-breathe-clean-air-says-sc/articleshow/94996958.cms*> accessed 2 May 2023.

[83] Sidharth Sharma, Economic and Political Weekly, March 8, 2008, Vol.43 *https://www.jstor.org/stable/40277222*. Accessed January 10, 2022.

[84]13thAugust 1997.

[85][1985] SCC (3) 545.

[86][2016] 5 SCC 1.

[87]Justice U.L. Bhat, Story of a Chief Justice (2015)

[88]*Sri Venkataramana Devaru v State of Mysore* [1958] SCR 895.

[89]*N. Adithayan v Travancore Devaswom Board* [2002] 8 SCC 106.

[90][1985] (3) SCR 844.

motor-cyclists unless they were wearing helmets. The court further ordered that those filling stations that sell petrol to motor cyclists not wearing helmets to be closed down and fined[91]. In one sweep the court created a law and purported to enforce it.

Unsustainability of judicial overreach

Courts should not deceive themselves that this unwarranted intermeddling in matters that ought to be left to elected leaders is sustainable. In the short run, courts may bask in the hubristic feeling that they have tamed Parliament and the executive. However, the reaction of the elected political leaders to judicial intermeddling shows that political leaders are ready, willing and even anxious to override courts by any means necessary.

Some courts appreciate the danger. In Pakistan, the Supreme Court in *Mian Irfan Bashir v The Deputy Commissioner (D.C.), Lahore and others* distinguished judicial overreach from judicial review and activism and ruled that judges who overreach their judicial authority violate their oath of office.[92] The Court was concerned that overreaching lowers the public image of the judiciary and weakens the public trust reposed in the judiciary where courts issue orders that are not really anchored in law yet encroach on the domain of the executive or the legislature[93].

In India, Justice A.K. Mathur and Justice Markandey Katju of the Supreme Court warned that,

> 'If the judiciary does not exercise restraint and over-stretches its limit there is bound to be reaction from politicians and others. The politicians will then step in and curtail the powers or even the independence of the judiciary. The judiciary should therefore confine itself to its proper

[91]*Mall Road Traders Association v The Deputy Commissioner, Lahore* [2019] CLC 744.
[92][2021] PLD SC 571.
[93]Ibid.

> sphere, realizing that in a democracy many matters and controversies are best resolved in an non-judicial setting'[94].

The court explained that,

> 'We are compelled to make this observation because we are repeatedly coming across instances where judges are unjustifiably trying to perform executive or legislative functions. In our opinion, this is clearly unconstitutional. In the name of judicial activism, judges cannot cross their limits and try to take over functions which belong to other organs of the state'[95].

The Judges are right in expecting a strong reaction from the elected leaders. To demonstrate the reactions, I will highlight a few incidents of judicial overreach and the reaction of the politicians.

In 2014, the parliament of India attempted to override judicial decisions that entrenched the opaque and undemocratic collegium system where judges use undisclosed criteria to appoint, promote and transfer judges, by passing a constitutional amendment to establish a National Judicial Appointments Commission[96]. The amendment was supported by a consensus in both houses of Parliament. The object of the Act was to abolish the collegium system and replace it with a transparent system based on merit. Promptly, the Supreme Court of India declared the Act and the Commission to be unconstitutional on the ground that the Act was interfering with the independence of the judiciary[97]. The judgment met a lot of criticism with the Attorney General and the Minister of Law castigating the judges for disregarding a fundamental democratic consideration of the will of the people and their democratically elected

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[94]Sidharth Sharma, 'Myth of Judicial Overreach' (2008) 43 Economic and Political Weekly 15.
[95]Ibid.
[96]Ninety ninth Constitutional Amendment Act of 2014.
[97]*Supreme Court Advocates on record Association v Union of India* [2016] 5 SCC 1.

representatives as shown by the consensus of the two houses of Parliament[98]. The viciousness and unanimity of the criticism should warn the Judiciary of India that the days of their collegium system are numbered. Sooner or later the people and their democratically elected representatives will get a way of overriding whatever judgement the Judiciary of India could coin for sustaining the opaque system of appointing, promoting and transferring judges.

When President Lincoln rose to power in the U.S.A, he and Congress simply ignored the decisions of the Supreme Court that were in support of slavery. They simply passed a law banning slavery in all territories[99]. Having been on the receiving end of political rhetoric for supporting slavery in *Dred Scott v Sand*, the Supreme Court did not object or in any way accuse Congress and the President for the open contempt of court, or attempt to declare the statute unconstitutional. The Supreme Court simply acquiesced and the political class prevailed on the question of legality of slavery in the U.S.A. It is quite ironic that the Supreme Court was supporting slavery while the politicians were against it. It shows just how wrong courts, including the Supreme, Courts can be.

In Tunisia, the government went as far as dissolving the Supreme Judicial Council (CSM), accusing it of serving political interests. The executive locked the doors of the headquarters of the Council and stationed police to stop staff from accessing it. Appealing directly to the people, the President declared that he would use referendum to change the constitution and address all the issues, including the legal-political challenges facing the government[100].

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[98]India Today Web Desk, 'Attorney-General Says Collegium Changes Inadequate, Judges Alone Can't Judge Each Other', *India Today* (New Delhi, 6 November 2015) <*https://www.indiatoday.in/india/story/attorney-general-says-collegium-changes-inadequate-judges-can-not-judge-each-other-271869-2015-11-06*> accessed 19 March 2023.

[99]The 13thAmendment to the U.S. Constitution, 1865.

[100]Tarek Amara, 'Tunisian President Dissolves Supreme Judicial Council', *Reuters* (6 February 2022) <*https://www.reuters.com/world/africa/tunisian-president-dissolves-supreme-judicial-council-2022-02-06/*> accessed 20 March 2023.

In Hungary and Poland, the democratically elected leaders reclaimed the political supremacy from judges by simply changing the rules of procedure and accessing the courts including the rules for appointing, monitoring, disciplining and retirement of judges[101]. In the EU countries, politicians have openly criticized decisions of the European Court of Justice as an outrageous intervention in domestic political affairs of member states[102].

In Turkey, judicial activism against the democratically elected government culminated in the judiciary getting linked to an attempt to sabotage and overthrow the government of President Tayeep Edrogan[103]. Consequently, the government could not trust courts to make objective decisions that were necessary in cases involving the security of the state. The Government banned judges from travelling abroad, arrested two judges of the Constitutional Court and sponsored a law that abolished judicial review during the emergency period[104]. The most the judiciary could do was to issue a press statement signed by forty-five judges denouncing the actions of the President as awful and unprecedented. Not surprisingly, the remaining judges of the Constitutional Court made a judgment this time round supporting the removal from office and jailing of their two colleagues[105]. Another Turkish Judge explained in an international conference that the Government of Turkey removed the activist judges from office to save the state from juristocracy[106].

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[101]Polly Botsford, 'Hungary and Poland Challenged over Breaches of the Rule of Law' (*International Bar Association*, 12 September 2018) <*https://www.ibanet.org/article/2BCA2B83-C44D-43C0-ABF5-B8EBB32CEAB9*> accessed 20 March 2023.

[102]Miles Jackson, 'Judicial Avoidance at the European Court of Human Rights: Institutional Authority, the Procedural Turn, and Docket Control' (2022) 20 Int J Const Law 112.

[103]Zafer Yılmaz, 'Erdoğan's Presidential Regime and Strategic Legalism: Turkish Democracy in the Twilight Zone' (2020) 20 Southeast European and Black Sea Studies 265.

[104] Ibid.

[105]AFP, President Power- Grab Sparks fears for Freedoms, Daily Nation, August 23, 2021 p.21.

[106] Ibid.

Kenya has also had its incidences of judicial overreach and backlash. When the Supreme Court of Kenya nullified the re-election of a then sitting president in 2017[107], the President held a political rally in which he dismissed the judges of Supreme Court as thugs and promised to revisit the judges for what he condemned as judicial thuggery.[108] Whereas I do not agree with the expletives of the former president and irrespective of the correctness or otherwise of the decision to nullify the election, I note that the reaction is a clear signal to the judiciary that the political class can react even violently if judicial overreach goes too far in undermining the authority of the elected leaders. Earlier in the paper, I identified a few decisions in the long line of judgments nullifying all kinds of decisions of the executive. This overreach culminated in the executive coining constitutional amendments whose object, among other things, was to stem the judicial overreach by amending the constitution to establish a judicial ombudsman to be appointed by the President. The process of amending was labeled the 'Building Bridges Initiative'. Like in India, the High Court and the Court of Appeal in self-serving judgments declared the proposed amendments unconstitutional on the grounds that, *inter alia*, the provisions of the Constitution relating to the Judiciary are part of the basic structure of the constitution and are therefore eternal and can never be amended[109]. The decision was ultimately overturned by the Supreme Court to the extent of the alleged eternity, though the main decision nullified the process of amending the constitution on other grounds. There is a striking similarity between the Kenyan efforts to amend the constitution through the Building Bridges Initiative and the nullification of the National Commission for Judicial Appointments Act by

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[107]*Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* [2017] KESC 42 (KLR).

[108]Standard Digital, 'We Shall Revisit-President Uhuru Kenyatta in Scathing Attack on Chief Justice David Maraga and Supreme Court', *Standard Entertainment* (Nairobi, 2 September 2017) <*https://www.standardmedia.co.ke/entertainment/news/article/2001253376/we-shall-revisit-president-uhuru-kenyatta-in-scathing-attack-on-chief-justice-david-maraga-and-supreme-court*> accessed 20 March 2023.

[109]*Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others (Amicus Curiae)* [2021] eKLR.

Indian Courts. The similarity is in that like the judiciary in India, the judiciary in Kenya disregarded a fundamental factor that the proposed constitutional amendments in the Building Bridges Initiative had overwhelming democratic support. The National Assembly, the Senate and thirty out of the 47 County Assemblies supported the proposed referendum. The courts in Kenya further ignored the fact that it was for the people to ultimately approve or reject the proposed amendments in the referendum.

Similar reactions by elected political leaders have been observed in Ghana, Burundi, Zambia, Ghana, Botswana, Uganda and other African Countries when courts appeared to over indulge in political matters [110]. One of the scholars who has made this observation is Baer, who laments that there are serious attacks on juristocracy all over the world and that the attacks are growing in intensity, popularity and success. Baer notes that the attacks are fashioned as reforms to protect the will of the people against the judicial elite[111]. This trend is best demonstrated by the arrest and jailing of activist judges in Turkey and Tunisia[112].

In these circumstances, courts must learn from the mistakes of judiciaries of other countries where the judiciary is in forced retreat. In some of those countries, politicians bundled courts with other political organs and dealt with them politically in referendums, popular uprisings, military coups or other non-legal means. In those countries, courts reckon that judicial authority is an illusion in the face of a determined political process. This is irrespective of whatever the constitution or the legal framework provides. The reality is that courts are forced to acquiesce to the new constitutional dispensation even in cases of rule by decree in countries such as Myamar, Gambia, Sudan, Egypt and other countries where the current or past governments came to power by

[110]T. Masengu, 'The Vulnerability of Judges in Contemporary Africa: Alarming Trends (2017) 63 Africa Today.
[111] Susane Baer, The Rule of –and not by any-Law. On Constitutionalism, Current Legal Problems (2018) 71:335.
[112]Yılmaz (n 103).

military coups. The point is that politics overrides constitutions. The argument is not that courts should at all times timidly follow political forces, rather, it is that in countries with democratically elected leaders, courts ought to respect the elected leaders by refraining from intermeddling with political, policy, economic and other non-justiciable decisions of the elected leaders.

Gregory argues that if courts do not stop intervening in politics, the common man will come to see courts as just one more political player bearing all the fallibilities of political institutions[113]. Classifying courts as political players makes courts vulnerable since as against the executive and the legislature, courts do not wield any real power in politics. The coercive power of the courts is based on good will of the other arms of government and the public since courts do not control the instruments of violence such as the army or police. In addition, courts do not have a forum for seeking support from the public at large. The helplessness of the courts as against the other arms was aptly described by Republican politicians reacting to the decision of the Supreme Court in *Dred Scott v Sand*. The politicians dismissed the authority of the Supreme Court as 'superstitious worship' and 'fulsome flattery'[114]. Kramer dismisses the unquestioning obedience to court orders as the 'cult of court' in which the democratically elected leaders meekly acquiesce to even the most outrageous judicial decisions[115]. The backlash against judicial overreach is so acute that prominent scholars like Besirevic have contemplated a day when the elected leaders will govern without judges [116].

Some judges appreciate the danger

Fortunately, not all judicial officers are drunk with the so called fulsome flattery. A significant number of them appreciate their vulnerability. In South Africa,

[113] Peter Y. Gregory H. (2016) Is anyone Listening? The Politicization of the Judiciary and the Loss of Authority: An Initial Assessment. J.Pol Sci Pub Aff 4:217

[114]Matt Karp, 'How Abraham Lincoln Fought the Supreme Court' [2020] (39) Jacobin.

[115]Larry Kramer & Russel D. Niles, Who Has the Last Word On the Constitution, Boston Review 13.

[116] V Besirevic, 'Governing Without Judges '. The Politics of the Constitutional Court in Serbia' (2014) 12 International Journal of Constitutional Law 954.

Justice Krieger in *S v Mawabolo*[117] brought out the illusion of judicial authority under the South African Constitution in the following words,

> *'In our constitutional order, the judiciary is an independent pillar of the state, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers, it stands on an equal footing with the executive and the legislative pillars of the state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars… Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its function…'*

Again in South Africa, the former Chief Justice of the Supreme Court of Appeal, Hon. I. Mahomed, similarly observed that,

> *'Unlike Parliament or the executive, the court does not have the power of the purse or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier. They would be impotent to protect the Constitution if the agencies of the state which control the mighty physical and financial resources of the state refused to command those resources to enforce the orders of the courts. The courts could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship. Its ultimate power must therefore rest on the esteem with which the judiciary is held within the psyche and soul of the nation. That esteem must substantially depend on its independence and integrity'.*[118]

In UK, a significant number of Senior Judges frown upon judicial overreach. They have spoken openly against incidents of judicial overreach and are agreeable to the state taking steps to correct the course. After the September 11th attacks in the U.S, Lord Hoffman of the House of Lords in *Secretary of State For*

[117][2001] ZACC 17.

[118]I Mahomed, 'The Role of the Judiciary in a Constitutional State - Address at the First Orientation Course for New Judges' (1998) 115 S African LJ 111.

The Home Department v Rehman (AP) noted that the gravity of the attacks underlie the need for the judicial arm of government to respect the decisions of the executive on matters of national security since the executive have special information and expertise in those matters[119]. He noted that above all, the decisions have such serious repercussions for the community that they require legitimacy which can only be conferred by leaving the decisions to be made by those the community itself has entrusted with the responsibility through the democratic process[120]. The Lord cautioned the judges that if people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove[121]. Guided by these insights, the UK Court of Appeal refused the attempt to challenge the lawfulness of the corona virus lockdown restrictions[122].

Lord Sumption of the UK Supreme Court sums up judicial overreach with the argument that purporting to resolve major policy issues judicially deprives decisions legitimacy by substituting judicial decisions in the place of the negotiations and compromises that society, whether directly or through its representatives, makes through democratic process to be able to live together.[123] For instance, in the hotly contested campaigns for amending the Constitution of Kenya through the Building Bridges Initiative, one of the main controversies was whether to restructure the executive from purely Presidential to a hybrid of parliamentary and presidential.[124] Politicians for and against the proposed amendment sold their policies to the public, to members of the County Assemblies, Members of Parliament and the Senate. The bill passed in the National Assembly, Senate and more than half of the County Assemblies.

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[119][2001] UKHL 47.
[120][2003] 1 AC 153, (62).
[121]Ibid.
[122]*Dolan & Ors, R (On the Application of) v Secretary of State for Health And Social Care & Anor* [2020] EWCA Civ 1605.
[123]Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (2019).
[124] Roselyne Obala, 'BBI Team Proposes Hybrid System of Governance', *The Standard* (Nairobi, 2020) <*https://www.standardmedia.co.ke/article/2001350996/bbi-team-proposes-hybrid-system-of-governance*> accessed 10 August 2023.

However, the ultimate decision was made by the courts, which nullified the process through some sort of constitutional review.[125] The question that remains is whether the decision to amend or not to amend was made by the courts or the people. A decision of the court on such a major political issue clearly lacks democratic legitimacy.[126]

Goelzhauser, commenting on the wisdom of the U.S. Supreme Court in matters with potential for overreach, observes that research shows that on matters that touch on policy, the Supreme Court appreciates Congress has immense powers relative to the Court and often acts strategically to make decisions that do not contradict the public opinion or the Congressional majority[127]. Thereby, the Court avoids friction with the electorate or their elected leaders in Congress and the Presidency. This observation is supported by Marino who observes that Parliaments possesses enormous power over courts and have the ability to pass legislation that can erode the authority of the courts especially on matters of policy[128].

The point is that in a democratic state, the power of judiciary is dependent on the political organs.[129] Therefore, to protect their moral authority, esteem and the goodwill of the masses and their elected leaders in Parliament and the Executive, courts should avoid overreaching and venturing into decisions

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[125] *Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others (Amicus Curiae)* [2021] eKLR.

[126] Sophie Koning, '(Re)Defining Conflicts: Democratic Legitimacy in Socially Sensitive Court Cases' (2023) 19 2, 58.

[127] Goelhuaser, G. Avoiding Constitutional Cases, American Politics Research (2011) 483-511.

[128] Phillip Marino Court- Curbing: Why and When Members of Congress Seek to Harm the Supreme Court, Florida State University Libraries (2012) lib-ir@fsu.edu. <accessed on July 20,2021>.

[129] Consultative Council Of European Judges, 'The Position of the Judiciary and Its Relation with the Other Powers of State in a Modern Democracy' (2015) 4 CCJE. <*https://rm.coe.int/16807481a1#:~:text=No%20judiciary%20%E2%80%93%20as%20with%20any,has%20to%20interpret%20and%20apply.*>

meant for politicians and policymakers.[130] In this regard, the lesson from the Supreme Court of the U.S seems to be that except in the clearest cases of violation of the constitution, courts should not interfere with political processes. They should avoid interfering with political processes and policy decisions on account of minute and inconsequential infractions of the constitution. In such matter courts should perhaps invoke the old maxim of *de-minimis*. As Thayer argues, courts should only intervene in uncontroversial constitutional violations or clear errors[131]. Unfortunately, courts often apply a perfectionist approach in constitutional and judicial review controversies as well as in enforcing fundamental rights. They scrutinize policy decisions for the slightest, albeit harmless, violations of the law and use it to declare the policy unconstitutional.

For instance, in *Alice Muthoni Wahome v Attorney General & 2 others*, the High Court held that it was unlawful for the President and the Cabinet to invite a non-member to attend its meetings.[132] Such intrusive intermeddling risks unnecessarily antagonizing the elected leaders and the masses. It undermines the entire authority of Court. Courts should above all appreciate that their primary duty is to decide ordinary legal disputes between citizens as well as between citizens and governments over private rights[133]. Determining the mega-politics that decide the political destiny of the country should be left to the political accountability of the elected leaders, perhaps in Parliament or general elections[134]. In fact, other institutions including Parliament have elaborate political mechanisms for holding government Ministers to account. These include scrutinizing accounts of government ministries, Parliamentary questioning, summoning and interrogating government ministers, withholding or reducing budgetary allocations, giving votes of no confidence, among others.

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[130] Ibid.

[131] James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, (A Paper Read at Chicago August 9,1893, before the Congress on Jurisprudence and Law Reform) Little Brown and Company (1893).

[132] [2021] eKLR.

[133]Richard Ekins and Christopher Forsyth, Judging the Public Interest: The Rule of Law vs. the Rule of Courts: Policy Exchange Judicial Power Project 2015.

[134]Ibid.

It is therefore not open for courts to argue that the other institutions are not able to effectively hold the executive to account. This cannot legitimize the overreach by courts. Creating a system where the elected leaders are primarily accountable to judiciary for their political decisions corrupts the core of democracy which is that political leaders are politically accountable to their electorate in elections while government ministers are accountable to Parliament in between the elections.

Conclusion

This paper has shown that in the long run, judicial overreach is not sustainable since it undermines the basic concept of democracy that major decisions affecting the nations should be decided either by the people directly or by their democratically elected representatives and the moral authority of the court. On the other hand, the backlash from the people and their elected leaders threatens the authority, respect and the very existence of courts unless the courts return to their place in democracies.

Already, there are signs of backlash from the other arms of government reclaiming their own independence from rule of judicial overreach. Elected institutions are devising all manner of mechanisms to tame the overreaching courts. Though unsuccessful so far, the consistent attempts in Israel, India, United Kingdom, Germany, United States, Kenya and other unquestionably democratic countries to tame judicial overreach suggests that the elected leaders are probably back on the drawing board devising better strategies for putting the judiciary back into its place in a democracy. It is a matter of when and not whether they will eventually succeed. In the meantime, the problem of judicial overreach calls upon *jurisprudes* to scrutinize the current constitutions and identify legitimate avenues which the people and the elected leaders may use to rein on the overreaching courts, save democratic constitutions from the courts, and the courts from themselves. I hope to contribute to the debate through the next paper.

Book Review: Embracing Environmental Social and Governance (ESG) Tenets for Sustainable Development

By: ***James Njuguna*** [*]

The book "Embracing Environmental Social and Governance (ESG) tenets for Sustainable Development" (follow link for free download) published by Glenwood Publishers at Nairobi in July 2023 is a collection of Hon Dr. Kariuki Muigu's latest articles on ESG and related topics. He defines ESG as referring to a model through which corporations and investors integrate Environment, Social and Governance tenets into business models. He adopts the definition of Sustainable Development engendered in the Environmental Management and Coordination Act (EMCA) of the Republic of Kenya as 'that development that meets the needs of the present generations without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems."

The author, Dr. Kariuki Muigua, PhD, is a Member of the National Environment Tribunal (NET) and the Permanent Court of Arbitration at The Hague representing the Republic of Kenya. He is one of the foremost Environmental and Natural Resources Lawyers and Scholars in Africa. He is ranked in Band 1 among the Top 5 Arbitrators in Kenya by Chambers and Partners in 2023. Dr. Kariuki Muigua is Africa's CIARB Trustee Emeritus (2019-2022) and won the African Arbitrator of the Year 2022 and African ADR Practitioner of the Year Award 2022 last year. He has authored more than dozen books in the areas of

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Environmental and Natural Resources Law, Dispute Resolution and Conflict Management. In this book, Dr. Kariuki Muigua offers twenty-three (23) peer-reviewed and well-researched articles that highlight the latest cutting-edge research on ESG and relevant law in Kenya.

The paper "Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya," critically examines the extent to which Environmental, Social and Governance (ESG) principles have been embraced in Kenya and notess that ESG has emerged as arguably the most important tool of corporate governance. The paper "Linking Alternative Dispute Resolution (ADR) and Environmental, Social and Governance (ESG) Tenets for Sustainable Development," focuses on the nexus between Alternative Dispute Resolution (ADR) mechanisms and Environmental, Social and Governance (ESG) tenets and argues that linking ADR and ESG tenets can foster the realization of the Sustainable Development agenda. "Conflict Management Mechanisms for Effective Environmental Governance in Kenya," discusses the nature of environmental and natural resource related conflicts and their applicability or suitability in the management of environmental conflicts.

In "Enhancing Environmental Governance for Peace Building in Kenya," the author critically discusses how peacebuilding efforts can benefit from enhancing and streamlining environmental governance as way of addressing some of the causative factors that may directly or indirectly contributed to instability in a society. The paper "Re-imagining the Role of Lawyers in Climate Justice" revisits the role of lawyers both as active players in fighting climate change and also as agents of securing climate justice for those most affected by the adverse effects of climate change in society. "Bilateral Investment Treaties and Environmental, Social and Governance in Africa" critically investigates the relationship between Environmental, Social and Governance (ESG) and Bilateral Investment Treaties (BITs) in Africa. It argues that Environmental, Social and Governance factors have become integral in the foreign investment sphere and are being widely embraced in BITs.

On its part, "The Viability of Arbitration in management of Climate Change Related Disputes in Kenya," discusses the disputes related to climate change implications, and how the same can be addressed using arbitration as a dispute settlement mechanism. The author argues that arbitration has certain advantages over litigation which makes it more viable in addressing the disputes in question. Related to this, "Managing Governance Conflicts Through Alternative Dispute Resolution in Kenya," critically analyses the suitability of Alternative Dispute Resolution (ADR) mechanisms in managing governance conflicts. The paper discusses the nature, causes and underlying issues in governance conflicts, delves into the applicability of ADR in managing governance conflicts, highlights the shortcomings of ADR towards this course and proposes recommendations aimed at ensuring good corporate governance through the use of ADR as a tool for managing governance conflicts.

"Realising Environmental, Social and Governance Tenets for Sustainable Development," discusses the Environmental, Social and Governance (ESG) aspects of sustainable development agenda and how the same affect sustainability. The paper looks at the best practices as far as these tenets are concerned and argues that unless countries and stakeholders ensure that there is convergence of efforts in pursuit of environmental, social and governance aspects of sustainability, then the struggle for achievement of the 2030 Agenda for Sustainable Development will remain a mirage. The Paper "Revisiting the Role of Law in Environmental Governance in Kenya" discusses the general environmental governance practices and makes recommendations on how the environmental law frameworks in Kenya can be reviewed to make them more inclusive. The paper advocates for laws that strike a balance between anthropocentric and ecocentric approaches in environmental governance.

"Streamlining Water Governance in Kenya for Sustainable Development" assesses the current measures and attempts by the state to achieve the constitutionally guaranteed right of access to clean and safe water in adequate amounts and offers an overview and analysis of the provisions of Water Act

2016 in light of the international best practices in water governance and the sustainable development agenda. "COP 27 and Biodiversity: Towards an Integrated Approach to Climate Change Mitigation and Biodiversity Conservation" highlights the outcomes of COP 27 and argues there is a need for climate change mitigation efforts and biodiversity protection and conservation measures to consider the nature-based approaches and create an opportunity for collaboration between communities and government agencies. The paper "Embracing Technology for Enhanced Efficiency and Access to Justice in the Legal Profession," critically discusses the impact of technology on modern legal practice in Kenya and argues that the legal profession has more to gain than lose if it embraces technology as a tool of access to justice. "Enforcing the Right to Clean and Healthy Environment in Kenya Through the Polluter Pays principle" makes a case for the enforcement of the right to clean and healthy environment in Kenya through the internationally recognised polluter pays principle.

"Harnessing the Blue Economy: Challenges and Opportunities for Kenya" discusses the challenges that bedevil Kenya's blue economy and suggests ways through which the sector can be unlocked to boost national development agenda in light of the Nairobi Blue Economy Conference held in Nairobi in November 2018. "Fostering Africa's Blue Economy: Problems and Promises" critically examines the concept of Blue Economy in Africa, gives an overview of how it has been embraced in Africa and then discusses its problems and promises and suggests reforms towards fostering Africa's Blue Economy. "The Role of Climate Change in Environmental Conflicts" analyses the disagreements that arise from the consequences of Climate Change and how such disagreements may be resolved via the implementation of efficient climate change mitigation strategies. "Embracing Sustainability Audit for Enhanced Corporate Environmental Compliance in Kenya" examines the concept of sustainability audit as a means of increasing the percentage of businesses that comply with environmental regulations in Kenya and discusses the challenges that are associated with it and argues that a sustainability audit is one of the approaches that may be used to address these difficulties.

"*Combating Climate Change in Kenya for Sustainable Development*" argues that for the country to combat climate change, there is a need for an integrated approach that meaningfully involves all the stakeholders and the Government alone cannot achieve this task which is key for realisation of both the country's Vision 2030 and the United Nation's 2030 Agenda for Sustainable Development. "Combating Climate Change Through Sustainable Forests Management for Current and Future Generations" critically discusses how taking care of forests can positively contribute to climate change mitigation as part of achieving sustainable development for a better tomorrow. "*Actualizing Africa's Green Dream*" critically discusses the concept of 'green economy' in Africa and argues that green growth is vital in Africa in the wake of the threat of climate change among other concerns. "*The Place of Environmental, Social and Governance (ESG) in Arbitration,*" critically discusses the relationship between Environmental, Social and Governance (ESG) and arbitration and argues that arbitration represents a viable mechanism for managing ESG related disputes while simultaneously promoting ESG tenets. "Reconceptualizing Corporate Governance for Sustainable Development" highlights some of the corporate governance practices that have fostered Sustainable Development including the concepts of Corporate Social Responsibility (CSR) and Environmental, Social and Governance (ESG).

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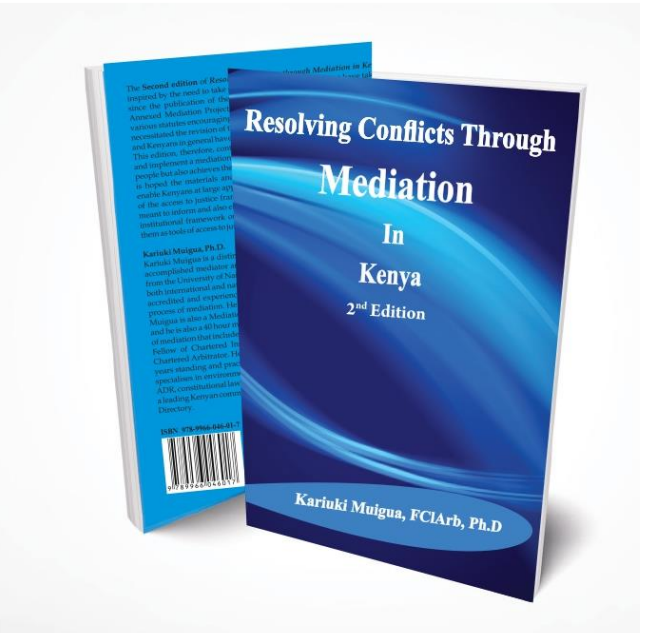

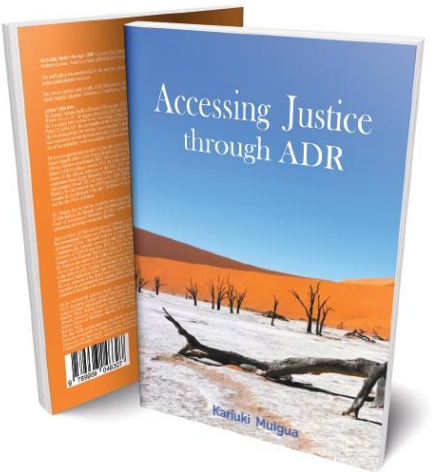

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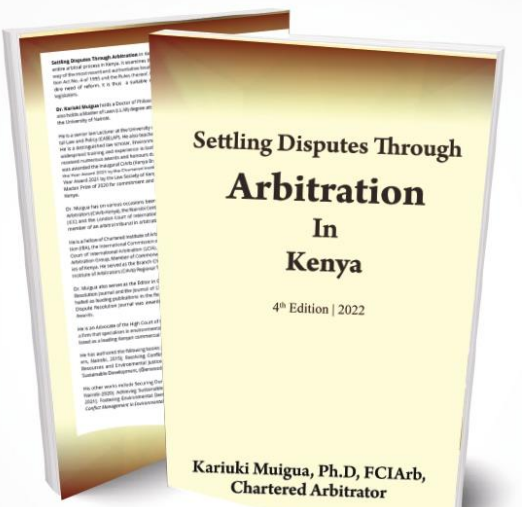

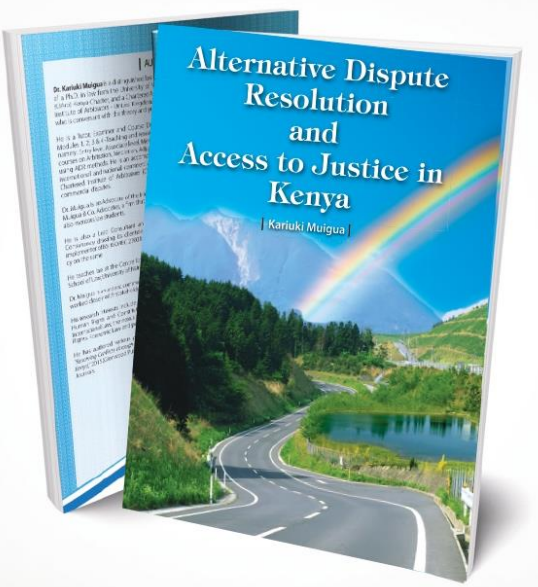

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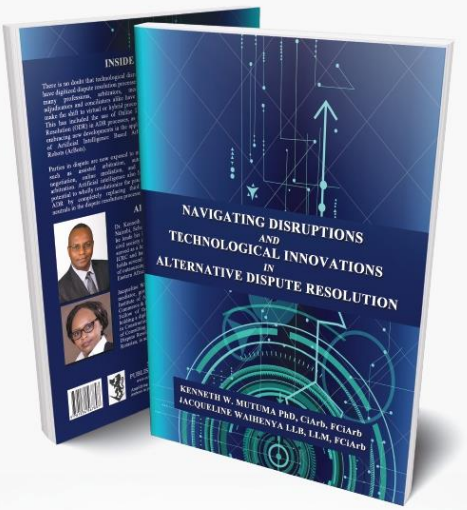

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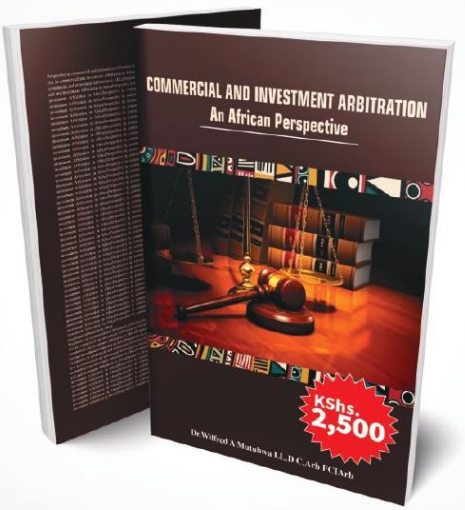

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ISBN 978-9966-046-14-7