



# Alternative Dispute Resolution

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## **Editor's Note**

Welcome to this edition of the Alternative Dispute Resolution Journal. The Journal has a worldwide audience and is available online at [www.ciarbkenya.org](http://www.ciarbkenya.org). It is a global platform for scholarly discourse on Alternative Dispute Resolution (ADR). It features the ADR's role in the Rule of law, Access to Justice, Empowerment, Development and effective conflict management.

This edition contains a rich offering of articles with diverse themes on arbitration, mediation and Traditional Dispute Resolution mechanisms.

With regard to arbitration, various authors have addressed issues ranging from privacy and confidentiality versus transparency in Government arbitrations; challenges facing arbitral institutions in Africa; challenges and advances in service delivery to users of arbitration on the continent, by prominent and emerging centres and institutions; the role of lawyers/advocate in the arbitration process; and the doctrine of arbitrability vis-à-vis public policy, in the realm of commercial arbitration.

Traditional Dispute Resolution mechanisms have been examined in relation to the following: successes and challenges faced by elders, and opportunities offered by the institution of elders in conflict resolution to enhance access to justice amongst African communities; the implication of multiple legal orders on dispute resolution mechanisms in Africa; the use of ADR as a tool for the empowerment of the Kenyan people, to boost their participation in conflict management, governance matters, and improve the socio-economic aspects of their lives; and the implication of the repugnancy clause on the enforceability and institutionalization of Article 159 (2) (c) of the Kenya Constitution.

The potential role of the Chartered Institute of Arbitrators in boosting the principled use of commercial mediation for realisation of the full potential and power within the African context has also been examined.

The journal is a publication of the Chartered Institute of Arbitrators Kenya and it is a good source of information for ADR practitioners, researchers and the wider audience worldwide.

Alternative Dispute Resolution is really not 'alternative' in the African context. It is a way of life and has been so for hundreds of years. Kenya has formally recognized ADR in the constitution and this has had the effect of legitimizing it within the legal framework and creating awareness of its ability to assist Kenya attain access to justice.

The journal offers an opportunity to reflect on ADR and its place in the social, economic and legal spheres.

The Chartered Institute of Arbitrators wishes to thank the contributing authors, editorial team, reviewers and all those who have made the publication possible.

**Dr. Kariuki Muigua, Ph.D., FCIArb, (Chartered Arbitrator)**  
**Editor,**  
**Nairobi, October, 2015**

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## WHAT IS THERE TO HIDE? PRIVACY AND CONFIDENTIALITY VERSUS TRANSPARENCY: GOVERNMENT ARBITRATIONS IN LIGHT OF THE CONSTITUTION OF KENYA 2010

*By: L. Obura Aloo\* and Edmond Kadima Wesonga\**

*Giza adui yake mwangaza  
(Light is the enemy of darkness) Kiswahili Proverb*

### 1. INTRODUCTION

When listing the advantages of arbitration over other dispute resolution processes and, in particular litigation, it is not uncommon to include “confidentiality” as one of the advantages of arbitration.<sup>1</sup> Indeed, confidentiality is often listed as one of the most attractive features of arbitration.<sup>2</sup> Arbitration proceedings are taken to be private and the substance is considered confidential, offering the advantage of protection against unwelcome scrutiny and publicity for the disputants.<sup>3</sup>

Confidentiality as an attribute of arbitration has a long history in the common law. Sir George Jessel MR in the often cited case of *Russell v Russell*<sup>4</sup> stated:

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<sup>1</sup> Muigua, Kariuki. *Settling Disputes Through Arbitration in Kenya*. Glenwood Publishing Nairobi, 2012. p. 3 “This aspect of confidentiality is highly prized by the individuals/disputants, as there is not ‘washing dirty linen in public.’”; Paulsson, Jan and Nigel Rawling. “The Trouble with Confidentiality” 11 *Arb. Int'l* 303 (1995) p. 303; Bernstein, R et al *Handbook of Arbitration Practice* Sweet & Maxwell, London, 1998. 10.

<sup>2</sup> Secretary General International Chamber of Commerce Lord Saville – Departmental Advisory Committee on Arbitration Bill February 1996. See also Amos Wako Attorney General of Kenya on Arbitration Bill Second Reading Arbitration Bill *Kenya Parliamentary Hansard* 5<sup>th</sup> July 1995 p 1351-1357 Government Printer Nairobi, 1995.

<sup>3</sup> Muigua, Kariuki. *Ibid note 1*

<sup>4</sup> *Russell v Russell* (1880) 14 ChD 471



*As a rule persons enter into these contracts with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public, which must be a painful one, and which might be an injury even to the successful party to the litigation, and most surely would be to the unsuccessful<sup>5</sup>*

The position is asserted or assumed in later English cases.<sup>6</sup> The attitude of the Kenyan authors and courts is similar.<sup>7</sup> However, despite this widespread acceptance of privacy and confidentiality as a feature of arbitration, there is no statutory foundation for it.<sup>8</sup> The reason given for this by learned arbitration authors is that the exceptions to the rule are too difficult to properly define hence the matter was left to the courts.<sup>9</sup> The area is in flux so much such that some conclude that “confidentiality”,

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<sup>5</sup> Ibid p. 474

<sup>6</sup> *The Eschesheim* [1974] 2 Lloyd’s Rep 188, 198-199; *Marine Contractors v Shell Petroleum Development Co of Nigeria* [1984] 2 Lloyd’s Rep 77; Colman J in *Dolling –Baker v Merrett* [1993] 2 Lloyd’s Rep 246 it has been universal practice [in London] ‘for hundreds of years that arbitration hearings are conducted in private.’

<sup>7</sup> See for example Karanja J.A. in *Nyutu Agrovet Limited v Airtel Networks Limited* Court of Appeal Civil App( App) No 61 of 2012 “[arbitration is] ..also expected to be cheaper, faster and more confidential as compared to ordinary litigation.” Muigua, Kariuki. *ibid note 1* “This aspect of confidentiality is highly prized by the individuals/disputants, as there is not ‘washing dirty linen in public.’”; Githu Muigai(ed) *Arbitration Law & Practice in Kenya*. LawAfrica, Nairobi. 2011; Gakeri J. “Placing Kenya on the Global Platform: An Evaluation of Arbitration and ADR” *International Journal of Humanities and Social Science* Vol 6 June 2011

<sup>8</sup> Neither the Arbitration Act (Cap 49) Laws of Kenya expressly provides for confidentiality nor the UNCITRAL Model Law upon which it is based. See also St. John Sutton, David J. Gill and M. Gearing, *Russell on Arbitration* 23<sup>rd</sup> (ed) Sweet and Maxwell, London p. 253.

<sup>9</sup> St. John Sutton, David J. Gill and M. Gearing *Russell on Arbitration* 23<sup>rd</sup> (ed) Sweet and Maxwell London p. 253; Thomas, I. “Confidentiality in English Arbitration Law: Myths and Realities About its Legal Nature” 25 *J. Int’l Arb* (2008) 299; Hwang, M. and K. Chung. “Defining the Indefinable: Practical Problems of Confidentiality in Arbitration” 26 *J. Int’l Arb* (2009) 609

although an important facet of the arbitration process, can no longer be considered inherent to it.<sup>10</sup>

Given that the legal basis of privacy and confidentiality in arbitration may not be as sound as their great antiquity and constant repetition would suggest, they are bound to come under judicial scrutiny in light of the constitutional provisions. In a recent High Court decision, in words likely to alarm the local arbitration purist, the court stated:

*It is therefore clear that unlike in mediation, arbitral proceedings are, just like in litigation, open to the public and follows a similar procedure to that of litigations but with a more relaxed approach.*<sup>11</sup>

Although these words were stated *obita* and, following reference to a lesser known American arbitration text, the warning bells have been sounded.<sup>12</sup> It is no longer obvious that arbitration proceedings are necessarily private or confidential.

With the passage of the Constitution of Kenya 2010, it cannot be doubted that, a new era of government transparency is with us. This transparency affects all spheres of government relations, and raises the question about the place of privacy and confidentiality when it comes to arbitration involving government or state owned entities.<sup>13</sup> The

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<sup>10</sup> Misra, J. and R. Jordans “Confidentiality in International Arbitration: An Introspection of the Public Interest Exception” 23*J. Int’l Arb.* (2006) 39, 48

<sup>11</sup> *Hon Senator Johnstone Muthama v Tanathi Water Services board and 2 others* [2014] eKLR para 13

<sup>12</sup> The decision at para 9-12 makes reference to Jacqueline R. Clare (eds), (2003), *Alternative Dispute Resolution in Northern Carolina: A New Civil Procedure*, North Carolina Bar Foundation and uses the definitions there to draw the conclusion. This paper will later deal with the significant differences in the American and English approaches to confidentiality in arbitration which suggests that it may be an error to use American sources on the point.

<sup>13</sup> This debate is not unique to Kenya and has been raging for some time in investment treaty arbitration. Commentators have predicted a ‘pitched battle’ between promoters of greater transparency and defenders of privacy and confidentiality. See “Behind Closed Doors; Investment Arbitration and Secrecy (A pitched battle looms over transparency in commercial arbitration) *The Economist*, 25 April 2009 p. 60

government is also interested, it appears, in greater openness of arbitration.

A senior government official has noted that "Public interest is a significant consideration in government arbitrations due to the need for accountability and integrity of the process to ensure transparency in the Arbitration process."<sup>14</sup> She further points out that "Due to the increase in demand for ADR, the Government would like to see an increase in transparency and accountability of ADR processes."<sup>15</sup>

There are at least four provisions of the Bill of Rights that appear to be relevant. First, Article 31 of the Constitution asserts the right to privacy.<sup>16</sup> The right to privacy includes the right not to have information relating to private affairs unnecessarily required or revealed.<sup>17</sup> Secondly, freedom of expression is guaranteed by article 33 of the Constitution, which defines freedom of expression broadly to include "freedom to seek, receive or impart information or ideas".<sup>18</sup> Thirdly, and perhaps most significantly, article 35 provides that any person has a right of access to;

- (a) information held by the state
- (b) information held by another person and required for the exercise or protection of any right or fundamental freedom."

Finally, article 50 of the Constitution may be considered in this context. Article 50(1) provides that "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."<sup>19</sup> (emphasis added)

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<sup>14</sup> Kimani, Muthoni. "Kenyan Government's Perspective on ADR" (2014) 1 *Alternative Dispute Resolution* 18-20 at 19

<sup>15</sup> Ibid at 20

<sup>16</sup> Constitution of Kenya, 2010. Government Printer Nairobi Article 31

<sup>17</sup> Ibid article 31(c)

<sup>18</sup> Ibid article 33(1)(a)

<sup>19</sup> Constitution of Kenya Article 50(1)

In addition, one of the national values and principles of governance provided for under Article 10 of the Constitution is “transparency and accountability”.<sup>20</sup> It is further reiterated in Article 232 (1)(f), which provides that the principles and values of public service include transparency, and provision to the public of timely and accurate information.

Although the Constitution seeks to promote alternative dispute resolution mechanisms, including arbitration, the values of transparency are not, as it would appear, thereby affected.<sup>21</sup>

It is thus clear that the touted virtues of privacy and confidentiality in arbitration are at odds with the constitutional requirements of transparency and freedom of information. The area of conflict is likely to be subjected to litigation in courts.<sup>22</sup> There is a good reason to suppose that parties to arbitration or interested members of the public may ask for arbitration proceedings to be opened up to the public. There have, for example, been increased murmurings about corruption or perceived corruption, amongst arbitrators.<sup>23</sup> These concerns about the integrity of private justice are not confined to Kenya nor are they new. John Locke, the drafter of the first Arbitration Act in England in 1698, was concerned enough then, to make corruption one of the grounds upon which an arbitration award would be declared void.<sup>24</sup> The arbitration process itself could also be used to disguise

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<sup>20</sup> Article 10 (2)(c) Ibid

<sup>21</sup> Article 159 (2) *ibid* “In exercising judicial authority, the courts and tribunals shall be guided by the following principles... (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted...”

<sup>22</sup> For potential arguments see Egonu, M. “Investor-State Arbitration Under ICSID: A Case for Presumption Against Confidentiality?” 24 *J.Int’l Arb.* 479 (2007)

<sup>23</sup> Kisero, Jaiindi. “Don’t Abuse Arbitration Process”. *Business Daily* Thursday May 16 2013 pointing to large arbitration awards against state owned entities. Accessed at <http://www.businessdailyafrica.com/Opinion-and-Analysis/Do-not-abuse-arbitration-process/-/539548/1854720/-/3nj8f5/-/index.html> [last accessed 31/8/2015]; See also Kimani, Muthoni. “Kenyan Government’s Perspective on ADR” (2014) 1 *Alternative Dispute Resolution* 18-20 at 20 on government institutions discomfort with repeat appoints of arbitrators amongst other things.

<sup>24</sup> Arbitration Act 1698 (9 & 10 Will. III c 15) “ – any arbitration or umpiring procured by corruption or undue means shall be judged and esteemed void and of none effect

corrupt practices, with the arbitrator being an unwitting player in the game. In this case, the award is used to sanitise the underlying corruption.<sup>25</sup>

This note proposes that those with an interest in arbitration should take the initiative and define the limits of privacy and confidentiality in government or state-related arbitration or risk disruptive court intervention. The definition of the scope of confidentiality may be informed by the international rules on transparency that have been adopted for international investment arbitrations.<sup>26</sup>

Once the scope of confidentiality required of government arbitrations is agreed, it can be placed as an exception to the freedoms of information in the freedom of information legislation that is currently being debated.

In order to address these issues, part II of this paper briefly examines the concepts of privacy of procedure and confidentiality of the information relating to arbitration process, and the confidentiality of documents created for, or by the proceedings. Consideration is given to the approaches of different jurisdictions regarding the questions of privacy and confidentiality in arbitration proceedings.<sup>27</sup>

The paper then looks at the place of constitutional provisions, and in particular freedom of information, in government arbitration or arbitration

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and accordingly shall be set aside by any court of law or equity ...” For history of Arbitration Act 1698 and role of John Locke see Horwitz, H & J. Oldham. “John Locke, Lord Mansfield and Arbitration During the Eighteenth Century” *The Historical Journal* Vol 36 Issue 1 1993 pp 137-169

<sup>25</sup> Kisero, Jaindi. “Don’t Abuse Arbitration Process”. *Business Daily* Thursday May 16 2013 op cit. Galgalo, Fayo. “KPC Asks High Court to Reject Shs 386m Claim” *Business Daily* Monday February 17, 2014

<sup>26</sup> UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (the “Rules on Transparency”) which took effect from 1/4/2014.  
[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html)  
United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the “Mauritius Convention on Transparency”)  
[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html) [last accessed 31/8/2015]

<sup>27</sup> There is a good deal of writing on the area eg Bhatia, V.K., C. N. Candlin & R. Sharma, “Confidentiality and Integrity in International Commercial Arbitration Practice” (2009) Vol 75 *Arbitration* No. 1 of 2009 2-13

involving a state-owned entity. We note that it is now common in democratic countries to find laws opening up government records and processes.<sup>28</sup> There is a presumption, albeit one bound by caveats and exceptions, that the information held by public authorities should be freely available to the public.<sup>29</sup> At the very least, freedom of information legislation creates transparency, stimulates civic involvement, increases efficiency and prevents corruption.<sup>30</sup> Due to its colonial legacy, Kenya has had a particularly secretive and largely unaccountable government.<sup>31</sup> However, the constitutional environment and climate of public opinion has changed. People expect much greater openness and accountability from government.

Finally, the paper examines recent developments relating to investment agreement arbitrations and, in particular, the transparency rules adopted by UNCITRAL that require that certain information about the dispute is to be made available to the public.<sup>32</sup> The rules' provisions allowing non-parties to be permitted to attend hearings and, in some cases,

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<sup>28</sup> Republic of Kenya. *Draft Freedom of Information Bill, 2005*. <http://www.information.go.ke>; (accessed 31/8/2015) and Miring'uh, Eluid. "Lawyers dismiss Information Bill" *The East African Standard* Thursday December 15, 2005 p. 7; *Draft Access to Information Bill, 2013* .....

<sup>29</sup> Brasted, Charles. "Brave New World?" 156 *NLJ* 26

<sup>30</sup> Hart, Thomas and Carolin Welzel. "Freedom of Information and the transparent state" Bertelsmann Stiftung Foundation. April, 2003 p 6-7 accessed at <http://www.begix.de/foi/berlsmann-foundation-foi.pdf> (last visited on 31/8/2015)

<sup>31</sup> As noted by Prof Migai Aketch, new African states "...inherited a state apparatus that was highly authoritarian and unaccountable to the majority of the citizens, although it claimed to act in their name." Aketch, Migai *Privatisation and Democracy in East Africa: The Promise of Administrative Law* East African Educational Publisher. Nairobi 2009

<sup>32</sup> UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (the "Rules on Transparency") which took take effect from 1/4/2014. [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html) United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency") [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html) [last accessed 31/8/2015]

make submissions to the arbitral tribunal are also considered. We make an evaluation of whether these rules are a suitable foundation for designing rules of confidentiality in arbitration proceedings involving government.

## 2. PRIVACY AND CONFIDENTIALITY OF ARBITRATION

In recent times, the issue of confidentiality in relation to arbitration proceedings and in relation to the documents created or disclosed in the course of arbitration proceedings, has become the subject of discussion by both scholars and judicial officers.<sup>33</sup>

There seems to be a general agreement, in some jurisdictions, at least, that there is a duty of confidentiality between the parties, which requires them not to disclose anything in and about arbitration proceedings, including the award, to a third party not involved in the process.<sup>34</sup> This classic feature of arbitration, that the proceedings are private and the substance confidential, offers the advantage of protection against unwelcome scrutiny and publicity from the disputants. Jessel MR in the case of *Russell v Russell*<sup>35</sup> noted that confidentiality is intended to avoid the painful public settlement of disputes.<sup>36</sup>

Avoiding painful consequences appears obvious between private individuals without public-reporting responsibility. Commentary by scholars and practitioners alike illustrates this presumption. For example, it has been noted that:

*Confidentiality and privacy are supposed to be among the hallmarks of arbitration, together with enforceability and party control. By this it is usually meant that arbitration has an essentially private nature. Not only is the hearing in private with strangers excluded, but the parties, by entering*

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<sup>33</sup> Sir Patrick Neill, QC, 1995 *Bernstein Lecture*, at Middle Temple Hall, London, on 13<sup>th</sup> November 1995.(1996) Vol 62 No 3 (Supplement) *Arbitration* 1-18

<sup>34</sup> Bhatia, V.K., C. N. Candlin & R. Sharma, "Confidentiality and Integrity in International Commercial Arbitration Practice" (2009) Vol 75 *Arbitration* No. 1 of 2009 2-13 p.4

<sup>35</sup> (1880) 14 ChD 471

<sup>36</sup> *Ibid* p. 474;

*into arbitration agreement, accept a mutual obligation not to disclose or use for any other purposes any documents which are prepared for and used in the arbitration. This includes transcripts, notes of the evidence in the arbitration and the award.*<sup>37</sup>

In many jurisdictions such as Kenya, it is assumed that the arbitral agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings. Where arbitration involves government or a state-owned entity, this privacy and confidentiality of arbitration proceedings is at odds with the principles of open government and transparency expected of public authorities and provided for under the Kenyan Constitution 2010. The potential for conflict is even greater, where the right to information is better defined under freedom of information legislation.<sup>38</sup>

The existence of the constitutional provisions of freedom of information and transparency are of greater significance when one considers that arbitration commentators are not clear on whether the privacy and confidentiality of arbitration is an absolute or a limited concept.

Compelling arguments have been advanced against the confidentiality of arbitration proceedings. These include the arguments that confidentiality leads to inconsistency of decisions and that it makes it difficult to train new arbitrators. Arguments are also made that there is no true confidentiality anyway, as enforcement proceedings have to be subjected to public court processes. It is ironic that the substance is held confidential and proceedings kept private, but many of the awards made are publicly made available by enforcement proceedings or otherwise.<sup>39</sup> Recent studies indicate that confidentiality is not the most important aspect

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<sup>37</sup> David Fraser, *Confidentiality in Arbitration*, Address in Paris (Oct. 13, 1998) at [http://www.bakerinfo.com/Publications/Documents/756\\_tx.htm](http://www.bakerinfo.com/Publications/Documents/756_tx.htm). (*highlighting confidentiality as a hallmark of arbitration*); (last accessed 31/8/2015)

<sup>38</sup> *Draft Access to Information Bill, 2013*. However, a major exclusion to provision of information is where it may affect outcome of litigation

<sup>39</sup> Tweedale A., "Confidentiality in Arbitration and the Public Interest Exception," 21 *Arb. Int'l* 63 (2005).



of arbitration for participants.<sup>40</sup> However, the most compelling argument against confidentiality-and most significant for purposes of this paper- is that it “makes it almost impossible to control the quality of the services provided by the institution and individual arbitrators.”<sup>41</sup>

Public access and transparency of arbitration proceedings may encourage quality control in the decision-making process, enhancing legitimacy.<sup>42</sup> In addition it is suggested that disclosure of information creates favourable conditions for the monitoring of the decision-making in arbitration.<sup>43</sup> Disclosure also avoids the secrecy and potential hazards of unaudited “voluntary compliance” with awards.<sup>44</sup> Sociologists argue that professionals perform better “on stage” (in public) than they do “off stage” (in private) and this has consequences for issues of integrity in arbitration.<sup>45</sup>

## **2.1 Is Privacy and Confidentiality in Arbitration an Absolute Principle?**

The principle of privacy and confidentiality in arbitration proceedings and information thereof, whether involving private individuals or public authorities, raises the question of whether it is absolute or not. Many jurisdictions across the world have refrained from accepting the principle as absolute thereby admitting numerous exceptions

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<sup>40</sup> Bhatia, V.K., C. Candlin and R. Sharma. “Confidentiality and Integrity in International Commercial Arbitration Practice” (2009) *75 Arbitration* 1 at p. 11

<sup>41</sup> Bhatia, V.K., C. Candlin and R. Sharma. “Confidentiality and Integrity in International Commercial Arbitration Practice” (2009) *75 Arbitration* 1 at p. 11

<sup>42</sup> Ibid note 42 at p. 12

<sup>43</sup> Supra

<sup>44</sup> Rodgers C.A. & R. C. Cadwallader, “Secrecy and Transparency in Dispute Resolution: Transparency in International Commercial Arbitration” (2006) *54 Kansas Law Review* 1301

<sup>45</sup> Bhatia, V.K., C. Candlin and R. Sharma. “Confidentiality and Integrity in International Commercial Arbitration Practice” (2009) *75 Arbitration* 1 at p. 3 quoting Goffman, E. *The Presentation of Self in Everyday Life* (New York: Doubleday, 1959)

thereto.<sup>46</sup>Indeed, even in jurisdictions that accept the very existence of privacy or confidentiality of arbitration, the principle has to be analyzed critically. For example, whenever an award is filed in court for enforcement, part of it becomes public thus undermining confidentiality.<sup>47</sup> Applications to court for interim measures of protection have the same effect.

The confidentiality of arbitral proceedings is statutory in some jurisdictions, and implied by the laws and rules of arbitral institutions, or based on mutual agreement between the parties in others.<sup>48</sup>

This principle of the private nature of the arbitration was recognised by the English courts in *Oxford Shipping Co. v Nippon Yusen Kaisha (The Eastern Saga)*<sup>49</sup>where Leggatt J stated:

*The concept of private arbitrations derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration.*<sup>50</sup>

Strangers to the proceedings are usually not admitted to the proceedings, except with the consent of the parties to the dispute. The principle has been asserted in the following terms:

*It is, however, implicit in the nature of arbitration proceedings that the proceedings are confidential, and that strangers shall be excluded from the hearing. A party's right to attend the hearing may not be exercised, except with the consent of all other parties, so as to allow persons to attend except for the purpose of conducting the proceedings or giving evidence.*<sup>51</sup>

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<sup>46</sup> See discussion on Australia and United States below

<sup>47</sup> *Arbitration Act (Cap 49) Laws of Kenya s. 36-38*

<sup>48</sup> *Supra* note 6 p 5

<sup>49</sup> *Oxford Shipping Co. V Nippon Yusen Kaisha (The Eastern Saga)* (1984) 2 Lloyd's Rep 373

<sup>50</sup> *Ibid*

<sup>51</sup> See Redfern& Hunter (1991), *Law and Practice of International Commercial Arbitration*, 2<sup>nd</sup> Ed, p. 345.

The absoluteness or otherwise of the principle has come under the view of scholars and judges, almost expressing unanimity on the subject. Fortier observed:

*The principle that a duty of confidentiality whether implied or explicit exists, at least in the absolute form in which it is generally understood by most parties, is more truism than truth...basic questions ranging from the nature and scope of the principle, in law, to its utility, in practice, to its formulation as a rule of arbitral procedure, are highly contentious.<sup>52</sup>*

The challenges to an absolute principle of confidentiality in England was stated emphatically by Brown in the following words:

*A presumption of confidentiality – whether implied or explicit – exists between the parties to an international commercial arbitration. However, there is a disconnect between that presumption and the frequent realities of disclosure and publicity imposed by courts, arbitrators, and sometimes even the parties themselves....the question of confidentiality in international arbitral proceedings is far from settled.<sup>53</sup>*

The courts in many countries have established that the principle of privacy of arbitration proceedings and confidentiality of the substance is not absolute in its application and admits certain exceptions. Colman J in the English Court stated that:

*Since a duty of confidence must be based on an implied term of the agreement to arbitrate. That term must have regard to purposes for which awards may be expected to be used in the ordinary course of commerce and in the ordinary application of English arbitration law.<sup>54</sup>*

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<sup>52</sup> Yves L. Fortier, *The Occasionally Unwarranted Assumption of Confidentiality* (1999) 15 *Arbitration International* 131

<sup>53</sup> Brown C. Alexis, "Presumption Meets Reality: An Exploration of Confidentiality Obligation in International Commercial Arbitration" (2001) *American Uniform International Law Review* 969

<sup>54</sup> *Hassneh Insurance Company of Israel v Stuart J. Mew* [1993] 2 *Lloyds Rep* 243

The exception alluded to by Colman is wide and admits many cases which the ordinary usages and customs of practice in commerce permits. The position in England is well summarised by Sir Rix where he articulated it in the following words:

*The English rule is that arbitration proceedings are prima facie confidential: but there are exceptions: thus (i) the parties may consent to lift confidentiality; (ii) the arbitration proceedings may get into court; (iii) the interest of justice may require disclosure.<sup>55</sup>*

Thus, while it is true in some jurisdictions that the duty of confidentiality exists by the very existence of the arbitration agreement, that duty admits certain recognised exceptions under which the party to arbitration may be justified in disclosing the information relating to arbitration. The duty of confidentiality is therefore, not absolute. There is, in many jurisdictions, a general duty of confidentiality, albeit subject to limited exceptions and qualifications that in principle, a party shall not disclose any information about the arbitration, any information learned through the arbitral proceedings and any award or decision rendered by the arbitral tribunal.<sup>56</sup>

Even where a general duty of confidentiality is accepted, jurisdictions vary in their approach to any number of the following and other questions that may arise. What information should be kept confidential – witness statements, commercially sensitive information, submissions, the award, or all information related to the arbitration? Who is bound by any such duty – does it cover only the parties and arbitrators, or also their representatives and employees as well as lay and expert witnesses? Whether confidentiality applies during court proceedings that are related to the arbitration – such as enforcement proceedings or proceedings challenging the arbitral award; and whether confidentiality extends to the fact that the

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<sup>55</sup> Bernard Rix, “Three Addresses in St Petersburg: Conference April 4, 2006: International Arbitration, Yesterday, Today and Tomorrow” (2006) 72 *Arbitration* 226

<sup>56</sup> Tatsuya Nakamura, *Confidentiality in Arbitration; SVEA Court of Appeal Decision-Is It Good News from Stockholm?*.14 *Mieale’s Int’l Arb. Rlp.* 24 June 1999

arbitration is taking place – or does it cover only information produced or disclosed within the arbitral proceedings?<sup>57</sup>

## 2.2 The Legal Basis of privacy and confidentiality in Arbitration

There is no generally accepted approach to confidentiality in arbitrations internationally. Different jurisdictions (both civil and common law jurisdictions) have produced conflicting results on a number of key confidentiality issues. Several cases from different national jurisdictions have shown that the question of whether confidentiality exists in international arbitration is one of complexity. There are broadly two opposing views. One view which exists in countries like England and France holds that arbitration proceedings are subject to an implied duty of confidentiality. The other view, which is prevalent in America, Sweden and Australia is to the effect that for confidentiality to be found to exist, it must be seen in either the arbitration agreement, or the applicable arbitration rules.<sup>58</sup> Without addressing the question directly, Kenyan authors suggest that Kenya follows the approach in England.<sup>59</sup>

Even where the principle is implied, it is open to so many exceptions that they make up the rule. A tour of some the English cases will illustrate the point.<sup>60</sup>

The English law classic case on the view of the principle of confidentiality in arbitration is established in *Dolling-Baker v. Merrett*,<sup>61</sup>

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<sup>57</sup> See generally Pyres, Michael. “Confidentiality”. Chapter 19 in Lawrence W. Newman and Richard D. Hill(ed) *Leading Arbitrators’ Guide to International Arbitration* (2<sup>nd</sup>ed) Juris Publishing Inc, New York, 2008. pp 415-468; see also See generally Pyres, Michael. “Confidentiality”. Chapter 3 in Lawrence W. Newman and Richard D. Hill(ed) *Leading Arbitrators’ Guide to International Arbitration* (3<sup>rd</sup>ed) Juris Publishing Inc, New York, 2014.(the third edition as not available to the authors)

<sup>58</sup> Emem Uduak Udobong, *Confidentiality in International Arbitration: How Valid is This Assumption?* University of Dundee, p. 12

<sup>59</sup> Muigua, Kariuki. *Settling Disputes Through Arbitration in Kenya*. Glenwood Publishing Nairobi, 2012. p. 3

<sup>60</sup> See generally Sir Patrick Neill, QC, 1995 *Bernstein Lecture*, at Middle Temple Hall, London, on 13<sup>th</sup> November 1995.(1996) Vol 62 No 3 (Supplement) *Arbitration* 1-18

<sup>61</sup> [1991] 2 All ER 890

where the English Court of Appeal found that an implied obligation of confidentiality existed in the arbitration process. This obligation extended to documents prepared in contemplation of arbitration or used in the process, transcripts, evidence and the award. It was further restated in the later case of *Hassneh Insurance Co. of Israel v Mew*,<sup>62</sup> where the court recognized the existence of an implied duty of confidentiality as a natural extension of the privacy of internal arbitration. Colman, J expressed the view that an arbitration agreement could not be operative without the implication of a confidentiality term.<sup>63</sup>

This classical position was also reaffirmed in *Ali Shipping Corporation v Shipyard Trogir*<sup>64</sup> where the English Court of Appeal held that confidentiality of the arbitral process was implied by law. In this case, a party was seeking disclosure of arbitration documents relating to prior arbitration proceedings in support of a plea of issue estoppel in a new arbitration. Issue estoppel prevents an issue that has already been litigated and decided on the merits from being re-litigated.<sup>65</sup> The party against disclosure of the documents belonged to the same group of companies as the party involved in the first arbitration. The Court of Appeal held that the duty of confidentiality ought to be implied by law, subject to defined exceptions of the general rule. Potter L J reading the lead judgment, with respect to the origin and purpose of a rule of confidentiality said;

*“I observe by way of preliminary that, to date, the confidentiality rule has been founded fairly and squarely on the ground that the privacy of arbitration proceedings necessarily involves an obligation not to make use of material generated in the course of arbitration outside the four walls of the arbitration, even when required for use in other proceedings.”*

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<sup>62</sup> [1993] 2 Lloyd's Rep. 243

<sup>63</sup> Thoma, J. 2008, “Confidentiality in English Arbitration Law: Myths and Realities About its Legal Nature”. *Journal of International Arbitration*, 25, 299-314.

<sup>64</sup> [1998] 2 All E.R. 136 (C.A.).

<sup>65</sup> Cross, R & C. Tapper. *Cross on Evidence*. Butterwoths London 1990 p. 78-79

The exceptions alluded to in this case include where disclosure is authorized by implied or express consent of the parties to the first award; where a court order orders disclosure for the purposes of a later court action; when it is necessary to protect the legitimate interest of any of the parties, for instance, to found a cause of action against a third party; and where public interest requires disclosure.<sup>66</sup> The court further stated that in considering whether disclosure is necessary, the court should take into account the nature and purpose of the proceedings for which the material is required. The appeal was allowed and the injunction granted, the court holding that the material sought by the defendant was not necessary for the protection and enforcement of his right.

The English court holds the position that confidentiality exists and is implied in arbitration agreements despite the 1996 English Arbitration Act being silent on the issue. The Court of Appeal in *City of Moscow v Banker's Trust Co & International Industrial Bank*<sup>67</sup> said that;

*"Among features long assumed to be implicit in parties' choice to arbitrate in England, are privacy and confidentiality. The 1996 English Arbitration Act's silence does not detract from this."*

This implied duty of confidentiality is contested in other jurisdictions which have an opposite view from that held by English courts. Led by Australia and United States of America, these jurisdictions consider confidentiality to apply only when expressly provided for. The "seismic tremors set up throughout the arbitration world" by the 1995 judgment of the High Court of Australia in *Esso Australia Resources Ltd & others v Plowman (Minister for Energy and Minerals) & others*,<sup>68</sup> where the majority of the court rejected the view that a general duty of confidentiality existed in arbitration. The case involved two state companies who respectively had gas supply agreements with Esso. These two state entities and Esso were

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<sup>66</sup> Smith, P. 2003, *Confidentiality of Arbitration Awards* [Online]. Bermuda: Conyers Dill & Pearman. Available: <http://www.conyersdill.com/uploadedfiles/Article%20033.pdf>. [last visit 30<sup>th</sup> August 2015]

<sup>67</sup> [2004] EWCA Civ 314

<sup>68</sup> (1995) 128 A.L.R. 391

parties to an arbitration that dealt with the cost of gas supplied by Esso.

The Minister for Energy brought an action against Esso. He sought a declaration that all information disclosed by Esso to the state companies in the course of arbitration was not subject to any confidential duty. The majority of the High Court of Australia held that there is no firm legal basis in contract to support the confidentiality of a commercial arbitration, as distinct from the privacy of arbitral hearings, and that parties who wished to secure confidentiality in the proceedings, could insert a provision to that effect in their arbitration agreement. This case completely shifted the notion that a duty of confidentiality existed in all arbitration proceedings through implication.<sup>69</sup>

The court in United States of America considered and adumbrated the issue in the case of *United States v Panhandle Eastern Corporation*.<sup>70</sup>The US government sought in this case, the production of a document related to a previous arbitral process that took place in Geneva under the ICC Rules. The Court ruled that as the applicable arbitration rules and arbitration agreement contained no provision on confidentiality, the US government could have access to the documents. The US court would order disclosure of arbitration information even where the information was subject to a confidentiality clause. This may arise where such information is needed to satisfy the public interest. It is also ironical that sometimes where the substance is held confidential and proceedings kept private, many of the awards made are publicly made available.<sup>71</sup> The judicial view of the concept of confidentiality and privacy of the proceedings undoubtedly varies.

The Arbitration Act of Kenya, which is based on the UNCITRAL Model Law, does not have provisions for privacy and confidentiality of arbitration.<sup>72</sup> The failure by the Act to provide for this doctrine perhaps

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<sup>69</sup> Smit, Hans. "Confidentiality in Arbitration" (1995) Vol II No 3 *Arbitration International* 337-340

<sup>70</sup> (1998) 118 F.R.D. 346 (D. Del).

<sup>71</sup> Tweedale A., *Confidentiality in Arbitration and the Public Interest Exception*, 21 *Arb. Int'l* 63 (2005).

<sup>72</sup> The Arbitration Act (Cap 49) Laws of Kenya



begs the question as to whether it is necessary in any arbitration, especially where the courts will intervene either to issue interim measures, or for enforcement of the award.<sup>73</sup> The Act only provides that the parties shall determine the procedure to be followed during arbitration proceedings.<sup>74</sup> It also further provides that the parties have a general duty to do all things necessary for the proper and expeditious conduct of arbitral proceedings. Whether privacy and confidentiality is one of the things parties can agree on or one of those necessary for proper and expeditious conduct of arbitral proceedings, remains a question of fact and very unpredictable .

Given the strong influence of English common law on the approach adopted in Kenya, it may be assumed that the Kenyan position, like the English, is that there is an implied duty of confidentiality. Indeed existing Kenyan text on arbitration follow this assumption.<sup>75</sup> Judges of the Court of Appeal, though not addressing the issue directly, have also indicated that some confidentiality exists in arbitration proceedings.<sup>76</sup>

However, the existence of the assumption may be eroded by decisions such as the judgment in *Hon Senator Johnstone Muthama v Tanathi Water Services Board and 2 others*<sup>77</sup> where the very existence of the principle is put in doubt.

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<sup>73</sup> But consider the approach of the English Courts notwithstanding the silence of the English Arbitration Act 1996 on the point

<sup>74</sup> S 20(1) Arbitration Act, Cap 49 Laws of Kenya

<sup>75</sup> Muigua, Kariuki. *Settling Disputes Through Arbitration in Kenya*. Glenwood Publishing Nairobi, 2012. p. 3 Muigai Githu(ed) *Arbitration Law & Practice in Kenya*. Law Africa, Nairobi. 2011 p. ?

<sup>76</sup> See for example Karanja J.A. in *Nyutu Agrovet Limited v Airtel Networks Limited* Court of Appeal Civil Application No 61 of 2012 “[arbitration is] ...also expected to be cheaper, faster and more confidential as compared to ordinary litigation.”

<sup>77</sup> [2014] eKLR at para 13

### **3. TRANSPARENCY IN GOVERNMENT ARBITRATION: SEARCHING FOR A POINT OF INTERSECTION**

From the foregoing discussions, the principle of privacy of the proceedings and confidentiality of the substance is one which cannot be lightly disregarded. Some jurisdictions will consider the doctrine even when it is not expressly provided for. Other jurisdictions require express provision of a confidentiality clause. On the other hand, government dealings and proceedings are required to be open to the public and allow public participation for accountability. Where can a balance be struck between these two parallel and often opposing principles?

The Constitution of Kenya in 2010 anticipated a likely fundamental change to many sacred legal principles, especially those on uncertain foundation in legislation. The Constitution requires openness in government dealings and provides for access to information held by the state.<sup>78</sup> In most Commonwealth countries, it is considered essential that justice be administered in public. Anyone who seeks to enforce rights by litigation must do so in public. There are few exceptions.<sup>79</sup> Arbitration proceedings are one such exception, but the discussion above suggests that these too may be subject to openness and transparency..

This openness may not be completely alien to arbitration in Kenya. The High Court has recently set the ball rolling when it observed that:

*“It is therefore clear that unlike in mediation, arbitral proceedings are, just like in litigation, open to the public and follow a similar procedure to that of litigations but with a more relaxed approach. The nature of the arbitration process therefore encompasses the application and interpretation of the law.”<sup>80</sup>*

The Constitution of Kenya enshrines, as national values and principles of governance, transparency, which affects all spheres of

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<sup>78</sup> Article 35 Constitution of Kenya 2010

<sup>79</sup> Bernstein, R et al *Handbook of Arbitration Practice* Sweet & Maxwell London,1998. 10.

<sup>80</sup> *Hon. JohnstoneMuthama v Tanathi Water Services Board and two others* [2014] eKLR para. 13.

government relations and raises the questions about the place of privacy and confidentiality in arbitration involving government or state-owned entities. We must now stop and rethink the tune we are marching to in light of this.

Article 31 asserts the right to privacy.<sup>81</sup> Privacy, in this regard, includes the right not to have information relating to one's private affairs unnecessarily required or revealed.<sup>82</sup> The kind of information that is subject to privacy in this provision is not categorically stated and one will presume that it includes all information relating to one's affairs. The Constitution has firmly established the right to privacy as fundamental, and requires that any governmental infringement of that right be justified by a compelling state interest, or fulfill the requirements of Article 24 which provides how a right in the Bill of Rights can be limited, since it is not one of those mentioned in Article 25.<sup>83</sup>

Secondly, the Constitution guarantees the freedom of expression, which entails the right to seek, and impart information. Article 33 provides that every person has the right to freedom of expression which includes freedom to seek, receive or impart information or ideas.<sup>84</sup> Thus, the provision obligates the government or state entities to disclose information relating to, among other things, arbitration, to effectively enable the citizens to take active participation in government activities as decreed by the Constitution.<sup>85</sup> Indeed, this provision has significant impact on the implied duty of confidentiality of arbitration proceedings, and often raises the question as to whether non-state entities will be willing to allow publication of their arbitration proceedings where government is a party.

Article 35 provides for the right of access to information. Every citizen has the right of access to information held by the state, and information held by another person and any information required for the

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<sup>81</sup> Article 31 Constitution of Kenya 2010, Government Printer Nairobi

<sup>82</sup> Ibid

<sup>83</sup> Article 24 Constitution of Kenya 2010, Government Printer, Nairobi

<sup>84</sup> Article 33(1)(a) Constitution of Kenya 2010, Government Printer, Nairobi

<sup>85</sup> Article 10(2)(a) Ibid

exercise or protection of any right or fundamental freedom.<sup>86</sup> These provisions summon the government to make available all information in its hand relevant for the protection of the right provided for in the Bill of Rights. These provisions obligate the state, rather than give it discretion, to make public any information required by any person for the purpose of vindication of their rights and fundamental freedoms. This right to information did not exist prior to promulgation of the Constitution and any attempts to introduce it vide an Act of Parliament did not bear any fruit, and was accordingly frustrated. Further Article 232(1) (f) provides that the principles and values of public service include transparency, and provision to the public of timely and accurate information.<sup>87</sup>

Article 50(1) provides that every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court, and if appropriate, another independent and impartial tribunal or body.<sup>88</sup> We note that this provision is one of the rights which are non-derogable and cannot be limited by whatever means.<sup>89</sup> The impact it poses on arbitration and its principles, especially where government is involved, is that it prevails over the duty of confidentiality and privacy in arbitration proceedings, which is more often than not implied in the arbitration. What is the framework within which this right should supersede the historical principle of confidentiality and privacy of arbitration?

Government dealings and proceedings are required to be open and transparent to the public, to enable them have adequate information for public participation. This information is required to be provided whenever requested, to enable the party requesting it to vindicate their right. This is significant because lack of transparency and openness have engendered corruption. As noted by Prof James Gathii:

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<sup>86</sup> Article 35(1) Ibid

<sup>87</sup> Article 232(1)(f) Ibid

<sup>88</sup> Article 50(1) Ibid

<sup>89</sup> Article 25(c) Ibid

*Corruption flourishes in countries without openness in the manner in which governments and the private sector make decisions... information in the control of public authorities is a valuable public resource' and access to it by the public promotes transparency and accountability of these authorities. As such when citizens have access to information about how and why their government and private sector make decisions which affect them, there is greater scope for transparency and accountability.<sup>90</sup>*

Effective strategies for tackling corruption rest on the ability to expose the corruption in the first place.<sup>91</sup> Openness of the proceedings is a step that would aid in exposing underhand dealings in arbitration where they exist.

Examples of arbitrations taken from the area of investment arbitration may illustrate the dangers of closed arbitrations. In the ICSID Case of *Siemens A.G. v The Argentine Republic*<sup>92</sup>, Siemens, a well known German company, instituted arbitration proceedings against the government of Argentina under the Bilateral Investment treaty between Germany and Argentina. It was alleged that the government of Argentina had unlawfully expropriated property by unilateral termination of the agreement with Siemens. The tribunal directed Siemens to pay US\$ 200 million in damages. As the proceedings were ongoing, it emerged that Siemens had bribed an Argentinean official to procure the tender. Consequently, Siemens voluntarily surrendered the award and withdrew all related claims.<sup>93</sup>

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<sup>90</sup> Gathii, James. "Defining the Relationship between Corruption and Human Rights" *U.Pa.J. Int'l L.* Vol 31:1 pp 125 -202 p 152

<sup>91</sup> Gathii, James. "Defining the Relationship between Corruption and Human Rights" *U.Pa.J. Int'l L.* Vol 31:1 pp 125 -202 p 153

<sup>92</sup> *Siemens A.G.v The Argentine Republic* ICSID Case No ARB/02/8  
<http://www.italaw.com/cases/documents/1029> [last accessed 30/8/2015]

<sup>93</sup> Vicie-Milburn, M and Y. Andreeva. Testing the Procedural Limits of the ICSID Annulment Regime in Cases Against Argentina" in Savvat, K .*Yearbook of International Investment Law and Policy 2009-2010*. Oxford University Press, New York, 2010. p. 293

In the famous *World Duty Free v Republic of Kenya*<sup>94</sup>, the ICSID tribunal rejected the claimants case as it was admitted by the claimant that they had paid a bribe to the then President of the Republic of Kenya (the President was not a party to the proceedings).

There are obviously many more commercial arbitrations than investor state arbitrations. The question one is left asking is how many tainted awards are ultimately enforced? How is the citizen to know if the award was tainted if the arbitration is conducted behind closed doors? If the arbitration is conducted behind closed doors and there is then voluntary compliance with a tainted award by the government or stateowned entity how, would the citizens know? How would they raise questions?

It may also be noted that sociologists have argued that professionals perform better when their actions are under direct public scrutiny as opposed to when their actions are not. This has been described as the difference between professionals “on stage” and “off stage” performance.<sup>95</sup> The effect of this performance variation on integrity or the arbitration process and of the actors is obvious.<sup>96</sup> Goffman’s approach would suggest that the performance of arbitrators would be enhanced if the proceedings are conducted in public rather than in private. Government arbitrations would be conducted in the public hearings rather than in closed sessions unless there is compelling reason to exclude the public. Such reasons would have to meet the conditions required to exclude the public in civil proceedings.

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<sup>94</sup> *World Duty Free Company v Republic of Kenya* ICSID Case No ARB/00/7 <http://www.italaw.com/cases/3280> [last accessed 30/8/2015]; see also *Metal-Tech Limited v Republic of Uzbekistan* ICSID Case No ARB/10/3 where the tribunal declined jurisdiction on account of indicators” and “red-flags” of corruption <http://www.italaw.com/cases/2272> [last accessed 2/9/2015]

<sup>95</sup> Vijay K. Bhatia, Christopher N. Candlin & Rajesh Sharma, *Confidentiality and Integrity in International Commercial Arbitration Practice: The International Journal of Arbitration, Mediation and Dispute Management*, Vol 75 No. 1 of 2009, Chartered Institute of Arbitrators and Sweet & Maxwell 1-13 p. 3 quoting Goffman, E. *The Presentation of Self in Everyday Life* (New York: Doubleday, 1959)

<sup>96</sup> Goffman, E. *The Presentation of Self in Everyday Life* (New York: Doubleday, 1959)

Even if one were to start from a position of assuming that a duty of confidentiality exists, the exceptions to confidentiality duty created by both judicial pronouncements and international instruments on arbitration would provide the point of reconciliation and indeed, liberalise arbitration from the old notion of implied confidentiality, more so in government arbitrations. The English courts, while holding that an arbitral agreement *ipso facto* introduces privacy and confidentiality of the arbitration proceedings, agreed to some exceptions. This judicial jurisprudence began with the case of *Hassneh*<sup>97</sup> where the court stated:

*“Since a duty of confidence must be based on an implied term of the agreement to arbitrate, that term must have regard to purposes for which awards may be expected to be used in the ordinary course of commerce and in the ordinary application of English arbitration law.”*

Although the court did not expressly categorise the exceptions, or give examples therewith, it was an essential point in this court to uphold that the duty is not absolute as it may appear. The point was further made clear in the words of Lord Potter while reading the leading judgment, with respect to the origin and purpose of a rule of confidentiality:

*“I observe by way of preliminary that, to date, the confidentiality rule has been founded fairly and squarely on the ground that the privacy of arbitration proceedings necessarily involves an obligation not to make use of material generated in the course of arbitration outside the four walls of the arbitration, even when required for use in other proceedings.....the manner in which that may be best achieved is by formulating exceptions of broad application to be applied in individual cases, rather than by seeking to reconsider, and if necessary adapt, the general rule on each occasion in light of the particular circumstances and presumed intentions of the parties at the time of their original agreement.”<sup>98</sup>*

He identified the four corners as follows:

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<sup>97</sup> *Hassneh Insurance Co. of Israel v Mew*, [1993] 2 Lloyd's Rep 243

<sup>98</sup> *Ali Shipping Corporation v Shipyard 'Trogir'* [1998] 2 All ER 136 p. 149

- a) Where a party consents to the disclosure.
- b) If the court makes an order or grants leave for disclosure of such documents or evidence.
- c) When it is reasonably necessary to protect the legitimate interest of the party to the arbitration.
- d) Where the interest of justice requires disclosure.

Consent by the parties will give either of them the opening to make disclosure only to the extent that their consent is sought. Absolute consent will entitle the disclosure of all information including the proceedings to the public. This seems not to solve our lacuna in relation to government arbitration. On the other hand, intervention by the court, for whatever reasons, such as issuing of interim orders and measures, granting of leaves, and enforcement or challenge of the award, may make public the substance of arbitral proceedings, even though this may be against the will of the parties. The third and fourth exceptions may be controversial and call for further illustration, which this paper will not delve into. Clearly, *Ali Shipping* was a landmark decision that gave teeth to confidentiality protection not only in English arbitration, but also in international arbitration, while admitting exceptions. Rather than rethinking their view on confidentiality as an implied-in-law obligation, the English courts dug in their heels and fortified their position.

Accommodating public interest in arbitration proceedings can only be attained by introduction of transparency, and disclosure of information regarding those arbitral proceedings and awards. Thus it is important to accept the paradigm shift from absolute duty of confidentiality and the notions of implied confidentiality in arbitration, to a more pragmatic and liberal system of arbitration proceedings. This is particularly so when one considers the provisions of the Kenya's progressive constitution.<sup>99</sup> It is our view that a new dawn has come where the courts should abandon the strict constructionist view of arbitration agreement, especially in relation to government arbitration, to imply duty of privacy of proceedings and confidentiality of the substance. This approach is one which does not promote the principles and national values of transparency and public participation. The people of Kenya showed the will through referendum,

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<sup>99</sup> Constitution of Kenya 2010



the courts and legislature must rethink their dance and certainly follow suit.

#### **4. TRANSPARENCY IN GOVERNMENT ARBITRATION: LOOKING FOR GUIDANCE**

If it is agreed that there is need for some level of transparency in government arbitrations, whether voluntary, statutory or enforced by constitutional litigation, where would one look to for guidance as to the extent of this transparency?

Transparency and disclosure of information in arbitral proceedings have increasingly become important in international trade agreements. This necessitated the review of certain rigid rules to accommodate the change. In line with this objective, the Working Group II of the United Nations Commission on International Trade Law (UNCITRAL) was tasked with revising the Commission's Arbitration Rules in 2010.

At the first session of Working Group II deliberations for revising the 1976 UNCITRAL Arbitration Rules, the working group determined that a generic approach would be used, which refrained from reflecting the concerns of specific types of arbitration. This spirit, which was approved by the delegations, explains many of the conclusions subsequently adopted by the Working Group II and included in the Arbitration Rules. This achievement in 2010, later revised in 2014, to include transparency in the Arbitration Rules followed the failure by the commission in 2008 to make the transparency clauses.<sup>100</sup>

These rules apply to investor - state arbitration disputes arising out of treaties concluded after 1<sup>st</sup> April 2014, when parties to the relevant treaty, or disputing parties, agree to their application.<sup>101</sup> Article 1 of these Rules on Transparency provide significant information that is intended to fully liberalise the rules of arbitration. Where these rules apply, parties in

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<sup>100</sup> [http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration/2014\\_Transparency.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014_Transparency.html). [last accessed 2/9/2015]

<sup>101</sup> Article 1(4) UNCITRAL Rules of Transparency accessed: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>. [last accessed 31/8/2015]

dispute may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty.<sup>102</sup>

These rules on transparency require that the information be published or made available to the public by Central Repository created under the rules, a function undertaken by the Secretary-General of the United Nations, through the UNCITRAL secretariat . The Rules further provide that once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository. Upon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made.<sup>103</sup>

The old regime as to the publication of the documents is downgraded by these Rules, which provide that the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defense and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available and orders, decisions and awards of the arbitral tribunal, expert reports and witness statements, exclusive of the exhibits thereto.<sup>104</sup>

In addition to availing the documents to the public, a third party non-disputant may attend the hearing and even make submission with regard to arbitration proceedings without a duty of confidentiality being imposed on them to keep the substance confidential. However, this right is granted to third parties upon application and by the tribunal in consultation with

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<sup>102</sup> Article 1(3)(a) Ibid

<sup>103</sup> Article 2 Ibid

<sup>104</sup> Article 3(1)(2) Ibid

the parties to the dispute.<sup>105</sup> The only determining factors to admit the third party to proceedings is the interest the said third party has, and the relevant use of the submissions to be made to the tribunal.

The notion of access to hearings has been reversed. From the decisions of the English courts, we saw that a hearing was and should be in private unless necessitated by legitimate interests of the parties or public interest. The Rules on Transparency, however, proceed on the inclination that hearings shall be in public unless there is compelling factor to keep them confidential. The tribunal shall facilitate access by the public to the hearings.<sup>106</sup> The identified compelling reasons to keep hearing confidential is where it involves information, that from its nature, need to be kept confidential or secret. It is no longer confidential and private unless it falls within the four corners of exceptions but rather transparent and participatory unless the nature necessitates otherwise.

From the foregoing analysis, transparency has become something of a buzzword in state – state and state – private party arbitration and should be widely accepted. National laws also need to follow suit subject to necessary safeguards for the protection of confidential business in order to enhance openness, effectiveness and public acceptance of arbitration where government or a state owned entity is a party to arbitral proceedings.

## **5. CONCLUSION**

The foregoing discussion has identified two opposite principles of transparency and confidentiality in relation to arbitration proceedings. We have noted that government arbitrations are relevant to citizens and need to be carried out in an open and transparent manner. It is a constitutional requirement that this remain so. This can be achieved by following the Australian and American approach on the issue of confidentiality. The approach is that arbitration is not confidential unless it is expressly provided for. Arbitration involving the government or a government institution should be open to the public unless privacy and confidentiality are expressly provided for. Privacy and confidentiality in government arbitration should be restricted to only those matters where it would

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<sup>105</sup> Article 4(1)(2)

<sup>106</sup> Article 6(1)(2)(3)

compromise state interests. Should this proposal prove too radical for the arbitration purist then, the balance between the constitutional requirements for transparency and secrecy concerns can be achieved by utilizing the exceptions recognized by the English courts particularly consent by the parties, legitimate interest by the party, and on account of public interest. Public interest may be defined by looking at the application of the UNCITRAL Rules of Transparency, which have a wider scope than judicially recognized exceptions under English case law.

It should be remembered that public access and transparency encourages better quality of decision making while disclosure of information creates favourable conditions for the monitoring of decision making in arbitral proceedings. If matters remain closed, no one, apart from the parties involved, would be aware of the proceedings of arbitration until the citizens of the state are asked to pay for the award made against the state or state owned entity. This virtual black box into which few can peer and fewer can ask questions is not a good advertisement for arbitration and for the future of arbitration.<sup>107</sup>

These matters are significantly grave as one can, with certainty, predict that absent statutory reform, Kenyan courts will be called upon to decide these questions prompted by a public spirited citizen.<sup>108</sup> Those with an interest in arbitration should take the initiative and define the limits of privacy and confidentiality in government or state-related arbitration or risk disruptive court intervention. The defining of the scope of confidentiality may be informed by the international rules on transparency that have been adopted for international investment arbitrations. It is our hope that the Kenyan arbitration practice will be modified to adopt the concept of transparency and public participation.

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<sup>107</sup> Rodgers C.A. & R. C. Cadwallader, "Secrecy and Transparency in Dispute Resolution: Transparency in International Commercial Arbitration" (2006) 54 *Kansas Law Review* 1301

<sup>108</sup> See *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case NO ARB/05/55 which is an investment treaty arbitration but may illustrate the direction on citizen interests in arbitration. See in particular Petition for amicus curiae status and Procedural Order No 5 available at <http://www.italaw.com/cases/157> [last accessed 2/9/2015]

## **CONFLICT RESOLUTION BY ELDERS IN AFRICA: SUCCESSES, CHALLENGES AND OPPORTUNITIES**

By: **Francis Kariuki\***

### **ABSTRACT**

*Colonialism impacted the social, cultural, political and economic life of Africans in a very significant and radical manner. With it, a western legal tradition, premised upon an Anglo-American jurisprudential thought was imposed on Africans. African values, norms and beliefs, which provided the normative and undergirding framework for conflict resolution, were severely weakened, undermined and disregarded. Withal, the resilience of African justice systems across African States, illustrates that they still occupy a central place in the world of dispute resolution in Africa as exemplified by their recognition in laws and policies. The paper assesses the institution of elders in conflict resolution. Using examples across the African continent, the author examines some of the successes and challenges faced by elders, and opportunities offered by the institution in enhancing access to justice amongst African communities.*

### **1. INTRODUCTION**

Conflict is ubiquitous in all societies. It is a phenomenon that is inevitable in all human society due to differences in interests, goals, values and aims among people.<sup>1</sup> Most conflicts arise in the basic units of society such as within families, clans, villages, locations or other small units. Amongst most African communities, there are frameworks that are in place for the resolution of conflicts and for preventing their escalation into

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<sup>1</sup> Fayemi Ademola Kazeem, "Agba (Elder) as Arbitrator: A Yoruba Socio Political Model for Conflict resolution-A Review of Lawrence O. Bamikole" *Journal of Law and Conflict Resolution* Vol 1(3) pp 060-067, August 2009.

violence, thus threatening the social fabric.<sup>2</sup> Elders provide one of the most important conflict resolution institutions in African societies. Even in countries with no formal state recognition of the institution of elders, it has remained resilient and exists outside the spheres of state influence. In dispute resolution, the institution of elders can be organized in two main ways: the council of elders or a single elder. The council of elders usually consists of more than one elder and thus acts as a form of third party collegiate dispute resolution system.<sup>3</sup> The second form of organization is where a single elder presides over the dispute resolution process. The most basic example of this organization is where a patriarch or the eldest individual in an extended family resolves the disputes relating to that family. In some communities, an elder has a position of authority such as chieftainship or kingship to resolve disputes among the members of the communities, clans, ethnic groups or tribes.<sup>4</sup> The paper aims to highlight the role of elders in resolving conflicts in Africa. The paper starts by laying out a conceptual framework for dispute resolution. It then, situates traditional justice systems within different epochs in the African legal history. Different case studies from Africa are discussed including dispute resolution in Kenya by elders.

## **2. THEORETICAL FOUNDATIONS FOR CONFLICT RESOLUTION BY ELDERS**

Before colonialism, most African societies, if not all, were living communally and were organized along clan, village, tribal or ethnic lines. Being part of a community was important, if not downright necessary, due to the vicissitudes of life in primal or communal societies. Social ties, values, norms and beliefs and the threat of excommunication from society provided elders with legitimacy and sanctions to ensure their decisions were complied with. There are different social theories that explain why elders are able to resolve disputes in such contexts.

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<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

## 2.1 The Social Capital Theory

The social capital theory explains the formation of communal societies and the attendant social ties that bind them together. Putnam R.D., in theorizing social capital, posits that social networks, bonds, reciprocal duties and trust, bind people together and enable them to co-exist.<sup>5</sup> It is these social ties that guaranteed the existence and effective functioning of the society. Putnam outlines two types of social capital: *bonding social capital*, that fastens ties of individual members of a group, and *bridging social capital*, that allows interlinkage with other social groups.<sup>6</sup> The social capital theory can also explain the restorative nature of dispute resolution by elders in African Societies. In most of Africa, elders aim at restoring the social ties or social capital that had been broken by the wrongs done, committed or omitted.<sup>7</sup> Without strong social ties, communities could not exist and function effectively. Even in serious cases such as murder, the threat of excommunication from the society, and therefore exclusion from social ties, acted as a deterrent for wrongdoing.

## 2.2 Social Solidarity Theory

Emile Durkheim, in his book, *the Division of Labour*,<sup>8</sup> explains the society in terms of social order and social facts. According to Durkheim, individuals in a society are social actors who are restrained by social facts to stay in society. Social facts are functionalist in nature. They exist only if the society can derive utility or benefits from them. Extrapolating this theory to dispute resolution by elders, dispute resolution is viewed as a social fact from which society derives some benefit. Elders resolve disputes due to their long experience, wisdom and the respect they are accorded in

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<sup>5</sup> Robert D. Putnam, *Bowling Alone* (1<sup>st</sup> edition, Simon & Schuster, 2000), 19. See J. Kenyatta, *Facing Mount Kenya: The Tribal life of the Gikuyu*, (Vintage Books, New York, 1965).

<sup>6</sup> *Ibid.*

<sup>7</sup> In an interview with the author, the Kipsigis Council of elders emphasised how it was difficult, for example, for a couple to undergo divorce in the community. They said that the elders had to give the couple time to ensure that they amend the situation and encouraged them not to divorce.

<sup>8</sup> 1<sup>st</sup> translated into English in 1933 and published by Macmillan publishers.

society. The social solidarity theory, being a functionalist theory, explains the resilience of dispute resolution by elders even in modern societies that have embraced western legal systems. Where a community cannot access formal justice systems due to costs and other externalities, elders are there to resolve arising disputes. Therefore, the existence of elders in society is a social fact that provides a dispute resolution utility occasioned by the absence or low penetration of western legal systems.

### **2.3 Optimal Psychology Theory**

Optimal psychology theory uses culture to explain how people view reality, live and resolve disputes.<sup>9</sup> It is argued that there is optimal psychology in dispute resolution, when people use their cultures to resolve disputes. Consequently, dispute resolution and other real life conditions are sub-optimal when done through a foreign culture. 'Received'<sup>10</sup> justice systems such as courts are thus sub-optimal in the African context due to varying cultural context. For instance, while African traditional societies were and to a large extent are grouped communally, western societies are individualistic. This results in a cultural-conflict if western ideals are applied in dispute resolution. Moreover, while dispute resolution in African societies aimed at repairing social ties and restoring harmony; 'received' justice systems are mainly retributive with a winner-loser ideology. This theory is important in understanding the resilience of traditional dispute resolution in modernized and westernized African societies.

## **3. A GENERAL OVERVIEW ON DISPUTE RESOLUTION BY ELDERS ACROSS AFRICAN SOCIETIES**

### **3.1 The *Gacaca* Courts in Rwanda**

In traditional Rwanda, the basic and most important unit of socialization was the extended family. Status within the society was

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<sup>9</sup> Myers L. J, *Understanding an Afrocentric world view: Introduction to an optimal psychology*, (Kendall/Hunt. 1992).

<sup>10</sup> By 'received' justice systems I mean the dispute resolution mechanisms that were introduced and imposed upon African societies with the dawn of colonialism.



divided along gender and age lines. The family unit was not only a social unit but also a security system since almost everyone was dependent on lineage for socialization.<sup>11</sup> The initial conflict and problem resolvers were the headmen of the lineages or the eldest male or patriarchs of families. They resolved conflicts by sitting on the grass together to settle disputes through restoration of social harmony, seeking truth, punishing perpetrators and compensating victims through gifts.<sup>12</sup> However, the main aim of the *Gacaca* process was to ensure social harmony between lineages and social order throughout the Rwandan ethnicities. With the advent of colonialism, western ideals and notions of justice influenced or limited some aspects of the *Gacaca* process. Although colonialists introduced Western legal systems in Rwanda, the *Gacaca* process operated at the lower levels, especially in most customary conflicts.<sup>13</sup> Moreover, after the Rwanda Genocide, the Rwandan Government institutionalized *Gacaca* courts as a means to obtain justice and deal with a majority of the genocide cases that the formal Courts and International Criminal Tribunal for Rwanda (ICTR) could not handle.

Institutionalization of the *Gacaca* Courts aimed at establishing the truth about the Rwandan Genocide, expedite proceedings against suspects of genocide, remove impunity, reconcile Rwandans and use Rwandan Customs to resolve their disputes.<sup>14</sup> Differences between the old traditional *Gacaca* and the new institutionalized *Gacaca* process abounds. First, the old *Gacaca* process entailed people sitting together and resolving disputes while the institutionalized *Gacaca* process is mainly accusatory and adversarial especially in the collection of information. The old version of the *Gacaca* emphasized on bringing people together to talk about their problems and to foster social harmony and restoration.<sup>15</sup> Second, while the old *Gacaca* aimed at restoring social harmony between families the

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<sup>11</sup> Bert Ingelaere, "The *Gacaca* Courts in Rwanda" *Traditional Justice and Conflict Resolution After Violent Conflict: Learning From African Experiences*, Luc Huyse and Mark Salter (Eds)( IDEA, Stockholm, 2008), 33.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid*, 34.

<sup>14</sup> *Ibid*, 38.

<sup>15</sup> *Ibid*, 44.

institutionalized Gacaca seeks to provide retribution by punishing those held liable for crimes during the genocide period. Last, in the old Gacaca, the umpires who resolved disputes were predominantly male elders while young people and elders of both genders constitute the new Gacaca. The change in composition of arbiters in the Gacaca process is due to the involvement of a large portion of Rwandans in the genocide, and even the elders who used to arbitrate or mediate disputes were accused of certain crimes.<sup>16</sup>

### 3.2 The Tswana of Botswana

Among the Tswana, customary dispute resolution runs parallel to the formal justice system.<sup>17</sup> Traditional dispute resolution in the Tswana society is based on the norms and practices of the people. There are different actors depending on the social organization of the Tswana community. At the lower family levels are the *batsadi ba lolwapa* (family leaders), the *batsheregany* (headmen of records), *dikgosana* (headmen), *moemela kgosi-kgolo* (the chief's representative) and finally the *kgosi-kgolo* (paramount chief). Dispute resolution consists of elders working at a collegiate level (for example the *dikgosana* and the *batsheregany*) or a single elder resolving a dispute alone (for example the *batsadi ba lolwapa* and the *kgosi-kgolo*).

Dispute resolution starts at the household (*lolwapa*) level.<sup>18</sup> If a dispute cannot be resolved at the household level, it is taken to the *Kgotlana* (extended family level) where elders from the extended family sit and listen to the matter. The elders emphasize mediation of disputes. If the *kgotlana* does not resolve the dispute, the disputants take the matter to *kgotla*, which is a customary court with formal court like procedures. It consists of the chief at the village level and the paramount chief at the regional levels. The chiefs are public officials and handle both civil and criminal matters. However, the customary court does not deal with land disputes as its role is merely advisory. The decision of the paramount chief

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<sup>16</sup> Linda James Myer and David H Shihn, "Appreciating Traditional Forms of Healing Conflict and in Africa and the World," *Black Diaspora Review* 2(1) Fall, 2010, 6.

<sup>17</sup> Kwaku Osei-Hwedie and Morena J. Rankopo, *Indigenous Conflict Resolution in Africa: The case of Ghana and Botswana*, 42.

<sup>18</sup> *Ibid*, 43.

is appealable to the customary court of appeal, which is the final court on customary matters and has the same status as the high Court.<sup>19</sup>

At every level, a council of elders (*bo-ralekgotla*) exists to advise the decision maker. Further, village committees exist to support and compliment the dispute resolution process. The parties may call their relatives during the hearings and their relatives participate in the dispute resolution process. A spiritual dimension exists in dispute resolution mostly due to the centrality of the spiritual agency in all human spheres. Traditional healers, diviners, herbalists, spiritual seers and healers also play an important role in conflict resolution. Due to the respect, fear and reverence that these experts have in society, they play a crucial role in truth seeking. They also mediate between the living, ancestors and God. Conflicts arising from witchcraft are not resolved by the customary courts. They are regarded as private matters and hence privately resolved by traditional healers and affected parties. Consequently, the role of the spiritualists, especially in helping to identify suspected ritual murderers is prohibited by law.<sup>20</sup>

### **3.3 Dispute Resolution by Elders in South Africa**

South Africa, like most African countries has a pluralistic legal system. The legal system has allowed customary law, based on customs and practices of the people, to be used in traditional courts.<sup>21</sup> Unlike formal courts, the arbiters or elders in traditional courts are not trained judges. Moreover, there is no legal representation or recording of proceedings, and the trial follows the customs and practices of a particular ethnic group.<sup>22</sup> The main aim of the traditional courts is dispute resolution in a manner that restores social equilibrium. The main actor in the traditional justice system is the traditional leader of the community, who is often an elder.<sup>23</sup>

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<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid*, 45.

<sup>21</sup> Christina Rautenbach, "Traditional Courts as Alternative Dispute Resolution (ADR) Mechanisms in South Africa" *SSRN*, 290.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid*, 292.

Before colonialism, dispute resolution in South Africa was governed by customs and practices of the various tribal communities.<sup>24</sup> Customary dispute resolution was used to resolve all disputes and conflicts. After Colonization, the White rulers enacted the Black Administration Act of 1927. The Act has been repealed several times and although it does not create a traditional court, it allows both civil and criminal powers to be vested in traditional leaders who use customary law to resolve disputes. It allows chiefs and headmen to try civil matters. However, the traditional leader must have the Minister's authorization to resolve civil disputes; the claim must be based on customary law; the race of the parties must be African; and the parties or the defendant must be residents within the traditional leader's area of jurisdiction. Examples of civil disputes heard by traditional leaders are return of dowry (*lobolo*) or damages for adultery. A traditional leader can, however not determine divorce, nullity or separation matters.<sup>25</sup>

Chiefs, headmen and other traditional leaders can deal with certain offences with the Minister's authorization. The crimes they can handle include common law, statutory and customary law.<sup>26</sup> The exceptions to these crimes for which the traditional leaders have no jurisdiction are listed in the Third Schedule to the Act. The traditional leaders only have jurisdiction if both the offender and the victim are African. Traditional leaders may impose any punishment under customary law except fines exceeding R100, death, imprisonment or corporal punishment.<sup>27</sup> The traditional leaders may report a defaulter to a magistrate within 48 hours and the magistrate will order the defaulter to comply.<sup>28</sup> A person aggrieved by the decision of the traditional leader may appeal to a magistrate under Section 20(8) of the Act.

After attainment of black rule in South Africa, a new Constitution was promulgated. Questions arose as to whether the Constitution recognized traditional courts as they were not expressly listed under

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<sup>24</sup> *Ibid*, 296.

<sup>25</sup> Section 12(1).

<sup>26</sup> Section 20.

<sup>27</sup> Section 20(2)

<sup>28</sup> Section 2(5) (a) and (b), Black Administration Act.

Section 166 of the Constitution that lists the courts. The matter was laid to rest in the Constitutional court decision in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa*,<sup>29</sup> where the court read the provision of section 166(e) and Section 16(1) of Schedule Six of the Constitution to find that section 16(1) included traditional courts.

In spite of the recognition of the judicial powers of traditional leaders by the law, there is unofficial dispute resolution. The first level of unofficial dispute resolution is usually the family council and if the dispute is not resolved, the matter is heard at the ward level by ward leaders and their advisers. The methods of dispute resolution at these levels are negotiation and mediation.<sup>30</sup> If the matter is not resolved at these levels, it proceeds for resolution by traditional leaders recognized by law. In all of these levels, the main actors are elders who try to resolve the disputes either officially or unofficially.

### 3.4 Karamajong and the Teso in Uganda

Traditionally, disputes among the Karamojong and Teso communities in Uganda, are resolved by a council of elders. The council of elders among the Karamojong is called the *Akiriket* while among the Teso it is called *Arriget*.<sup>31</sup> Amongst the two communities, the council of elders play a crucial role in maintaining social order by preventing the violation of community rules. This is important because these communities are far removed from formal justice systems. Conflict resolution in the Karamoja region is through age sets: the eldest age set listens and resolves disputes and a high age set plays the role of bringing offenders from lower age set before the eldest age set for conflict resolution in a system known as *ameto*.<sup>32</sup> The challenge of this system is that it is only applicable at the village level.

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<sup>29</sup> 196(4) SA 744(CC).

<sup>30</sup> Rautenbach (note 21), 315.

<sup>31</sup> Chris Chapman and Alexander Kagaha, *Resolving Disputes using Traditional mechanisms in the Karamoja and Teso Regions of Uganda*, Minority Rights International 2009, 3.

<sup>32</sup> *Ibid.*

In relation to crimes such as murder, the offender undergoes a cleansing ceremony before reintegration into the community. When the disputes are interethnic, the main methods used to resolve the conflicts by elders are negotiation and compensation.<sup>33</sup> The residents in the Karamoja and Teso areas prefer dispute resolution by elders because it is free and thus accessible to most people. Decisions by elders are easily complied with due to strong communal ties, and commitment to customary norms. Elders are also able to address all the causes of the commitment. With colonialism and modernity, younger educated people are becoming leaders affecting dispute resolution negatively. Under the age set system, elders were not supposed to report to younger people and this is threatening the role of elders in dispute resolution.<sup>34</sup> Nepotism and corruption among elders have reduced the legitimacy of the council of elders in the Karamoja and Teso regions. Moreover, poverty and accumulation of wealth by young people have reduced the influence and power of elders, reducing their sphere of influence.<sup>35</sup>

### **3.5 Dispute resolution by elders in Ethiopia: Some examples**

Dispute resolution by elders in Ethiopia presents a rare case from other African countries. Ethiopia, unlike most African countries, was not colonized. The expectation, therefore, is that dispute resolution by elders would be free from western influences. However, it is argued that dispute resolution by elders among the different tribes in Ethiopia was largely influenced by the Abrahamic religions of Christianity, Judaism and Islam.<sup>36</sup> These religions are monotheistic in nature and are against the reference to ancestral spirits in dispute resolution. Due to the influence of these religions, dispute resolution by elders in Ethiopia has adopted a religious dimension. Some elders in Ethiopia insist that they use spiritual mediums and spiritual connections to the ancestors in reconciliation. The use of religion or spiritualism caught up again with the introduction of the

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<sup>33</sup> *Ibid*, 4.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid*.

<sup>36</sup> Gebreyesus Tekla Bahtu, *Popular Dispute Resolution Mechanisms in Ethiopia: Trends, Opportunities, Challenges and Prospects*, p.109.

Abrahamic religions in Ethiopia with different religious elders performing their religious rituals in cases of serious crimes such as murder.

It is also reported that the Gumuz, the Oromo and the Amhara living in the Metekkel region of Western Ethiopia have adopted a mechanism of *Michu* or friendship to resolve land disputes due to many immigrants in the area.<sup>37</sup> The aim of traditional dispute resolution by elders in Western Ethiopia, a tribal milieu, is not to punish the wrongdoers but to restore social harmony seeing that different tribes live side by side. The types of conflicts in the area include land boundary disputes, disputes over grazing area and cultural disputes especially due to intermarriages.<sup>38</sup> The nature of these disputes is that they are not amenable to government intervention as most formal dispute resolution mechanisms pass judgment and mete out punishment without resolving the underlying causes of conflict. Resolution of disputes by elders thus provides an alternative dispute resolution that is wholesome and responsive to the living conditions of the disputants.

### 3.6 Dispute Resolution by elders among the Agiriama of Kenya

The Giriama had two main dispute resolution institutions: the council of elders and the oracles. Two sets of council of elders existed. The first set was the senior age set known as the *kambi* that listened to normal and day-to-day complaints and resolved them.<sup>39</sup> The most revered set of council of elders was known as the *vaya*, which consisted of a few select elders who operated as a secret society. The *vaya* governed the whole of the Giriama community by determining planting and harvesting seasons, praying for rain, initiating of youth into age-sets.<sup>40</sup> The *vaya* also presided over trial by ordeals as oracles. Supernatural and superstitions played a great role in dispute resolution, especially in seeking and finding the truth. The Giriama used ordeals to determine the guilt or innocence of parties to a dispute

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<sup>37</sup> Linda James Myers & David H Shinn, "Appreciating Traditional Forms of Healing Conflict and in Africa and the World," *Black Diaspora Review* 2(1) Fall 2010, p.7.

<sup>38</sup> *Ibid.*

<sup>39</sup> Marguerite Johnson, "Giriama Reconciliation," *Afr.L.Std.*, 16:1978, 95. Retrieved from <http://heinOnline.org> on 16.03.2015

<sup>40</sup> *Ibid.*

through their reaction to the ordeals.<sup>41</sup> Two ordeals were common among the Giriama: ordeal by fire and ordeal by poison. The ordeal by poison made the guilty person sick while the ordeal by fire caused the guilty person to blister. The accused and the accuser often went to the ordeal together but sometimes the accused went alone to prove his innocence. The jurisdiction of elders among the Giriama was not physical but psychological.<sup>42</sup> Elders did not force anyone to appear before them, but such non-attendance was viewed as an admission of guilt. Parties were only subjected to trial by ordeal by their consent. The council of elders and trial by ordeals often operated as one process where ordeals and oracles determined who to blame and then the council of elders imposed duties and enforced rights.<sup>43</sup> After colonization and independence, the government eliminated the powerful *vaya* but retained the less powerful *kambi* to aid local administration. The *kambi* were exclusively composed of elders in pre-colonial days. However, the *kambi* is now increasingly being accused of corruption by disputants.<sup>44</sup>

### 3.7 Pokot, Turkana, Marakwet and the Samburu of Kenya

These communities have a similar lifestyle and way of life.<sup>45</sup> They live in areas with inter and intra-ethnic conflict arising from cattle theft, cattle rustling, grazing areas and watering areas. Being pastoralist communities they live in arid and semi-arid areas with little access to courts, or even modern facilities and amenities. Traditional justice systems play a great role in managing conflicts and maintaining social order among the communities. Elders play a great role in preventing and resolving disputes among these societies. Elders determined the use of water and grazing

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<sup>41</sup> *Ibid*, 96.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid*.

<sup>45</sup> Ruto Pkalya, Mohamud Adan & Isabella Masinde, *Indigenous Democracy: Traditional Conflict Reconciliation Mechanisms Among the Pokot, Turkana, Samburu and the Marakwet* (ed. Betty Rabar & Martin Kirimi, Intermediate Technology Development Group-Eastern Africa, 2004), 89-95.



areas as well as migration patterns.<sup>46</sup> Elders also took part in arbitration, mediation, dialogue, negotiation and other dispute resolution process both within and with other ethnic groups. Elders can enter into peace pacts with other communities. Among the Samburu and the Pokot, the peace pact is known as the *Imumai* for peace and military alliance.<sup>47</sup> The Marakwet and the Pokot have peace pacts known as the *miss* among the Marakwet.<sup>48</sup>

Belief in superstitions, charms, sorcery and witchcraft formed a great part of dispute resolution and prevention mechanisms in these societies. For instance, among the Samburu witchcraft could be used to blind or disable enemies. Belief in these superstitions served to reduce conflicts. Among the Samburu, Turkana and Pokot communities there are indigenous warning systems about conflicts by looking at goat intestines and studying stars in the sky.<sup>49</sup> Among the Pokot, there is trial by ordeal in cases of murder where the suspects are made to drink water after washing their clothes. Other witchcraft practices in resolving disputes among the Pokot are the *Muma* and *Mummat*.

### 3.8 Kamasian Council of Elders in Kenya

The Kamasian is a council of elders among the Kipsigis community. It deals with disputes ranging from land, matrimonial disputes to murder disputes. In this part the author highlights some of the rules and procedures that the elders apply in resolving disputes. Regarding family disputes, the elders say that such disputes are resolved depending on whether it is a monogamous or polygamous family. Disputes arising from a polygamous family are resolved by elders who are in a polygamous union. A monogamous man or woman cannot preside over such a dispute. For example, if a man in a polygamous union has a dispute with one of his subsequent wives, the parents of that particular wife would be asked by the elders to correct their child. The rationale being that it is the subsequent

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<sup>46</sup> *Ibid*, 94.

<sup>47</sup> *Ibid*, 85.

<sup>48</sup> *Ibid*, 72.

<sup>49</sup> *Ibid*, 84.

wife who is troublesome and not the man, as the man has lived peacefully with all the other wives.<sup>50</sup>

Where a man has committed adultery with another man's wife, it is the latter's parents who would be asked to pay a penalty of a heifer to the husband's family. The rationale being that the wife had caused shame to her husband by sleeping with another man. The man, who committed adultery with another's wife, could only be beaten up or if he was a respected man his status lowered. However, if a man had slept with an unmarried woman there was no dispute as married men were allowed to sire out of marriage. Traditionally, this was regarded as a blessing to the community.

In relation to family land, disputes are minimal because an old man normally makes a customary oral will before he dies. The old man normally calls all his children and states how he wishes the property to devolve. Each child's share depends on respect towards his parents and whether or not he took good care of his father. Once the property is shared, and if it is land a boundary has been set, the old man would ask the children if there is any objection. If there is no objection at that time, then customarily none of the children could raise an issue regarding the distribution of the property when the old man dies as it is said that he is still watching over the living. Consequences for violating a customary will range from curses or even being struck by lightning. If there is any property, in the form of dowry that is paid to a polygamous family, such would only go to the girl's mother and co-wives cannot have claims to it. Such rules, according to the elders, ensured that there were very few or no disputes at all over family property.

Divorce cases, can be lodged by either the wife or husband. The wife can file for divorce for beatings, if the husband is not caring for the family or does something that can haunt the family in future, for example if he is a thief. The divorce procedure is that the matter is handled by elders. Each party presents its case. After hearing each side, the elders do not make any determination at all but allow room for reconciliation. If the elders realize that reconciliation is not possible, the divorce procedure is initiated.<sup>51</sup>

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<sup>50</sup> Based on an interview the author had with the Kipsigis Kamasian Council of Elders on 4<sup>th</sup> July 2015 in Kericho town.

<sup>51</sup> It was reported that divorce is a rare occurrence and is viewed as a curse because of the vows people take at marriage.

Divorce involves both parties standing outside the house of the man's parents and near a shrine. Each party applies fat derived from cow's milk on the hands. The man is then asked to apply the fat on the woman's face while reciting the surnames of the girl (that are demeaning to her) 3 times and while declaring divorce. The woman does the same thing and recites the man's surnames 4 times.<sup>52</sup>

If one killed another, such disputes were resolved by elders. However, for elders to hear such disputes it depended on whether the killing was intentional or not. For unintended killing, the elders would seat with the offender and both families and forgiveness would be sought. This would relieve and minimize bitterness on the part of the deceased family. If there was no bitterness, parties would talk and forgiveness sought. It was also reported that the elders can also write to the prosecutor or court (if a matter is already before a court of law) to have the matter withdrawn and resolved by the elders,<sup>53</sup> or to refer a matter to court if they find it is beyond their capacity. If one admits that he killed unintentionally a cleansing ritual is usually conducted by elders to deter recurrence.<sup>54</sup> The ritual involves the slaughtering of a spotless ram in a nearby river. Reconciliation is then done with the deceased family and compensation agreed upon. If it is a man who has been killed, 9 cows are paid to the bereaved family and 11 cows if the slain person was a woman. Elders indicated that they currently do not deal with intentional killing or murder and such is handled by formal courts. However, it was reported that traditionally and in the early years, murderers would face mob justice or banishment from community.

The Kamasian elders pointed out that they were not paid anything at all for the work they did. It was upon the disputants to determine whether to pay anything. To be the chairman of the council of elders no election is done. One is chosen based on his outstanding ability, respect or calling

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<sup>52</sup> It is said that the surnames recited that mostly childhood names that were used to refer to boys and girls and that were demeaning to a man or woman.

<sup>53</sup> This has happened in Kenya in the past in a number of cases to wit: *R v. Mohammed Abdow Mohammed* [2013] eKLR.

<sup>54</sup> Those who participate in the cleansing ceremony must be men of good social standing. Moreover, not everyone is allowed to attend the ceremony. It was also reported that those involved in traffic offences such as killing by reckless driving, must also undergo the cleansing ritual as outlined above. Similarly, warriors involved in cattle raiding must be cleansed after raids.

hence duties not worth of money. However, the council of elders comprises of both the elderly and educated people. Young men are members of the council so that they can be trained to take up roles in future. Women are also involved in dispute resolution and mostly act as a go-between conflicting parties.

## 4. ANALYSIS AND FINDINGS

### 4.1 Principles undergirding Dispute Resolution by Elders

Conflict resolution by elders is based on social or cultural values, norms, beliefs and processes that are understood and accepted by the community. For that reason, people are able to abide and comply by their decisions. It is said that as a man grows old, his prestige increases according to the number of age-grades he has passed. An elder's seniority makes him almost indispensable in the general life of the people. As such, the presence or advice of elders is sought in all functions<sup>55</sup> including in dispute resolution. Elders hold supreme authority and customs demand that they be given due respect and honours, not only when they are present, but even when absent.<sup>56</sup>

Respect for elders, ancestors, parents, fellow people and the environment is cherished and firmly embedded in the mores, customs, taboos and traditions amongst Africans. According to Bujo the admonitions, commandments and prohibitions of ancestors and community elders are highly esteemed, they reflect experiences which have made communal life possible up to the present.<sup>57</sup> Due to the respect accorded to elders, people avoid being in conflicting situations. For example, Kenyatta documents how a man could not dare interfere with a boundary mark amongst the Gikuyu people, for fear of his neighbour's curses and out of respect. Boundary trees, lilies and demarcation marks were ceremoniously planted and highly respected by the people. If the boundary trees or lilies dried out, fell down or was rooted up by wild

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<sup>55</sup> J. Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965), 253-258.

<sup>56</sup> *Ibid.*

<sup>57</sup> B. Bujo, *The Ethical Dimension of Community-The African Model and the Dialogue between North and South*, (Paulines Publications Africa, 1998), 198-202.

animals, the two neighbours would replace it. But if they could not agree as to the actual place where the mark was, they could call one or two elders who after conducting a ceremony would replant the tree or lily.<sup>58</sup>

The spiritual agency imbues all spheres of traditional African communities. Even in dispute resolution, spirituality occupies a central place in resolving disputes and in the search for truth. Traditional healers, diviners, herbalists, spiritual seers and healers also play an important role in conflict resolution. Commenting on the mediating role of elders, Kenyatta notes that:

*“The function of an elder, both in his own family group and in the community, is one of harmonising the activities of various groups, living and departed. In his capacity of mediator his family group and community in general respect him for his seniority and wisdom, and he, in turn, respects the seniority of the ancestral spirits.”*<sup>59</sup>

As the literature review reveals, spiritual experts like seers, diviners and mediums complimented the role of elders in dispute resolution. They were helpful in the search for truth and some of them were involved in cleansing rituals and slaughtering ceremonies, underscoring their usefulness in dispute resolution.

Reciprocity, in the sense that there is a mutual exchange of privileges, goods, favours, obligations, amongst most African communities also fosters peaceful coexistence.<sup>60</sup> This eliminates the likelihood of disputes and conflicts. Again, because of reciprocity conflict resolution mechanisms must foster relationships and the sense of togetherness. Reciprocity fosters a sense of communal living.

Communal setups provide necessary impetus for conflict resolution and peaceful co-existence. Conflicts and disputes have the potential to disrupt the social fabric holding society together. In essence, disputes and conflicts are a threat to the existence of society and are thus avoided. Social

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<sup>58</sup> J. Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965), 38-41.

<sup>59</sup> *Ibid*, 255.

<sup>60</sup> J. Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965), 38-41.

values, norms and beliefs in place aim at avoiding conflicts, and ensuring that if they arise they are resolved amicably.

In line with the writer's interview with the Kamasian elders who said that they are not paid for their work, Kenyatta also documents that among the Gikuyu people 'an elder in a community renders his services freely.' In this regard he observes as follows:

*"He receives no remuneration in the way of a salary, but helps the community with his advice and experience in the same way as he directs the management of his own homestead and family group. In recognition of these services he receives public tributes ceremonially, and is regarded specifically as the father and officiating priest of the community."*<sup>61</sup>

Other principles that aid elders in conflict resolution are social cohesion, harmony, openness/transparency, participation, peaceful co-existence, respect, tolerance and humility. Virtually all African communities depict adherence to these values explaining why the African model of dispute resolution using elders fostered reconciliation and social justice. This sharply differs with the western models of dispute resolution such as litigation and arbitration, which are individualistic and adversarial in nature.

## 4.2 Methods of Traditional Dispute Resolution by Elders

Conflict resolution amongst African communities has since time immemorial taken the form of negotiation, mediation, reconciliation or 'arbitration'<sup>62</sup> by elders. Communally, disputing parties would sit together informally and resolve disputes and conflicts to maintain social harmony and restore social bonds. Thus, all the methods of dispute resolution had the aim of restoring social order. Conflict resolution was wholesome and tried to resolve all the underlying causes of conflict by ensuring that the parties to the conflict participated and reached a settlement. In some cases, fines and compensation were used but only as means to acknowledge the

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<sup>61</sup> *Ibid*, 254-255.

<sup>62</sup> The writer uses the terms negotiation, mediation and arbitration not in the western usage where the same have been formalized and are now legal processes but in their informal sense.

wrongs done and restore the parties. The fines and the compensation were not retributive in nature but compensatory. The social bonds and social ties referred to as social capital, enabled elders to resolve disputes since the threat of exclusion from the community made parties willing to settle.

Additionally, the concept of social harmony and peace applied not only among the living but also between the living and the dead. For some wrongs such as murder, rituals and cleansing had to be carried out to allow the spirit of the dead to rest in peace and not disturb the living. Some dispute resolution mechanisms involved reference to ancestors and spirits due to the importance of lineage and ancestry among Africans. Reference to spirits, trials by ordeal, rituals and cleansing in dispute resolution were the preserve of traditional healers, diviners and seers, who complimented elders in the dispute resolution process.

#### **4.3 Pre-Colonial and Post-Colonial Influences on Dispute Resolution by Elders**

Cultural worldview has a great impact on how people live their lives and resolve disputes. In pre-colonial Africa, the dominant cultural worldview was the traditions, customs and practices of specific ethnicities. Most African societies were communal, depending greatly on social capital to maintain social order and harmony. Dispute resolution was the preserve of elders, diviners, healers and other respected members of the society. Conflict resolution aimed at restoring social harmony, mending breached social ties, performance of rituals and offering apologies or compensation to ensure that the status quo before the dispute is restored. The process involved getting the parties and their families together, and getting to the root of the dispute to ensure underlying causes of conflict were resolved and the parties reconciled.

Colonization brought a cultural conflict between the African and western cultures. The western culture was viewed as superior and dominant, thus subjugating African cultures. Cultural imperialism was extended to the world of dispute resolution.<sup>63</sup> African cultures were allowed to guide courts so long as they were not repugnant to justice and morality, yet repugnancy was measured by western senses of justice and morality and not African. Even in Ethiopia, which was not colonized,

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<sup>63</sup> Section 3(2) of the Judicature Act, Cap. 8, Laws of Kenya.

traditional dispute resolution has been influenced by the Abrahamic religions.

Myers optimal psychology theory views westernized justice system as sub-optimal in the African context. The westernized justice system is retributive in nature as it emphasizes a winner-loser paradigm in dispute resolution that does not resolve the underlying causes of the conflict. The adoption of the Westernized justice system in African societies has made many traditional societies to revert to their own traditional dispute resolution by elders.<sup>64</sup> Moreover, modernization and westernization have impersonalized conflict making it difficult for elders to resolve disputes through traditional means. In Africa, dispute resolution by elders brings parties together to resolve their disputes. Formal justice systems are adversarial and dispute resolution is a form of destructive warfare between conflicting parties.

Interestingly, it is not only the western justice system that is sub-optimal in the African context but also the worldview of most Africans. At independence, most African countries adopted the justice system left by colonialists and continued the work of subjugating their own cultures and traditional justice systems. Therefore, the process of colonization did not only bring about the alienation of land and natural resources; it left an indelible cultural inferiority among Africans that few if any society has been able to escape.<sup>65</sup>

#### **4.4 Interface between conflict Resolution by Elders and Formal Justice Systems**

There is a marked resiliency of African justice systems in spite of the onslaught and subjugation by formal justice systems. Many reasons abound for this resilience. First, the Western Justice System is in principle very different from the African justice System. The Western system is individualistic, retributive and emphasizes a winner-loser paradigm.<sup>66</sup> Moreover, the African justice systems focus on the restoration of social harmony and social bonds between disputants, while the formal

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<sup>64</sup> Myers and Shinn (note 37), 4.

<sup>65</sup> *Ibid.*

<sup>66</sup> Myers and Shinn (note 37), 3-5.



mechanisms are destructive and leave wounds unhealed while causing new ones.

Second, and more often than not, African justice systems have a spiritual component. Traditional healers, diviners and seers take part in the process to seek the truth at the core of the dispute. The spiritual nature of dispute resolution is because Africans are still beholden to their ancestors and the dead; and they seek to make peace with them. In contrast, the Western-style justice systems are secular and do not countenance rituals. In fact, the Western justice system criminalizes certain acts such as witchcraft and sorcery.

Third, traditional justice systems are informal, cost-effective and expeditious. The parties often sit together and resolve their dispute within a sitting or two. Formal justice processes involve complex and technical procedures that consume a lot of time and resources. As such, the poor and indigent clients are locked out of the formal justice systems as they cannot afford. Thus, in poor rural areas and informal settlements in urban areas, informal, non-state justice systems fill up the void. An interesting example is seen in South Africa where traditional leaders have been given authority to try both civil and criminal matters, yet most disputes are resolved unofficially.<sup>67</sup>

#### **4.5 Challenges of Dispute Resolution by Elders in Modern Societies**

The first key challenge of dispute resolution by elders or any form of traditional justice system is the negative attitude they receive from 'modernized' Africans. In Ethiopia, Christians and Muslims alike have criticized the Borana-Oromo-Gadda ritual system as paganism.<sup>68</sup> Traditional practices such as rituals, cleansing, and trial by ordeals which are central in resolving disputes have been declared illegal under most legal systems. Similarly, in most countries in Africa including Kenya, South Africa and Ethiopia, there are laws proscribing witchcraft and traditional African practices despite their complementary role in dispute resolution.

Secondly, African justice systems are regarded as inferior in comparison to formal justice systems. The inferiority is as a result of the subjugation of African customary law, which is the undergirding

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<sup>67</sup> Rautenbach(note 21), 314-315.

<sup>68</sup> Bahtu(Note 36), 109.

normative framework providing the norms, values, and beliefs that underlie traditional dispute resolution. The repugnancy clauses which aimed at limiting the application of African customary law remain in the statute books of most African countries even in the post-independence era. In Kenya, for instance, Article 159(3) of the Constitution limits the use of traditional dispute resolution mechanisms using a repugnancy clause. The Article prohibits the use of traditional justice systems in a manner that contravenes the Bill of Rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality or is inconsistent with the Constitution or any other written law. In South Africa, Sections 12 and 20 of the Black Administration Act, limits the use of traditional dispute resolution in civil and criminal cases respectively. This subjugation is a feature that is invariably common to virtually all African countries;<sup>69</sup> and acts as a fetter to their effective utilization in enhancing justice among Africans.

Thirdly, modernity has had its fair share of negative impacts on African justice systems. In pre-colonial period, elders were the rich and wealthiest people as they held land and livestock. Their wealth and respect enabled them to be independent during dispute resolution processes. However, in modern societies, younger people have accumulated wealth and in most cases, older people rely on the younger people. This has enabled dispute resolution by elders to be affected by bribery, corruption and favoritism. For instance, there are reports that the *Abba Gada* elders of the Borana-Oromo and the *Sefer* chiefs of the Nuer community have been corrupted by bribes therefore limiting people's faith in them.<sup>70</sup>

Apart from corruption and bribery, modernity and westernization have broken down the close social ties and social capital between families and kinsmen. In contrast to pre-colonial days when the most important family system was the extended family, in modern times the main family system, especially in urban areas, is the nuclear family. Migration to urban areas and an increasingly individualistic society have broken down the communal or extended family system and thereby reducing the influence of elders. In addition, the superiority of the Westernized judicial and legal

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<sup>69</sup> HWO Okoth-Ogendo, *The Tragic African Commons: A Century of Expropriation, Suppression and Subversion*, (Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, Cape Town, SA:2002), 7-8.

<sup>70</sup> Bahtu (Note 36), 115-116.

system has further reduced the influence elders have in resolution of disputes.

Furthermore, inadequate or unclear legal and policy framework on traditional dispute resolution mechanisms poses a major challenge to their application in contemporary African societies. Most African countries lack clear policies and laws on traditional dispute resolution mainly due to plurality of their legal systems. Even in countries such as South Africa where there is a legal framework for the application of traditional dispute resolution, there are still challenges and limitations in their usage.<sup>71</sup>

The unclear legal and policy framework extends to matters of appeal of decision of elders and enforcement of these decisions. Among the Samburu, Pokot, Turkana and Marakwet for example, it is difficult to enforce the decision of elders unless all the parties agree with the decision.<sup>72</sup> Formal justice systems are backed by government sanction and disputants easily comply with their decisions easily.

## **5. RECOMMENDATIONS**

- (a) There is need to develop a clear legal and policy framework for the application of traditional dispute resolution by elders. In this regard, we can learn from the challenges and successes of the Black Administration Act in South Africa.
- (b) Emphasis should be placed on traditional dispute resolution, as the first port of call where applicable and relevant, in resolving disputes. Parties in certain personal relations such as marriage, divorce, child custody, maintenance, succession and related matters should first opt to traditional dispute resolution before approaching the formal legal system. This has been well used in Botswana and South Africa though with a lot of limitation on areas of application.
- (c) There is need to give elders engaged in the process adequate remuneration to prevent chances and opportunity for corruption.<sup>73</sup> This would prevent corruption as has been observed that corruption

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<sup>71</sup> Rautenbach (note 21), 312-315.

<sup>72</sup> Pkalya, Adan & Masinde (note 45).

<sup>73</sup> This has to be done cautiously since it is clear that traditionally elders were not paid at all for their work.

- of elders among the Karamoja, Teso, Oromo, Borana and Nuer communities have influenced the dispute resolution process.
- (d) There is need for a framework for appealing the decision of elders in the traditional dispute resolution mechanisms. For instance, among the Tswana, the hierarchy of traditional dispute resolution mechanism begins at the household level, then goes to the extended family level, then a formal customary court, and lastly to the customary court of appeal, with the status of the High court.
  - (e) There is need to develop an enforcement mechanism for traditional dispute resolution mechanisms by elders. For instance, in South Africa, if a person fails to obey the decision of a traditional elder, the person is reported to a magistrate who gives the person 48 hours to show cause and if he fails to, he is punished.
  - (f) African traditions and customs should be co-opted into formal education system to enhance the respect for our cultures, especially after centuries of subjugation. Most African customs and practices are neither written nor codified since they are passed from generations to generations through word of mouth. They are at great risk of dying away and should therefore be taught not only for use in dispute resolution but also for posterity and appreciation by present and future generations.
  - (g) Need for codification of key concepts, practices and norms of traditional dispute resolution to protect them. Further, such codification increases uniformity and consistency of application of traditional dispute resolution mechanisms by elders.

## **THE JURIDIFICATION OF ARBITRATION: "THE ADVOCATE'S DUTY IN ARBITRAL PROCEEDINGS"**

By: **Kihara Muruthi\***

### **ABSTRACT**

*The author traces the historical development of arbitration and what inspired its growth especially with regard to the current role of lawyers in the process. In the paper, the author critically analyses the place of lawyers in the arbitration process as experienced in many countries and commercial fields, and also focuses on the potential conflict between litigation lawyers' and arbitration lawyers' role. While placing the discussion in the context of Kenya, the author clearly examines the role of lawyers with regard to: the duty of the arbitration lawyer/advocate to the Tribunal; choosing the appropriate arbitration procedure; case investigation; issues for determination; preparation of pleadings and the hearing process.*

*In conclusion, the author asserts that the duties of a litigation advocate and those of an arbitration advocate are different and ought to be treated as such, due to the technical differences in the two processes. He argues that it is necessary to eliminate the conflict between arbitration and the advocates on one hand, or arbitration and the judiciary on the other, for neither field is a panacea for all the ills of commercial conflict. As such, both may exist well in a complimentary relationship, with each exuding its value to the body politic and economic sphere.*

### **1. INTRODUCTION**

When modern arbitration became popular in the United States in the 18<sup>th</sup> and 19<sup>th</sup> centuries, courts viewed it as a threat to their exclusive powers. Over time, that mindset has changed dramatically. Thereafter, agreements to arbitrate found their way into many standard form agreements and business contracts as arbitration became accepted as a *bona fide* alternative to litigating in court.<sup>1</sup> Arbitration was feared in earlier days

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as an "ogre" which would only tend to oust the courts of their jurisdiction. As a result, arbitration agreements were held to be unenforceable and the best a claimant could hope for was nominal damages for breach of the agreement to arbitrate.<sup>2</sup> It is significant that, in this, the fortieth year of the anniversary of the passage of the first modern arbitration statute in the United States<sup>3</sup>, the modern trend away from the aforementioned hostile attitude is now clearly shown. Arbitration owes its long history to the tradition of merchants and to the days before the emergence of the modern nation state.<sup>4</sup> Nevertheless, in many countries and commercial fields it is the custom for arbitrations to be conducted by lawyers. In others, it is still the custom for "commercial men" or men of technical experience to be engaged.<sup>5</sup>

The legal framework governing arbitration in Kenya is contained in The Arbitration Act<sup>6</sup>. This Act is generally modeled along the provisions of the United Nations Commission on International Trade Law Model Law of 1985<sup>7</sup>. In Kenya the litigation lawyer is the same as the arbitration lawyer. The term commonly in use as a reference to lawyers is "advocate". Advocate means any person whose name is duly entered upon the Roll of Advocates.<sup>8</sup> An Advocate is a lawyer granted a license to practice in the ordinary courts in Kenya. Though non-advocates or non-lawyers are not barred from representing parties in arbitral proceedings, the advocates have dominated this representation. The upshot of this is that the

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<sup>1</sup> Neal M. Eiseman, John E. Bulman, and R. Thomas Dunn, 'A Tale of Two Lawyers: How Arbitrators and Advocates can avoid the dangerous convergence of Arbitration and Litigation,' *Cardozo Journal of Conflict Resolution*, Vol. 14 Issue 3, April 2013, p 683.

<sup>2</sup> Sylvan Gotshal, 'Arbitration's Importance to the Lawyer,' 1 B.C.L. Rev. 151 (1960), <http://lawdigitalcommons.bc.edu/bclr/vol1/iss2/2> [Accessed on 27/09/2015]

<sup>3</sup> The first modern arbitration statute was passed in New York in 1920. N.Y. CIV. Prac. Act §§ 1448-1469.

<sup>4</sup> Geoffrey Hartwell, 'Who Shall Be the Arbitrators?' Available at <http://www.hartwell.pwp.blueyonder.co.uk/whoshall.htm> [Accessed on 27/09/2015].

<sup>5</sup> Ibid.

<sup>6</sup> The Arbitration Act, No. 4 of 1995, Revised Edition, 2010, *The Government Printer*

<sup>7</sup> [https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)

<sup>8</sup> Advocates Act, Chapter 16, Revised Edition, 2012 [1989], *The Government Printer*

undesirable trends, lapses, practices, inadequate preparation, delays, unmerited applications and adjournments are, sadly, imported into arbitration practice.

The task of an arbitration lawyer depends on the type of arbitration, domestic or international, and whether the lawyer is in-house or an outside counsel. The tasks are informed by the arbitration agreement and a decision as to whether or not the dispute is arbitrable. Arbitration laws and rules prescribe the steps to be taken if the dispute is to proceed to arbitration. The in-house lawyer may be assisted by an outside counsel in the ensuing steps by attending to correspondence and arranging the preliminary meeting and setting up a procedural timetable for the arbitral process.

As to the role of the advocate in arbitration, it would be definitely prudent, in preparing for and conducting the cases of clients, to draw distinction between Arbitration and Litigation. There seems to be a world of difference between, on the one hand, agreeing to seek a fair outcome to a contract privately with an arbitrator chosen by the parties to the contract, and on the other hand, publicly invoking the coercive power of the state in civil proceedings.

Arbitration is one means of resolving disputes, perhaps the oldest form of acceptable alternative dispute resolution, i.e., an alternative to the state court system. The essence of the type of arbitration under discussion is that the parties choose a third party whose decision on the dispute is binding on them.<sup>9</sup> Arbitration is triggered by an Arbitration agreement embedded in a commercial contract. An arbitration agreement is defined in the Kenyan Arbitration Act as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not.<sup>10</sup>

On the other hand, civil litigation is a dispute resolution procedure between two or more parties that seeks money damages or specific performance rather than criminal sanctions. An advocate who specializes in civil litigation is known as a "litigator" or "trial lawyer." Advocates who practice civil litigation represent parties in trials, hearings, before

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<sup>9</sup> Ronald Bernstein, John Tackaberry & Arthur Marriott, *Handbook of Arbitration Practice*, (3<sup>rd</sup> Edition, London 1998), p. 4,

<sup>10</sup> Section 3(1) The Arbitration Act, Chapter 49, Revised Edition, 2010 [1995], *The Government Printer*

administrative tribunals or state courts.<sup>11</sup> The litigation lawyer determines and advises whether a suit or claim is maintainable and proceeds to deal with demand notices and related correspondence. If claim is not admitted or is denied, the suit is filed and a timetable is set for the delivery of pleadings. The role of the civil litigation advocate is challenging and diverse. Since civil litigation is an adversarial process, litigation advocates must be willing to assume an oppositional position and embrace conflict and controversy. Procedure is primarily governed by statute and in litigation practice, advocates throughout the trial process put a lot of emphasis on the procedure prescribed by law.

## 2. DUTY TO THE TRIBUNAL

An advocate has a duty not to participate in deceiving or misleading the court. He owes a similar duty to the Arbitrator. Advocates should exhibit respect and courteousness to the Arbitrator. This would go a long way in ensuring the standards, efficiency and integrity of the process is upheld. An Advocate has an ethical duty towards the Arbitrator which includes avoiding unnecessarily delay, reducing costs related to such delays and avoiding tendering evidence that is immaterial or irrelevant. An Advocate may exhibit procedural conduct that negatively affects the efficiency of the arbitration, and by extension failing in his or her duties to the Arbitrator. This can be either because of a lack of experience in domestic or international commercial arbitration or a lack of satisfactory preparation, including a lack of thorough knowledge of the case in question; or because Advocates are applying procedural strategies that are engineered to introduce delays or disruptions into the speedy conduct of the arbitral proceedings.

As mentioned above, an Advocate has a duty not to mislead the Arbitrator. It has often been said that this duty is owed only to the court and does not apply to arbitral proceedings. However, this may not be factually correct as both processes complement each other by dispensing justice and therefore applies to arbitrations too. Misleading the court or Arbitrator by presenting a misleading or false document is contrary to the Advocate's duty of honesty and sincerity, as well as in their capacity as a

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<sup>11</sup> <http://hls.harvard.edu/dept/opia/what-is-public-interest-law/public-interest-work-types/civil-litigation/> [Accessed on 28/09/2015].



litigant. In *Law Society of New South Wales v Foreman*,<sup>12</sup> the New South Wales Court of Appeal ordered that the respondent be removed from the Roll of practitioners, because she had knowingly presented a falsified document to the Court on the basis that it was genuine. Mahoney JA stated that:-

".....A practitioner must not merely not deceive the court before which she practices; she must be fully frank in what she does before it. This obligation takes precedence over the practitioner's duty to her client, to other practitioners and to herself: *Meek v Fleming*<sup>13</sup>. The justice system will not work if a practitioner is, for her own purposes, free to put to the court that which she knows to be false."

### 3. THE CHOSEN PROCEDURE

The rules of procedure, which the civil courts apply so as to dispense their duties, exist in such a way as to facilitate the court in ensuring that justice is served to all the parties. The procedural rules have been aptly described by Charles Clark, who stated that just as a handmaid, however devoted, seems never averse to becoming mistress of a household, so do the rules of procedure tend to assume a too obtrusive place in the attentions of judges and lawyers."<sup>14</sup> The Court of Appeal in *Nairobi Civil Appeal (Application) No. 228 of 201, Nicholas Kiptoo arap Korir Salat vs Independent Electoral and Boundaries Commission and 6 Others*<sup>15</sup> reiterated what the same Court stated in *Githere vs Kimungu*<sup>16</sup>, that the relation of rules of practice to the administration of justice is intended to be that of a handmaid rather than a mistress, and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case. The

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<sup>12</sup> *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 New South Wales Law Reports

<sup>13</sup> [1961] 2 QB 366 at 382, 383

<sup>14</sup> "The Handmaid of Justice" Clark, Charles 23, *Washington University Law Quarterly*, 297 (1938).

<sup>15</sup> <http://kenyalaw.org/caselaw/cases/view/93025/>

<sup>16</sup> *Githere vs Kimungu* [1976 - 1985] E.A. 101.

court was of the view that rules remain subservient to the Constitution<sup>17</sup> and statutes, and they place a heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice. This being a recent case, it is evident enough that procedural technicalities and emphasis thereto is still the norm in court litigation in Kenya.

The Arbitrator is the master of procedure. Section 20(1) of the Act gives the parties a free hand to determine the procedure they wish to adopt. The Arbitrator's power<sup>18</sup> to determine the manner in which the arbitration is to be conducted, checks in when the parties fail to agree and is limited only by the agreement between the parties.

John Flood and Andrew Caiger,<sup>19</sup> in their celebrated essay on construction arbitration describe how the highly specialized and dispute ridden field of construction arbitration has become a competition between construction experts and lawyers, with the latter slowly gaining ascendancy despite their lack of technical knowledge. The lawyers have been able to "juridify" the arbitration process such that the substantive experts have been marginalized. In fact, I am aware of a recent scenario where a Kenyan lawyer strongly challenged the representation of a party in arbitral proceedings by a non-lawyer, for unlawful and illegal practice of law in spite of the clear legal provisions in the Arbitration Act<sup>20</sup> allowing non-lawyer representation. The lawyer, obsessed with outdoing the non-lawyer, even reported to the Law Society of Kenya for possible action. The Arbitrator, himself a lawyer, ruled that a non-lawyer may represent a party in arbitration and condemned the party that agitated the application with costs.

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<sup>17</sup> The Constitution of Kenya, 2010, *The Government Printer*

<sup>18</sup> Section 20(2).

<sup>19</sup> John Flood and Andrew Caiger, *Lawyers and Arbitration* (1993) 56 *Modern Law Review*, P 412,

<sup>20</sup> Section 25 (5).

#### **4. INVESTIGATION**

Litigation attorneys often conduct an initial case investigation to determine, in the plaintiff's case, if enough evidence exists to file a lawsuit or, in the defendant's case, what evidence exists to defend a potential suit.<sup>21</sup> The investigation process may include locating witnesses, taking witness statements, gathering documents, interviewing the client and investigating the facts leading to the dispute.<sup>22</sup> The Advocate has a duty to gather as many facts as are available about the case and determine how to present this to the Arbitrator. This should be done in an orderly fashion. He should first examine the correspondence and responses connected to the dispute. Here, the advocate should find the basic contentions of the parties regarding the dispute and, perhaps, an indication of the facts that each party intends to prove. This examination will offer only a patchy view of the case and must be treated as merely the beginning in the development of the case. The observant advocate must examine all documents that relate to the case. At this stage, the Advocate may seek clarifications from his client and if need be, engage expert witnesses of fact to substantiate or clarify his client's case.

#### **5. ISSUES FOR DETERMINATION**

One of the most important aspects of any trial is the framing of issues. As such, framing of issues is a complex exercise involving determination of the exact points of dispute between the parties to the proceedings, and the onus is on each party to prove the correctness or otherwise of an issue.

The Act does not expressly mandate framing of issues by the Arbitrator. The Act places the burden on the Arbitrator to conduct the proceedings in the manner he deems appropriate. Ordinarily, the Arbitrator during the Preliminary Meeting may direct the parties to agree on a set of issues for determination or if they cannot agree, then to separately furnish draft issues on the completion of exchange of pleadings. The Arbitrator will then come up with his own issues whilst writing the award. "In connection with establishing a sensible Arbitral procedure, the

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<sup>21</sup> *'The Role of the Litigation Attorney,'*  
<http://legalcareers.about.com/od/legalspecialties/a/litigationatto.htm>  
[Accessed on 28/9/2015].

<sup>22</sup> *Ibid.*

Tribunal and parties must define the contested issues of law and fact, and devise efficient and rational means of presenting and deciding them."<sup>23</sup> If the parties are in agreement on the list of issues to be decided, this would make the work simpler for the Arbitrator.

Once the disputed points of law and fact are determined, the same will contribute to the efficiency of the Arbitration in several ways. Framing points for consideration will enable the Arbitrator to approach the Arbitration in a systematic manner.<sup>24</sup> The parties can lead evidence by addressing each issue individually. The Arbitrator can deal with each issue in the award separately thereby bringing cogency to the award. The determination of issues in the dispute has a significant effect on the costs and resources incurred for the Arbitration. Issues can no doubt take a considerable length of time to formulate. One of the major benefits of a lawyer representative is his ability to narrow down the issues with ease.

## 6. THE PLEADINGS

Pleadings should state clearly and in concise form, what you want from the Arbitrator. The pleadings are not evidence, and are only averments and therefore the Advocate has a duty to introduce witnesses and documents at the hearing to establish each of the claims or defenses raised in the pleadings. The pleadings are your opportunity to tell your story. Tell the Arbitrator a logically presented story. Any time there are facts which are not in dispute, identify them for the Arbitrator. Use headings to help highlight the major points and to organize your presentation. A draft of the pleadings should be sent to the client for concurrence. Since your pleadings are the roadmap for the presentation of your case at the hearing, instill in your clients and experts the fact that their testimony is expected to be consistent with the assertions and defenses contained in those pleadings.

Preparing a clearly written and convincing statement of claim may make the difference between winning and having to explain to your client

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<sup>23</sup> Gary Born, *International Commercial Arbitration Volume III* (Wolters Kluwer, 2009) 1815

<sup>24</sup> Badrinath Srinivasan, 'Is the Arbitrator Obligated to Frame Issues?' *Current Tamil Nadu Cases*, Vol. 4, 2014, p 162-167. Available at [https://www.academia.edu/8923525/Is\\_the\\_Arbitrator\\_Obligated\\_to\\_Frame\\_Issues](https://www.academia.edu/8923525/Is_the_Arbitrator_Obligated_to_Frame_Issues) [Accessed on 28/9/2015].

why the arbitrators rejected your proof at the hearing. Formal and technical procedural rules, including pleading requirements, do not govern arbitrations. The Act does not specify the format of pleadings in arbitration but under the Civil Procedure Rules,<sup>25</sup> there are detailed provisions regarding the format and contents of pleadings. Nonetheless, Advocates today spare no more effort in preparing a statement of claim than a Plaint to be filed in the civil court. You may not find much difference with pleadings in court and arbitration today although arbitration is supposed to be a more relaxed procedure. Both are filled with legalese. In every arbitration, when the Arbitrator sits down to write the award, they will first review the pleadings. The pleadings should be in a chronological manner so as to tell your clients story with clarity. This is even more important when the arbitration is a documents only arbitration, as this may be the only medium to communicate to the Arbitrator.

## 7. THE HEARING

In Arbitrations, the hearings may be conducted by way of documents only or oral hearing. The task of the arbitration lawyer, unlike the litigation lawyer, includes advising the client whether hearings should be oral or documentary.<sup>26</sup>

It would be worthwhile to mention here that the main objective is simplicity and clarity. If the evidence tendered is complex, the Arbitrator may not grasp your proposition and may by extension doubt its validity. An arbitration hearing must be conducted in a manner which is fair to all parties. This means that the parties must know their rights and responsibilities in advance so they may properly prepare and present their positions. Procedures are required to assure an orderly hearing. But procedures may and should be modified as interests of justice and truth dictate. However, in modifying established procedures, care must be taken to ensure that the rights and interests of all parties are protected.

It is good practice to hire a stenographer to transcribe the arbitration proceedings. In nearly every instance, the advocates will consent to splitting the expense of engaging a transcriber. This exercise of reducing the proceedings verbatim becomes very useful to the parties and the Arbitrator. In Kenyan courts, proceedings are handwritten by the presiding

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<sup>25</sup> Order 2 Rules 1 - 17, Civil Procedure Rules, 2010, L.N. 151/2010, *The Government Printer*

<sup>26</sup> Model Law Art. 24

Magistrate or Judge and this can be particularly cumbersome and leaves the presiding officer with little time to concentrate on the proceedings and demeanor of witnesses. In many cases, arbitration hearings do not take place in one block of time. Instead, several hearing dates are completed, and then weeks or months may pass before the next hearing date. Without a transcript it becomes virtually impossible for the advocate and, more importantly, the arbitrators, to recall the earlier evidence. It then follows that the advocate has a duty to agree with his counterpart on hiring a transcriber. This can be done during the Preliminary meeting.

## 8. CONCLUSION

Arbitration is here to stay. Resolution of disputes and particularly arbitration is transforming. However, the Advocate, whose duties appear to be similar to his duties in court, has to bear in mind that parties to disputes choose arbitration due to its preferred unique qualities which should remain as such. For the success of arbitration, the advocate should cooperate by avoiding exaggeration, being too technical on procedure, presenting irrelevant arguments and evidence as this would prolong the proceedings, confuse the Arbitrator and escalate costs. There need be no conflict between arbitration and the advocates on one hand, or arbitration and the judiciary on the other, for neither field is a panacea for all the ills of commercial conflict; both may exist well in a complimentary relationship, with each exuding its value to the body politic and economic sphere.<sup>27</sup>

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<sup>27</sup> Mosk, *the Lawyer and Commercial Arbitration: The Modern Law*, 39 A.B.A.J. 193-6, March 1953, and Com. L.J. 63 (1953)

## EMPOWERING THE KENYAN PEOPLE THROUGH ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

By: **Dr. Kariuki Muigua**

### ABSTRACT

*This paper discusses the concept of empowerment in the context of the Constitution of Kenya 2010, with a view to demonstrate how Alternative Dispute Resolution (ADR) can be employed as a tool for the empowerment of the Kenyan people, to boost their participation in conflict management, governance matters, and improve the socio-economic aspects of their lives.*

*The discourse conceptualizes empowerment in the context of Kenya, based on the various elements of the same. It highlights the main challenges hampering efforts to empower the Kenyan people and proposes the way forward. The paper ends by suggesting ways in which empowerment can be achieved for the Kenyan people, for the realisation of an environment based on the values of human rights, equality, freedom, democracy, social justice, and the rule of law as envisaged in the preamble to the current Constitution of Kenya 2010.*

### 1. INTRODUCTION

This paper explores how Alternative Dispute Resolution (ADR) can be employed as a tool for the empowerment of the Kenyan People through conflict management and participation in governance matters touching on socio-economic aspects of their lives.

The author argues that if the aspirations of the Kenyan people are to be met, then it has to be in a secure and peaceful environment, and one that allows people to make decisions regarding their own affairs and to access justice. Such an environment would be based on the values of human rights, equality, freedom, democracy, social justice, and the rule of law, as envisaged in the preamble to the current Constitution of Kenya 2010<sup>1</sup>.The

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paper explores the viability of ADR mechanisms in empowering the Kenyan people.

## 2. BACKGROUND

During the colonial period, the political and legal systems of the colonial masters were superimposed upon the traditional and customary, political and legal processes of African peoples. In an attempt to safeguard own interests, the colonial masters suppressed the African customs and practices, only allowing them to continue 'if they were not repugnant to justice and morality'.<sup>2</sup>

A misconception of the African communal way of life, conflict resolution institutions and prejudice against their traditional way of life, saw the Europeans introduce the Western ideals of justice, which were not based on political negotiations and reconciliation.<sup>3</sup> Although certain minor disputes could be settled in the customary manner, the English Common Law was the ultimate source of authority.<sup>4</sup> The effect of this was disempowerment of the Kenyan people, as far as control of their lives was concerned.

Although the African States gained external self-determination in terms of independence and sovereignty from the Colonial masters, there was need to work towards achieving internal self-determination for its citizens. Internal self-determination is used to refer to various political and social rights, while external self-determination refers to full legal independence/secession for the given 'people' from the larger politico-legal

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for Advanced Studies in Environmental Law & Policy (CASELAP), University of Nairobi. Former Chairperson CI Arb (Kenya Branch). [August, 2015]

<sup>1</sup> Government Printer, Nairobi 2010.

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

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

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



state.<sup>5</sup> Even after independence, Kenyans and indeed, the African people, were not assured of self actualisation due to a number of factors which ranged from weak or non-existent legal and institutional frameworks for the empowerment of people, corruption, violation of human rights, poverty, and illiteracy amongst others.<sup>6</sup>

In many other countries, internal conflicts amongst communities abound and these undermine internal self-determination. Conflict-torn areas around Kenya, such as the Northern Kenya region, are faced with the challenges of human rights violations, inequality, constraints of freedom, diminished democracy, social injustice and absence of the rule of law.<sup>7</sup> The result of these is insecurity, lack of development and poverty amongst people, who are consequently disempowered by losing basic control of their lives. Ordinary citizens are unable to drive their own lives and it also becomes hard or impossible to access justice especially in the absence of the rule of law.<sup>8</sup>

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<sup>5</sup> Cornell University Law School, Legal Information Institute, 'Self-determination (international law)'. Available at [https://www.law.cornell.edu/wex/self\\_determination\\_international\\_law](https://www.law.cornell.edu/wex/self_determination_international_law) [Accessed on 25/02/2015].

<sup>6</sup> See generally, Forje, J.W., "Self-Determination, Nationalism, Development and Pan-Africanism Stuck on the Runway: Are Intellectuals to be Blamed?" *African Journal of International Affairs*, vol. 6 nos 1 & 2, 2003, pp.54-86; See also Obeng-Odoom, F., "Avoiding the Oil Curse in Ghana: Is Transparency Sufficient?" *African Journal of International Affairs*, Vol.13, Numbers 1&2, 2010, pp. 89-119; See generally, Dersso, S.A., "Post-Colonial Nation-Building And Ethnic Diversity In Africa" in Kenyan Section of the International Commission of Jurists, *Ethnicity, Human Rights And Constitutionalism In Africa*, 2008. Available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.icjkenya.org%2Findex.php%2Fresources%2Fpublications%2Fbooks-dl%3Fdownload%3D15%3Aethnicity-human-rights-and-constitutionalism-in-kenya&ei=GOD9VNHHLdPYatCogtgP&usq=AFQjCNGx3i7FgPXxxC27UIBEi8b6SKYBeAg&bom=bv.87611401.d.d.2s>

<sup>7</sup> See UNESCO, "Human Security and Human Development: A Deliberate Choice," *Kenya National Human Development Report*, 2006. Available at [http://planipolis.iiep.unesco.org/upload/Kenya/kenya\\_2006\\_en.pdf](http://planipolis.iiep.unesco.org/upload/Kenya/kenya_2006_en.pdf) [accessed on 25/02/2015].

<sup>8</sup> Ibid, p. 25.

### 3. CONCEPTUALISING EMPOWERMENT

Empowerment has been generally defined as a multi-dimensional social process that helps people gain control over their own lives, through fostering power (that is, the capacity to implement) in people, for use in their own lives, their communities, and in their society, by acting on issues that they define as important.<sup>9</sup> It is also seen as a social-action process that promotes participation of people, organizations, and communities towards the goals of increased individual and community control, political efficacy, improved quality of community life, and social justice.<sup>10</sup> It is the expansion of assets and capabilities of poor people to participate in, negotiate with, influence, control, and hold accountable institutions that affect their lives.<sup>11</sup>

Empowerment theory has been described as one that connects individual well-being with the larger social and political environment, and suggests that people need opportunities to become active in community decision-making in order to improve their lives, organizations, and communities.<sup>12</sup>

There are basic aspects of empowerment: *participation, control and critical awareness*(emphasis ours) where participation is the individual's actions that contribute to community contexts and processes; control is the effective or the perception of ability to influence decisions; and critical awareness is the ability to analyze and understand the social and political environment.<sup>13</sup>

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<sup>9</sup> Nanette Page, N. and Czuba, C.E., "Empowerment: What Is It?" *Journal of Extension*, October 1999, Volume 37, Number 5, Commentary, 5COM1.

<sup>10</sup> Wallerstein, N., "Powerlessness, empowerment and health: Implications for health promotion programs." *American Journal of Health Promotion*, 6(3), 197-205 (As quoted in Lord, J. and Hutchison, P., "The Process of Empowerment: Implications for Theory and Practice." *Canadian Journal of Community Mental Health*, 12:1, Spring 1993, Pages 5-22 at p. 4.)

<sup>11</sup> World Bank, *Chapter 2. What Is Empowerment?* p.11. Available at <http://siteresources.worldbank.org/INTEMPowerment/Resources/486312-1095094954594/draft2.pdf> [Accessed on 25/02/2015].

<sup>12</sup> Zimmerman, M.A., "Empowerment Theory: Psychological, Organizational and Community Levels of Analysis," in Rappaport, J. and Seidman, E. (Eds.), *Handbook on Community Psychology*, New York: Plenum Press, 2000. p.52.

<sup>13</sup> *Ibid.*

Based on the foregoing, empowerment is used in this paper to refer to the process where the Kenyan local communities are enabled to participate more productively in social, political and economic decision-making processes. This discourse is restricted to empowerment in the areas of natural resources and environmental management, conflict management and participation in general governance matters. This is because these are the main areas that have a direct impact on the quality of the social, economic and cultural life of the local people. The author seeks to explore how Alternative Dispute Resolution Mechanisms (ADR) can be utilised to achieve empowerment of the disempowered groups of persons into the socio-economic and political system. This is by way of inclusion, influence and representation of various disadvantaged or marginalised social groups within the governance structures in the country.

#### **4. CURRENT CHALLENGES IN EMPOWERMENT OF THE KENYAN PEOPLE**

The search for a society based on the values of human rights, equality, freedom, democracy, social justice and the rule of law informed the promulgation of the current Constitution of Kenya 2010. This is because Kenya's history is one that is marked with human rights violation, inequality, curtailed freedom, autocracy, social injustice and lack of the rule of law. There have also been widespread ethnic, political and even inter-clan conflicts.<sup>14</sup> The effect of these has been underdevelopment or non-development in the country, despite the fact that it is richly endowed with

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<sup>14</sup> UNESCO, "Human Security and Human Development: A Deliberate Choice," *Kenya National Human Development Report*, 2006. P. 55.

natural resources.<sup>15</sup> The local people find themselves struggling to meet their basic needs of right to life, shelter, health, food and water.<sup>16</sup>

#### 4.1 Violation of Human Rights

Human rights are the equal and inalienable rights, in the strong sense of entitlements that ground particularly powerful claims against the state, which each person has simply as a human being.<sup>17</sup> Individual human rights are increasingly viewed not merely as moral ideals, but as both objectively and subjectively necessary to protect and realize human dignity.<sup>18</sup>

Abuse of human rights in Africa has mainly been attributed to racism, post-colonialism, poverty, ignorance, disease, religious intolerance, internal conflicts, debt, bad management, corruption, the monopoly of power, the lack of judicial and press autonomy and border conflicts.<sup>19</sup> It is noteworthy that among the list, conflicts feature prominently. As such, it is arguable that the creation of a peaceful and secure environment where every African enjoys human rights heavily relies on the management of these conflicts.

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<sup>15</sup> Ibid, p. 4; Daily Nation, *Kakamega the poorest county in Kenya*, Monday, November 10, 2014. Available at <http://www.nation.co.ke/counties/Kakamega-Poverty-Devolution-Ministry-Report/-/1107872/2517956/-/gvyj9g2z/-/index.html> [Accessed on 25/02/2015]; Government of Kenya, Ministry of State for Planning, National Development & Vision 2030, *Poverty & Environment Indicators Report*, February 2011. Available at [http://www.unpei.org/sites/default/files/e\\_library\\_documents/PEI\\_Indicators\\_report.pdf](http://www.unpei.org/sites/default/files/e_library_documents/PEI_Indicators_report.pdf)

<sup>16</sup> The Star, *Africa: Kenya Sixth Poorest in Africa, Report Says*, 19 February 2015. Available at <http://allafrica.com/stories/201502190545.html> [Accessed on 25/02/2015].

<sup>17</sup> Howard, R.E. and Donnelly, J., "Human Dignity, Human Rights, and Political Regimes," *The American Political Science Review*, Vol. 80, No. 3 (Sep., 1986), pp. 801-817 at p.802.

<sup>18</sup> Howard, R.E. and Donnelly, J., "Human Dignity, Human Rights, and Political Regimes," *op. cit.* p.805.

<sup>19</sup> Magnarella, P.J., "Achieving Human Rights in Africa: The Challenge for the New Millennium", *African Studies Quarterly*, Volume 4, Issue 2, Summer 2000, PP.17-27 at p. 17; See also generally, Maphosa, S.B., "Natural Resources and Conflict: Unlocking the economic dimension of peace-building in Africa". *Africa Institute of South Africa Policy Brief*, Briefing No. 74, March 2012.

There has been widespread violation of social, cultural and economic rights which are vital for the empowerment of the ordinary people.<sup>20</sup>

The *Universal Declaration of Human Rights*<sup>21</sup> (UDHR 1948) affirms in its Preamble that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Human dignity is indeed inviolable and it must be respected and protected.<sup>22</sup> In addition to the foregoing, UDHR 1948 states that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.<sup>23</sup> The Constitution of Kenya 2010 also guarantees that every person in Kenya has inherent dignity and the right to have that dignity respected and protected.<sup>24</sup>

Notwithstanding the comprehensive Bill of Rights in the current Constitution of Kenya, cases of violation of human rights still persist. A case in point is the *Endorois case*,<sup>25</sup> where the Kenyan community, Endorois was fighting against violations resulting from their displacement from their ancestral lands without proper prior consultations, adequate and effective compensation for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of their development as a people.

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<sup>20</sup> See Kapindu, R.E., "Courts and the enforcement of socio-economic rights in Malawi: Jurisprudential trends, challenges and opportunities." *African Human Rights Law Journal*, (2013) 13 AHRLJ 125-151. p. 126.

<sup>21</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III),

<sup>22</sup> See also Art. 1, UDHR, 1948.

<sup>23</sup> Art. 22.

<sup>24</sup> Art. 28.

<sup>25</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, No. 276 / 2003.

Despite the African Commission on Human and Peoples' Rights (ACHPR) Ruling that found Kenya to be in violation of the African Charter,<sup>26</sup> and urged Kenya to, *inter alia*, recognise the rights of ownership of the Endorois; restitute their ancestral land; ensure the Endorois have unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle, the Government of Kenya is yet to implement the decision of the Commission in the Endorois case.

It is evident that access to justice in Kenya especially for the poor and marginalised groups of persons is still a mirage. This is due to the fact that access to justice is not just about presence of formal courts in a country but also entails the opening up of those formal systems and legal structures to the disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.<sup>27</sup> Arguably, this has not yet been achieved in our country and the result is a poor people who are often condemned to a life of misery without any viable recourse to alleviate the injustices.

It has been observed that marginalised individuals and groups often possess limited influence in shaping decision-making processes that affect their well-being.<sup>28</sup> It has been observed that loss of land does not only lead to hunger, but loss of property, livelihoods, water scarcity and related issues such as children dropping out of schools and social unrest, with the overall effect being characterized by gross violation of human rights.<sup>29</sup>

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<sup>26</sup> Arts.1, 8, 14, 17, 21 and 22. the Kenyan government had violated their right to religious practice (Art. 8), right to property (Art. 14), right to freely take part in the cultural life of his/her community (Art. 17), right of all peoples to freely dispose of their wealth and natural resources (Art. 21), and right to development (Art. 22).

<sup>27</sup> Global Alliance against Traffic in Women (GAATW), Available at <http://www.gaatw.org/atj/> (Accessed on 09/03/ 2015).

<sup>28</sup> Gibson, C., et. al., "Empowerment and Local Level Conflict Mediation in Indonesia: A Comparative Analysis of Concepts, Measures, and Project Efficacy", Volume 3713, *Policy research working papers*, World Bank Publications, 2005. P.1.

<sup>29</sup> Uganda Land Alliance, "Campaign against Land Grabbing". Available at <http://ulaug.org/data/smenu/34/Campaign%20against%20Land%20Grabbing.html> [Accessed on 06/03/2015].

## 4.2 Lack of Access to Justice and Inequality

Although the concept of access to justice does not have a single universally accepted definition, usually the term is used to refer to opening up the formal systems and structures of the law to disadvantaged groups in society and includes removing legal and financial barriers, but also social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.<sup>30</sup> Access to justice is said to have two dimensions to it, namely: procedural access (fair hearing before an impartial tribunal) and substantive justice (fair and just remedy for a violation of one's rights).<sup>31</sup>

The concept of 'access to justice' involves three key elements namely: *Equality of access to legal services, national equity and equality before the law* (emphasis ours).<sup>32</sup> Equality of access to legal services, means ensuring that all persons, regardless of means, have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests.<sup>33</sup> National equity is ensuring that all persons enjoy, as nearly as possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy.<sup>34</sup> Equality before the law means ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in all fields, use of community facilities and access to services.<sup>35</sup> A framework that does not guarantee these may therefore not facilitate access to justice.

The *United Nations Universal Declaration of Human Rights* 1948 provides that all persons are equal before the law and are entitled without

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<sup>30</sup> Global Alliance against Traffic in Women (GAATW), op. cit.

<sup>31</sup> Ibid.

<sup>32</sup> Access to Justice Advisory Committee, *Access to justice: an action plan*, AGPS, Canberra, 1994. See also Louis Schetzer, et. al., 'Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW', page 7, Background Paper, August 2002, available at [www.lawfoundation.net.au/tjf/site/articleIDs/.../\\$file/bkgr1.pdf](http://www.lawfoundation.net.au/tjf/site/articleIDs/.../$file/bkgr1.pdf) [Accessed on 24/02/2015].

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

any discrimination to equal protection of the law.<sup>36</sup> Further, it guarantees everyone's right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.<sup>37</sup> This includes everyone's right in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of a person's rights and obligations and of any criminal charge against them.<sup>38</sup>

In Kenya, this right is guaranteed under the Constitution of Kenya 2010,<sup>39</sup> although the actual implementation or realisation is yet to be seen due to various factors that hinder its effective implementation. The Judicial system in Kenya has been affected by various barriers to accessing justice, which include high legal fees, complex rules of procedure, geographical location of Courts that does not reflect the demographic dynamics, cultural, economic and socio-political orientation of the society and selective application of laws.<sup>40</sup>

It is difficult for Kenyans to seek redress from the formal court system. The end result is that these disadvantaged people harbour feelings of bitterness, marginalization, resentment and other negative feelings that also affect the stability and peace of the country. Such scenarios have been the causes of ethnic or clan animosity in Kenya.<sup>41</sup>

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<sup>36</sup> Art. 7.

<sup>37</sup> Art. 8.

<sup>38</sup> Art. 10.

<sup>39</sup> Art. 27.

<sup>40</sup> Muigua, K., *Resolving Conflicts through Mediation in Kenya*, op. cit., p.22; *Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol.III, May, 2002; Jackton B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29, p. 29.

<sup>41</sup> See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, (the 'Akiwumi Commission'), published in 1999. Government Printer, Nairobi.



### 4.3 The Rule of Law

It has been argued that in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.<sup>42</sup> It is noteworthy that access to justice is an essential component of rule of law. Rule of law has been said to be the foundation for both justice and security.<sup>43</sup> A comprehensive system of rule of law is said to be inclusive, in that all members of a society must have equal access to legal procedures based on a fair justice system applicable to all. It promotes equality before the law and it is believed that the rule of law is measured against the international law in terms of standards of judicial protection.<sup>44</sup> Therefore, without the rule of law, access to justice becomes a mirage.

Realization of the right of access to justice can only be as effective as the available mechanisms to facilitate the same. It has been rightly noted that a right is not just the ability to do something that is among your important interests (whatever they are), but a guarantee or empowerment to actually do it, because it is the correct thing that you have this empowerment.<sup>45</sup>

In some instances, non-governmental organisations have come to the aid of some few communities in assisting them to access justice through the judicial system. As observed earlier, access to courts is often difficult for the

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<sup>42</sup> United Nations Development Programme, 'Access to Justice and Rule of Law' Available at [http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus\\_areas/focus\\_justice\\_law/](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/) [Accessed on 24/02/2015]

<sup>43</sup> Ibid.

<sup>44</sup> Dag Hammarskjold Foundation, 'Rule of Law and Equal Access to Justice', p.1, Discussion Paper, January 2013. Available at [http://www.sida.se/PageFiles/89603/RoL\\_Policy-paper-layouted-final.pdf](http://www.sida.se/PageFiles/89603/RoL_Policy-paper-layouted-final.pdf) [Accessed on 26/02/2015]

<sup>45</sup> The Hendrick Hudson Lincoln-Douglas *Philosophical Handbook*, Version 4.0 (including a few Frenchmen), p. 4, Available at <http://www.jimmenick.com/henhud/hhldph.pdf> [Accessed on 26/02/2015].

Kenyans due to the problems of high court fees, illiteracy, and geographical location of the courts, amongst many other hindrances.<sup>46</sup>

#### 4.4 Poverty

In Kenya, there has been contestation of unjust or illegal distribution of resources, especially with regard to land and/or natural resource extraction since some communities feel discriminated and sidelined in the management of these resources.<sup>47</sup>This also bleeds tribal animosity. <sup>48</sup>They continue suffering in abject poverty despite the presence of natural resources in their areas of residence.<sup>49</sup>

The Constitution outlines the principles of landholding and management in Kenya which include: sustainability, efficiency, equity and productivity. These principles are to be realised by ensuring equitable access to land; security of land rights; transparent and cost effective administration of land; elimination of gender discrimination in law, customs and practices related to land and property in land; and *encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution* (emphasis ours).<sup>50</sup> These principles are meant to help in combating poverty, promote the values of

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<sup>46</sup> The Danish Institute for Human Rights, "Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors." *A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, 2011.* Available at [http://www.humanrights.dk/files/media/billeder/udgivelser/legal\\_aid\\_east\\_africa\\_dec\\_2011\\_d\\_ihr\\_study\\_final.pdf](http://www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_d_ihr_study_final.pdf) [Accessed on 06/03/2015].

<sup>47</sup> See *Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Njonjo Report), November, Government Printer, Nairobi, 2002; *Commission of Inquiry into the Illegal and Irregular Allocation of Public Land* (Ndung'u Commission), Government Printer, Nairobi, June, 2004.

<sup>48</sup> See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, the 'Akiwumi Commission', published in 1999. *Op.cit.*

<sup>49</sup> Daily Nation, *Kakamega the poorest county in Kenya*, Monday, November 10, 2014. *Op cit.*

<sup>50</sup> Art. 60(1).

human rights, equality, freedom, democracy, social justice and the rule of law as envisaged in the preamble to the Constitution of Kenya. They are meant to achieve this through ensuring active participation of the local communities in the management of their land and other land-based natural resources.

Despite the foregoing, the local people are yet to benefit from the new governance approaches as introduced by the current Constitution of Kenya. They have continued to be sidelined in the decision making processes relating to the management of land-based resources. The debate has been who, between the national Government's bodies and the County Governments, has the Constitutional mandate to manage the resources. Even where the Constitution requires public participation in such governance matters<sup>51</sup>, there has been little or no regard to the views of the people. In the end, the affected communities are relegated to mere spectators as the supremacy battles persist.

## 5. TOWARDS EMPOWERMENT

It has been argued that Africa needs to inculcate in its people a culture of peace, tolerance and respect of human rights so as to energetically fight poverty, illiteracy and intolerance, and to strive to overcome the scourge of conflicts and ensure that human rights violations are not only condemned but also effectively opposed and eliminated.<sup>52</sup>

There is need to explore means of ensuring that there is actual empowerment of the Kenyan people to enable them to take advantage of the gains brought about by the current Constitution of Kenya, including the devolved system of governance. Even though we have the legal framework for the devolved system of governance in place, more needs to be done to equip the ordinary *Mwananchi*<sup>53</sup> to enable them participate in governance matters and to enable them to have more say in how the allocated resources should be used to improve their lives. In the absence of this, the politicians

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<sup>51</sup> See Articles 10, 69, 118 and 196.

<sup>52</sup> Ibid, p. 24; See also "Protection of Human Rights Concerns OAU," African News Service, 15 April 1999. Available at <http://allafrica.com/stories/199904150006.html> [Accessed on 25/02/2015].

<sup>53</sup> Mwananchi means the Kenyan citizen.

continue to take advantage of the disempowered and ignorant people to misuse resources and perpetrate bad governance. An empowered people are also able to participate in addressing the inevitable conflicts that arise from time to time.

## 5.1 ADR and Empowerment

Empowerment is aimed at achieving the following: developing the ability to access and control material and non-material resources and to effectively mobilize them in order to influence decision outcomes; developing the ability to access and influence decision-making processes on various levels (household, community, national, global), in order to ensure the proper representation of one's interests (also described as getting a "voice"); gaining an awareness of dominant ideologies and of the nature of domination that one is subjected to in order to discover one's identity, and ultimately to develop the ability to independently determine one's preferences and act upon them; and developing the ability to trust in one's personal abilities in order to act with confidence.<sup>54</sup> ADR is mainly concerned with enabling parties take charge of their situations and relationships.

The *United Nations Declaration on the Rights of Indigenous Peoples* guarantees that indigenous peoples have the right to access to and prompt decision through just and fair procedures for the management of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision is to give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.<sup>55</sup> This provision contemplates conflicts and dispute management mechanisms that give the indigenous peoples control over the processes and to a large extent the outcome of the process. The role of the local people in empowerment is crucial and it has actually been argued that that even in the face of extreme poverty, conflict and crisis, civilians often

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<sup>54</sup> Oladipo, S.E., 'Psychological Empowerment and Development', *African Journals Online*, Vol. 2, No 1 (2009), p.121. Available at <http://www.ajol.info/index.php/ej/article/view/52661/41265> [Accessed on 26/02/2015].

<sup>55</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Article 40.

play a critical role in responding to threats to their safety and dignity and violations of their fundamental rights.<sup>56</sup>

The desire for dignity is said to be a motivating force behind all human interaction and when it is violated, the response is likely to involve aggression, even violence, hatred, and vengeance.<sup>57</sup> The United Nations observes that today, some of the most serious threats to international peace and security are armed conflicts that arise, not among nations, but among warring factions within a State.<sup>58</sup> Further, the human rights abuses prevalent in internal conflicts are said to be now among the most atrocious in the world.<sup>59</sup>

On the other hand, when people treat one another with dignity, they become more connected and are able to create more meaningful relationships.<sup>60</sup> It is thus essential to devise ways of eradicating these problems that undermine human dignity for purposes of eradicating poverty and ultimately empowering people.

Although conflicts are part of any society, any mechanisms employed in dealing with them ought to, as much as possible, help in creating an environment that fosters development, peace, social justice amongst other positive values. It has been stated that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness, expressed in terms such as Ubuntu in South Africa and Utu in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into

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<sup>56</sup> Eby, J., et. al., "Exploring the role of community partnerships and empowerment approaches in protection", *Humanitarian Exchange Magazine*, Issue 46, March 2010. Available at <http://www.odihpn.org/humanitarian-exchange-magazine/issue-46/exploring-the-role-of-community-partnerships-and-empowerment-approaches-in-protection> [accessed on 26/02/2015].

<sup>57</sup> Hicks, D. and Tutu, D., *Dignity: The Essential Role It Plays in Resolving Conflict*. Yale University Press, 2011.

<sup>58</sup> United Nations, Human Rights and Conflicts: A United Nations Priority. Available at <http://www.un.org/rights/HRToday/hrconfl.htm> [accessed on 25/02/2015].

<sup>59</sup> Ibid.

<sup>60</sup> Hicks, D., *Dignity: Its Essential Role in Resolving Conflict*, Yale University Press; Reprint edition (January 29, 2013)

formal justice systems in the resolution of conflicts.<sup>61</sup> It has been rightly observed that the objective of dispute resolution in many non-Western traditions typically is not the ascertainment of legal rights and the allocation of blame and entitlement, as it is in the West; the objective is a resolution, and hopefully a reconciliation, whatever the result.<sup>62</sup>

Conflict management mechanisms may either result in settlement or resolution. Settlement is an agreement over the issue(s) of the conflict which often involves a compromise.<sup>63</sup> Settlement practices miss the point by focusing only on interests and failing to address needs that are inherent in all human beings, parties' relationships, emotions, perceptions and attitudes. Consequently, the causes of the conflict in settlement mechanisms remain unaddressed resulting to conflicts in future.<sup>64</sup> Settlement implies that the parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. Since a settlement is power-based and power relations keep changing, the process becomes a contest of whose power will be dominant.<sup>65</sup> Examples of such mechanisms are litigation and arbitration.

Courts can only handle a fraction of all the disputes that take place in society. Courts have had to deal with an overwhelming number of cases and as noted one reason the courts have become overburdened is that parties are increasingly turning to the courts for relief from a range of personal distresses and anxieties.<sup>66</sup>

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<sup>61</sup> Mkangi K, "Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualised Paradigm for Examining Conflict in Africa", Available at [www.payson.tulane.edu](http://www.payson.tulane.edu).

<sup>62</sup> McConaughay, P.J., 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles' *PKU Transnational Law Review*, Volume 1, Issue 1, pp. 9-31, p.23.

<sup>63</sup> Bloomfield,D., Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, *Journal of Peace Research*, vol. 32 no. 2 May 1995, pp. 151-164.

<sup>64</sup> Muigua, K., *Resolving Conflicts through Mediation in Kenya*, *Op cit.*, Page 81.

<sup>65</sup> *Ibid*, p. 80; See also Makumi, M., *Conflict in Africa: Theory Processes and Institutions of Management* Centre For Conflict Research, Nairobi, 2006.

<sup>66</sup> Waddell, G.G. and Keegan, J.M., "Christian Conciliation: An Alternative to Ordinary ADR - Part 1". *The Institute for Christian Conciliation*. Available at

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

Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.<sup>67</sup>

As such, ADR mechanisms are seen as viable for conflict management because of their focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by common law and statutory measures on disputes and conflict management.<sup>68</sup> They are also advocated for as an effective vehicle for mobilizing community talent, for preventing unnecessary violence and for revitalizing the self-help capacities of ordinary citizens.<sup>69</sup>

Traditional approaches to justice and reconciliation are also preferred due to their focus on the psycho-social and spiritual dimensions of violent

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[http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5369217/k.9B7D/Christian\\_Conciliation\\_An\\_Alternative\\_to\\_Ordinary\\_ADR\\_Part\\_1.htm](http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5369217/k.9B7D/Christian_Conciliation_An_Alternative_to_Ordinary_ADR_Part_1.htm)

<sup>67</sup> Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, Available at <http://www.beyondintractability.org/bi-essay/culture-of-mediation>.

<sup>68</sup> Idornigie, P.O., "Overview of ADR in Nigeria", 73 (1) *Arbitration* 73, (2007), p. 73.D.

<sup>69</sup> Merry, S.A. and Milner, NA. (Eds), *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States*, University of Michigan Press, 1995. p.67. Available at [http://books.google.co.ke/books?hl=en&lr=&id=gulG64KCtYc&oi=fnd&pg=PA67&dq=adr+and+political+empowerment&ots=I4QWemArtq&sig=B2eLL1rqu5Nub5vl8daDEqojg7c&redir\\_esc=y#v=onepage&q=adr%20and%20political%20empowerment&f=false](http://books.google.co.ke/books?hl=en&lr=&id=gulG64KCtYc&oi=fnd&pg=PA67&dq=adr+and+political+empowerment&ots=I4QWemArtq&sig=B2eLL1rqu5Nub5vl8daDEqojg7c&redir_esc=y#v=onepage&q=adr%20and%20political%20empowerment&f=false) [Accessed on 25/02/2015].

conflicts.<sup>70</sup> They are also often inclusive, with the aim of reintegrating parties on both sides of the conflict into the community.<sup>71</sup>

This is however not to say that litigation is not always useful. Where there are power imbalances and need for protection of human rights, then courts are the most viable channel to seek redress. In instances of gross violation of human rights, ADR or even traditional justice systems cannot work. Examples of these are the *Endorois case*<sup>72</sup> and the *Ogiek case*<sup>73</sup> where the two communities separately sought the intervention of the African Court on Human and People's Rights to compel Kenya respect their rights by refraining from evicting them from their ancestral lands.

It is noteworthy that adopting a community-based approach to empowerment does not automatically translate into greater participation and inclusion. It cannot be overstressed that some of the traditional practices have negative impacts such as discrimination of women and disabled persons.<sup>74</sup> In fact, it is against this fact that the Constitution retains the test of non-repugnancy while applying traditional justice systems.<sup>75</sup> This is where the Courts come in as the legal guardians of the Bill of Human rights as envisaged in the Constitution.<sup>76</sup>

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<sup>70</sup> Haider, H., "Community-based Approaches to Peace building in Conflict-affected and Fragile Contexts", *Governance and Social Development Resource Centre Issues Paper*, November 2009, p. 6. Available at <http://www.gsdr.org/docs/open/EIRSS.pdf> [Accessed on 28/02/2015].

<sup>71</sup> Ibid.

<sup>72</sup> 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya.

<sup>73</sup> *African Commission on Human and Peoples Rights V Republic of Kenya*, Application 006/2012.

<sup>74</sup> See generally, Muigua, K., "Securing the Realization of Environmental and Social Rights for Persons with Disabilities in Kenya". Available at <http://www.kmco.co.ke/attachments/article/117/Securing%20the%20Realization%20of%20Environmental%20and%20Social%20Rights%20for%20Persons%20with%20Disabilities%20in%20Kenya.pdf>; See also generally *Human Rights Watch, World Report 2013*, available at [http://www.hrw.org/sites/default/files/wr2013\\_web.pdf](http://www.hrw.org/sites/default/files/wr2013_web.pdf) [accessed on 28/02/2015].

<sup>75</sup> Art. 159(3).

<sup>76</sup> Art. 23.



### 5.1.1 Legal and Institutional Framework on ADR Mechanisms in Kenya

The Constitution of Kenya guarantees the right of every person to access justice.<sup>77</sup> To facilitate this, it provides that in exercising judicial authority, the courts and tribunals are to be guided by the principles of *inter alia*: justice is to be done to all, irrespective of status; justice is not to be delayed; alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms* are to be promoted, subject to clause(3)<sup>78</sup> (emphasis ours); justice is to be administered without undue regard to procedural technicalities; and the purpose and principles of this Constitution are to be protected and promoted.<sup>79</sup>

Access to justice could also include the use of informal conflict management mechanisms such as ADR and traditional dispute resolution mechanisms, to bring justice closer to the people and make it more affordable.<sup>80</sup> ADR mechanisms mainly consist of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures.

The Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.<sup>81</sup> The traditions, customs and norms of a particular community have always played a pivotal role in conflict resolution and they were highly valued and adhered to by the members of the community.<sup>82</sup>

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<sup>77</sup> Art. 48.

<sup>78</sup> Art. 159(3) "*Traditional dispute resolution mechanisms shall not be used in a way that – (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.*"

<sup>79</sup> Art. 159(2).

<sup>80</sup> See Muigua, K. and Kariuki F., 'ADR, Access to Justice and Development in Kenya'. Paper Presented at Strathmore Annual Law Conference 2014 held on 3<sup>rd</sup>& 4<sup>th</sup> July, 2014 at Strathmore University Law School, Nairobi.

<sup>81</sup> Art. 11(1).

<sup>82</sup> Muigua, K., *Resolving Conflicts through Mediation in Kenya*, *op. cit.*, p. 35.

Article 159 (1) of the Constitution provides that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and that it is administered without undue regard to procedural technicalities.<sup>83</sup>

Article 159(1) echoes the right of all persons to have access to justice and also reflects the constitutional spirit of every person's equality before the law and the right to equal protection and equal benefit of the law.<sup>84</sup>

For this constitutional right of access to justice to be realized, there has to be a framework based on the principles of: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies*(emphasis ours).<sup>85</sup>

Recognition of ADR and traditional dispute resolution mechanisms is thus predicated on these cardinal principles: to ensure that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system.<sup>86</sup>

It is also borne out of the recognition of the diverse cultures of the various communities in Kenya as the foundation of the nation and cumulative civilization of the Kenyan people and nation. Most of these mechanisms are entwined within the cultures of most Kenyan communities which are also protected by the Constitution.<sup>87</sup> ADR mechanisms are flexible, cost-effective, expeditious, foster relationships, are non-coercive and result in mutually satisfying outcomes. They are thus more appropriate

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<sup>83</sup> Article 159(2) (d).

<sup>84</sup> Article 27.

<sup>85</sup> See Maiese, M., "Principles of Justice and Fairness," in Burgess, G. and Heidi Burgess, H. (Eds.) "Conflict Information Consortium", *Beyond Intractability*, University of Colorado, Boulder (July 2003).

<sup>86</sup> Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, p. 6. Available at <http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf>

<sup>87</sup> Art. 11.

in enhancing access to justice by the poor in society as they are closer to them. They may also help in reducing backlog of cases in courts.<sup>88</sup>

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

### (a) Negotiation

Negotiation is an informal process that involves the parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It has been hailed as one of the most fundamental methods of conflict resolution, offering parties maximum control over the process.<sup>89</sup>

The Constitution requires cooperation between national and county governments.<sup>90</sup>The two levels of government are to *inter alia*, assist, support and consult and, as appropriate, implement the legislation of the other level of government; and liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.<sup>91</sup>In case of any dispute between the governments, they are to make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation. Such national legislation is to provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.<sup>92</sup>

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<sup>88</sup> See Shantam, S. K., et al., *Promoting Alternate Dispute Resolution to reduce backlog cases and enhance access to justice of the poor and disadvantaged people through organizing Settlement Fairs in Nepal*, Case Studies on Access to Justice by the Poor and Disadvantaged, (July 2003) Asia-Pacific Rights And Justice Initiative, Available at <http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/Nepal-SettlementFair>

<sup>89</sup> Muigua, K., *Resolving Conflicts through Mediation in Kenya*, *op. cit.*, p.11.

<sup>90</sup> Art. 189.

<sup>91</sup> Art. 189(1) (b) (c).

<sup>92</sup> Art. 189(3) (4).

It is worth noting that the Governments are to ensure participation by the public in conducting their affairs.<sup>93</sup> Negotiation offers a viable avenue for such consultations and exchange of information especially when seeking the views of the residents on development projects. Where community members feel aggrieved by the actions of their county governments, they can seek to engage them through negotiation before exploring any other means, in case of a deadlock. Armed with the relevant information, such members are able to appreciate the work of their governments and also feel a sense of ownership and belonging. They are able to have their concerns addressed in a way that leaves them satisfied.

Negotiation has been used since time immemorial among African communities and it is still applied widely in Kenya today.<sup>94</sup> It can be used as a powerful empowering tool to assist the Kenyan people to manage their conflicts effectively.

## **(b) Mediation**

Negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.<sup>95</sup> Mediation is a voluntary, informal, consensual, strictly confidential and non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated solution.<sup>96</sup> It is also defined as a method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussion and the flow of information, and thus aiding in the processes of reaching an agreement.<sup>97</sup>

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<sup>93</sup> Art. 196.

<sup>94</sup> Muigua, K., *Resolving Conflicts through Mediation in Kenya*, op. cit., chapter 2; Kenyatta, J., *Facing Mount Kenya: The Tribal life of the Gikuyu*, (Vintage Books, New York, 1965).

<sup>95</sup> Makumi, M., *Conflict in Africa: Theory Processes and Institutions of Management*. Op.cit. P. 15.

<sup>96</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", In Chartered Institute of Arbitrators, *Workbook on Mediation*, (CI Arb, London, 2002), p. 10.

<sup>97</sup> Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, Vol.7.289, p. 290.

Mediation can be classified into two forms, namely: mediation in the political process and mediation in the legal process. Mediation in the political process is informed by resolution as against settlement. It allows parties to have autonomy over the choice of the mediator, the process and the outcome. The process is also associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control, addressing root causes of the conflict, non-coerciveness and enduring outcomes.

Mediation in the legal process is a process where the conflicting parties come into arrangements which they have been coerced to live or work with while exercising little or no autonomy over the choice of the mediator, the process and the outcome of the process. This makes it more of a settlement mechanism that is attached to the court as opposed to a resolution process and defeats the advantages that are associated with mediation in the political process.<sup>98</sup>

The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship.<sup>99</sup> In conflict resolution processes like mediation, the goal, then, is not to get parties to accept formal rules to govern their relationship, but to help them to free themselves from the encumbrance of rules and to accept a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.<sup>100</sup>

The salient features of mediation (in the political process) are that it emphasizes on interests rather than (legal) rights and it can be cost - effective, informal, private, flexible and easily accessible to parties to conflicts. These features are useful in upholding the acceptable principles of justice: *expedition; proportionality; equality of opportunity; fairness of process;*

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<sup>98</sup> Muigua, K., "Resolving Environmental Conflicts Through Mediation in Kenya" Ph.D Thesis, 2011, *Unpublished*, Chapter 4; See also sec.59A,B,C& D of the Civil Procedure Act on Court annexed mediation in Kenya.

<sup>99</sup> Fuller, L.L., *Mediation – Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., 'Extending The Shadow of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socio-economic Rights Cases' *Utah Law Review*, (2009) [NO. 3] op. cit. pp. 802-803]

<sup>100</sup> *Ibid.*

*party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies* (emphasis ours), thus making mediation a viable process for the empowerment of the parties to a conflict.<sup>101</sup>

Mediation as practised by traditional African communities was informal, flexible, voluntary and expeditious and it aimed at fostering relationships and peaceful coexistence. Inter-tribal conflicts were mediated and negotiated in informal settings, where they were presided over by a Council of Elders who acted as ‘mediators’ or ‘arbitrators’.<sup>102</sup> It was customary and an everyday affair where people sat down informally and agreed on certain issues, such as allocation of resources.<sup>103</sup>

### (c) Traditional Justice Systems

It is noteworthy that there is an overlap between the forms of ADR mechanisms and traditional justice systems.<sup>104</sup> The Kenyan communities and Africa in general, have engaged in informal negotiation and mediation since time immemorial in the management of conflicts. For instance, in relation to women, it has been argued that for Kenyan women, custom is particularly important as it defines their identity within society, and mediates their family relationships, entitlements and access to resources.<sup>105</sup> In addition, informal justice systems which constitute the most accessible forms of dispute resolution utilize localized norms derived from customary law.<sup>106</sup>

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<sup>101</sup> See generally Muigua, K., “Resolving Environmental Conflicts through Mediation in Kenya” Ph.D Thesis, 2011, *Unpublished*.

<sup>102</sup> Muigua, K., *Resolving Conflicts through Mediation in Kenya*, *op. cit.*, pp. 20-37; See also generally, Kenyatta, J., *Facing Mount Kenya: The Tribal life of the Gikuyu*, (Vintage Books, New York, 1965).

<sup>103</sup> *Ibid*, p. 20.

<sup>104</sup> *Ibid*, pp.20-21. Art. 159 (2) treats traditional justice systems as part of ADR.

<sup>105</sup> Kamau, W., “Customary Law and Women’s Rights in Kenya.” p. 1. Available at <http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf> [Accessed on 27/02/1015].

<sup>106</sup> *Ibid*.

Culture has been identified as an essential component of sustainable development and a critical element of human rights-based approaches as it represents a source of identity, innovation and creativity for the individual and community and is an important factor in building social inclusion and eradicating poverty, providing for economic growth and ownership of development processes.<sup>107</sup> Indigenous knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment.<sup>108</sup> Indeed, this has been recognised in the current Constitution of Kenya and it provides that it recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.<sup>109</sup> It also obligates the state to recognise the role of science and indigenous technologies in the development of the nation and to promote the intellectual property rights of the people of Kenya.<sup>110</sup>

Effective application of traditional conflict resolution mechanisms in Kenya and across Africa can indeed strengthen access to justice for all including those communities who face obstacles to accessing courts of law, and whose conflicts, by their nature, may pose difficulties to the court in addressing them.<sup>111</sup> Restorative justice in the field of criminal justice is lauded, especially in relation to young offenders since it is seen as a paradigm shift in criminal justice, away from dominant punitive and therapeutic paradigms, emphasizing instead the reintegration of offenders and potential offenders into their communities.<sup>112</sup>

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<sup>107</sup> United Nations Development Group, *Delivering The Post-2015 Development Agenda: Opportunities At The National And Local Levels*, 2014. p. 28.  
Available at <http://www.undp.org/content/dam/undp/library/MDG/Post2015/UNDP-MDG-Delivering-Post-2015-Report-2014.pdf> [Accessed on 28/02/2015].

<sup>108</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, Preamble.

<sup>109</sup> Art. 11(1).

<sup>110</sup> Art. 11(2).

<sup>111</sup> See the Kenyan case of *Republic v. Mohamed Abdow Mohamed*, Criminal Case No. 86 of 2011 (May, 2013), High Court at Nairobi,

<sup>112</sup> Johnstone, G., *Restorative Justice: Ideas, Values, Debates*, Willan, 2002. Available at [http://books.google.co.ke/books?id=Fu5GKPqVUnAC&printsec=references&dq=adr+and+political+empowerment&lr=&vq=%22The+Possibility+of+Popular+Justice%22&source=gbs\\_citations\\_module\\_r&cad=5](http://books.google.co.ke/books?id=Fu5GKPqVUnAC&printsec=references&dq=adr+and+political+empowerment&lr=&vq=%22The+Possibility+of+Popular+Justice%22&source=gbs_citations_module_r&cad=5) [accessed on 25/02/2015].

It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.<sup>113</sup> It has been observed that in Tanzania, customary and religious laws are both recognised alongside state law, an indication of the decisive role of state in validating each body of law while attempting to reconcile customary laws with national laws and international laws.<sup>114</sup>

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

#### (d) Arbitration

Arbitration is a process subject to statutory controls, whereby formal disputes are determined by a private tribunal of the parties' choosing. A third party neutral is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award.<sup>115</sup>

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

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<sup>113</sup> Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at [www.payson.tulane.edu](http://www.payson.tulane.edu). [accessed on 24/02/2015].

<sup>114</sup> Derman, Bill, et. al. (Eds), *Worlds of Human Rights: The Ambiguities of Rights Claiming in Africa*, BRILL, 2013. p. 198. Available at [https://books.google.co.ke/books?id=lvv8qTTsBocC&pg=PA198&lpg=PA198&dq=adr+and+political+empowerment&source=bl&ots=47tIVGJoSS&sig=vrAEzhGPcL8r7UhEFyC4GWwRo30&hl=en&sa=X&ei=VhbwVKjqA4fraL3LgrAP&redir\\_esc=y#v=onepage&q=adr%20and%20political%20empowerment&f=false](https://books.google.co.ke/books?id=lvv8qTTsBocC&pg=PA198&lpg=PA198&dq=adr+and+political+empowerment&source=bl&ots=47tIVGJoSS&sig=vrAEzhGPcL8r7UhEFyC4GWwRo30&hl=en&sa=X&ei=VhbwVKjqA4fraL3LgrAP&redir_esc=y#v=onepage&q=adr%20and%20political%20empowerment&f=false) [Accessed on 27/02/1015].

<sup>115</sup> R. Stephenson, *Arbitration Practice in Construction Disputes*, (Butterworths, London, 1998), p.123.



accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration.<sup>116</sup>

In Africa, there existed the customary arbitration which was used in a wide array of disputes. In some States, arbitration was the highest level of dispute resolution at the village level. The proceedings were formalized and paid public officials used to guide them in settlement of both civil and criminal cases.<sup>117</sup>

In disputes involving parties with equal bargaining power and with the need for faster settlement of disputes, especially business related, arbitration offers the best vehicle among the ADR mechanisms to facilitate access to justice. Arbitration can be useful in helping parties take control of their disputes and help in saving costs, time and emotional stress that may come with courts. However, arbitration, as practised today still requires courts for enforcement of awards.<sup>118</sup>

#### (e) Conciliation

Conciliation is a process in which a third party, called a conciliator, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions and pointing out misperceptions. It has all the advantages and disadvantages of negotiation except that the conciliator can propose solutions, making parties lose some control over the process. Conciliation is different from mediation in that the third party takes a more interventionist role in bringing the two parties together. Conciliation works well in labour disputes.<sup>119</sup> A conciliator who is more

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<sup>116</sup> Muigua, K., *Settling Disputes Through Arbitration in Kenya*. (Glenwood Publishers Ltd, Nairobi, 2012).

<sup>117</sup> Osei-Hwedie, K. and Rankopo, M.J., *Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana*. Available at <http://home.hiroshima-u.ac.jp/heiwa/Pub/E29/e29-3.pdf> [accessed on 27 / 02 / 1015].

<sup>118</sup> S. 36, Arbitration Act, No. 4 of 1995 (2009), Laws of Kenya. Government Printer, Nairobi.

<sup>119</sup> International Labour Office, "Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives." *High-Level Tripartite Seminar on the Settlement of Labour Disputes through Mediation, Conciliation, Arbitration and Labour Courts*. Nicosia, Cyprus October 18th - 19th, 2007; S. 10 of the *Labour Relations Act*, No. 14 of 2007, Laws of Kenya.

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

The Constitution provides for *reconciliation* (emphasis added) which is believed to connote a deeper implication.<sup>120</sup> While conciliation is concerned with finding peace and harmony by putting an end to a conflict, reconciliation seeks to reestablish relations. As such, it can be said to be a restorative process which is desirable in building lasting peace and ensuring that competing interests are balanced.

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

## 5.2 Human Rights Protection and Empowerment

The *United Nations Declaration on the Rights of Indigenous Peoples* provides for the indigenous peoples' right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.<sup>121</sup> Political empowerment requires inclusion in democratic decision-making processes which is equated to mainly gaining a voice within the local and/or central state.<sup>122</sup>

The Constitution of Kenya 2010<sup>123</sup> spells out the Bill of Rights for the Kenyan people and states it is an integral part of Kenya's democratic state

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<sup>120</sup> Comment by Commissioner Otiende Amollo, during the 1st NCMG East African ADR Summit held at the Windsor Golf Hotel, Nairobi on 25th & 26th September, 2014; Art. 159(2) (c).

<sup>121</sup> Ibid, Article 5.

<sup>122</sup> Miller, B., "Political empowerment, local – central state relations, and geographically shifting political opportunity structures: Strategies of the Cambridge, Massachusetts, Peace Movement", *Political Geography*, (Special Issue: Empowering Political Struggle), Volume 13, Issue 5, September 1994, Pages 393–406. Available at <http://www.sciencedirect.com/science/article/pii/0962629894900493> [Accessed on 26/02/2015].

<sup>123</sup> Government Printer, Nairobi 2010.

and is the framework for social, economic and cultural policies.<sup>124</sup> It goes further to state that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. As such, the Constitution envisions a country where all the citizens fully enjoy the human rights and are empowered to realise their full potential for their self-development and ultimately the whole country in general.

Indeed, as a way of ensuring that this is achieved, the Constitution outlines the national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets the Constitution; enacts, applies or interprets any law, or makes or implements public policy decisions.<sup>125</sup> These values and principles include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and *participation of the people* (emphasis ours); human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.<sup>126</sup>

Further, the Constitution of Kenya tasks the State and every State organ with the duty to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.<sup>127</sup> It also gives every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.<sup>128</sup> The problem however arises where the aggrieved person is not even aware of their rights or the redress available to them.

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<sup>124</sup> Art. 19(1).

<sup>125</sup> Art. 10(2).

<sup>126</sup> Art. 10(2).

<sup>127</sup> Art. 21(1).

<sup>128</sup> Art. 22(1).

Courts ought to actively take up their role of upholding and enforcing the Bill of Rights as envisaged in the Constitution.<sup>129</sup> The Court's role is especially important where the application of ADR risks perpetrating violation of human rights such as discrimination.<sup>130</sup>

The Constitution provides for specific application of rights to specific groups of persons. These groups include children, persons with disabilities, youth, minorities and marginalised groups, and the older members of society.<sup>131</sup> The Constitution advocates for pro-poor changes to policy, law and regulation of resource allocation and service delivery in different sectors of the economy, through such means as requiring the State to put in place affirmative action programmes designed to ensure that the above-mentioned groups of persons are empowered to participate in the development agenda of the country as well as self actualisation.<sup>132</sup> These measures are also meant to facilitate redress for rights violations and injustices perpetrated against the vulnerable groups in the society.

With all persons enjoying their rights and having the guarantee that they are being treated equally before the law, it is possible to achieve national cohesion, unity, peace and cooperation in development activities to boost the socio-economic status of the citizens. Where human rights are upheld and enforced by the national courts, even the so-called marginalised groups in the society will have a sense of self-pride and a sense of belonging and will be able to participate in the governance matters of the country.

### **5.3 Accountability/Public Participation and Empowerment**

One of the national values and principles of governance as outlined in the current Constitution of Kenya 2010, is accountability.<sup>133</sup> It also provides for accountability to the public for decisions and actions as one of

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<sup>129</sup> Art. 23.

<sup>130</sup> Art. 159(3)(c)

<sup>131</sup> Part 3 (Articles 52-57)

<sup>132</sup> Ibid.

<sup>133</sup> Art. 10(2).

guiding principles of leadership and integrity.<sup>134</sup> There have been problems of accountability from the Kenyan leaders, with the local people being sidelined in the political decision making on matters that affect their leaders. There has been inequitable benefit sharing, exclusion of the poor and the marginalised in the decision making system and indiscriminate environmental degradation.<sup>135</sup>

The effect of this has been massive poverty on the citizenry since the available resources are not properly utilized to empower the people. Indeed, this informed the formation of the current devolved system of governance in Kenya.<sup>136</sup> Devolution is expected to improve the performance of government by making it more accountable and responsive to the needs and aspirations of the Kenyan people and secondly, to facilitate the development and consolidation of participatory democracy.<sup>137</sup> This is because it entails moving away from the state-centric resource control, towards approaches in which the local people and authorities play a much more active role in managing the resources around them.<sup>138</sup> Their involvement increases resource user participation in natural resource management decisions and the accruing benefits.<sup>139</sup> Transparency and accountability with regard to government management of natural wealth

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<sup>134</sup> Art. 73(2) (d).

<sup>135</sup> Yatich T, et al. 'Policy and institutional context for NRM in Kenya: Challenges and opportunities for Landcare.' *ICRAF Working paper-no. 43*, 2007. Nairobi: World Agro forestry Centre.

<sup>136</sup> Chapter 11, Constitution of Kenya 2010.

<sup>137</sup> Oloo, O.M., 'Devolving Corruption? Kenya's Transition to Devolution, Experiences and Lessons from the decade of Constituency Development Fund in Kenya'. *Paper Presented at Workshop on Devolution and Local Development in Kenya*, June 26th 2014 Nairobi. p.5.

<sup>138</sup> See generally, Muigua, K. & Kariuki, F., ADR, 'Access to Justice and Development in Kenya', Paper Presented At *Strathmore Annual Law Conference 2014* held on 3rd & 4th July, 2014 at Strathmore University Law School, Nairobi. Available at <http://caselap.uonbi.ac.ke/sites/default/files/chss/law/law/ADR%20access%20to%20justice%20and%20development%20in%20Kenya%20-%20STRATHMORE%20CONFERENCE%20PRESENTATION.pdf>

<sup>139</sup> Sheona Shackleton, *et al.* 'Devolution and community based natural resource management.' *Natural Resource perspectives (ODI)*, Number 76, March 2002. P. 1

and the revenues it generates are crucial.<sup>140</sup> People are able to voice their views and engage the authorities through *negotiation* (emphasis ours) especially in relation to their most preferred use of the resources in their area, for purposes of coming up with economic investments that will ultimately benefit most people and in a better way. The Government's priority development projects may not always necessarily be the most beneficial to the targeted groups of persons at least in addressing their immediate needs. There arises a need to consider the implications of these projects on the social, cultural, political and economic aspects of the affected communities.

As such, the use of ADR mechanisms such as *negotiation, convening, facilitation* or *dispute resolution panels* (emphasis ours) can go a long way in enabling the State authorities and the local communities to work together in development projects that have the social acceptability in those particular areas. The overall effect of this may be eradication of poverty as a result of the all-round empowerment of people in social, cultural, political and economic aspects of their lives.

#### 5.4 Environmental Justice and Empowerment

Natural resources play a key role in triggering and sustaining conflicts.<sup>141</sup> The Constitution of Kenya 2010 recognises the environment as the heritage of the people of Kenya and it calls for environmental protection for the benefit of present and future generations, through legislative and other measures, particularly those contemplated in Article 69 thereof. Article 69(1) obligates the State to *inter alia*: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; and encourage public participation in the management, protection and conservation of the environment. These provisions are aimed at achieving environmental justice for the Kenyan people.

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<sup>140</sup> Maphosa, S.B., "Natural Resources and Conflict: Unlocking the economic dimension of peace-building in Africa". *Africa Institute of South Africa Policy Brief*, op.cit. p.3.

<sup>141</sup> Maphosa, S.B., "Natural Resources and Conflict: Unlocking the economic dimension of peace-building in Africa". *Africa Institute of South Africa Policy Brief*, op. cit. p.2.

Broadly defined, environmental justice entails the right to have access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and involvement in decision-making.<sup>142</sup>

It has been suggested that if decision-making regarding use of local resources is owned at the local level, it can potentially equalize leverage or negotiation power and thus equalize resource sharing, which would in turn promote poverty reduction.<sup>143</sup> Empowering people is deemed critical for achieving poverty eradication through making them aware of their rights and entitlements, equipped with skills to make informed choice and *negotiate*(emphasis ours) for their rights and have access to resources for their development.<sup>144</sup>

Increasing the local people's access to resources is useful in increasing their control over those resources. The element of control in empowerment is used to refer to participation in collective processes and is the effectiveness or perception of the ability to influence decisions, mobilize resources and solve problems, building an effective personal and group participation.<sup>145</sup> Control enables the participation process to be gradual and coherent to people's critical awareness, which implies a redistribution of power, so the process can be meaningful and real, and participation can boost an empowerment process.<sup>146</sup>

This comes with increased economic empowerment, which in turn affects many other areas. Improved communication and flow of information amongst communities helps them gain more control over the

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<sup>142</sup> R. Ako, 'Resource Exploitation and Environmental Justice: the Nigerian Experience,' in F.N. Botchway (ed), *Natural Resource Investment and Africa's Development*, (Cheltenham, UK: Edward Elgar Publishing, 2011), pp. 74-76.

<sup>143</sup> United Nations Department of Economic and Social Affairs, *Online Survey on Promoting Empowerment of People in achieving poverty eradication, social integration and full employment integration and full employment and decent work for all*. p. 6. Available at <http://www.un.org/esa/socdev/publications/FullSurveyEmpowerment.pdf> [accessed on 05/03/15].

<sup>144</sup> *Ibid*, p. 8.

<sup>145</sup> Aguiar, J., "Empowerment - a relational challenge", *Global Journal of Community Psychology Practice*, Vol. 3 Issue 4 Jan 15, 2013.

<sup>146</sup> *Ibid*.

economic resources and they contribute to the development agenda in their counties.

The end result of the implementation of the elements of environmental justice would be empowerment of people to enable them to utilize the resources at their disposal to better their lives.<sup>147</sup>

## 5.5 Education and Empowerment

Education is a fundamental human right and one that is essential for the exercise of all other human rights, since it promotes individual freedom and empowerment and yields important development benefits.<sup>148</sup> Education is important for promoting sustainable development and improving the capacity of people to address environment and development issues.<sup>149</sup> It also promotes the realisation of the basic aspects of empowerment namely participation, control and critical awareness.<sup>150</sup>

Environmental education is thus important in empowering people to participate in finding viable solutions for environmental protection and conservation.<sup>151</sup> This education would include traditional knowledge, which plays an important role in enabling communities appreciate such concepts as sustainable development in environmental management and

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<sup>147</sup> See generally, Muigua, K., "Utilizing Africa's Natural Resources to Fight Poverty". Available at <http://www.kmco.co.ke/attachments/article/121/Utilizing%20Africa%27s%20Natural%20Resources%20to%20Fight%20Poverty-26th%20March,2014.pdf>

<sup>148</sup> UNESCO, 'The Right to Education', Visit <http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/right-to-education/> [accessed on 28/02/2015].

<sup>149</sup> UNESCO, 1992, para. 36.3, p. 2 (as quoted in Tilbury, D., 'Environmental Education for Sustainability: Defining the New focus of Environmental Education in the 1990's', *Environmental Education Research*, Vol. 1, No. 2, 1995, 195-212 at p.198.

<sup>150</sup> Zimmerman, M.A., "Empowerment Theory: Psychological, Organizational and Community Levels of Analysis," op. cit. p. 52.

<sup>151</sup> Muigua, K., "Realising the Right to Education for Environmental and Social Sustainability in Kenya". P.6. Available at <http://www.kmco.co.ke/index.php/publications/139-realising-the-right-to-education-for-environmental-and-social-sustainability-in-kenya-by-kariuki-muigua>



conservation, as well as using this knowledge in coming up with decisions that work within their socio-cultural contexts.<sup>152</sup>

Advocacy and lobbying by individuals, communities and civil society have been effective tools to push for social justice and equity in Kenya. These tools are so useful in the human rights agenda, that the Constitution of Kenya recognises their legality. It guarantees the right of every person, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.<sup>153</sup> Armed with knowledge, it is possible for the local people to engage the relevant stakeholders in governance matters.

## 6. CONCLUSION

Although the current Constitution of Kenya holds hope for the Kenyan people, there is urgent need for putting in place measures that will facilitate implementation of the constitutional provisions aimed at empowering the Kenyan people. This calls for an integrated approach to deal with the challenges impeding their empowerment. The various ADR mechanisms such as *negotiation, mediation, facilitation* and *convening* can be useful tools for the different sections of society to mount pressure on both the national and devolved Governments for reforms in natural resources management and general governance in the country.

The recommendations herein can go a long way in achieving empowerment for the Kenyan people. Empowerment for the people will translate into better lives, improved economy and generally a better

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<sup>152</sup> See Puri S.K., "Integrating Scientific With Indigenous Knowledge: Constructing Knowledge Alliances for Land Management in India." *MIS Quarterly*, Vol. 31 No. 2, pp. 355-379/June 2007; United Nations University, "Why Traditional Knowledge Holds the Key to Climate Change." 2011. Available at <http://unu.edu/publications/articles/why-traditional-knowledge-holds-the-key-to-climate-change.html> [Accessed on 28/02/2015]; Tavana, N.G.V., "Traditional knowledge is the key to sustainable development in Samoa: examples of ecological, botanical and taxonomical knowledge." Available at <http://www1.mnre.gov.ws/documents/forum/2002/4-Tavana.pdf> [Accessed on 28/02/2015]; Kothari, A., "Traditional Knowledge and Sustainable Development." International Institute for Sustainable Development, 2007. Pp. 5-6. Available at [http://www.iisd.org/pdf/2007/igsd\\_traditional\\_knowledge.pdf](http://www.iisd.org/pdf/2007/igsd_traditional_knowledge.pdf) [accessed on 28/02/2015].

<sup>153</sup> Art. 37.

country for everyone. Empowering the Kenyan people through Alternative Dispute Resolution is an ideal that is achievable.

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## PRIVATIZATION OF COMMERCIAL JUSTICE THROUGH ARBITRATION: THE ROLE OF ARBITRATION INSTITUTIONS IN AFRICA

By: **Hon. Justice Edward Torgbor \***

### EXPLANATORY ABSTRACT

*This article was originally conceived and presented as a discussion paper at an arbitration conference on the role and functions of African arbitration centres and institutions. The conference was jointly convened by Dr. Emilia Onyema of SOAS University of London and this writer, and hosted by the African Union Commission at Addis Ababa on 23<sup>rd</sup> July 2015. It was the first time a conference dedicated solely to a deeper examination of the role of African arbitration institutions has been held on the continent. As a discussion paper, it dispensed with distracting footnotes in order to focus attention on the conference theme and the ideas and proposals generated for discussion. The same methodology is adopted for this article and references are brought into the text to facilitate concentration and fluent reading. The article identifies prominent and emerging centres and institutions, underscores their important roles and functions, and exemplifies some challenges as well as progress, and the advances made in service delivery to users of arbitration on the continent. The aim is not to pontificate but to engage with the institutions in reviewing their functions and to identify what we can do better together. The African Union Centre was a fitting venue for this important conference and the writer is particularly grateful to Amb. Catherine Mwangi, Kenyan Ambassador to the AU, whose assistance the writer sought, and obtained for the use of the venue and its pleasant facilities.*

### 1. INTRODUCTION

A wide variety of role players consisting of professionals, institutions, states, corporate and individual users, and a plethora of supportive service providers and administrative staff, contribute to the management, administration and dispensation of private commercial justice through arbitration. But the topic is prompted by first, the growing

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institutionalization of arbitration and, second, a critical concern with the ability and capabilities of the centres and institutions (hereafter “institutions”) that administer the arbitration process and the quality of the services they provide for their consumers in the delivery of arbitral justice. This paper therefore, is a contribution to the discussion and examination of the structures, roles and functions of these institutions on the African continent.

## **2. FACILITATING COMMERCIAL JUSTICE**

Whether arbitration is a field of study, a system of justice, a profession, business or an industry is beside the point. Modern arbitration is all these. We know there has to be a dispute, disputing parties and arbitrators for arbitration to come alive. But alongside these key components are the arbitration institutions that provide administrative assistance, procedural rules, direction and guidance for the parties and arbitrators, for conducting the arbitration proceedings, ensuring the integrity of the process and ultimately, the arbitral award.

From its modest origins, involving a coterie of arbiters speedily disposing of disputes for merchants and traders, arbitration is now perceived, in some quarters, as a “free market model of adjudication” and a profit-making venture with professional arbitrators as business people, vying for lucrative appointments. While those who see arbitration primarily as a justice delivery system may be uncomfortable with its description and growing recognition as a “business” or “industry”, driven by market forces, it is inescapable that modern international arbitration, with its own domain professionals and specialists in dispute resolution, enshrouded in privacy, confidentiality, and founded on the autonomies of party and tribunal, with a regulatory mechanism (distinct from the public law and justice system) is indeed a privatized justice provider. The responsibility of the role players and the arbitration institutions in particular, in inspiring confidence in the users and winning respect and popularity for arbitration as a justice provider of choice, then becomes apparent and greater. Therefore we may neither ignore nor lose sight of the primary role of arbitration as a justice system.

### **3. ADVANTAGES**

We know the key components of arbitration, the differences between ad hoc and institutional arbitration, and their advantages and disadvantages. This paper dwells on the advantages. As a novice arbitrator this writer had a preference for ad hoc arbitration, which enabled the arbitration to be conducted without the involvement (nay intrusion) of an arbitral institution, in contrast to an arbitration that prescribed an institution to administer and even supervise the proceedings. Once appointed the ad hoc arbitrator had full control of the process, from fixing the level of fees, dealing with preliminary issues, setting the procedural timetable, granting orders and directions on request, fixing hearing dates and conducting the arbitration to the making of an award. In almost all this, the arbitrator exercised discretionary and statutory powers not necessarily available to a state judge. Later on, when institutional arbitration practice revealed its practical advantages, the writer remembered the frustrations of an ad hoc arbitration – haggling over fees with party representatives, followed by several reminders for payment, contending with unwarranted challenges and unmerited applications to extend compliance time, which were grudgingly granted, though sometimes to no avail. In contrast, the arbitral institution that took care of these administrative and procedural matters authoritatively and competently thereby relieved parties and arbitrators of the frustrations and the tedium of negotiating and collecting fees and some of the cumbersome administrative burdens of conducting the reference. Some institutions provided their own sets of procedural rules and framework for the arbitration process and, in some instances, also provided a model arbitration clause, specialist services, and arbitrators. These functions were value-added advantages to institutional arbitration. The importance of the role and essential services rendered by the specialist and well established arbitration institutions, particularly in international arbitrations, are now not in doubt.

### **4. EMERGING OPPORTUNITIES**

Several arbitral institutions already exist and even more are emerging as arbitration disputes and spaces expand in Africa and elsewhere. Modern arbitration institutions therefore ought not to be stuck with their

limited traditional roles and functions, but should respond to the new opportunities offered by the ever expanding arbitration world in disputes from various fields and sectors - financial, commercial, industrial, investment and business transactions, across borders. If surveys, monitors and publications by the IMF and the UNCTAD World Investment Reports are to be relied upon, four of the fastest growing economies in the world in 2014 are located in Africa, and foreign direct investment increased over a period of 10 years, from USD11 billion in 2002 to over USD56.38 billion in 2013. Think of the emerging opportunities for arbitration institutions and arbitrators offered by the ongoing industrialization initiatives in the five political/economic regions of the African Union - The Arab Maghreb Union of North Africa, ECOWAS of West Africa, EAC of East Africa, ECCAS of Central Africa and SADC of Southern Africa (including COMESA). These initiatives are within the context of the African Union Plan of Action for Accelerated Industrial Development in Africa, aimed at building an "integrated prosperous and peaceful Africa, driven and managed by its own citizens and representing a dynamic force in the international arena"; what is needed is action and implementation. Think again of the peaceful resolution of disputes and conflicts emanating from such developmental initiatives, and the opportunities for ADR institutions to tap into their micro-management by networking with these organizations. The capacities of the existing institutional arbitration consultants and experts as major role players in these developments ought to be interrogated. On present performance, there is need for the institutions to reassess and expand their existing organizational bases, facilities and mechanisms and, where necessary, create new operational platforms and functional avenues for qualified professional staff and competences to deal with, manage, administer and supervise arbitrations with greater professional and business aptitude and expertise.

As institutions depend on money their fundraising activities have to be intensified, old sources revitalised and new avenues and opportunities explored. This is unavoidable especially by the fledgling institutions. Costs claims for legal fees and disbursements in international arbitration proceedings are pegged as high as between 20 - 40 million dollars, and that is no small change. The institutions must, in addition, utilise these new opportunities for further training and development of the skills necessary for arbitration to remain the dispute resolution model of choice, hence the importance of continuing to explore ways and means of enabling the

several competing arbitration institutions in Africa to co-ordinate and complement their functions for better quality and service delivery. The opportunities for Africans to do things for themselves make it imperative for their professional institutions to place themselves in lead positions, where the qualifications and services of their accredited members can be put to test and greater use and advantage. The message: don't do what foreigners continue telling you to do to their sole or greater advantage; do what they do successfully, to your advantage.

## **5. AFRICAN ARBITRATION CENTRES AND INSTITUTIONS**

5.1 The several arbitration and ADR Centres and Institutions that already exist in Africa include: The Cairo Regional Centre for International Commercial Arbitration (CRCICA), 1979; the Lagos Regional Centre for International Commercial Arbitration (LRCICA), 1989; Arbitration Foundation of South Africa (AFSA), 1996; the Ugandan Centre for Arbitration and Dispute Resolution (CADER), 2000; the Kigali Centre for International Arbitration (KIAC), 2012; the Lagos Court of Arbitration (LCA), 2012; the LCIA-MIAC Arbitration Centre, Mauritius, 2012; the International Centre for Arbitration and Mediation Abuja (ICAMA), 2012; the Nairobi Centre for International Arbitration (NCIA), 2013; the Nairobi Centre for Alternative Dispute Resolution (CADR), 2013; and branches of the Chartered Institute of Arbitrators affiliated to the English Chartered Institute operating in some English speaking countries on the continent. For the mainly French speaking countries there is the OHADA Common Court of Justice and Arbitration (CCJA). The Arbitration Tribunal of ECOWAS (ATE) established under Article 16 of the ECOWAS Treaty and renamed as Arbitration Tribunal of the Community, is not operational.

These arbitration institutions, like their foreign international counterparts, have differing characteristics. Some appoint arbitrators and administer the arbitration while others do not go beyond appointing the tribunal, leaving it to administer and manage the process to the making of an award. Some have rules in line with the UNCITRAL Arbitration Rules. The significant observation is that there is no uniformity in the services provided nor is there harmonization of arbitration practice. As noted, some settle and collect the arbitrators' fees and their intervention helps with the progress of the arbitration. The enactment of new arbitration laws entails the recognition of arbitration as a study field for students and



practitioners alike. The standards and complexities of modern arbitration practice require skilled managers for the business of arbitration, and the phenomenon of increased costs and high income expectations of practitioners, require professionalised and specialist arbitration institutions to regulate their memberships and keep costs within reasonable limits.

5.2 A list of some sixty four arbitration institutions in Africa was presented at the Addis Ababa conference. It was apparent from the presentations of some representatives that their institutions are struggling while others are breaking new grounds. For present purposes, sampled sketches of four of these institutions exemplify some challenges as well as progress.

5.3 In a brief narrative by Judge Charles Kajimanga, it emerged that the Zambia Centre for Dispute Resolution (2001) that was established by various organizations for ADR services, was not active or operational for lack of funding and transfer of their training programmes to the local Chartered Institute of Arbitration. When asked why he chose to present a moribund institution, the judge replied whimsically that the institution was not dead; it is alive but not kicking. Should funding be sought from increased subscriptions, contributions, donors and sources such as government, from whose very control a private-sector institution seeks independence? That is a specific challenge.

Emmanuel Amofa, Administrator of the Ghana Arbitration Centre (GAC), described the GAC as established and sponsored by a cross-section of senior members of the Ghanaian legal profession for resolving civil disputes. The target users are mostly local and foreign companies but the Ghana Government and its agencies become involved in a wide variety of arbitral disputes administered by the Centre. The monetary value of claims range between USD20, 000 to USD1, 000,000, with an annual workload averaging 15 cases. The challenges include inadequate funding, coupled with lack of resources and modern equipment. Therefore, here again is an example of an institution that is underperforming due to lack of resources and can do with assistance. The Zambia and Ghana institutions, being privately sponsored initiatives with financial and resource challenges, need technical guidance for transformation, amalgamation or association with existing and functioning institutions, locally or regionally.

Bernadette Uwicyeza, Secretary General of the Kigali International Arbitration Centre (KIAC), highlighted the prominent features of KIAC with a governing board membership from the private and international sectors and a world-wide panel of experienced and accredited international arbitrators. The caseload consists of domestic and international disputes involving parties from Kenya, Pakistan, South Africa, Uganda, Senegal and the USA. KIAC has a modern set of arbitration rules, a cost-effective schedule of fees depending on size and complexity, with costs averaging 5% of the value of the claim. There is focus on capacity building of service providers and training of role players such as counsel, arbitrators and advisers. Certification in Mediation and Adjudication is granted by internationally recognised institutions. KIAC recently moved to new office premises centrally located in Nyarutarama. The institution has signed a Memorandum of Co-operation with La Cour d'Arbitrage de la Cote d'Ivoire and KLRCA in Malaysia enabling sharing of knowledge, experiences, capacity building techniques and opportunities, locally and abroad.

Megha Joshi, Executive Secretary and CEO of the Lagos Court of Arbitration (LCA), presented the LCA as an international institution service provider for dispute resolution, established by LCA Law No. 17 of 2009. It is private-sector driven and independent from government regulation or control. It is funded by grants, income from dispute resolution services and membership fees.

The LCA has both Nigerian and international arbitrators on its Panel of Neutrals with rules modeled on the UNCITRAL Rules of Arbitration that apply to disputes under the Lagos State Arbitration Law of 2009 where parties choose to use those rules.

LCA has a working business relationship with KIAC (Rwanda) and the Mauritius International Arbitration Centre (MIAC) in Africa. Other activities are the publication of a Dispute Resolution Journal, and the establishment of a "small claims scheme" for disputes between 1 million Naira (USD5, 000) to 5 million Naira (USD30,000) with capped fees, as a strategy to help aspiring arbitration practitioners gain experience.

Lagos is indeed upfront with a new Lagos State Arbitration Law that some say is in advance of the existing federal Arbitration and Conciliation Act, itself considered "modern", for substantially enacting the principles of the UNCITRAL Model Law. The permanent headquarters of the International Centre for Arbitration and ADR (ICAA) were completed in

May 2015 and handed over to the LCA by the Lagos State Government to own, operate and sustain itself. The spanking new buildings have spacious rooms, modern communication equipment and facilities that would compete favourably with those of other modern institutions, and located on the scenic shores and azure blue waters of the Atlantic Ocean. This writer recently had the opportunity and historic privilege of chairing the very first arbitration tribunal in hearings conducted in these new and comfortable premises.

5.4 By these indications, there can be little doubt that both Kigali and Lagos are scaling up to compete in the ADR market continentally and internationally. These narratives demonstrate modernization and what can be achieved and emulated by aspiring arbitration institutions on the continent. The risk of institutional independence and justice delivery being compromised is present where government support, in whatever form, is availed or lurking.

In recognition of its material importance, and in search of viable solutions to issues and perceived problems raised thereat, several representatives present at Addis undertook, as follow-up, to write up substantive chapters for a compendium in the form of a book as a contribution to the literature on the subject for use by students, researchers, practitioners, and users of arbitration.

## **6. PROLIFERATION AND FRAGMENTATION**

While these centres and institutions are indicators of continental progress and achievement in the management and administration of dispute resolution with varying degrees of success, we must be mindful that proliferation of institutions is not akin or tantamount to progress or excellence in operations or service delivery. On the contrary, proliferation is often accompanied by fragmentation, staff shortage, inadequate professional performance and poor service delivery. The proliferation of institutions with sub-standard and care-free orientations or whose only justification for existence is the business of seeking new members and sustenance from membership subscription fees will not be a rewarding trend for African users. What can be done? Institutions ought to apply themselves not only to the collection of contributions or training of arbitrators, but also to the establishment of cognisant and cohesive

structures and programmes for ensuring high quality and continuing professional development of arbitrators while also facilitating their appointments. The key institutions and their managers, administrators, professional staff and advisers must dialogue on their commonalities and differences, assess their strengths and weaknesses and the ways and means of improving their services to their consumers and users. For example, those that do not have their own procedural rules must consider the advisability of developing such rules; those that have existing rules must review their efficacy for dispute resolution in the expanding fields and sectors from where arbitration business emanates. Improving staff complements, with quality secretariats and updating databases are concomitant services with funding from sources that do not compromise their independence or operations.

In an earlier paper, this writer made recommendations for the way forward. They included setting up a substantial fund and databases for African arbitrators and ADR practitioners, and networking with and amongst other institutions and users across borders. More than a quarter century down the line, and with the existence of new African ADR institutions and the ever growing crop of learned and well trained professionals, there can be little excuse for exporting African disputes and conflicts to foreign capitals. Questions will continue to arise as to the performance of the African institutions and professionals, their competences, capabilities and the adequacy, or otherwise, of the services expected of them and what they actually offer. Periodic reappraisal, performance reviews of African ADR institutions and assessment of their programmes and capacities to overcome the challenges that impede service delivery are necessary. Arbitration seminars and conferences that provide participants with the platform for informed discussion of such matters are invaluable.

In light of such advanced arbitration institutions, practitioners and indeed users still beholden to old dispute resolution and management styles, with repeated appointments from the same privileged stock of arbitrators, must respond to the demands of change and the rationality of expanding the pool of practitioners and the introduction of new perspectives, insights and experiences in the expanding terrain of arbitration practice across continents. The growing move towards institutional arbitration globally must encourage the institutions to extend

their roles beyond being primary regulators and gatekeepers for their well-established members.

International institutions transcend territorial boundaries of state by not restricting their services to the states in which they are located or headquartered, and the African institutions may emulate such example and open up to cross-border dispute resolution with experienced arbitrators. An international outlook enhances international appeal, institutional profile and reputation, where users and their advisers are able to engage the services of an institution with reputable arbitrators from jurisdictions without territorial restrictions. It is feasible that by developing sound and attractive arbitration practices and efficient procedures, the institutions may thereby set standards also for ad hoc arbitration.

## **7. REALIGNING GOALS, BENEFITS AND EXPECTATIONS**

The increasing institutionalization of arbitration in Africa is also an occasion for taking stock, reappraising goals and expectations and taking in the perspectives of well-informed others on the way forward. The writer recently read a paper on the sociology of international arbitration replete with footnotes and arcane terminology. After describing what the author termed the “social actors” (by which he meant the parties, arbitrators and a plethora of European institutional service providers) and the “rituals” of arbitration, (meaning arbitral hearings and conferences) the author concluded with a chart listing himself and a few others as prominent arbitrators.

If your arbitral institution or name is not in this self-serving list there is no need to lose sleep. Self-advertisement is open to all. African role players can set the standard for doing what others elsewhere do profitably for themselves. For the rest, if the legitimacy for inclusion in any list is by giving a prestigious lecture and attending networking conferences to get known, practitioners, arbitrators and institutions on the continent can surely do all those things and engage those with relevant knowledge of the context of the dispute, cultural competence, and the requisite skills for dispute resolution.

Sundaresh Menon, former Attorney General and Chief Justice of Singapore, now patron of the Chartered Institute of Arbitrators, is concerned with arbitration today as a highly sophisticated, procedurally complex and exhaustive process, dominated by its own domain experts

using detailed frameworks and rules with emphasis on legal accuracy, precision and certainty that have overtaken the ad hoc compromise-oriented system. Yet arbitration need not be so ossified by complicated frameworks. It should do what parties and users require and expect it to do – resolve their disputes by their chosen procedure, within the timetable they have agreed upon to deliver a fair, just and final award.

As arbitration would be valueless without users, the arbitral institutions, as role players, need to engage with users' expectations, which emanate from the very advantages and benefits claimed by arbitration as a quick and user friendly mechanism for solving disputes at reasonable cost.

In his contribution on users' expectations and the role arbitration institutions can play in increasing Africa's desirability as an arbitration destination, Dr. Stuart Dutson of Eversheds LLP endorses the growing user perception that the benefits claimed by arbitration are today more of a myth than a reality as arbitration can be just as expensive and protracted by delays as litigation. African arbitral institutions are challenged to address these problems in order to significantly increase the attractiveness of Africa as an arbitration destination. They can do so by providing parties with access to speedy solutions such as the Emergency Arbitrator procedure offered by the institutional rules of, for example, the ICC and LCIA, that provides a simple, user friendly, streamlined and expeditious mechanism for an enforceable award. It is noted, however, that the emergency procedure is limited by rules that exclude the award of 'Arbitration and Legal Costs', and the Emergency Arbitrator may adjourn all or any part of the claim for emergency relief to the Arbitral Tribunal when formed. Also, the Emergency Arbitrator's order or award may be confirmed, varied, discharged or revoked in whole or in part by the Arbitral Tribunal. The lack of finality puts into question the enforceability of the emergency order or award under the New York Convention.

A potential alternative solution is for parties and users to include an expedited procedure in their arbitration agreement enabling the imposition of strict time limits, for example, 7 days for the determination of procedural issues, and a single hearing on jurisdiction. Hearing on merits and quantum may not exceed say 4 months of the formation of the Tribunal, with the award rendered within one year of the request for arbitration. African arbitral institutions can innovatively develop the expedited procedure to meet such user expectations.

The disconnect between users and practitioners today is a direct consequence of the introduction to arbitration practice of procedural and technical complexities, that were never part of the benefits offered by arbitration and do no more than protract the proceedings and increase costs and fees. African institutional rules can align both the declared benefits of arbitration, and the interests and expectations of users. The rules can be formulated or strengthened in line with arbitration law and principles, that delimit judicial intervention in arbitration the benefits of which include (i) keeping out the courts as far as possible from the entire arbitral process until the award is rendered and (ii) enabling the arbitral tribunal to dispose of the dispute fully and conclusively, supported by regulatory provisions that ensure the finality of the award as expected by the parties. The elimination of court involvement in arbitration is in turn beneficial to the judiciary by reducing its workload and freeing up court time for other essential business.

African voices and views must be heard, first and foremost, in Africa by Africans and actualised by stakeholders, policy and lawmakers in specific ways, such as, by:

- (a) Enacting laws that specifically prescribe African venues for arbitration with culturally competent arbitrators conversant with those laws in the relevant jurisdictions,
- (b) African arbitration institutions likewise formulating, for the benefit of users, model arbitration clauses and agreements, rules and regulatory regimes that accord with state laws and public policy,
- (c) State laws and institutional rules in turn incorporating universal principles and standards of practice recognised by international law, and
- (d) African States signing and acceding to investment and arbitration-related treaties and conventions, not forced on them, with arbitration clauses and submission agreements that do not compromise national sovereignty or the freedom to arbitrate disputes in Africa by African arbitrators.

Taking action goes beyond the initiatives taken at conferences, to taking charge of implementation and ceasing to blame others for unfulfilled expectations. For that reason, the African Union Commission's support for

this conference was entirely appropriate and encouraging for what needs to be done to transform arbitration in Africa.

In his article “*African arbitration can be a success*” Des Williams, a leading South African lawyer and experienced arbitrator writes:

*“Now is the time for Africa to be more visible, confident and assertive in the world of arbitration. If we meet the challenge, disputes emanating from Africa may continue to be submitted to arbitration under the auspices of international arbitration organisations, but should increasingly be heard in Africa by African arbitrators.”*

The auspices of international arbitration organisations is food for thought for the African institutions and stakeholders in arbitration.

## 8. CONCLUSION

The direction of this discussion on the examination of the roles, functions and potentialities of arbitral institutions, is towards the creation of an enduring culture for the practice of arbitration in Africa in which the institutions can be leading role players. The wider vision is of the process and progression towards the greater and effective participation of African role players – the arbitrators, states, cities and the institutions that meet the requirements of their users - in the global arbitration space. This critique has highlighted some of the shortcomings and challenges of the arbitral institutions, to enable them to understand and embrace the perceptions and expectations of their users, and the ways their services can be enhanced, expanded and improved. If the arbitration centres and institutions can see and appreciate the importance of their functions and services more clearly, and grasp the new and expanding opportunities for placing themselves at the forefront of dispute resolution in Africa, then the better for the provision of those services and the advancement of arbitration practice in Africa.



## COMMERCIAL MEDIATION

By: Njeri Kariuki\*

Myth or reality? Are the roots/origins/genesis of mediation to be found in Africa or is this just another way of directing the world's attention to the Dark Continent? Well, the pundits claim that the source of HIV-AIDS & Ebola is Darkest Africa, so why not Mediation? Stories abound of Elders sitting under trees to dispense their version of Justice to 3<sup>rd</sup> Parties falling under their aegis but wait a minute (*skid marks evident*)! The Chinese make the same claim; just take a listen to what Yu Jianlong, the then Vice Chair/ Secretary General of CIETAC had to say during the opening of the International Mediation Institute (IMI) in 2007:

*“Resolving disputes by way of mediation has been inherent in the Confucian culture, and my colleagues and I have been long time advocates of mediating international commercial disputes.*

Whatever its source, roots or genesis, it cannot be gainsaid that Mediation, as we know it today, has changed the face of dispute resolution, whether civil or commercial, the world over in the last 30 years or so.

In speaking to the converted, I find no need to extol the many virtues of Mediation, but a short world history as it appertains to Mediation with specific emphasis on the experience of the African continent would, nevertheless, allow this paper to be seen through the prism of the Institute's own promotion of Mediation, taking into account that this Conference celebrates 100 years of the Institute's existence, and would travel along the path that the Institute has taken in 'owning' Mediation and other ADR mechanisms through the provision of credible training of Mediators, providing referral & appointing services of mediators by maintaining a Register and particularly through the introduction of the Mediation Pathway to Fellowship, as an alternative to Arbitration and Adjudication, so expanding its profile.

Human interaction throughout the mists of time necessarily denotes a level of negotiation, which although may be viewed as primitive today, forms the very basis of the ADR mechanisms we make use of in the present.

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Revisiting early human negotiating behavior is likely to awaken us to the fact that many traditional negotiation tactics and approaches remain relevant today. History will also assist us in trying to understand ways of managing the ingrained reflexes of resistance and ambivalence to negotiation/mediation while offering an important alternative perspective on the many approaches and styles of mediation that have mushroomed, to allow for a global standard in the practice of commercial mediation to emerge.

It seems the 2<sup>nd</sup> World War was a turning point in so far as dispute resolution is concerned, as it paved the way for the brainstorming and development of more “*scientific- and academic/skill based*” methods of conflict management. After this event, attempts were made to re-invent negotiation and mediation into more “rational” and acceptable forms. The development of Mediation was given great impetus in the 1980’s and 90’s as a direct concomitant to clogged court systems and the prohibitive costs associated with traditional litigation. The invention and spread of technology was permeating all aspects of human existence with the notable exception of commercial dispute resolution where the technology (within the Court System, for example) seemed firmly rooted in the 19th century. This environment combined with post-modern social developments most closely associated with the increased liberalism of the 1960’s, proved fertile ground for the growth of commercial mediation.<sup>1</sup>

North America led the way in the developments in modern/formal commercial mediation. 39 years ago when the Pound Conference was held in 1976,<sup>2</sup> a remarkable paper by a Prof. Frank Sanders entitled, "The Pound Conference: Perspectives on Justice in the Future", profoundly influenced and transformed both ADR and the American Legal System. In his paper, Sanders urged conference participants to envision alternatives, a "rich variety of different processes, which ...singly or in combination, may provide far more 'effective' conflict resolution.". The outcome of this inspiring paper was the envisioning of a multi-door judicial system by the participants!

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<sup>1</sup> February 2003, Rick Weiler, Commercial Mediation - “We Ain’t Seen Nothing Yet”, ADR Institute of Ontario

<sup>2</sup> A historic gathering of legal scholars and jurists brought together to discuss ways to address popular dissatisfaction with the American legal system and reform the administration and delivery of justice.

That vision ultimately led to the conception of the Multi-door Courthouse, such as that located in Lagos, Nigeria, which whirled into existence through the partnership between the High Court of Justice, Lagos State and the Negotiation and Conflict Management Group (NCMG), with doors swinging wide open to a broad range of dispute resolution processes, where disputes may be efficiently addressed through the mechanism best suited for the parties and the issues involved.

Early use of commercial mediation, mainly by the Insurance industry, effectively demonstrated significant savings in transaction and claim costs, with claimants often found to be fairly satisfied through mediation as it addressed the “common interests” of both parties, offering the opportunity to foreclose risk, delay, cost and stress in a procedurally fair setting. The favourable experience in the insurance sector caught the attention of policy makers and led to “court-connected” mediation as an accepted feature of modern courts. Other structural changes fueled the growth of commercial mediation such as Codes of Professional Conduct, for example, requiring lawyers to consider mediation when advising clients, and the growth of multi-step dispute resolution clauses (requiring mediation and then arbitration) in domestic and international commercial agreements.

The resultant explosion in mediation caused a chain reaction, with Canada and Britain following closely and then greater Europe. The European Commission subsequently issued a “Green Paper” on the use of mediation.<sup>3</sup> Today, Africa, Asia and Australia all have multiple commercial mediation initiatives. Further, the United Nations Commission on International Trade Law (UNCITRAL) adopted a new Model International Conciliation Law (June 2002) and the World Bank Justice Reform Project currently has ADR as a component.

UNCITRAL, under its UNCITRAL Working Group II (Arbitration and Conciliation), has recently conducted its first-ever large-scale international survey regarding the use and perception of international commercial mediation and conciliation in the international legal and business communities, following a proposal from the Government of the United States regarding a possible convention or treaty on commercial

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<sup>3</sup> October 2004, the European Commission adopted and submitted to the European Parliament and the Council a draft Directive on Mediation. **The Green Paper, the Code of Conduct** are all part of the European Community's current work on establishing an area of freedom, security and justice, and particularly on improving access to justice.

conciliation & mediation – this was considered during its 62<sup>nd</sup> Session, held between 2<sup>nd</sup> and 6<sup>th</sup> February 2015, New York.

One fact emerging from the Report was that countries adopt legislation on mediation, and provide various solutions for enforcement of settlement agreements. The diversity of approaches toward the objective of enforcing settlement agreement might **militate** in favour of considering whether harmonization of the field would be timely. About 80 economies out of the 100 economies surveyed indicated that their leading arbitration institutions also provided mediation and/or conciliation services. The Chartered Institute of Arbitrators is one such leading institution.

Some countries have enacted legislation dealing with commercial mediation like Canada, which in 2010 enacted the Commercial Mediation Act, 2010, “to facilitate the use of mediation to resolve commercial disputes”.

In many a country the world over, the growth of commercial mediation has led to a cadre of experienced commercial mediators and the development of training and curriculum development in commercial mediation. Lawyers, too, have very grudgingly been initiated into the mediation movement, understanding that in the future, it would be traditional trials that would truly become the “*alternative*” process for resolving commercial disputes.

## 1. WHAT IS THE AFRICAN EXPERIENCE TO DATE?

As already intimated at the start of this presentation, in many parts of Africa, village elders, often seen as knowledgeable and wise, impartial and therefore able to be mutually acceptable as a third party, have through the ages provided guidance to disputing parties, seeing their conflicts, whatever their nature, to a resolution of their own design, or into a morally (this can be and is subjectively defined) acceptable resolution, which would not otherwise have been possible. The last 15 years or so has seen the rise of a plethora of institutions touting the use of Arbitration & ADR in the execution of their duties and obligations; others in existence prior to this period, have seen to the adoption of a variety of practices which involve the use of ADR techniques in their operations. In addition, we have seen a mushrooming of training institutions that have resulted in differing approaches & styles in the practice of mediation, hence a lack of uniformity, if that be a desirable outcome, in experience.

Regional trading blocs like ECOWAS, EAC, COMESA, NEPAD and the African Union have a limited offering in commercial mediation. West

Africa's ECOWAS takes the lead by not only introducing dispute resolution mechanisms for the West African Power Pool (WAPP) and the West African Gas Pipeline (WAGP), but also by incorporating ADR practices within its court.

COMESA has restructured its Treaty to accommodate conflict resolution with an emphasis on peace building on the basis that without peace there is *no development and no foreign investment*. This initiative bodes well for a stronger directive on commercial lines, perhaps similar to the EU Directive, which promotes better access to adequate dispute resolution processes in order to make it easier for businesses to agree to mediation.

The major purpose of the **Organization for the Harmonization of Business Law in Africa ("OHADA")**,<sup>4</sup> is to promote regional integration and economic growth and to ensure a secure legal environment through the harmonization of business law among its member states. The OHADA Uniform Act on Arbitration was established in 1999, and it authorizes the practice of ADR, lays out the rules of procedure, provides for an enforcement mechanism in member states and created a key regional ADR centre: the Common Court for Justice and Arbitration ("CCJA"). The CCJA has the potential and ability to hear a variety of issues including commercial disputes.

The East African Court of Justice was established in 2001 by the East African Community ("EAC").<sup>5</sup> The Court has jurisdiction over the interpretation and application of the treaty. It also has arbitral jurisdiction on matters arising from:

- (a) an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party;

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<sup>4</sup> This is a supranational organization established by a treaty signed on October 17, 1993. It is comprised of 16 sub-Saharan African member states: Benin, Burkina Faso, Cameroon, Central Africa, Comoros, Congo, Cote d'Ivoire, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, and Togo.

<sup>5</sup> The East African Community is a regional intergovernmental organization comprising the Governments of Burundi, Kenya, Rwanda, Tanzania and Uganda with the aim of establishing the East African economic, social, cultural and political integration

- (b) a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or
- (c) an arbitration clause contained in a commercial contract or agreement which the parties have conferred jurisdiction on the Court.

The EAC has promulgated its own set of arbitration rules and procedures which vary from other international and regional rules and standards but has no mechanism for the practice of international commercial mediation.

The Asian-African Legal Consultative Organization (“AALCO”)<sup>6</sup> has 4 regional centres for International Commercial Arbitration:

- (a) the Regional Centre for Arbitration, Kuala Lumpur
- (b) the Cairo Regional Centre for International Commercial Arbitration
- (c) the Lagos Regional Centre for International Commercial Arbitration, and
- (d) the Tehran Regional Arbitration Centre.

All centres use the UNCITRAL Arbitration Rules and aim to provide arbitration facilities of a widely acceptable international standard. All hosts of the Regional Centres are parties of the New York Convention, and as such its awards may be enforced against a disputing party in other signatory states.

Africa ADR is a non-profit, dispute resolution administering authority started in 2009. It has an ambitious vision:

- (a) to be the arbitral link between those who invest in Africa, and those who trade in Africa
- (b) to be the link between the business communities of Africa and abroad and with the international community
- (c) to foster the culture of alternative dispute resolution in Africa, and
- (d) keep well-oiled the wheels of international trade and commerce.

Initially managed by a multi-national steering committee under the leadership of the Arbitration Foundation of Southern Africa, it provides comprehensive and complete administrative services in the resolution of

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<sup>6</sup> This is an international organization with members from 47 States in Africa and Asia.

regional and international disputes by way of arbitration, mediation or conciliation throughout Africa at approved venues.

Clearly, the main focus of most of the institutions & centres just named remains commercial arbitration, whereas the Lagos Regional Centre provides other options for settlement of disputes, such as negotiation, mediation, and conciliation while continuing to promote and administer international commercial arbitration.

## **2. THE INITIATIVE OF A FEW AFRICAN GOVERNMENTS IN PROMOTING ARBITRATION & ADR:**

2.1 In 2011, Rwanda established the Kigali International Arbitration Centre to facilitate settlement of International Arbitration and promote other ADR mechanisms.

2.2 In July 2011, the Government of the Republic of Mauritius, the London Court of International Arbitration (LCIA) and the Mauritius International Arbitration Centre Limited (MIAC), entered into an agreement for the establishment and operation of a new arbitration centre in Mauritius, to be known as the LCIA-MIAC Arbitration Centre.

2.3 Kenya established the Nairobi Centre for International Arbitration under an Act of Parliament passed in 2012 to establish an independent, non-profit-making international organization for commercial arbitrations, for promoting and encouraging international commercial arbitration as well as other alternative dispute resolution (ADR) techniques, developing internal rules encompassing conciliation and mediation processes; and coordinating and facilitating, in collaboration with other lead agencies and non-state actors, the formulation of national policies, laws and action plans on alternative dispute resolution, and facilitating their implementation, enforcement, review, monitoring and evaluation. Mediation & Arbitration Rules and Codes of Conduct for practitioners have already been developed.

## **3. DEVELOPMENTS AT THE INDIVIDUAL COUNTRY LEVEL**

Several countries in Africa have embraced commercial mediation, including the following;

3.1 **Nigeria** introduced Africa's first Multi Door Courthouse - opened in Lagos in 2002 -with robust rules that remove cases from the court system where ADR is more appropriate. The MDC concept turns on the premise that litigation, as a single door, is insufficient in meeting the demands of 21<sup>st</sup> century commerce, so it offers litigants and non-litigants the choice of three 'doors' to resolving disputes: Arbitration, Early Neutral Evaluation and Mediation. The practical result is that, for the administration of justice, only those disputes which cannot be resolved through ADR will proceed to trial. The system has prided itself in the promotion of foreign investment and Nigeria's business industry has heeded the ADR call. The Nigerian Investment Securities Tribunal boasts an ADR Unit which, under statute, concludes proceedings within 90 days of commencement of action through arbitration, mediation and 'any other creative dispute resolution process'. All settlements are passed to the Tribunal which, sitting as a court, enters a consent judgment based on the agreed terms. Further the Nigerian Communications Commission has established conflict resolution centers in selected cities to dispose of disputes in the telecommunications industry; with a value under N1million (US\$ 4,976.47 ) within 60 days to ensure consumers get 'justice and fairness'.

3.2 Since 2000, **Zambia** has used court-annexed mediation.

3.3 In response to the clamour from its business community to improve the investment climate, **Mozambique** passed an Arbitration, Conciliation and Mediation Act in 1999, which legitimised non-court ADR, compliant with World Trade Organisation standards, and established a Centre for Arbitration, Conciliation and Mediation. A year ago, its National Assembly approved major revisions to the commercial code which now provides an effective basis for modern commercial practice including the resolution of business disputes through ADR.

3.4 **Malawi** has a court-connected mediation scheme as well as a dynamic paralegal programme that trains community-based mediators to handle something in the region of 80% of the country's disputes

3.5 The 1995 Constitution laid the foundation stone for ADR in **Uganda** by promoting reconciliation in all matters handled by the judiciary. It enjoins judges to speed the trial process and settle disputes on the basis of



substance and not technicalities. The 2000 Arbitration and Conciliation Act described new judicial powers of referring cases to mediation and Commercial courts. Uganda piloted a mediation scheme whereby all cases filed in the Commercial Court were referred compulsorily to a Centre for Arbitration and Dispute Resolution (CADER) at no cost to the parties. By the end of 2005, the Commercial Court was disposing of 60% more cases than in 2001; the Pilot has been deemed such a success that it is to be rolled out to the other divisions of the High Court.

3.6 **Ghana's** government policy is to settle any investment-related dispute through ADR. ADR is main stream in Ghana's justice, business and social systems. They recognized that the mono-door of litigation was the biggest impediment to improving Ghana's investment climate and set about far-reaching reforms, declaring a 'Golden Age of Business'. Ghana's legislation has implicit provisions for ADR when the need arises.

3.7 The Kigali International Arbitration Centre in **Rwanda** has launched a mediation service for business disputes with 30 trained mediators<sup>7</sup> Rwanda has also institutionalized mediation committees, a concept developed to help resolve mostly land-related disputes; mediation committees have resolved over 8,000 land-related cases, passed the Organic Law in 2010, enhanced local capacity in dispute resolution as well as the role of women in the mediation committees<sup>8</sup>

3.8 **Benin** established a commercial chamber within its court of first instance and assigned 6 judges to solely hear commercial cases.

3.9 The **Seychelles** established a specialized commercial court and assigned a permanent local judge to resolve only commercial disputes

3.10 In **Cameroon**, commercial institutions use arbitration, conciliation and mediation. The government has a policy supporting arbitration and mediation as well. The success of ADR is due to an established comprehensive network of ADR specialist trained by the successful *Centre*

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<sup>7</sup> East African Business Week (September 27, 2014)

<sup>8</sup> AllAfrica (October 4, 2014); AllAfrica (October 16, 2014)

*d'Arbitrage de Groupement Inter-patronal du Cameroon* ("GICAM"). GICAM is a professional association that represents over 80% of the commercial enterprises that exist in Cameroon. The organization represents 192 enterprises in Cameroon, which has helped it reach the commercial sector. Based in Douala, the GICAM arbitration center provides arbitration services to enterprises and individuals in Cameroon and across the Central African region.

3.11 **Angola** has an Arbitration Centre based in Luanda

3.12 **Botswana** has a court annexed mediation process

#### 4. A CASE FOR MEDIATION IN KENYA

The Chartered Institute first opened its doors in Nairobi in 1983 and since then has grown in leaps and bounds to become the premier institution in promotion of arbitration and the training of arbitrators. Several high-profile individuals have been trained by the Institute and form part of our membership. It was this association that ultimately led to having ADR firmly anchored in the Constitution of Kenya 2010, a constitution borne out of the ashes of post-election chaos - which gives it a revolutionary flair and being focused on the needs of the people, it carries throughout its body strains of reconciliation & mediation, while calling for co-operation and consultation in all things. The COK 2010 expressly provides that ADR ought to be taken into consideration, which was unheard of prior to its advent, and is one of the principles that shall guide the courts and tribunals in the execution of their judicial mandate. Article 159 (2) (c) provides that in exercising judicial authority, the courts and tribunals shall *inter alia* promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, so long as the latter does not contravene the Bill of Right and are not repugnant to justice and morality or inconsistent with the Constitution or any other written law.

You can well imagine that for the local Branch & practitioners, like myself, all this was like a dream come true. Since attending my very first CEDER seminar in Mediation in Y2000, I was a goner where Mediation is concerned yet trying to convince colleagues of the virtues of Mediation was a virtual impossibility - they just couldn't see the merits of it and many of us, including our past Chairman, Dr. Kariuki Muigua, have been shouted

down in our pursuit of extolling the several virtues of Mediation. Yet here on a silver platter, was Mediation, standing in the light of the Constitution, for all to accept, and, to never again refute its usefulness and application within the Kenyan milieu.

As part of the on-going implementation of Kenya's Constitution, 2010, significant developments and changes have taken place both in the Judiciary and in the entire justice sector. There is now a structure for carrying out mediation within the Kenyan legal and institutional framework. Section 59A of the Statute Law (Miscellaneous Amendments) Act, 2012 establishes the Mediation Accreditation Committee. The functions of the Committee for certification of mediators ·

- (a) Propose rules for the certification of mediators ·
- (b) Maintain a register of qualified mediators ·
- (c) Enforce such code of ethics for mediators as may be prescribed ·
- (d) Set up appropriate training programs for mediators ·

The establishment of the Committee is informed by the fact that there is no centralized institution or umbrella body to which this panoply of mediators, bodies or institutions are held accountable and their activities professionally regulated. The legal framework will go a long way in protecting the integrity of mediation processes

The Judiciary now intends to introduce come September this year, a Pilot Project in the Commercial & Family Divisions of the High Court, whereby cases will be vetted or tracked for resolution by Mediation. The Civil Procedure Act 2010 already makes provision for Mediation in S. 81(2ff), S.59B(1) & Order 46. Indeed, international experience suggests that reform of Civil Procedure Rules and the introduction of case management in tandem with related ADR schemes are among the most effective of all judicial civil reforms. The Institute's local Branch was represented in the Judicial Training School Steering Committee that formulated the Rules for this Project.

Commercial mediation is, however, not widely practiced in the country and needs to be widely sold or marketed to the *Wananchi* or denizens of the Republic. It is sorely hoped that through the Judiciary's Pilot Project, resolution through mediation will gain currency thereby creating a footprint in all corners of the country. In addition, the Institute's Local Branch is heading a Task Force, in conjunction with other stakeholders, including the Office of the Attorney General & the Nairobi

Centre for International Arbitration, which seeks to develop a comprehensive legal framework for ADR in Kenya; deliberations are in their final stages.

As the premier training institute in Kenya, one of our mandates is to see the advancement of commercial mediation in the country and we are now some way to achieving this goal after a long hiatus brought about by a failure of leadership at headquarters. During this period, other institutions were able to take advantage of this vacuum and stamp their own brand of mediation training on the Kenyan Society. The training of mediators by the Institute has been long awaited and we have taken up this project with much gusto, especially on account of the Judiciary's Pilot Project, mentioned earlier, that requires well-trained Mediators to be accredited by MAC. After several years of merely offering the One day Introduction to Mediation Course, our inaugural 40 Hour Training Sessions was held in November 2014, where 39 individuals from all walks of life were trained over the course of 2 separate weeks, followed in June 2015 by the Assessment of 20 individuals we now believe we are at least part-way to finding traction in this regard. It is essential, in our view, that for mediation to gain wide acceptance, Kenyan Advocates be 'on-board' and convinced that an "accelerated decline in revenue" will not be experienced through the advancement of mediation. I am happy to report that several of the individuals who attended the 40 hour training sessions were, indeed, advocates! Having undertaken training in arbitration within several countries on the African continent & beyond (Nigeria, Zambia, Egypt, Dubai) the Kenya Branch is well poised to conduct training in Mediation the continent over.

The interest in ADR has surely sparked demand in commercial mediation training in the country and is undertaken by institutions, other than CI Arb in Kenya such as CADR, NMG, Strathmore Dispute Resolution Centre, MTI which offers Workplace Mediation Training to name only a few. FAMEC offers training in Family Mediation under the auspices of the Mediators Institute of Ireland & the Association of Conflict Resolution, USA, one of which 60 hour training sessions this presenter had the great pleasure of attending in 2002. There are also other initiatives that offer training in conflict resolution & peace management, but these do not operate in the mainstream, hence the need for MAC to refine its criteria for accreditation of mediators for use in the Court System

An example of the ascendancy of Mediation within the Kenyan Business Community is the recent six-month Banking Industry Mediation

Pilot undertaken in conjunction with the Strathmore Dispute Resolution Centre, which provided the banking public with complimentary access to trained, practicing Mediators. 6 banks participated, the goal being to have qualified SDRC mediators facilitate discussions between the bank and their customers relating to transactional and credit cases. The pilot concluded in September 2014 and was reported successful in settling 85% of the cases referred.

Another notable development is that the Kenya National Chamber of Commerce & Industry is trying to find its feet again after several years in the doldrums. Prior to its decline, several years ago, one of its mandates was to offer services in arbitration to its members and it has picked up this service since its resurgence in 2014. In this regard, the setting-up of a Chamber Arbitration Centre is in the pipeline. The KNCCI is an ardent supporter of mediation & conciliation initiatives and has been at the forefront of advocating the use of alternative means of settling or resolving disputes within its membership rather go through litigation.

## **5. WHAT'S THE WAY FORWARD FOR COMMERCIAL MEDIATION IN THE AFRICAN MILIEU AND WHAT ROLE COULD THE CHARTERED INSTITUTE POSSIBLY PLAY?**

A few factors to be kept in mind as we deliberate on the point:

5.1 Maintaining quality in delivery of services is crucial, so investment must be made in designing procedures, protocols and mechanisms that match today's business practices.

5.2 So long as market users, i.e. the true decision makers, remain dependent on their legal counsel to select, direct and control the mediation/negotiation process, there is likely to be little advancement in public education. Hence the need to expand knowledge base.

5.3 Despite the necessity to negotiate as a logical concept, and a sensible approach to settling differences, humanity still suffers ingrained ambivalence and resistance to negotiation or mediation. While many profess to like the idea of cooperating in theory, they find the actual practice of compromise to be far more problematic.

In Africa, despite apparent wide acceptance of mediation, commercial mediation has only experienced "surface scratching" despite its potential

and power. Providers, users and regulators of commercial mediation should reflect on the recent history of the process and commit to the expanded principled use of commercial mediation for their mutual benefit.

5.4 Commercial mediation is being practised in different ways in almost all of Africa, from the North, East, Central, West and South Africa, with varied experiences eg Nigeria & SA having practised it in its formal form earlier than other countries and has built on experience of multi-door court approaches and has thereby gone about establishing a greater number of ADR institutions. There has not been general research on the use of commercial mediation in Africa; however, experience in the different countries and lessons gained thereby indicate that most commercial disputes are still taken to courts, which are still not accessible to a large population of the citizenry.

## 6. THE STRATEGIES

Make commercial mediation training & accreditation available and accessible to the majority of Africans – cause it to become less formal to suit the uneducated population (only about 40% of all African adults are literate) so as to ensure that they are able to use commercial mediation/ device training and certification for local/ village commercial mediators so enhancing their access to justice.

Adoption of inclusive strategies rather than risk excluding the lower end of the commercial litigation market through what could well be regarded as elitist projects, considering that SMES contribute more than 50% of GNI in most Sub-Saharan countries, such as incorporating schemes that will address their specific needs within the Magistrates and Small Claims Courts as well as traditional institutions by providing affordable legal advice and ADR services at community level.

Is a focus shift from arbitration to commercial mediation in Africa desirable? The economic growth and development/ and advancement of both intra-African regional trade and trade with other continents would be given great impetus when an environment exists to support fast, efficient and cost-effective determination of disputes through commercial mediation which is quite business friendly as parties have more power to determine outcomes and implement them.

*'Ambition maketh man'* so goes the age-old adage. Why not seek a platform at the AU to enlighten AU heads of States of the presence of qualified Commercial Mediation practitioners in Africa and of Mediation's

potential benefits? A structured way to partner and work with the AU at policy level could be developed in a bid to promote commercial mediation in Africa, with a view to ensuring that a deliberate effort is made and with funding being invested to increase awareness and the practice of commercial mediation. In this way, AU will help in making Africa business friendly. A starting point could well be for the AU to focus on its vision to unite Africa in Peace and Trade, to break trade and human movement barriers and with the improved funding and development in infrastructure and increased use of ICT, intra-Africa trade is set to improve.

Sensitize regional trading blocs to incorporate international commercial mediation in regional courts and help in its advancement by partnering with those regional organizations in coming up with rules and codes of conduct etc AU, AfDB, EAC, COMESA, SADC, ECOWAS, AFRIPO

CIArb ought to be at the centre of shifting the focus and enabling greater application and use of international commercial mediation at arbitration centres (with a focus on arbitration and less emphasis on commercial mediation) and greater co-operation and sharing of best practices. [*Make mention of Cairo Regional centre for International Commercial Arbitration (CRCICA) 1979, Egypt, Lagos Regional Centre for International Commercial Arbitration (LRCICA), 1989, Lagos Court of Arbitration, 2012, LCIA –MIAC Arbitration Centre in Mauritius, 2012, Kigali Centre for International Arbitration (KIAC) Rwanda, 2012, Nairobi Centre for International Arbitration (NCIA) 2013*].

Find ways of engaging with the business community with the informal business sector being sensitized and trained and encouraged to use commercial mediation. This can be undertaken at policy level where partnership between private sector groups, Government and CIArb may be explored.

Partnership with the private sector is key. CIArb needs to make it known that it has the capacity to be the fulcrum of providing expertise and mediators to resolve disputes, of whatever nature. To this end, during the month of June 2015, the Kenya Revenue Authority announced an intention to use mediation to sort out pending and future disputes relating to tax. The Kenya Branch has already made its interest in training facilitators known to the Authority.

Countries have only just been scratching the surface in terms of the application and promotion of commercial mediation whereas the globalization of commerce including the spread of e-commerce requires

that Africa, as the fastest growing continent currently and as a preferred investment destination, has a cost-effective and efficient system of resolving commercial disputes. This will further enhance international trade and spur development. CIArb is hereby called upon to stand up and reclaim its place as the premier dispute resolver within the African development agenda, to be proactive in promoting the recognition and appointment of African mediators in international commercial mediation since corporate firms the world over, even where African-owned, continue to prefer to appoint foreign mediators in international commercial mediation. Is this due to a lack of knowledge that Africa has credible, well-trained (that means by the Chartered Institute) mediators or are other factors involved in the making of such a decision? We have our work cut out for us.



## THE CHALLENGES FACING ARBITRAL INSTITUTIONS IN AFRICA

By: Collins Namachanja\*

### ABSTRACT

*Arbitration, as a key arm of Alternative Dispute Resolution (ADR) is hailed as a solution to the problems associated with litigation. Arbitral institutions are established and operated to offer administrative support to the arbitral process. While the option is open for parties to commercial transactions to refer their disputes to arbitral institutions in Africa, most prefer to 'export' their matters to London or Paris, under the rules of large international arbitral institutions. This paper identifies and addresses the challenges faced by arbitral institutions in Africa, which lead to the exportation of arbitration out of the continent.*

*This paper identifies and discusses pertinent challenges facing arbitral institutions including (1) different legal systems of parties' countries of origin; (2) language barrier; (3) uncoordinated institution building; (4) low numbers of disputes handled by arbitral institutions; (5) insufficient awareness of arbitration processes and procedures among lawyers, (6) nationality of the arbitrators and institutions, (7) low confidence in African arbitrators; (8) political instability in many African countries; (9) insufficient or lack of awareness of arbitration processes and procedures among judges.*

*Specific attention is given to Kenya, with an analysis of court decisions relating to arbitration to illustrate the challenge of incongruent application of the principles and law on arbitration by the superior courts as the metaphorical 'Achilles heel' to arbitral institutions in Africa.*

*To resolve some of these issues, this paper proposes (1) establishment of an Africa Arbitration publication, encompassing developments on the continent on arbitration matters (2) a public database of able and qualified African arbitrators and law firms to handle arbitral proceedings (3) enhanced training of the judges of the superior courts on arbitration.*

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*“When will mankind be convinced...and agree to settle their difficulties by arbitration?”*

*Benjamin Franklin, FRS (January 17, 1706 [O.S. January 6, 1705] – April 17, 1790)*

## 1. OVERVIEW OF THE ARBITRAL INSTITUTIONS IN AFRICA

Arbitration, as a key arm of Alternative Dispute Resolution (ADR) is hailed as a solution to the problems associated with litigation. 73% of multinational enterprises prefer to use international arbitration over litigation to solve their disputes.<sup>1</sup> As per Lord Langdale, M.R. in **The Earl of Mexborough v. Bower**:<sup>2</sup>

*“(m)any cases occur, in which it is perfectly clear, that by means of a reference to arbitration, the real interests of the parties will be much better satisfied than they could be by any litigation in a Court of justice. “*

Across the globe, arbitration is considered a favourable avenue for resolution of disputes arising from cross-border transactions, a view which has seen 95% of multinational enterprises include an arbitral clause in contracts.<sup>3</sup> With special reference to International Commercial Arbitration, parties to contractual agreements across borders in different African countries have increasingly adopted an arbitration clause to determine the mechanisms of resolving disagreements. Investors normally prefer the adoption of arbitration as the dispute resolution mechanism as opposed to litigation due to corruption, civil unrest and inefficiency of the state courts.<sup>4</sup>

The hallmark of arbitration, and ADR as a whole, is the release of the process to the intentions of the parties, who exercise extensive control over proceedings. At the commencement of the dispute resolution process,

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<sup>1</sup> Gerry Lagerberg and Robert Kus, ‘Global Survey Sheds Light on Perceptions of International Arbitration’ (PriceWaterhouse Coopers 2007).

<sup>2</sup> (1843), 7 Beav. 132.

<sup>3</sup> Gerry Lagerberg and Robert Kus, ‘Global Survey Sheds Light on Perceptions of International Arbitration’ (PriceWaterhouse Coopers 2007).

<sup>4</sup> Lexis PSL and Mayer Brown International LLP, ‘Arbitration in sub-Saharan Africa’ (Lexis Nexis 2015).

parties exercise their freedom in submitting the matter to an arbitral tribunal. The constitution of the tribunal, yet again, is determined by the parties, who may either select an ad hoc tribunal or an institutional tribunal.

76% of multinational corporations opt for institutional arbitration as opposed to ad-hoc arbitration.<sup>5</sup> From as far back as 1958, the world has encouraged the strengthening of arbitral institutions as a means of advancing international commercial arbitration.<sup>6</sup> The UN member states in 1959 recognized 'the desirability of encouraging, where necessary, the establishment of new arbitration facilities and the improvement of existing facilities, particularly in some geographic regions and branches of trade'<sup>7</sup>.

Arbitral institutions are established and operated to offer administrative support to the arbitral process. While there is insufficient empirical research into the extent to which arbitral institutions have discharged this role, the tendency of parties to arbitral proceedings to shy away from African institutions may be an indication of failure, in this respect. It is not necessary that the institution also forms the arbitral tribunal. However, it would usually concern itself with appointment of arbitrators, provision of facilities for the conduct of the proceedings and training of members of the public on arbitration, among other roles.

Due to the seemingly limited role arbitral institutions play in the arbitration process, many multinational enterprises opt for arbitration institutions close to the location of the dispute; however, due to the lack of a track record of efficiently concluded cases in these less-developed arbitral

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<sup>5</sup> Gerry Lagerberg and Robert Kus, 'Global Survey Sheds Light on Perceptions of International Arbitration' (PriceWaterhouse Coopers 2007).

<sup>6</sup> UN, Final Act of the United Nations Conference on International Commercial Arbitration, No 4739, *United Nations Treaty Series* (UN 1959) 10 <<https://treaties.un.org/doc/Publication/UNTS/Volume%20330/volume-330-I-4739-English.pdf>> Accessed on 3 June 2015; Ion Nestor, 'Problems Concerning the Application and Interpretation of Existing Multilateral Conventions on International Commercial Arbitration and Related Matters' *Report in the Yearbook of the United Nations Commission on International Trade Law* 2 (UNCITRAL 1972) 231 <<http://www.devkrishan.com/resources/Nestor---1970-Report-on-Multilateral-Conventions.pdf>> Accessed on 3 June 2015.

<sup>7</sup> UN, *Final Act of the United Nations Conference on International Commercial Arbitration*, No 4739, *United Nations Treaty Series* (UN 1959) 10 <<https://treaties.un.org/doc/Publication/UNTS/Volume%20330/volume-330-I-4739-English.pdf>> Accessed on 3 June 2015;

institutions, the parties may consider sending their matters to other well established ones.<sup>8</sup> African arbitral institutions suffer as a result of such factors in choosing an administrator for the process.

Arbitral institutions may either be national (general or specialised), binational, or international.<sup>9</sup> While the 1958 UN recommendation bent towards establishment of 'geographic regions', African states, in this spirit, established a number of arbitral institutions limited to their localities. This has supported arbitration in the region. However, it is notable that establishment of geographic regions may have contributed to a 'duplication of effort' referred to in the 1958 UN recommendation, whereas if the states had united to work on regional solutions, there may have been stronger integrated arbitral institutions representing a number of states.

There is no established Pan-African arbitration centre.<sup>10</sup> Most of the institutions based in African countries serve the local population. A comprehensive list of the arbitral institutions in Africa is contained in Appendix 1. However, arbitral institutions serving particular regions or groups of countries are as follows:<sup>11</sup>

- (a) Northern Africa - Cairo Regional Centre for International Commercial Arbitration (CRCICA) based in Cairo, Egypt; CRCICA has been hailed as 'one of the best arbitration centres across the African continent and can readily be recommended for use by parties from both the African continent and elsewhere'.
- (b) Western and Central Africa - Common Court of Justice and Arbitration (CCJA) based in Abidjan, Côte d'Ivoire; established by

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<sup>8</sup> Gerry Lagerberg and Robert Kus, 'Global Survey Sheds Light on Perceptions of International Arbitration' (PriceWaterhouse Coopers 2007).

<sup>9</sup> Peter Benjamin, 'A Comparative Study of International Commercial Institutional Arbitration in Europe and in the United States of America' in P Sanders (ed) *Arbitrage International Commercial 1* (Union Internationale Des Avocats 1960).

<sup>10</sup> Steven Finizio and Thomas Führich, 'Africa's Advance' *Expert View: Surveying Africa* (Commercial Dispute Resolution, May - June 2014) 27 - 29.

<sup>11</sup> Benoit Le Bars, Lazareff Le Bars, 'Arbitrating in West and Central Africa: An Introduction to OHADA' *Wolters Kluwer Law & Business* (Kluwer Arbitration Blog 2013) <<http://kluwerarbitrationblog.com/blog/2013/02/21/arbitrating-in-west-and-central-africa-an-introduction-to-ohada/>> Accessed on 2 June 2015.

- the Organization for the Harmonization of Business Law in Africa (OHADA) (Benin, Burkina Faso, Cameroon, Central African Republic, Chad, the Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea Bissau, Guinea, Mali, Niger, Senegal and Togo);
- (c) Southern Africa – Arbitration Foundation of Southern Africa (AFSA) based in South Africa;
  - (d) Eastern Africa – Kigali International Arbitration Centre (KIAC), Nairobi Centre for International Arbitration (NCIA), Mauritius International Arbitration Centre.

While the option is open for parties to commercial transactions to refer their disputes to arbitral institutions in Africa, most prefer to 'export' their matters to London or Paris under the rules of large international arbitral institutions.<sup>12</sup> This paper theorises that this tendency to export the matters to other jurisdictions, or to 'import' arbitrators to handle matters at the expense of development of local expertise may be attributed to the challenges that arbitral institutions in Africa face.

## 2. LITERATURE ON CHALLENGES FACING ARBITRAL INSTITUTIONS IN AFRICA

In the 12<sup>th</sup> Century, Bernard of Chartres is identified with having said the following words:

*"...we (the Moderns) are like dwarves perched on the shoulders of giants [the Ancients], and thus we are able to see more and farther than the latter. And this is not at all because of the acuteness of our sight or the stature of our body, but because we are carried aloft and elevated by the magnitude of the giants..."*

In 1676, Sir Isaac Newton, the English physicist, mathematician, astronomer, alchemist, inventor, theologian and natural philosopher,

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<sup>12</sup> Steven Finizio and Thomas Führich of WilmerHale, 'Africa's Advance' *Africa – Expert View: Surveying Africa – Commercial Dispute Resolution*, May-June 2014 (Centre for Dispute Resolution 2014) 26  
<[http://www.wilmerhale.com/uploadedFiles/Shared\\_Content/Editorial/Publications/Documents/expert-view-surveying-africa-africas-advance-finizio-2014.pdf](http://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/expert-view-surveying-africa-africas-advance-finizio-2014.pdf)> accessed on 3 June 2015.

renowned for discovering the Laws of Gravity, wrote a letter to Robert Hooke, in which he wrote:

*"If I have seen further, it is by standing on the shoulders of giants".*

Similarly, I, just but a mere dwarf in the academic discourse on arbitration, must stand on the shoulders of my colleagues who have studied Arbitral Institutions in Africa before me. In identifying and discussing the challenges of arbitral institutions in Africa, I will first give an overview of what has been said before me.

There are a myriad of other challenges to the arbitral institutions in Africa. Dr. Kariuki Muigua, lecturer, author and Fellow of the Chartered Institute of Arbitrators (Kenya Branch), writes about some of the challenges arbitral institutions experience, in a paper on 'Reawakening Arbitral Institutions for Development of Arbitration in Africa'. These challenges including the following:<sup>13</sup>

- (a) Confidentiality requirements: in some countries, there is no provision for confidentiality in arbitration, and the proceedings may be published, unless the parties enter into a separate confidentiality agreement limiting disclosure of their dealings. This puts arbitration in the same league as litigation in terms of disclosure, and poses a threat to the development of arbitration as a more favourable course of action;
- (b) Institutional capacity: some institutions in Africa need a greater focus on capacity building to improve the number of, and quality of training for arbitrators, and more funds to facilitate efficient administrative services;
- (c) National Court's interference: the courts in some countries, by virtue of their national arbitration legislation, are afforded a large opportunity to interfere with the arbitral process. Litigators infuse the arbitration system with the 'litigation mentality', which slows down

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<sup>13</sup> Kariuki Muigua, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' (May 2015)  
<<http://www.kmco.co.ke/attachments/article/154/Reawakening%20Arbitral%20Institutions%20for%20Development%20of%20Arbitration%20in%20Africa.pdf>> Accessed on 22 June 2015.

- the arbitral process through unnecessary requests for adjournments and interlocutory applications at the national courts, all which serve nothing but to delay the process and increase the associated costs. For example, Tanzania's arbitration 'law affords too great an opportunity for procedural intervention of the courts – obviously an undesirable characteristic for parties unfamiliar with the Tanzania legal process';<sup>14</sup>
- (d) Inadequate legal and institutional framework on international commercial arbitration: some African countries have provisions in their national legislation that are not in accordance with the UNCITRAL Model Law, the international standard for arbitration, posing a challenge since international arbitrators find it difficult to practice in those countries because the legal and institutional framework is not in tune with best practice;
  - (e) Appointment of International Arbitrators by parties: when parties select international arbitrators, it has generally been observed that African parties tend to select non-Africans, where instead of focusing on development of local home-grown talent, there is the inclination to 'import' arbitrators for their 'expertise', which begs more from their nationality than their actual capacity;
  - (f) Arbitrability: some African countries' arbitration statutes do not have a clear delineation of which cases are arbitrable, posing a challenge to the tribunal which would first need to consider if the matter may possibly be handled through arbitration;
  - (g) Recognition of international arbitral awards: there are different statuses on recognition of international arbitral awards in African countries, where those that are signatories to the New York Convention or other similar convention on arbitration, are in line with international best practices, while those that are not signatories still lag behind;
  - (h) Perception of corruption/government interference: African governments have been blamed for interference and corruption, and whereas some of these claims are not backed by evidence, the perception of this interference poses a hindrance to the arbitral process where the tribunal is to be upright and independent of all

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<sup>14</sup> Robert Vincent Makaramba (Hon Mr Justice), 'Arbitration as a Mechanism to Speed up Delivery of Justice' (The United Republic of Tanzania, The Judiciary Round Table Discussion on Curbing Delays in Commercial Dispute Resolution, A Paper presented at the Round Table Discussion, Dar es Salaam International Conference Centre, 20 July, 2012).

external influence. In addition, the interference may arise from appointment of the members of the arbitral institution by the government, for example in Kenya, where a good section of the leadership of the Nairobi Centre for Arbitration is appointed by the Government of Kenya, and while the support of the executive is appreciated, '(i)ts involvement however should be limited in order to ensure that the Centre is independent, and trusted by users'.<sup>15</sup>

- (i) The arbitral clause: there are many situations where the arbitral clause is challenged due to bad drafting (pathological arbitration clauses), the end result being that the dispute will not be referred to arbitration, thereby defeating the intention of the parties.

Paul Ngotho, a Fellow of the Chartered Institute of Arbitrators (Kenya Branch) and a Member of the Royal Institution of Chartered Surveyors,<sup>16</sup> adds his voice to this discourse on the challenges of arbitration in Africa.

With a focus on the arbitrators themselves, and not the institutions, Ngotho states that Africa's arbitrators face challenges through (1) politicisation of disputes, especially where the disputes involve infrastructural projects, land, and public funds, (2) lack of professional interaction, with few fora for arbitrators from different countries in Africa to meet, interact and share ideas, (3) lack of diversity, where there are not enough women, non-lawyers and young arbitrators, (4) proliferation of regional arbitration centres, where there may be too many disunited efforts to create the 'largest' 'international' arbitration centre, instead of focusing joint efforts toward creation of fewer centres with more efficient working structure, (5) language and territorial barriers, where English is the dominant language in some countries, while French is the main language in others, Portuguese in a number of countries, and so on; (6) African culture is close-knit and presents issues with disclosure requirements, for example with regard to impartiality where in order to protect one's own, an arbitrator may fail to reveal a link with the parties; (7) corruption, where

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<sup>15</sup> Nairobi Centre for Arbitration Act, 2013, s 6; Peter Mutuku Mbithi, 'International Commercial Arbitration in Kenya: Is Arbitration a Viable Alternative in Resolving Commercial Disputes in Kenya?' (LL.M Thesis, University of Cape Town 2014).

<sup>16</sup> Paul Ngotho, 'Profile' (2014) <<http://www.ngotho.co.ke/Profile.html>> Accessed on 14 July 2015.



according to Ngotho: “corruption among arbitrators, as among judges, is extremely difficult to prove (sic) because, like arbitration, corruption is also confidential!”; (8) insufficient experience of some arbitrators, (9) exclusion of Africa’s arbitrators from international arbitrations, thereby contributing to their low levels of experience; (10) high cost of arbitrators’ training and few (if any) mentorship programs for arbitrators, rendering it difficult for the more experienced arbitrators to guide those in their early years of the field; (11) open bias, where European arbitral organisations give ‘European and American arbitrators repeat appointments and very rarely appoint arbitrators from Africa or from South America, even though those countries have qualified arbitrators’.<sup>17</sup>

### 3. CHALLENGES FACING THE ARBITRAL INSTITUTIONS

Based on an evaluation of existing literature on arbitral institutions across the continent, the following arise as further challenges to arbitration institutions:

#### 3.1 Different legal systems

The legal systems in different countries across Africa vary from civil law, common law, Shari’a law, Roman-Dutch law and hybrid jurisdictions.<sup>18</sup> Due to the different origins of the legal systems, coupled with cultural differences ranging from Francophone, Anglophone and Lusophone backgrounds, arbitration takes diverse forms when the international laws and principles are ‘imported’ into each individual

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<sup>17</sup> Paul Ngotho, ‘Challenges Facing Arbitrators in Africa’ (East Africa International Arbitration Conference, The Norfolk Hotel, Nairobi, 28 – 29 July 2014).

<sup>18</sup> Chiara Albanese, ‘Ring of Diamonds: Africa’s Emerging Centres of Arbitration’ *Africa Law and Business* (Global Legal Group 2015) <<http://www.africanlawbusiness.com/news/ring-of-diamonds-africas-emerging-centres-of-arbitration>> accessed on 14 July 2015.

country.<sup>19</sup> Parties engaging in arbitration, in most cases seek to avoid the 'diversities' of the domestic legal system, as Sampasa succinctly states:<sup>20</sup>

*"[A]rbitration provides certain mechanisms of escape from substantive and procedural rules of municipal systems which foreign businessmen scarcely understand and often consider as having very little relevance to the issues needing resolution."*

However, the goals of Sampasa's 'foreign businessmen' cannot be fully achieved because at different points of the arbitral process, there is need to interact with the local court, for example during enforcement, where 'the enforceability of international arbitral awards rests on a decision to that effect of domestic courts'.<sup>21</sup> Due to the different legal systems and approaches to arbitration within the countries, an understanding of the host country's laws, rules and procedures would be required for the tribunal and parties to conduct the process efficiently.

Where, for example the parties are from Country A and Country B, and they select Country Y as the seat of arbitration with its law to govern the process, the arbitrators and counsel for the parties would need to be well versed in the legal system of Country Y to conduct the arbitration smoothly. However, since all the parties involved in the arbitration, including the tribunal, may have a different background in their understanding of normative rules of arbitration, the divergence may give rise to legal uncertainty. For example, research suggests that an 'an arbitrator who has the same legal origin as the host country, holding all else equal, will tend to review the actions of the host country more favourably'.<sup>22</sup>

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<sup>19</sup> Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (Kluwer Law International 2001).

<sup>20</sup> Samson L Sempasa, 'Obstacle to International Commercial Arbitration in African Countries' 41 *International and Comparative Law Quarterly* 2 (British Institute of International and Comparative Law 1992) 387 - 413.

<sup>21</sup> Polina Dlagnekova, 'The Need to Harmonize Trade-Related Laws within Countries of the African Union: An Introduction to the problems Posed by Legal Divergence' 15 *Fundamina* 1 (2009).

<sup>22</sup> The International Bureau of the Permanent Court of Arbitration (ed) 'An African Seat for the 21<sup>st</sup> Century' *The Mauritius International Arbitration Conference* 172

Since parties may select arbitration as the dispute resolution mechanism of choice on the basis of its predictability and legal certainty as opposed to the local courts, this challenge may undermine the advantage of this ADR mechanism.

### 3.2 Language

Language barrier is not generally considered as a challenge in this day and age, with developments in technology and the transition of the world into a global village. However, from a practical perspective, where English-speaking parties to a matter are in a French-speaking country, and the arbitral institution only operates in French, it is likely that they would prefer an institution elsewhere. For example, CRCICA in Egypt only administers cases in English and Arabic: it neither handles cases nor avails its arbitral rules in French.<sup>23</sup> Similarly, CCJA in Cote d'Ivoire only accepts French as the language of the arbitration,<sup>24</sup> thereby presenting a potential challenge to English-speaking parties.

### 3.3 Uncoordinated institution building

Many African countries have arbitral institutions. These national arbitration centres serve parties from that specific country. While each centre pools resources to build its own, there have been uncoordinated efforts toward promotion of regional centres. Notable are the efforts of CRCICA which was even honoured as the Regional Institution of 2013 by the Global Arbitration Review.<sup>25</sup>

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<sup>23</sup> Dr Werner Jahnel, Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius (African Development Bank 2014) 47  
<[http://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment\\_Report\\_of\\_arbitration\\_centres\\_in\\_C%3%B4te\\_d%E2%80%99Ivoire\\_Egypt\\_and\\_Mauritius.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment_Report_of_arbitration_centres_in_C%3%B4te_d%E2%80%99Ivoire_Egypt_and_Mauritius.pdf)> Accessed on 3 June 2015.

<sup>24</sup> Dr Werner Jahnel, Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius (African Development Bank 2014) 20  
<[http://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment\\_Report\\_of\\_arbitration\\_centres\\_in\\_C%3%B4te\\_d%E2%80%99Ivoire\\_Egypt\\_and\\_Mauritius.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment_Report_of_arbitration_centres_in_C%3%B4te_d%E2%80%99Ivoire_Egypt_and_Mauritius.pdf)> accessed on 3 June 2015.

<sup>25</sup> CRCICA, 'CRCICA Honoured as the Regional Institution of 2013 by the Global Arbitration Review' *CRCICA Newsletter 1-2014* (CRCICA 2014)

Africa's arbitration institutions should work hand in hand to foster growth. The national centres should partner with other national centres to share experiences. Bi-national institutions should learn lessons from similar bodies. Likewise, regional institutions should join the global networks of institutional arbitration centres and adopt best practices. According to Professor Minoli's Keynote Report to the Third International Arbitration Congress:<sup>26</sup>

*"the arbitration organizations are the natural meeting points for social forces that exert pressure to strengthen the international commercial arbitration network, extend it to world areas that still remain uncovered, and above all, to bring it to the 'standard' of full working efficiency."*

With increased coordination of the region's arbitration institutions, all parties can effectively work toward instilling public confidence in African institutions as the first choice of oversight bodies for even the most complex of disputes.

### 3.4 Low numbers of disputes handled by arbitral institutions

Comparatively, African arbitral institutions have handled few disputes to date, and litigation is still the favourite dispute resolution mechanism. These institutions 'do not yet have significant international case loads'.<sup>27</sup>The arbitral institutions need more disputes referred to them so that they can build a cogent body of 'African arbitration jurisprudence'. While precedence does not hold sway in arbitration as it does in the courts, the rules and procedures of arbitration may be concretised in published awards. The more matters handled by the institutions, the better skilled they become in anticipating possible shortfalls.

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<<http://crcica.org.eg/newsletters/nl012014/nl012014.html>> accessed on 3 June 2015.

<sup>26</sup> Ion Nestor, 'Problems Concerning the Application and Interpretation of Existing Multilateral Conventions on International Commercial Arbitration and Related Matters' *Report in the Yearbook of the United Nations Commission on International Trade Law* 2 (UNCITRAL 1972) 233 <<http://www.deokrishan.com/resources/Nestor---1970-Report-on-Multilateral-Conventions.pdf>> accessed on 3 June 2015.

<sup>27</sup> Steven Finizio and Thomas Führich, 'Africa's Advance' *Expert View: Surveying Africa* (Commercial Dispute Resolution, May - June 2014) 27 - 29.

### 3.5 Little or total lack of awareness of arbitration processes and procedures among counsel

If the advocate handling the matter is not apprised of the workings of arbitration, the party's case may be lost. Since the arbitration process is meant to be swift and efficient, counsel needs to know what to do and when. While the arbitral institution may assist to appoint the arbitral tribunal, the parties are free to select counsel. With a proclivity for the antagonistic nature of litigation, ill-advised counsel may misconstrue the process and fail to appreciate the nature of arbitration. While counsel may display antics common in litigation in many African countries, such as unnecessary requests for adjournments and other technical tactics, they may contribute to the collapse of their client's case or to an increase in the overall cost of the arbitration.

### 3.6 Nationality of the Arbitrators and Institutions

Most international commercial arbitrations arise from an arbitral clause in the contract which defines the relationship between the parties. At the onset, parties may consider which arbitral institution to refer their disputes to. In Africa, as already stated above, most parties to international commercial contracts prefer to refer their disputes to other continents. One reason proffered is that foreigners may favour the input of non-nationals. This is especially so when the foreign party is dealing with state parties or other nationals, where there would be a perception of the possibility of undue influence on the tribunal. Also, to 'internationalise' the tribunal, there may be need to add foreign nationals to the domestic panels of arbitrators or by designating a third party country as the seat of arbitration.<sup>28</sup>

Arbitration by its nature does not allow for the formation of precedent. However, African arbitral institutions may need a firm foundation to support their credibility and capacity to handle complex international commercial arbitration.

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<sup>28</sup> Ion Nestor, 'Problems Concerning the Application and Interpretation of Existing Multilateral Conventions on International Commercial Arbitration and Related Matters' *Report in the Yearbook of the United Nations Commission on International Trade Law* 2 (UNCITRAL 1972) 231 <<http://www.devkrishan.com/resources/Nestor---1970-Report-on-Multilateral-Conventions.pdf>> Accessed on 3 June 2015.

Institutions offer administrative support to parties throughout the arbitration process. The institutions may recommend arbitrators to constitute the tribunal. To borrow from the experiences of the Cairo Regional Centre for International Commercial Arbitration, to achieve legitimacy in the eyes of the parties and promote capacity building of African arbitral institutions, the institutions should consider non-nationals in the tribunals. This may especially be so where parties request appointment of a 3-member tribunal. In 2011, CRCICA arbitrators were drawn from Egypt and other countries including Lebanon, France, Belgium, Canada, Colombia, Iraq, the Netherlands, Sweden, Switzerland and Syria.<sup>29</sup>

To accommodate parties to the dispute from countries outside of Africa, the institution may need to incorporate non-African advisors. These individuals may give insight to the workings of the institutions to 'regionalise' them and assist toward achieving a global level of operation. CRCICA demonstrates this by the appointment of non-Egyptian members to its Advisory Committee, a sign that it is working toward a global approach to its functions.<sup>30</sup>

### **3.7 Low Confidence in African arbitrators**

Public confidence in arbitrators reflects on the arbitral institutions. If the members of the public are confident in the expertise and capabilities of the arbitrators, they would be ready to submit to the arbitral institution in the particular jurisdiction to administer the process. If, however, the parties do not have faith in the arbitrators, they may favour arbitrators in another geographical region, and therefore place their faith in the arbitral institution in that particular area.

Some individuals opine that specific African countries' arbitral institutions where ADR is underdeveloped conduct arbitrations in a 'disorganised and ineffective manner', prompting the parties to refer

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<sup>29</sup> CRCICA, *CRCICA Newsletter 1/2012* (CRCICA 2012) <<http://www.crcica.org.eg/newsletters/nl022012/crnl22012a002.html>> Accessed on 3 June 2015.

<sup>30</sup> CRCICA, *CRCICA Newsletter 2/2012* (CRCICA 2012) <<http://www.crcica.org.eg/newsletters/nl201202/crnl22012a003.html>> Accessed on 3 June 2015.

complex issues, such as international investment and commercial disputes to institutions such as ICSID, the ICC and LCIA. Similarly, even in selection of arbitrators, practitioners from Africa are rarely the choice of parties to the arbitral process, despite the possible advantages of their knowledge of cultural matters and their relatively lower cost as compared to arbitrators from other continents.<sup>31</sup>

African-based arbitrators do not have global reach and are rarely recognised in international award schemes. Who's Who Legal performs an annual review of distinguished practitioners from different nations across the world, and holds a dinner where the nominees and award recipients are lauded. With specific regard to international commercial arbitration, Who's Who Legal announced the 2014 'Most Highly Regarded Firms' in Arbitration, identifying 624 arbitrators and counsel from 84 countries'.<sup>32</sup> Of the 2014 top 25 arbitrators in the world listed by Who's Who, none is based in Africa.<sup>33</sup> In 2013, out of the 573 arbitrators from 74 countries, yet again no African-based arbitrator featured in the *crème-de-la-crème*.<sup>34</sup>

Who's Who Legal proclaims the intelligence, skill, knowledge and experience of law firms in the US, Canada, Europe, Asia, and Australia, but Africa is glaringly left out of the rankings.<sup>35</sup> This should be a challenge to African institutions, which could gain from the promotion and distinguishing of the practitioners in their own backyards. Through nomination of the top practitioners in the region, African institutions could

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<sup>31</sup> May Agbamuche-Mbu, 'Arbitration - A Key to Successful Foreign Investment' (Norfolk Partners, May 2014).

<sup>32</sup> Who's Who Legal, 'Most Highly Regarded Firms: Arbitration 2014' <<http://whoswholegal.com/news/analysis/article/30934/most-highly-regarded-firms-arbitration-2014/>> Accessed on 3 June 2015.

<sup>33</sup> Who's Who Legal, 'Most Highly Regarded Firms: Arbitration 2014' <<http://whoswholegal.com/news/analysis/article/30934/most-highly-regarded-firms-arbitration-2014/>> accessed on 3 June 2015.

<sup>34</sup> Who's Who Legal, 'Most Highly Regarded Firms: Commercial Arbitration 2013' <http://whoswholegal.com/news/analysis/article/30104/most-highly-regarded-firms-commercial-arbitration-2013/>

<sup>35</sup> Who's Who Legal, 'Most Highly Regarded Firms: Arbitration 2014' <<http://whoswholegal.com/news/analysis/article/30934/most-highly-regarded-firms-arbitration-2014/>> Accessed on 3 June 2015.

increase the chances of home-grown talent being recognised globally, and shine a light on the incredible expertise available. This could be a way of drawing the 'customers' to the African arbitration 'market'.

Who's Who Legal notably only lists 'specialists who have met independent international research criteria'.<sup>36</sup> Is it that African arbitrators do not have the intelligence, skill, knowledge or requisite experience to set trends on the continent? Or is it that Africa has hidden the arbitrators and will one day release their glory to the world? Rankings on international arbitration fora could foster credibility of African-based arbitrators to foreign investors, who could consider the continent as a favourable base for proceedings. This would go a long way in enhancing the role of African regional institutions in international arbitration, which would, as a result, make it easier to penetrate the global institutional arbitration market.

### **3.8 Political Uncertainty**

Many African countries have an unfavourable political environment, such that disputants favour more politically stable countries on other continents as the seat of arbitration. Parties to large transnational disputes would generally favour arbitral institutions in politically stable countries to carry out the administration of the process, because they offer greater certainty in efficient conduct of proceedings.<sup>37</sup> This is especially so since the disputes involve high value and complex transactions, and parties would be intent on completing the arbitration as efficiently, speedily and effectively as possible.

Political uncertainty is not isolated to African countries alone. Developing countries on other continents also face the debilitating effects of political instability and civil unrest. For example, in Latin America there is 'significant pressure from ... client(s) to appoint European arbitrators' to handle matters to the expense of local arbitrators due to 'instability in the region' which has 'stymied the embrace of local legal talent'. With

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<sup>36</sup> Who's Who Legal, 'Most Highly Regarded Firms: Arbitration 2014' <<http://whoswholegal.com/news/analysis/article/30934/most-highly-regarded-firms-arbitration-2014/>> Accessed on 3 June 2015.

<sup>37</sup> KwadwoSarkodie, 'International Arbitration in the Sub-Saharan African Context' (Mayer Brown 2014).



reference to South America, Leonard Tirado, a partner at Winston & Strawn LLP, the oldest firm in the City of Chicago, USA, states:

*“Political uncertainty may well be the benchmark that makes people cautious, especially if they have been bitten once before in a number of jurisdictions... countries with stronger institutions, legal certainty and better economic performance... are attracting more and more capital.”*

Africa has its own experience of political instability, diverting the attention of parties to international arbitration away from the continent. Civil unrest in the aftermath of the 2011 Middle East and North Africa (MENA) crisis in 2011 affecting countries such as Egypt and Libya has been an influential dissuading factor, coupled with a ‘lack of other regional alternatives’, which has seen parties resorting to countries with more established arbitral institutions, specifically Europe.<sup>38</sup>

An unsettled political environment deprives the African institutions from the experience that is required to build them, because the foreign disputants would prefer to choose arbitral institutions in countries with more predictable results. For example, how easy would it be for a disputant to land in a country, get from the airport to the place of residence during the arbitration process, live among the country’s inhabitants in peace during the arbitration, conclude the dispute resolution and take a plane back to the disputant’s home country? Threats of government destabilisation, extremist action and civil disorder would dissuade any right thinking and well-meaning investor in African arbitral institutions. Instead, the certainty, safety, rationality and comfort of a country with a stable political environment would draw the disputant, a fact which unfortunately directs most of the parties to the arbitral process to more developed parts of the world.

### **3.9 Limited appreciation of arbitration law and procedure among judges**

While arbitration operates as an independent dispute resolution mechanism aside from the courts, there are various instances where the court intervenes. The arbitration process may be all for nought if the

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<sup>38</sup> Steven Finizio and Amélie Skierka, ‘Arbitration in the Shadow of Old Empires’ (Wilmer Hale 2015).

judiciary does not support it. While there may be a general encouragement for parties to engage in arbitration, once an award is brought under court scrutiny, the gains of the process may be wiped out if a judge without the requisite specialised knowledge of arbitration imputes the very negativities of litigation that the parties sought to avoid.

Arbitration does not run completely parallel to the court system. It needs an efficient and independent judiciary to complement it.<sup>39</sup> In Africa, while there are intelligent, learned and experienced judges with the requisite efficiency of work and independence, in some countries the judges and courts are crippled by inadequate facilities including, more specifically, a shortfall in reference materials and training in commercial law and commercial arbitration matters.<sup>40</sup>

CCJA, based in Cote d'Ivoire and offering its services to parties of the OHADA treaty, has a dual system where it operates as an Arbitration Centre and the Supreme Court for matters between states arising from the OHADA Treaty. CCJA has been faulted for having judges with a 'lack of knowledge and fluency in arbitration'.<sup>41</sup> However, it must be pointed out that these are isolated opinions, and in general, for the OHADA states and parties originating from there, the CCJA is recommended as a 'suitable institutional arbitration system'.<sup>42</sup>

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<sup>39</sup> Amazu A Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (Cambridge University Press 2001) 40  
<[https://books.google.co.ke/books?hl=en&lr=&id=g837mlPTXFoC&oi=fnd&pg=PR11&dq=zambia,+institutional+arbitration&ots=IeyN8pOE-7&sig=itOHSmLVmYKy6V6APybBh\\_vP5V0&redir\\_esc=y#v=onepage&q=zambia%2C%20institutional%20arbitration&f=false](https://books.google.co.ke/books?hl=en&lr=&id=g837mlPTXFoC&oi=fnd&pg=PR11&dq=zambia,+institutional+arbitration&ots=IeyN8pOE-7&sig=itOHSmLVmYKy6V6APybBh_vP5V0&redir_esc=y#v=onepage&q=zambia%2C%20institutional%20arbitration&f=false)> Accessed on 3 June 2015.

<sup>40</sup> Amazu A Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (Cambridge University Press 2001) 40  
<[https://books.google.co.ke/books?hl=en&lr=&id=g837mlPTXFoC&oi=fnd&pg=PR11&dq=zambia,+institutional+arbitration&ots=IeyN8pOE-7&sig=itOHSmLVmYKy6V6APybBh\\_vP5V0&redir\\_esc=y#v=onepage&q=zambia%2C%20institutional%20arbitration&f=false](https://books.google.co.ke/books?hl=en&lr=&id=g837mlPTXFoC&oi=fnd&pg=PR11&dq=zambia,+institutional+arbitration&ots=IeyN8pOE-7&sig=itOHSmLVmYKy6V6APybBh_vP5V0&redir_esc=y#v=onepage&q=zambia%2C%20institutional%20arbitration&f=false)> Accessed on 3 June 2015.

<sup>41</sup> Dr Werner Jahnel, Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius (African Development Bank 2014) 18  
<[http://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment\\_Report\\_of\\_arbitration\\_centres\\_in\\_C%3B%4te\\_d%E2%80%99Ivoire\\_Egypt\\_and\\_Mauritius.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment_Report_of_arbitration_centres_in_C%3B%4te_d%E2%80%99Ivoire_Egypt_and_Mauritius.pdf)> Accessed on 3 June 2015.

<sup>42</sup> Dr Werner Jahnel, Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius (African Development Bank 2014) 19

### 3.10 The Kenyan Experience

Specific attention is drawn toward this particular challenge to arbitral institutions in Africa with a look at the Kenyan experience. It is imperative that there be the support of the courts for arbitral institutions to carry out their functions effectively. However, at times the very courts that are supposed to breathe life into arbitration stifle the process.

This paper delves into a brief analysis of some decisions of the Kenyan superior courts, to illustrate that with particular focus on sections 35 and 37 of the Arbitration Act No. 4 of 1995 of the Laws of Kenya, there are inconsistencies in the interpretation and application of arbitration law by the judiciary in the country. The hypothesis is that the honourable members of the bench do not have a single-minded approach to parties' recourse to the High Court and Court of Appeal, against an arbitral award.

Section 35 (1) of the Arbitration Act provides that '(r)ecourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3)', where section 35(2) provides the grounds for setting aside the award, and section 35(3) provides a time limit of 3 months for an application to be made, from the date the party received the award. Section 37 of the Arbitration Act provides for an application for setting aside or suspension of an arbitral award, where 'the recognition or enforcement of arbitral award, irrespective of the state in which it was made, may be refused only' (a) at the request of the party against whom it is invoked; or (b) by the High Court *suo moto*.

One of the most celebrated decisions in Kenya in the area of arbitration was delivered by Bosire, O'Kubasu and Nyamu JJ.A in **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR**, an appeal against the ruling and order of Kimaru J at the High Court. The subject matter of the suit was an agreement for the sale of land from which a dispute arose concerning the manner of payment of the purchase price. The matter was referred to arbitration as provided for under an arbitration clause in the contract, and once the matter was heard the tribunal delivered its award on 19th October, 1999 with the applicant absent; and copies of the award were forwarded to the parties' advocates. The respondent applied for leave to

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<[http://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment\\_Report\\_of\\_arbitration\\_centres\\_in\\_C%3CB4te\\_d%E2%80%99Ivoire\\_Egypt\\_and\\_Mauritius.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment_Report_of_arbitration_centres_in_C%3CB4te_d%E2%80%99Ivoire_Egypt_and_Mauritius.pdf)> Accessed on 3 June 2015.

enforce the award under section 36 of the Arbitration Act. Leave was granted on 17<sup>th</sup> January, 2002 (3 years later), and the applicant opposed enforcement vide an application dated 25<sup>th</sup> April, 2008 (almost 10 years after delivery of the award).

The main argument in the **Anne Mumbi Hinga** claim was that the applicant had no notice of either the reading or filing of the award. Kimaru J dismissed the application and found that the notice of making the award and the application to enforce the award were duly served. The appellant/applicant appealed Kimaru J's decision. In dismissing the appeal, the Court of Appeal stated inter-alia that:

*"...(h)ad the superior court played a supportive role as contemplated in Section 10 of the Arbitration Act and the other provisions in the Act which invite courts intervention, the consequential delay of close to 10 years in enforcing the award the subject matter of this appeal would have been avoided...In our case it is quite clear to us that it was wrong for the court to have entertained a challenge to arbitral award – reviewing or setting aside an award outside the provisions specifically set out in the Arbitration Act 1995. As we have stated above the court has no jurisdiction to do so in the first place under the clear provisions of the Act. Intervention by the filing of several interlocutory applications is which has in turn resulted in considerable delay should have been treated as a jurisdictional issue under the Act and dealt with straightaway."*

To phrase the honourable Judges' words differently, the High Court failed in its role of supporting arbitration because it entertained applications in the matter beyond the time limit allowed, thereby resulting in an inordinate delay of 10 years to the arbitral process. In doing so, the High Court also overstepped its jurisdiction. If the High Court had stuck to the law and applied section 35 of the Arbitration Act, it should have washed its hands at first instance when it realised that the matter was not properly before it. In the words of the Court of Appeal: *"the superior court had no business entertaining the application giving rise to this appeal as well and should have struck it out for lack of jurisdiction."*

The Court of Appeal also stated that the High Court erred in considering the application after the 3-month statutory period set under section 35(3) had elapsed. Yet again, the High Court misapplied section 35. In concluding the matter, the Court of Appeal held that the appeal before it was incompetent because there was no prior consent by the parties to

submit the matter to appeal, and neither were the conditions outlined under section 39(2) of the Act complied with. Section 39 provides that *'(w)here in the case of a domestic arbitration, **the parties have agreed** that (a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or (b) an appeal by any party may be made to a court on any question of law arising out of the award; such application or appeal, as the case may be, may be made to the High Court.'* (emphasis added).

While section 35 provides for an application to set aside an award, section 36 provides for recognition and enforcement of the award, and section 37 sets out the grounds for refusal of recognition and enforcement (presumably when an application is made by the winning party). The grounds set out under Section 37 for refusal of recognition and enforcement are the same grounds set out under Section 35 for setting aside an award. Gikonyo J, a Judge of the High Court of Kenya, discussed these two provisions in **Samura Engineering Limited v Don-Woods Company Limited [2014] eKLR** in an application for stay of execution of an order to enforce an arbitral award, and setting aside judgment on the application. In the words of the honourable judge:

*"There are striking similarities on the grounds of setting aside the award under section 35 and 37 of the Arbitration Act. It is also clear that both sections give the party against whom an award has been made opportunities at different stages of the proceedings.... I do not think there is any conflict between section 35 and 37 of the Arbitration Act. Equally, I do not think section 35 of the Arbitration Act is a claw-back on the opportunity to be heard granted under section 37 of the Arbitration Act. In any event, the Arbitration Act as an existing law as at the effective date of the Constitution of Kenya, is the exemplar and classic promoter of the principles of justice enshrined in the Constitution.... I hope parties will so comply with the law and obviate a situation where the court will waste the precious judicial time on a convoluted matter such as this. I also would wish to see a recast of the Arbitration Rules in order to reconcile them with the requirements of the Act and the Constitution which encourages Alternative Disputes (sic) Resolution."*

The inconsistencies in interpretation of the same law by different judges contributes to legal uncertainty in the arbitration process, where once a matter is submitted to the High Court, parties would have no guarantee that the judges would appropriately apply the law. Since there is

no provision for appeal to the Court of Appeal under sections 35 and 37, parties who have a matter disposed of by the High Court where the judge inaccurately applies the arbitration law, would be forced to abide by an arguably unjust decision. Further, since section 39 appeals to the Court of Appeal are restricted to points of law, and only with the prior consent of the parties presumably before the dispute arises, the parties may suffer for lack of foresight if such a clause is not included in the arbitration clause. This in turn presents a conflict for the parties; balancing between the principle of finality in arbitration and pursuit of a fair hearing.

The 'opportunity to be heard' referred to by Justice Gikonyo above, relates to parties' attempts to file section 35 or 37 applications ex-parte, without notifying the other party about their actions.

The Court of Appeal has previously discussed the procedure under section 35, where Bosire, Onyango Otieno and Aluoch JJA, stated as follows in the case **Sadrudin Kurji& another v Shalimar Limited & 2 others [2008] eKLR:**

*"The procedure as we understand it is that at the conclusion of arbitral proceedings, as those in issue before us, either party may file the arbitral award in Court, (rule 4(1). Upon filing of the award by dint of the provisions of rule 5, the party filing is obliged to notify all parties of the filing. Thereafter any party aggrieved has a right to apply pursuant to section 35 of the Act for an order setting aside the award for any one, some or all the reasons which are set out under that section. A careful reading of the rules suggests that ex parte proceedings are eschewed. However if any party wishes to move the court ex parte, then rule 6 comes into play. One must seek the leave of the court to enforce any arbitral award. Such an application may only be made where no party has taken steps to move the court under section 35 to set aside the arbitral award."*

It is not to say that all judges misunderstand the meaning and application of sections 35 and 37 of the Act. In various other judgments, the Courts have adhered to the strict application of these sections, with a view to upholding the spirit of arbitration. As per Ngugi J.M, Judge of the High Court in a ruling in **Nancy Nyamira & Another v Archer Dramond Morgan Ltd [2012] eKLR:**

*"...it is important that Courts enforce the time limits articulated in that Act – otherwise Courts would be used by parties to underwrite the undermining*

*of the objectives of the Act. In section 35(3) of the Arbitration Act, a party can only bring an application to set aside the arbitral award within 3 months from the date on which the party making the application received the arbitral award. Here, evidence suggests and the Defendant admits in various Court documents... (that) (t)he Application to Supersede was ... filed ... outside the time permitted to bring such an application... (and) since the Court has found the grounds relied on by the Defendant to seek to set aside the arbitral award to be wanting, and since the Defendant was relying on these secondary grounds as the foundation to erect its ground to refuse to enforce the arbitral award under section 37(a)(vi), it follows that the Defendant cannot succeed in its quest to resist enforcement under that section."*

The other legal issue that has been under consideration is the question of whether an application to set aside an award under section 35 of the Arbitration Act is appealable or not. On the one hand, there are judges who follow the reasoning of Omolo JA in **Kenya Shell limited vs Kobil Petroleum Limited, Civil Appeal No. 57 of 2006 (unreported)** where he maintained that *'the provisions of section 35 of the arbitration Act have not taken away the jurisdiction of either the High court or the Court of Appeal to grant a party leave to appeal from a decision of the High court made under that section.'* In this passage, the honourable judge states that it is implied that an order of the High Court under section 35 is appealable because if Parliament desired to make it not so, it would have categorically stated that the High Court would be the final stage in the matter. Omolo JA argues that 'appealability' is implied in silence. However, the majority of the Judges declined leave to appeal the decision of the High Court, giving force to the principle of finality in arbitration.

In further support of the 'non-appealability' of section 35 orders of the High Court, in **Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited [2015] eKLR**, Gikonyo J, High Court Judge, stated that where an arbitrator makes a mistake of fact or law, the parties may only have recourse to an appeal to the High Court under its supervisory jurisdiction of all tribunals subordinate to the superior court, not by an application to set aside the award by section 35, but rather by an appeal under section 39 of the Act. In the words of the honourable judge:

*"...the way I understand the law, even if there was a mistake of facts or law in the appreciation or explication of fact or the law respectively by the arbitrator, such will not found a ground to set aside an award or be corrected*

*in an application under section 35 of the Arbitration Act. The law and the plethora of case law I am aware of say that is within the purview of appellate jurisdiction of the Court where facts and law will be evaluated. See the literary work by At pages 558-9 Mustill & Boyd, Commercial Arbitration, 2nd Edition, at page 558-9 that:-*

*“Mistakes by the arbitrator in the conclusions of law or fact implicit or explicit in a final award or in an interlocutory ruling do not (generally) form a ground for remission or setting aside.*

*A mistake of law, or inconsistency of reasons, may in certain circumstances be the subject of an appeal”.*

*And at page 560, Mustill & Boyd - Commercial Arbitration, supra, observes that:*

*“It sometimes happens that a party asserts, not only that the arbitrator’s decision of the facts is wrong, but that it could not possibly be right, since there is no evidence to support it; or that the arbitrator has exercised a discretion in a way which is wholly wrong in principle. Such an attack fails, for the same reasons as other challenges to the arbitrator’s decision. To arrive at a wrong conclusion of fact or to exercise a discretion on a wrong principle is at most an error of law, and does not find an application for relief except by those mechanisms which are available for appeals on questions of law””*

Karanja JA, Judge of the Court of Appeal, in the 2015 ruling in the case of Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR alludes to the principle of finality envisioned to thrive in the arbitral process. The honourable judge states that ‘(i)n this case the history of the law of arbitration... clearly shows why no right of appeal was meant to be inferred from **Section 35 of the Act**-- the concept of finality and certainty in the arbitral process as envisaged in the UNICITRAL model.’ In conclusion, Karanja JA stated succinctly that no appeal lies to the Court of Appeal from the High Court under Section 35 of the Act. Mwera, Musinga, M’Inoti, and J. Mohammed JJ.A, the other judges constituting the bench in the case, agreed with this view.

Inconsistencies in the use of the courts’ discretion poses a problem to parties who appear before the superior courts. Abwuor, in a critical analysis of the Kenyan Arbitration Act of 1995 points out that the High



Court has, faced with similar circumstances, exercised discretion in finding polar results.<sup>43</sup> Abwuor gives the example of **Kundan Singh Construction Ltd V Kenya Ports Authority HCCC No. 794 of 2003**, ‘an application for recognition and enforcement of an arbitral award was struck out for failure to comply with section 36(2) of the Act, since what was before the court was a photocopy of the award, and not an original or a duly certified copy;<sup>44</sup> while in **Structural Construction Co. Ltd V International Islamic Relief Organization [2006] eKLR**, ‘the lack of an original or certified copy of the arbitration agreement was held not to be fatal and a copy annexed to the supporting affidavit held to be acceptable for the purposes of the application for enforcement.’<sup>45</sup> Section 36(3) of the Act provides that ‘(u)less the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish (a) the original arbitral award or a duly certified copy of it; and (b) the original arbitration agreement or a duly certified copy of it.’

On the discretion of a judge with regard to applications under section 36(2), Gikonyo J, of the High Court in **Samura Engineering Limited v Don-Woods Company Limited [2014] eKLR**, after hearing an application for setting aside of the arbitral award and decree, and stay of execution stated:

*“I have perused the record and the Chamber Summons and I can only see a duly signed award in original ink by the arbitrator, but I do not find the original agreement or a certified copy of it. That is one error on the face of the record which is readily and easily discernible by cursory perusal of the record. Section 36(2) of the Arbitration Act is strict and in the absence of any express order of the court authorizing a departure from the requirements of the section, strict adherence to the said section is not negotiable. I do not even think the discretion given to the court under section 36(2) of the Act*

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<sup>43</sup> John Otieno Abwuor, ‘Role of Courts in Arbitration: A Critical Analysis of the Kenyan Arbitration Act No. 4 of 1995’ (LL.M Thesis, University of Nairobi, School of Law, 2012).

<sup>44</sup> Githu Muigai (ed), *Arbitration Law and Practice in Kenya* (LawAfrica Publishing Ltd, 2015); John Otieno Abwuor, ‘Role of Courts in Arbitration: A Critical Analysis of the Kenyan Arbitration Act No. 4 of 1995’ (LL.M Thesis, University of Nairobi, School of Law, 2012).

<sup>45</sup> John Otieno Abwuor, ‘Role of Courts in Arbitration: A Critical Analysis of the Kenyan Arbitration Act No. 4 of 1995’ (LL.M Thesis, University of Nairobi, School of Law, 2012).

*would include excusing a party from filing any or all of the documents required under that section, because those are the primary documents which form the basis of the recognition and enforcement of the award as the order of the court. Perhaps, the discretion would only entitle the court to accept the award irrespective of the state in which it was made in which case the court will accept an exemplification or a certified or duly authenticated copy thereof, but the documents must be present lest the court should be acting on nothing or anything which is never an acceptable judicial practice. To say the least, **any practice to the contrary of what I have stated would be the most awful and extravagant exercise of discretion.**" (emphasis added)*

In the **Samura Engineering Limited** case, Mabeya J had allowed an ex parte application for enforcement of an award under section 36(2) of the Act (1<sup>st</sup> Application). The applicant had only presented the original award, but no original arbitration agreement. The High Court allowed the section 36(2) application despite the clear requirement under section 36(3) that '(u)nless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish (a) the original arbitral award or a duly certified copy of it; and (b) the original arbitration agreement or a duly certified copy of it.' The plaintiff/respondent moved the court to stay execution of the decree, and set aside the judgment of Mabeya J which adopted the arbitral award (2<sup>nd</sup> Application). Gikonyo J heard the 2<sup>nd</sup> Application and in following the correct position under the law, set aside the orders of adoption resultant from the 1<sup>st</sup> Application, and all consequential orders arising from them, ordering the Respondent to file the original arbitration agreement or a certified copy before it could set its mind to the matter.

It is therefore evident that the High Court in the application for enforcement of the award misapplied the law and exercised its discretion where the confines of the Arbitration Act tied the court's hands, thereby displaying either a misunderstanding of the law or an inadvertent mistake of the honourable judge. Thankfully, the court later set the record straight.

To sum up the matter, and drawing from the Kenyan experience, this paper adopts the challenge of incongruent application of the principles and law on arbitration by the superior courts as the metaphorical 'Achilles heel' to arbitral institutions in Africa. The superior courts' approach to arbitration and its intricacies needs to be addressed for arbitral institutions

in Africa to gain the strength they require to carry out their duties. In the words of Abuor:<sup>46</sup>

*“The Courts have, in most instances, also contradicted themselves in their decisions even where the law is clear. This has ended up creating uncertainty on the position of the arbitration law, and an opportunity for unscrupulous litigants to exploit, to delay (sic) arbitration proceedings... In addition, recognition and enforcement of arbitral awards in court has often been unduly reduced to a sure wait-and-see game to the detriment of parties in whose favour the awards are made... It is clear that unnecessary judicial interference in Kenya falsifies both the trust which the legislature and the parties have placed in the arbitrator, and discourages arbitrators from employing them boldly in the future.”*

The extent of the spread of this challenge really blends itself in the argument that the judiciary plays a significant role in the building of attractive arbitral institutions. A judiciary seen as being pro-arbitration and experienced in handling any challenges arising from the arbitral processes, including the grant of interim relief measures and dealing with anti-suit injunctions, will be a selling point to would-be consumers of the arbitration services on offer.

#### 4. PROPOSED SOLUTIONS TO CHALLENGES

4.1 Although it is necessary to adopt specialised solutions to Africa’s particular problems, in some instances there is no need to reinvent the wheel. To strengthen the arbitral institutions in Africa, some recommendations may be drawn from the Final Act of the UN Conference on International Commercial Arbitration. One such recommendation revolves around circulation of pertinent information about arbitration across the continent:

4.2 States considered that wider diffusion of information on arbitration laws, practices and facilities contributes materially to progress in

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<sup>46</sup> John Otieno Abwuor, ‘Role of Courts in Arbitration: A Critical Analysis of the Kenyan Arbitration Act No. 4 of 1995’ (LL.M Thesis, University of Nairobi, School of Law, 2012).

commercial arbitration.<sup>47</sup>This could be done through the establishment of an Africa Arbitration publication encompassing developments on the continent on arbitration matters. As a central location for members of the public in general, legal counsel and also arbitrators in the various countries, this forum would include contributions from different African countries on their progress toward instilling the principles of arbitration in their respective regions.

4.3 Members of the public would access a database of able and qualified arbitrators and/or law firms to handle arbitral proceedings. On an international level, there are reviews covering advancements in arbitration. For example, the Global Arbitration Review (GAR) recognises distinguished arbitrators and arbitration practices.<sup>48</sup> To recognise home-grown talent, why doesn't Africa hold similar events to deepen the trust in local institutions?

4.4 To address the challenge of different legal systems, and remove bias of the arbitrator reviewing the actions of the host country more favourably, arbitral institutions should advocate for more regional approaches to development of arbitral rules. Instead of adopting the local arbitration rules of either of the parties to the process, the arbitral institution may encourage parties to adopt neutral international rules, and a neutral seat of arbitration to remove the bias for legal rules.

4.5 Language barrier may be overcome through adoption of a more international approach to arbitration by the leading arbitral institutions in Africa. The adoption of French, English and Arabic in the arbitral institutions and their rules, coupled with maintaining bilingual staff and arbitrators would assist in surmounting this challenged.

4.6 While arbitral institutions from the different regions in Africa may strive to be the leader in the area, there must be an increased effort at

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<sup>47</sup> UN, Final Act of the United Nations Conference on International Commercial Arbitration, No 4739, *United Nations Treaty Series* (UN 1959) 10  
<<https://treaties.un.org/doc/Publication/UNTS/Volume%20330/volume-330-I-4739-English.pdf>> Accessed on 3 June 2015.

<sup>48</sup> Global Arbitration Review Website <<http://globalarbitrationreview.com/>> Accessed on 3 June 2015.

collaboration between the disparate arbitral institutions to create a uniform driving force toward building Africa as a hub for home-grown solutions to parties within the continent.

4.7 To increase the caseloads of arbitration matters handled by arbitral institutions in Africa, the institutions should have more pronounced showcases of their previous works and capabilities. With a more concerted marketing drive of the services offered by the arbitral institutions, and improved investment in the institutions themselves in areas such as adoption of technology, expansion of available space for administration, and offering auxiliary services such as conference halls, the arbitral institutions may attract more cases. With more cases handled, the institutions may realise organic growth.

4.8 Lawyers must be more involved in arbitration training efforts. Due to the stake the arbitral institutions have in smooth development of the arbitral process, the institutions should organise seminars, workshops and training sessions for lawyers across the continent. This focus should not be confined to lawyers who intend to be arbitrators, but also to general counsel who should be abreast of the nature of arbitration process. The training would also be especially important to lawyers involved in drafting of the arbitration clauses in contracts, to ensure that the clauses withstand the possible challenges at the initial stages of arbitration.

4.9 Nationality being an important factor in choice of arbitrators, arbitral institutions may support the local capacity through recommending qualified and experienced arbitrators from Africa. In more complex matters requiring a 3-member tribunal, to develop African talent, 2 of the arbitrators may be from the continent and the 3<sup>rd</sup> member of the tribunal may be from a country outside the continent.

4.10 Public confidence in arbitrators may be enhanced through publication of available arbitrators in the region for consideration by prospective parties to an arbitration dispute. This may only be addressed if the other building blocks of arbitration in Africa are considered, such as increase in capacity of the arbitrators.

4.11 Political instability, being a matter not within the control of the arbitral institutions, may not be directly addressed at an individual

institution's level. However, the institutions should participate in awareness campaigns, and support research into the relationship between actions of political leadership on dispute resolution. This may contribute (though arguably on a small scale) to the sensitisation of political leaders on the impact of their actions on arbitration, and more pertinently on the economic results of diverting foreign direct investment to other regions of the world.

4.12 Regarding challenges faced by the judiciary to enhance the levels of knowledge and experience in arbitration, it is proposed that the arbitral institutions in each country give particular attention to training of the judges of the superior courts on arbitration. While much has been done since the establishment of arbitration and its emergence as a leading dispute resolution mechanism in various countries across the continent, there is still much more that could be done to concretise its position as the most desired choice for parties to resolve their disputes. In addition to simple arbitration between individuals, judges should be trained in more complex investor-state matters, to orient the courts toward greater capacity in supporting arbitral institutions.

4.13 African governments must take a proactive role in appointing African counsel to represent the state in arbitration proceedings before arbitration fora such as ICSID. Where counsels from outside the continent are to be engaged, the governments must support the cultivation of expertise of local counsel through incorporating them in the arbitration teams.

## **5. CONCLUSION**

Arbitration, as a key arm of Alternative Dispute Resolution (ADR) is hailed as a potential solution to the problems associated with litigation.

Significant strides have been made across the African continent in establishing and building the capacity of arbitration institutions, but these efforts are more or less recognisable at the domestic level. The challenges identified and discussed in this paper together with the proposed solutions will, if implemented, go a long way in propelling Arbitration institutions in Africa to the international level.

## Appendix 1 – List of ADR Institutions in Africa

Below are some of the institutions which champion the ADR agenda on the continent:<sup>49</sup>

Country	Institution/Centre
Algeria	Annaba Mediation & Arbitration Centre
	Mediation & Arbitration centre of the Algerian Chamber of Commerce & Industry
Benin Republic	Arbitration, Mediation and Conciliation Centre of the Chamber of Commerce & Industry of Benin
	Conciliation and Arbitration Chamber of the Cotton Inter-professional Association of Cotonou
Burkina Faso	Ouagadougou Arbitration, Mediation & Conciliation Centre of the Chamber of Commerce & Industry
Cameroon	GICAM Arbitration Centre Douala
Democratic Republic of Congo	Congo Arbitration Centre
Egypt	Cairo Regional Centre for International Commercial Arbitration (CIRICA)
	Dr. Kheir Law and Arbitration Centre (AKLAC)
Ethiopia	Addis Ababa Chamber & Sectoral Association
Ghana	Ghana Arbitration Centre
Ivory Coast	Court of Arbitration of Ivory Coast
	Common Court of Justice & Arbitration of OHADA

<sup>49</sup> Dr Emilia Onyema, 'Effective Utilization of Arbitrators and Arbitration Institutions in Africa by Appointors' Empowering Africa in the 21st Century through Arbitration & ADR: 4th Arbitration and ADR in Africa Workshop, Conrad Hilton Hotel, Cairo Egypt 29-31 July 2008 (SOAS, University of London 2008) 14 <[https://eprints.soas.ac.uk/5300/1/Arbitrators\\_and\\_Institutions\\_in\\_Africa.pdf](https://eprints.soas.ac.uk/5300/1/Arbitrators_and_Institutions_in_Africa.pdf)> accessed on 2 June 2015; Agostinho Pereira de Miranda, 'International Commercial Arbitration in Africa: Myth or Reality?: How Angola, Mozambique and Equatorial Guinea approach Arbitration in the Oil and Gas Industry' (Miranda CorreiaAmendoeira&Associados – Attorneys at Law 2005) <<http://www.mirandalawfirm.com/uploadedfiles/84/17/0001784.pdf>> accessed on 2 June 2015.

Kenya	Nairobi Centre for International Arbitration
Lesotho	The Directorate of Dispute Prevention & resolution
Libya	Libyan Center for Mediation & Arbitration
Madagascar	Arbitration Centre of Madagascar
Mali	Mali's Conciliation & Arbitration Centre
Mauritius	Permanent Court for Arbitration at the Mauritius Chamber of Commerce & Industry
	London Court of International Arbitration in Mauritius (LCIA-MIAC)
Morocco	Agadir Conciliation & Arbitration Centre
	Rabat International Mediation & Arbitration Centre
	Maritime Arbitration Chamber
Mozambique	Centre for Commercial Arbitration, Conciliation and Mediation (CACM)
Nigeria	Lagos Regional Centre for International Commercial Arbitration
Rwanda	Kigali International Arbitration Centre
Senegal	Arbitration Centre of the Dakar's Chamber of Commerce, Industry and Agriculture
	Dakar Arbitration & Mediation Centre
South Africa	Arbitration Foundation of Southern Africa
	Association of Arbitrators
	Commission for Conciliation, Mediation and Arbitration
Swaziland	Conciliation, Mediation and Arbitration Commission (CMAC)
Tunisia	Center for Conciliation and Arbitration of Tunis
Zimbabwe	Commercial Arbitration Centre in Harare



## **ADR IN AFRICA: CONTENDING WITH MULTIPLE LEGAL ORDERS FOR WHOLESOME DISPUTE RESOLUTION**

*By: Dr. K I Laibuta\**

### **1. INTRODUCTION**

ADR mechanisms in Africa trace back to the very origin of mankind. Today, the spectrum of dispute resolution mechanisms in Africa is shaped by multiple legal orders, which include: (a) informal community-based justice systems; (b) traditional dispute resolution mechanisms; (c) commercial arbitration and ADR (either backed by statute or founded on contractual relations); and (d) the conventional judicial system. It is believed that only a small fraction of disputes escalate and find their way into conventional judicial institutions, while most are resolved through a diverse range of ADR mechanisms.

Since conflicts are an integral part of human relations, their effective management and the resolution of ensuing disputes become critical to the maintenance of social order, and the very existence of communal life. It is no wonder that conflict management and dispute resolution strategies have evolved over the centuries in response to the diverse social needs, norms and standards of fairness, in their endeavor to balance and resolve competing interests.

The establishment of conventional judicial institutions in developing common law jurisdictions was closely linked to British colonial administrative strategies. They were founded on the English legal system, with minor modifications to accommodate local circumstances.<sup>1</sup> The concept of legal justice, as understood in the context of sociological jurisprudence of the day, was locally adapted and applied to suit the colonial agenda and satisfy the demands of the emerging economies. The ensuing rapid growth in the private-sector-driven commerce and industry in the urban centres coupled with the complexity of the ever-changing

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<sup>1</sup> Kwach, R. O. (Hon. Mr. Justice) (1998) "Report of the Committee on the Administration of Justice" p.6.

social-economic environment began to make pressing demands for effective management and resolution of increasing conflicts. The ensuing complexity of social-economic relations was characterized by competition and friction generating new demands, claims and wants<sup>2</sup>, overwhelming the conventional judicial systems, which are largely viewed as outdated, and incapable of expeditious and effective management, and resolution of conflicts. This has resulted in crisis in litigation.<sup>3</sup> Hence the urgent call for strategic review and reform, to recreate “a competent, efficient and effective judiciary”<sup>4</sup> backed by ADR.

Developed common law jurisdictions shared similar history, prompting far-reaching reforms and change in policy and practice, culminating in international best practices. They adopted alternative strategies for conflict management and dispute resolution, hitherto unknown to the conventional adversarial civil justice systems, and set the pace for reform in other jurisdictions.”<sup>5</sup> As Slapper et al (1996) observe, these reforms have greatly improved the machinery of civil justice by eliminating impeding factors such as administrative irregularities and inadequacies, prohibitive costs of litigation, clogged systems due to endemic delay in conclusion of civil proceedings and the intimidating solemnity, not to mention the complexity of largely incomprehensible substantive law and rules of adversarial procedure, with which lay parties had to contend<sup>6</sup> and which are still common in developing jurisdictions. Kwach (1998) also highlights psychological, information, economic, physical, geographical and literacy barriers as additional obstacles that inhibit access to justice.<sup>7</sup>

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<sup>2</sup> Pound, R. (1921) “A Theory of Social Interests” 15 Proceedings American Sociological Society, p.1.

<sup>3</sup> Kwach, R. O. (1998) at p.47 observes that there is “an increased growth of the Kenyan population and its urbanisation” (among other factors) resulting in delay and backlog of cases that bedevil the administration of justice.

<sup>4</sup> Kwach, R. O. (1998), p.7.

<sup>5</sup> Slapper, G. & Kelly, D. (1996) “Source Book On English Legal System” Cavendish Publishing Ltd., p.195.

<sup>6</sup> Ibid.

<sup>7</sup> Kwach, R. O. (1998), p.54.

Over the years, it was hoped that ADR would offer practical solutions to the impediments that characterize the administration of civil justice in commonwealth Africa. Indeed, ADR was often viewed as a universal remedy for the afflictions with which our modern-day civil justice systems are identified. However, this supposed panacea has itself fallen ill with multiple wounds, inflicted by ill-fitting policy, legal and institutional frameworks, not to mention the slow pace at which the legal profession and court users move towards internalizing the value of alternatives to litigation. It is true to say that the journey has been long and the Promised Land far from view.

While modern-day ADR strategies reflect age-old practices common in local communities and traditional societies, they are slowly losing their efficacy as they take on the burdens perpetually borne by the conventional judicial system. Lawyers who delight in litigation to demonstrate their dexterity often to the financial, emotional and relational detriment of their contending clients, have lately shifted their battlefields to the arena of commercial arbitration. In the end, arbitral tribunals are transformed into private courts, completely robed in the dilatory conduct, complexity and disproportionate costs, which ADR seeks to purge. Likewise, other ADR mechanisms do not enjoy their fair share of popularity in the prevailing atmosphere of strife. These challenges are compounded by the apparent lack of enthusiasm to embrace and promote tested ADR strategies for conflict management and dispute resolution. The question remains as to what holistic approaches are at our disposal to address these issues and challenges.

## **2. SEEKING THE IDEAL**

The primary goal of an ideal civil justice system is the effective management of conflicts, and just resolution of disputes through a fair but swift process, at a reasonable expense. It recognizes the fact that delay and excessive expense invariably negate the value of an otherwise just resolution. Similarly, systemic delay and expense common in litigation render the system inaccessible. Even though there is no absolute measure of a reasonable expense, jurisdictions world over subscribe to the basic principle that the cost of resolving a dispute should be proportional to its magnitude, value, importance and complexity. These are the standards that

market mechanisms seek to achieve in order to provide alternatives to civil litigation.

ADR practitioners and proponents of appropriate market mechanisms find reason in the assertion that it is not enough that the resolution of a dispute is fair. In addition to expedition and cost-effectiveness, two other considerations are vital to quality outcomes. To achieve quality outcomes, a sound balance must be struck between: (a) a rights-based approach; and (b) an interest-based approach. While a rights-based approach (characteristic of adversarial judicial systems) strictly upholds the legal rights and obligations of the parties, as do arbitral proceedings, an interest-based approach (characteristic of negotiation and mediation) aims at a just resolution of a dispute that meets the interests and needs of all parties.

In contrast, an adversarial system of dispute resolution is not designed with expedition and cost-effectiveness in mind; it is designed to resolve conflict by a competition of adversaries. It is no wonder that delay, case backlogs and disproportionate costs of litigation are frequently cited as some of the main factors that impede effective resolution of disputes. In addition, the complexity of rules and the intricate architecture of the legal framework limits party control, and sets the stage for legal counsel, whose adversarial approach to zealously champion the legal rights and downplay the corresponding obligations of their clients erodes the possibility of promoting and protecting the parties' needs and interests. In the end, extensive advocacy is rewarded regardless of the outcome or value of the case. Accordingly, the judicial system fails on all counts to provide efficient and effective justice. If unchecked, arbitral proceedings are likely to go down the same bumpy lane. This paper recommends a progressive shift towards an approach that balances legal rights and obligations on the one hand, and needs and interests of the parties on the other. Such reforms require review of sectoral policy and legislation, to promote market mechanisms and community justice systems (including traditional dispute resolution mechanisms) to complement the conventional judicial system.

This would maximize *inter alia*: (a) proportionality; (b) party control; (c) expedition; (d) quality procedures and outcomes; and (e) consumer satisfaction. The need for the formulation and implementation of a judicial policy to guide- (i) pre-action protocols; and (ii) court-mandated ADR, cannot be overemphasized. The primary goal is to establish a policy and legislative framework for the promotion of early dispute resolution,

whether by adjudicatory, facilitative or evaluative means within the ADR spectrum.

### **3. HARNESSING MULTIPLE STRATEGIES IN THE MODERN-DAY LEGAL FRAMEWORK**

Multiple legal orders are a common feature of most jurisdictions in Africa. The conventional judicial system operates alongside a diverse range of community justice systems and other alternative dispute resolution strategies that continue to offer practical alternatives to judicial services. While community justice systems were largely designed to restore and repair relationships in the context of restorative and distributive justice, the emergent market mechanisms that comprise what is commonly referred to as ADR are well suited to achieve comparable ends, whether with or without judicial intervention, hence the pressing need to reconstruct our policy and legal frameworks to guarantee quality procedures and outcomes in conflict management and dispute resolution. The question is: How?

We must recognize, at the outset, that conflict management and dispute resolution take place on a daily basis, in and outside the conventional judicial system with which we appear to have been unduly preoccupied. Secondly, it must be borne in mind that most community justice systems are largely unregulated. Thirdly, the extant judicial policies and legal frameworks in accordance with which commercial arbitration and ADR practitioners operate regulate conflict management and dispute resolution in only a small fraction of business and social relations. Finally, the existence of multiple legal orders calls for a holistic approach to dispute resolution. To this end, the beneficial example of Kenya sets the pace for the desired policy and legislation for the promotion and regulation of ADR practice in Africa.

The formal and informal justice systems that operate in tandem are either voluntary, or coercive in nature and effect. This paper focuses on the voluntary dispute resolution mechanisms comprising what is commonly known as ADR. The spectrum of ADR in the community justice systems and the conventional market mechanisms with which ADR practitioners are familiar may be viewed as a recipe for the realization of the constitutional right of access to justice at an affordable cost.<sup>8</sup> The market

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<sup>8</sup> The Constitution of Kenya, 2010 art 48.

mechanisms (which range from negotiation, conciliation, mediation to early neutral evaluation, adjudication and commercial arbitration, only to mention a few) emerged to address the need for expeditious resolution of disputes at proportionate costs. Over the years, ADR practitioners and professional bodies have sought to institutionalize and promote the establishment of policy and legal frameworks for the regulation of ADR, and to insulate their professional practice from the age-old community justice systems that are largely self-regulating.

The Constitution of Kenya, 2010 recognises the value of the extant multiple legal orders and seeks to place limitations on their outcomes. It lays down the principles of judicial authority and provides the foundation for the promotion and support of informal ADR mechanisms. To this end, the Constitution provides that, in exercising judicial authority, the courts and tribunals shall be guided by the principles that: (a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); and (d) justice shall be administered without undue regard to procedural technicalities.<sup>9</sup>

Clause (3) sets conditions on which traditional dispute resolution (TDR) mechanisms may be applied. It provides that TDR mechanisms shall not be used in a way that: (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with the Constitution or any written law.<sup>10</sup>

Whether or not replicated in identical terms, these constitutional ideals are not alien to comparable jurisdictions in Africa. Indeed, most commonwealth jurisdictions in Africa share Kenya's experience, with respect to the legislative and institutional frameworks under which ADR is practised. While only a few of these jurisdictions have comprehensive statute law dedicated to ADR in its widest sense, they nevertheless recognise the value of market mechanisms in the management of conflicts and resolution of contractual disputes at proportionate costs. More and more jurisdictions are recognising the pressing need to establish a holistic ADR framework that enjoys comprehensive statutory and other regulatory

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<sup>9</sup> Ibid Art 159(2).

<sup>10</sup> Ibid cl (3).

support mechanisms, in recognition of the existence of multiple legal orders that characterise our multicultural society.

## **4. SHAPING THE FUTURE OF ADR IN AFRICA**

### **4.1 Introduction**

The future of ADR and its efficacy in guaranteeing quality procedures and quality outcomes in conflict management and dispute resolution depends on the architecture of our policy, legal and institutional frameworks. These frameworks should be suitably designed to promote and support ADR mechanisms as practised in community justice systems and in the conventional judicial system. Recognition of the multiple legal orders offers a firm foundation for appropriate policy and legislation.

### **4.2 Promoting and Supporting ADR in Community Justice Systems**

The fact that community justice systems are essentially self-regulating and self-enforcing dictates that policy and legislation be appropriately designed to promote and support these mechanisms without the need to regulate them. The only regulatory content of such policies and legislation should be aimed at ensuring that:

- (a) the process and outcomes of community justice systems and their ADR mechanisms do not violate the Bill of Rights;
- (b) such processes are not repugnant to justice and morality, and that they do not offend the Constitution or any written law;
- (c) ADR practitioners in the communities are sensitised on- (i) the relevant constitutional standards (such as the effect of article 159(3) of the Constitution of Kenya); and (ii) the law;
- (d) there are defined jurisdictional limits and powers of ADR tribunals in making awards or sanctioning the criminal conduct of those persons subject to the community justice system;
- (e) there is in force a code of ethics and standards of conduct for ADR practitioners;
- (f) all practitioners of community-based ADR mechanisms adhere to the prescribed standards of ethical conduct;
- (g) unethical conduct by ADR practitioners is sanctioned by law;

- (h) any person whose fundamental rights and freedoms are violated in any of the ADR processes has access to judicial intervention and redress;
- (i) the ADR mechanisms are accessible by all on an equal basis, and for a minimal fee, if any;
- (j) the outcomes of ADR provide effective remedies and party satisfaction; and
- (k) there are simplified procedures for judicial intervention to enforce mediated settlements or agreements voluntarily entered into in resolution of disputes.

### 4.3 Promoting Market Mechanisms for Effective Dispute Resolution

It is noteworthy that most common law jurisdictions have a defined legal framework for the conduct of commercial arbitration. Accordingly, little remains to be said about this market mechanism, save that commercial arbitration needs to be salvaged from the apparent drift towards highly formal adversarial justice systems, which has the likelihood of making arbitration bereft of quality procedures and outcomes on account of disproportionate costs.

While other ADR mechanisms are essentially voluntary and contractual by nature, a holistic conflict management and dispute resolution framework would be an invaluable complement to the conventional judicial system. To this end, court mandated/annexed ADR requires enabling policy and legislation to guide judicial officers and tribunals in the promotion of ADR pursuant to article 159(2) (c) of the Constitution. Even though most jurisdictions have rules of civil procedure that regulate ADR as part of the judicial process, few have comprehensive legislative and administrative frameworks dedicated to ADR. Such rules of procedure do not go beyond a declaratory statement of their overriding objectives of *inter alia* expeditious disposal of proceedings<sup>11</sup> and the expression of authority to refer disputes to resolution by a specified ADR mechanism under an order of the court.<sup>12</sup> In effect, court-annexed ADR plays a significant role in the resolution of disputes submitted for adjudication in judicial proceedings.

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<sup>11</sup> Sections 1A and 1B of the Civil Procedure Act (Cap. 21 Laws of Kenya).

<sup>12</sup> Order 46 of the Civil Procedure Rules, 2010.



In addition to the policy and legislative measures proposed in section 4.3 above, there is pressing need for African states to undertake reforms in policy and legislation to regulate ADR professionals and professional bodies. This would guarantee quality service delivery in and outside the conventional judicial system. The beneficial example of Kenya is worth mentioning. This example is considered fitting, with the presumption that most common law jurisdictions in Africa are characterised by multiple legal orders, in accordance with which individuals and local communities manage conflicts and resolve disputes.

In a recently concluded study by the Commission for the Implementation of the Constitution in Kenya, it was recommended that reforms in policy and legislation be undertaken to, among other things: (a) promote, strengthen and support the application of ADR and TDR mechanisms in various communities to give effect to article 159(2)(c) and (3) of the Constitution; (b) set minimum standards of conduct and conditions for the application of ADR and TDR by local communities; (c) define the jurisdictional limits and powers of community justice systems in civil and criminal disputes; and (d) regulate the application of market mechanisms in dispute resolution by ADR practitioners and professional organisations.

While it is desirable that ADR practitioners and professional organisations be self-regulated, the need for enabling policy and legislation cannot be overemphasised. A comprehensive ADR policy would be instrumental in, among other things: (a) guiding the development and implementation of programmes, plans and actions for the training of judicial officers in the application of court mandated/annexed ADR strategies; (b) guiding the development of programmes for the sensitisation of ADR practitioners on the constitutional standards and conditions for the application of ADR mechanisms; (c) guide the formulation of a code of ethics for ADR practitioners and disciplinary procedures to be applied by professional organisations; and (d) guide the adoption or development and enforcement of universally accepted standards of ADR practice generally.

In addition to the proposed policy, a comprehensive legislative framework would provide the statutory basis for, among other things:

- (a) regulating the registration of professional organisations involved in the promotion and practice of ADR;

- (b) regulating the registration of centres for domestic and international commercial arbitration and dispute resolution;
- (c) regulating the registration and accreditation of ADR practitioners;
- (d) setting standards of conduct for ADR practitioners;
- (e) prescribing the procedure for the application of ADR in matters subject to judicial proceedings;
- (f) defining the jurisdictional limits of ADR mechanisms, particularly in relation to community justice systems;
- (g) defining the role of courts in the promotion and support of ADR mechanisms; and
- (h) Limiting court intervention in the application of various market mechanisms for dispute resolution and claim adjudication.

In addition to the proposed policy and law reform measures, it is recommended that judicial institutions adopt strategic interventions designed to ensure full and equal access to justice by application of appropriate ADR strategies. These include the need to:

- (a) recognises ADR and TDR as invaluable complements to the conventional judicial system;
- (b) formulate and implement effective programmes, plans and actions designed to guarantee full and equal access to justice;
- (c) undertake law reform and review of administrative procedures designed to guide effective and accessible judicial and ADR services in all decentralised units of governance;
- (d) simplify procedures and promote party autonomy/control in the process of adjudication of competing claims, which would in turn enhance expedition and minimize the cost of litigation in the adjudication of disputes;
- (e) develop appropriate programmes, plans and actions for the promotion and support of alternative and Traditional Dispute resolution mechanisms; and
- (f) simplify and strengthen judicial mechanisms for the enforcement of orders and awards of ADR tribunals.

#### **4. CONCLUSION**

The recommendations made in this paper are by no means exhaustive, neither is it suggested that they are applicable to each and every jurisdiction in Africa in identical terms. Rather, they are design to provoke thinking and exploration of possibilities for policy, law and institutional reforms to promote and strengthen ADR mechanisms alongside the conventional judicial system. The paper recognizes the need to set minimum standards for the regulation of ADR practitioners and the related professional organisations without undermining their paramount right to self-regulation. It recognizes the existence of multiple legal orders for the administration of justice and the need to promote and support community justice systems and conventional market mechanisms, which have recently emerged to address the need for expeditious dispute resolution and claim adjudication through quality procedures, to the ends of quality outcomes at proportionate costs. This presentation covers only a few of what I consider to be the conceptual imperatives for full and equal access to civil justice by means of which ADR and TDR are a significant part, hence the need to promote and support ADR and TDR for a holistic dispute resolution framework.

## PARADOX OF ARBITRABILITY IN KENYA

By: Desmond Owoth Tutu\*

### ABSTRACT

*Arbitrability is a core tenet of arbitration. It generally refers to a determination of the type of disputes that can be settled through arbitration, and those that are the domain of the national courts. More often than not, courts measure the subject matter of arbitration through the public policy lens. A question then arises as to what factors qualify a matter for arbitration in the event that public policy is not an issue. This explores the doctrine of arbitrability vis-à-vis public policy. The main purpose of this paper is to unearth the paradox that emanates in the application of the two tests in the realm of commercial arbitration.*

### 1. INTRODUCTION

Arbitrability refers to the question of whether specific classes of disputes are barred from arbitration because of the subject matter of the dispute.<sup>1</sup> Arbitrability may either be objective or subjective. Objective arbitrability refers to restrictions based on the subject matter of the dispute.<sup>2</sup> In contrast, subjective arbitrability refers to a situation where states or state entities may not be allowed to enter into arbitration agreements at all or may require special authorization.<sup>3</sup> In common practice, courts have referred to “public policy” as the basis of the bar.

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1 Shore L, “Defining ‘Arbitrability’: The United States v The Rest of the World” (2009) New York Law Journal p. 1, available at <<http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf>> accessed on 1 September 2015.

2 Kariuki Muigua, “Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration” (2015) 3 (1) *Alternative Dispute Resolution Journal*, 68.

3 Ibid.

Certain disputes may involve such sensitive public policy or national interest issues, that it is accepted that they ought to be dealt with only by the courts, for instance, matters of criminal law.<sup>4</sup> A problem, however, arises when a matter that is arbitrable fails the test of public policy. This paper delves into this problem at length.

## 2. THE PARADOX OF ARBITRABILITY

In a number of instances, arbitral tribunals will be faced with the challenge of what to do if there is a dispute as to the performance of an international commercial agreement, especially if the breach of nonperformance of that agreement arises as a result of fraudulent misrepresentation. Under the Kenyan law, fraud is considered a criminal matter, though it is largely viewed as a commercial dispute element and the general feeling is that it should consequently be dealt with in the context of civil litigation. A position with similar mixed views was raised back in 1967 before Judge Llargergren, who was acting as sole arbitrator in an ICC arbitration matter. According to him, disputes as such were not arbitrable as they contravened the public policy. He stated:

It cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously violate *bonus mores* or international public policy are invalid or at least unenforceable and they cannot be sanctioned by courts or arbitrators.

It is, however, observable that a tribunal may decide on an issue of public policy if it arises in the course of proceedings. It therefore appears that illegality alone does not fetter the jurisdiction of a tribunal because of the principle of separability. Ideally, the arbitral tribunal overlooks any inquisitorial approach in determining the legality of any dispute, especially if it entails any criminal law elements thus rendering it valid or invalid. As such, the arbitral tribunal should not allow itself to be used by the parties to sanction conduct which is illegal, but at the same time not to be the one determining the question of legality.

Considering the internationally accepted principle of party autonomy, the parties may choose for themselves the law applicable to the dispute. This principle is, however, subject to the qualifications of *bona fides*, legality and the absence of a public policy objection. If, for example,

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<sup>4</sup> Ibid.

an arbitration agreement, which is the subject matter of a proceeding, chooses the English law as the proper law of contract or the governing law, the courts, as well as any arbitral body are bound to honour the choice of the parties on the applicable law to the substance of the Agreement and must apply that law in determining the contract. Courts, nevertheless, are not contractually the proper forum. In such a case, what is arbitrable will depend on the public policy of the countries or states and thus may differ from state to state. To illustrate this point is the High Court's recent decision in *Republic v Mohamed Abdow Mohamed*,<sup>5</sup> which seems to suggest that Alternative Dispute Resolution (ADR) mechanisms may as well be applied in criminal cases, yet criminal matters are generally not arbitrable in Kenya and in many other states. This is a complete departure from the jurisprudence developed by the Kenyan courts prior to the promulgation of the 2010 Constitution.

Exceptions arise where it is the English law which is the proper law to govern the international agreement before the Kenyan courts, or the law of a country whose views are converse to Kenya's position. It would mean that Kenyan courts are a stranger as far as the Agreement is concerned. All the same, the irony of the situation is that the position would be different if a foreign court is involved in the same matter. It might as well turn out that all the disputes arising from the Agreement in question (which are considered not arbitrable in Kenya) are arbitrable, especially if the arbitral process has commenced in a place like Hague. It has been contended that Kenyan authorities are precluded from investigating any suspicion of corruption or fraud touching on the procurement of Agreements of this nature. Put differently, should the investigations reveal a criminal offence, no prosecution can be commenced in Kenya because all matters will be handled by the arbitrator of the foreign tribunal. Nonetheless, the paradox presented is that, on a strictly *prima facie* basis, this contention or position cannot be correct because it would violate the public policy of Kenya, were it not to investigate and prosecute the criminal offences within its territorial jurisdiction. It thus requires the Attorney General's advice or consent to the incorporation of a clause which excludes public law especially on criminal law matters. As to public policy, a court that applies a foreign law as the

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<sup>5</sup> 2013 eKLR.

law chosen by the parties is not obliged to apply provisions of that law which are incompatible with its mandatory rules.<sup>6</sup>

Notably, in a different consideration, there is no internationally accepted standard opinion on matters that are arbitrable.<sup>7</sup> This presents a platform for a broad definition which emanates either from particular principles, conducts or subject matter, thus it is subjective in approach. Arbitrability, in its ordinary sense, relates to matters that are in dispute and whether there is a capability of settlement. For instance, a matrimonial proceeding may not be arbitrable in England but the converse applies in Libya.<sup>8</sup> It is important to note that where parties have opted for arbitration to resolve conflict, there is a presumption that arbitration is the best suited among the rest of the ways that would have otherwise helped resolve the dispute.<sup>9</sup> Mustill and Boyd<sup>10</sup> agree with the position that the question of what is arbitrable is nowhere near a concern:

As rightly stated in a work of authority,<sup>11</sup> there is a balance between the policy of reserving matters of public interest to the courts, and the public interest of encouraging arbitration in commercial matters. Since different states have their own traditional precepts, dipping radically from state to state on matters of politics, economics, morality and the like, it is not surprising that equally radical divergences can be found when each

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<sup>6</sup> See Article 7 of the Rome Convention. Clause 75.1 does give rise to a serious contention concerning public policy, jurisdiction and applicable law. Tentatively rightly or wrongly it has excluded criminal matters as applicable law.

<sup>7</sup> Andrew Tweedale, Karen Tweedale *Arbitration of Commercial disputes; International and English Law and Practice*. p. 107.

<sup>8</sup> Article 740 and 772 et seq of Roman IX, Libya, 2a (Code of Civil Procedure) permit arbitrators to be appointed to the effect of conciliation between husbands and wives. However, under Libyan law disputes relating to the civil status of persons including matters relating to divorce are not arbitrable.

<sup>9</sup> Cruig, Park, Paulsson *International Chamber of Commerce Arbitration* (2000), 62 and see generally Bernard *Hanatia, Larbidarbilise' et la favor arbitrundum' re' exam* (1994) ILI JDI 899: AND SEE Mose H Cone Memorial Hospital V Mercury Construction Corp 460 US 1, 24, 1035 Ct 927, 74 L Ed 2d 76 5' (1983).

<sup>10</sup> Mustill and Boyd, *Commercial Arbitration* 2061 Companion (2001), at 71.

<sup>11</sup> A Redfern and M. Hunder, *Law and Practice of International Commercial Arbitration* (3<sup>rd</sup> Edition) paragraph 3.21

state identifies the matters which are regarded as too important to be left to private dispute resolution.

The attempt to draw up a list containing the common factors which determine non-arbitrability has proved unsuccessful.<sup>12</sup> Thus, in the majority of instruments where one might expect to find a definition, none exists. From the foregoing, the issue of arbitrability may be determined in a three-dimensional approach. Firstly, it may be determined by the arbitral tribunal as a preliminary point. Any party can raise the issue of arbitrability, coining its case from the question of jurisdiction. By doing so, the party will average that if the matter is not arbitrable then the arbitral tribunals jurisdiction is diminished. Secondly, a party may apply to the courts of the seat of arbitration for an injunction or declaration, to the effect that the subject matter of the dispute is not capable of being settled through arbitration. Lastly, a party may commence legal proceeding on the merits of the dispute. If the opposing party seeks to have the litigation process stayed in favor of arbitration, it then shifts to the interpretation of the courts whether that particular matter is indeed arbitrable or if the arbitral agreement between the contracting parties is null and void, inoperative or incapable of being performed.

Notably, there is a presumption in favor of the validity of arbitral agreement<sup>13</sup> which translates further into a presumption that the dispute out of that agreement is entirely arbitrable. In the decided case of *Moses H Cone Memorial Hospital v Mercury Construction Corp.*<sup>14</sup> The court held that “any doubts concerning the scope of arbitrable issues should be determined in favour of arbitration, whether the issue at hand is the construction of the contract language itself of allegation of waiver, delay or a like defense to arbitrability”

It is further considered that where there is an international relationship between the parties, this presumption is amplified.<sup>15</sup> In

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<sup>12</sup> For an illustration of the difficulties which would face the formulation of such a list see C Alfaro and F Cruimarey, “Who should Redefine Arbitrability? Arbitration in a Changing Economic and Political Environment’ (1996) 12 Arbitration International (No. 4) 415-28).

<sup>13</sup> *Oldroyd & Elmira Savings Bank FSB*, 134 F 3d 72, 76 (2<sup>nd</sup> Cir 1998).

<sup>14</sup> 460 US 1, 24-25 (1983).

<sup>15</sup> *Deloitte Noruudit A/S V Deloitte Haskins & Sells US*, 9F 3d 1060, 1063 (2<sup>nd</sup> G & 1993)



considering whether a dispute was arbitrable a second circuit court of the United States stated that it ought to undertake a two-party enquiry. The court stated that first, it must decide whether the parties agreed to arbitrate, and if so, whether the scope of that particular agreement encompasses the asserted claims.<sup>16</sup> This is referred to as functional and subject matters arbitrability.<sup>17</sup>

This issue of arbitrability was raised in the drafting of the UNCITRAL Model Law. It was observable that drafters could not reach a consensus as to the definition of arbitrability. In the end, the issue was ignored by the UNCITRAL Model Law. However, the issue did not go away and the subsequent paper by UNICITRAL, "Possible Future Work in the Area of International Commercial Arbitration,"<sup>18</sup> still proposes the need to reach some worldwide consensus, which is yet to be realised. Under Article II (2) of the New York Convention, the subject matter of the dispute must be capable of resolution by arbitration.<sup>19</sup> This is the test of arbitrability of disputes. The Convention also recognizes the substratum of arbitration which is the autonomy of the parties.<sup>20</sup> Thus, if an action founded on an arbitration agreement is instituted in a court of law, the court is enjoined to refer it to arbitration should one of the parties so request, unless the agreement is inoperative, void or incapable of being performed. One of the most serious drawbacks of the New York Convention is Article V which enumerates various grounds on which recognition and enforcement of an arbitral award may be refused. Some of the circumstances are too enveloping, such as "... the award would be contrary to the public policy of that country." The phrase "public policy" is too indeterminate and imprecise, and is susceptible to multiple interpretations. Debatably, it is possible for courts to frustrate enforcement

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<sup>16</sup> Imports Ltd & Saporiti Italia SPA 117 F 3d 655, 666 (2<sup>nd</sup> Cir 1997).

<sup>17</sup> Paine Webber Inc v Mohamud and Eghi 87 F 3d 1996 (1<sup>st</sup> Cir).

<sup>18</sup> A/CN. 9/460 Para S 32-34S1- See para 7.21 et seq:

<sup>19</sup> Jacob Gakeri K, "Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR" (2006) 1(6) *International Journal of Humanities and Social Science*, p. 225.

<sup>20</sup> Ibid.

of awards on grounds of public policy, even when this ground is far-fetched from the subject matter.

However, it is undeniable that the New York Convention is one of the most important multilateral Conventions on arbitration and many countries have domesticated some of its major articles. Article II (1) of the Convention, which deals with arbitrability, obliges each of the contributing states of the convention to ‘recognize an agreement in writing under which the parties undertake to submit to arbitration all of any differences which have arisen or for that matter that might arise between the parties in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.’ This statement in creates a presumption in favour of arbitration.<sup>21</sup> In it, there are essential elements that are to be considered. First, these questions of agreement must be in writing.<sup>22</sup> Secondly, there must be a defined legal correlation and lastly, the subject matter of the dispute must be capable of settlement by arbitration. The drawback here is the subject matter,<sup>23</sup> and whether it is capable of settlement by arbitration, because this presumption is still vague. Besides, the phrase ‘defined legal relationship’ is one which is found within a number of statutes.<sup>24</sup> What constitutes a defined legal relationship will therefore differ from country to country. It is common to find that the words “identified legal relationship” are a broad terminology for that matter.<sup>25</sup>

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<sup>21</sup> This presumption in favor of arbitration does not necessarily amount to the presumption in favor of arbitrability in *Act . Tridon Inc v Tridon Australia Pty Ltd* New South Wales Supreme Court, *Int DOR*, a presumption of arbitrability was rejected by the court.

<sup>22</sup> Agreements in writing are considered at paragraph 4.05 of seq above.

<sup>23</sup> See, for example, the Indian Council of Arbitration, rules of arbitration Ri (II) AND Netherlands Arbitration Institute, 1998 arbitration rules art I.

<sup>24</sup> See for example, the UNCITRAL, Model Law, art 70 Zimbabwe Arbitration Act 1996, article 7; New Zealand Arbitration Act 1996, S2; German Arbitration LAAW 1998, 1029; AND India Arbitration and Conciliation Act 1996, S7.

<sup>25</sup> See, for example, German Party X Atrium GmbH, Nole by P, Schossers in *Entscheidungen Zum Wirtschaftrecht*, (December 1995) 1245-6, (1996) XX7 Ybk Comm Arb 845-50; and *Silkurmn Screen Printers, Inc. V. Robert Abreans* 1992 UN, ‘App LEXIN 255-45; 32 Federal Reporter, Third Series, 563, es seq. (1995), XX Ybk Comm Arbn, 830-7.

In *Hi-Fest Pty Ltd and Cargill Fertilizer Inc v Kiu Kiang Machine Carriers and Western Bulk Carriers (Australia) Ltd*,<sup>26</sup> the Federal Court of New South Wales had to consider whether an arbitral tribunal had jurisdiction to hear claims arising from a breach of the Trade Practices Act. The Court considered whether a claim for breach of statutory duty arose from a breach of a “defined legal relationship.” In its decision, the court stated that the expression was followed by the words ‘whether contractual or not,’ and as such, these words indicated that what was being referred to, with respect to arbitration, reached beyond the contractual relationship established within the underlying conduct. As such, the legal relationship can be defined by statute, implied by the scope of arbitration agreement and can be applicable to forts.

For arbitration to be applicable, the dispute between the parties must be capable of settlement by arbitration. This is still a broad and vague position as these disputes are not defined or listed. It is therefore assumed that the jurisdiction of national courts would be key in reaching such determinations. The rationale for this is that certain matters are considered to be so important to the operation of justice or the running of business in a country or a state, that they are reserved exclusively to the control of courts.<sup>27</sup> In *Zimmerman v Continental Airline Inc 16* (1963), the court in arriving at its decision, held that bankruptcy proceedings were not capable of settlement by arbitration because of their importance to the smooth functioning of the national commercial activities.<sup>28</sup> Only the Congress was in the situation due to legislative exemptions.<sup>29</sup>

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<sup>26</sup> (1997) 12 Mealey’ S International Arbitration Report (No. 7) C-1-C-9 (1998 CCIII Ybk Comm. Arbn 606-18 See also Kanold Steel & Grane Ltd & Kone Corp (1992) 87 DLR 4<sup>th</sup> 129, 40CPR 3d 161 et seq

<sup>27</sup> Andrew Tweedale and Karen Tweedale, *Arbitration of Commercial Disputes; International and English Law and Practice*.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

### **3. CONCLUSION**

In conclusion, arbitrable matters, put differently, assume that all matters are arbitrable unless the law states expressly that they are not, or the courts in certain circumstances, make a ruling that they are the only body with the exclusive jurisdiction to make a determination on the matter at hand. They therefore state what is not arbitrable rather than list what is arbitrable and for that reason, continuing the discussion for years to come, since practice has shown that this should not be solely be left to the purview of the said courts.

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## **DISMANTLING KENYA JURIST STEREOTYPES TOWARDS TRADITIONAL JUSTICE SYSTEMS: CAN SOMETHING GOOD COME FROM ARTICLE 159 (2) (C) OF THE CONSTITUTION?**

**By: Dr. Duncan Ojwang\***

### **ABSTRACT**

*This writer discusses the enforceability of Article 159 (2) (c) of the Kenya Constitution, which seeks to promote Traditional Dispute Resolution Mechanism (TDRM). It is hard for formal courts to accept legal pluralism and seriously consider the place of informal justice system. This challenge was recently illustrated by the Supreme Court Judge, Hon. Justice Professor J.B. Ojwang's public presentation of his Doctor of Laws Thesis defense.<sup>1</sup> In his presentation, he asserted that the application of traditional justice systems and customary law is limited only to the extent that they are not repugnant to justice and morality.*

*The question that arises is why the recognition of customary law is pegged on the test of repugnancy. The author contends that there should not be such an assumption of repugnancy, as every Kenyan law has to comply with the Constitution and the Bill of Rights. For a Supreme Court Justice and Law Professor in post-colonial Kenya talking on the 2010 Constitution, the reasoning and use of the term "repugnant" is of great concern. Therefore, the writer proffers that the so-called repugnancy of African customary law and systems, does not hold water, and argues that the colonial thinking amongst jurists is in fact the problem, and calls for a fundamental shift in their mindsets.*

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<sup>1</sup> Proj J.B. Ojwang gave a public presentation of his Doctor of Laws Thesis entitled, "The Unity of the Constitution and the Common Law" at the University of Nairobi on 24<sup>th</sup> August, 2015 at Taifa Hall. While answering a question asked by a participant on the possible role of TDRM, he praised common law as the guarantor of the new constitution, while dismissing the role of customary law.

*This article interrogates the extent to which legal institutionalization of discrimination of customary law under the “repugnancy” clause and precedent, is pertinent to how lawyers, judges and prosecutors, conceptualize TDRM. The article further examines the foundations of western reasoning and how they conceptualize law, to the exclusion of other genuine sources of law.*

## 1. INTRODUCTION

The 2010 Kenya Constitution gives a legal context which encourages use of informal justice systems (IJS), which is meant to complement the formal justice systems and together, guarantee access to justice as envisaged in Article 48.<sup>2</sup> Article 159(2) (c) and (3) provide for the use of Alternative Dispute Resolution (ADR) mechanisms, as well as Traditional Dispute Resolution Mechanisms (TDRM).<sup>3</sup>

Discourse on the informal justice systems has been centred solely on the substance of these systems, with very little attention being paid to the attitude jurists have towards the informal system, distinctively, the traditional justice systems. However, the challenges of implementing TDRM need also to be understood against the background of Kenya’s legal tradition<sup>4</sup>. Onyango is not off when he argues that most of the Kenya jurists consider African justice system and laws as “pre-logical” and “pre-legal.”<sup>5</sup>

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<sup>2</sup> Article 48, which is on access to justice states thus: -  
The state shall ensure access to justice for all persons.

<sup>3</sup> The application of traditional dispute resolution mechanisms is, however, aligned within the requirement that it does not contravene the Bill of Rights; is not repugnant to justice and morality or result in outcomes that are repugnant to justice and morality; and should not be inconsistent with the Constitution or any written law (see Article 159(3) of the Constitution).

<sup>4</sup> Legal tradition: a set of deeply rooted, historically conditioned attitudes about the nature of law, the role of law in the society and the polity, proper organization and operation of a legal system and about the way law is or should be made, applied, studied, perfected and taught.

<sup>5</sup> Peter Onyango, *African Customary Law System: An Introduction*, Law Africa Publishing (U) Ltd. Nairobi, 2013; also see Leila Chirayath, Caroline Sage and  
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While not undermining the contribution of the constitution and numerous jurists who have worked to protect informal justice, the flawed opinion held by jurists on the definition of law gives credence to the argument that colonialism has been replaced by intellectual dependency among Africa elites.

The writer adopts the critical legal theory and the structural theory perspective to highlight fundamental problems with the implementation of the traditional justice system in post-independent Kenya. These theories do not just consider things as they appear, but examine the underlying structures and use of symbolic language, like 'repugnancy' used to disdain TDRM. The theories are better equipped to review the pre-colonial realities, such as how colonialists used the law and justice system to exclude majority of Africans from access to political and economic power, and other social privileges. Yet, more than fifty years on, African elites are still showing great intellectual dependency on the west, and our courts and laws are still perpetuating laws and ruling that depict Africans as primitive.

The article does not focus on the reasons for this predisposition. However, it briefly attributes lack of plurality consciousness to the Kenya legal tradition, with factors like colonization and the desire to perpetuate the system, the racist languages carried in our law and court rulings on the "the repugnancy clause", as some possible factors that contribute to why TDRM is not considered justice, and how they continue to undermine this system as primitive.

It is not the writer's position that there might not be genuine concerns on how to implement TDRM. The Constitution did not give a limitless endorsement to the traditional justice system or customary law. Like all other Kenyan laws, they only exert authority within the bounds of the Constitution and in tandem with it. Judges and those in charge of justice have a duty to make sure no custom or law violates the Constitution. Therefore, some arguments against the traditional justice systems automatically becomes of less concern, given the judicial powers and the constitutional standard.

## 2. THE DEVELOPMENT OF NEGATIVE STEREOTYPES TOWARDS TDRM

This section offers an overview of the development of the negative stereotypes towards TDRM, and how lawyers in Kenya have not escaped these stereotypes. Generally, stereotypes take the most negative element of a cultural practice or group, push that single negative element to its worst end and then “trumpet” that worst element as the representation of that practice.<sup>6</sup>

African lawyers’ training is engrained with a negative western stereotype, making them great colonizing agents even in a post-independence era. <sup>7</sup>They have continued to uphold the superiority of western thoughts and justice and remain the biggest enemy of African customary law or African justice systems. According to Onyango, most of the lawyers in Kenya carry a dismissive attitude towards customary law and African justice systems. The reason why customary law has made a marginal appearance is the negative attitude held by Kenyan jurists, that any law unwritten is “archaic, primitive, backward, unscientific and empirically unverifiable.”<sup>8</sup>

The argument by Onyango on socialization and the attitude of Kenyan jurists is unmistakable; they are predisposed towards dismissing Africa laws and traditional institutions. As mentioned in the abstract, Justice Ojwang’s doctorate in common law, which is equal to British customary law, dismisses African customary law, which is not only

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<sup>6</sup> Tatum Melisa Group Identity: Changing the Outsider’s Perspective, 10 G.M.U. Civil Rights Law Journal 357 (Summer 2000).

<sup>7</sup> Generally, Peter Onyango, African Customary Law System: An Introduction, Law Africa Publishing (U) Ltd. Nairobi, 2013. Onyango discusses in depth how customary law has undergone hard time both in court and by legislation in parliament. He discusses the following major customary cases in Kenya courts; *Ocharo D/O Oigo v Ombego Mogoi*; *Otieno v Ouga* ; *Raya Binti v Hamed Bin Suleiman* ; *Momanyi Nyaberi v Onwonga Nyaboga*; *Wambui v Kager Community*. Very critical and in depth review of the attitude of Kenyan jurists on customary law and African traditional systems.

<sup>8</sup> Ibid.

unsettling, but it can be seen as a prediction of how jurists think of African laws and system. It goes to the heart and soul of the hierarchy, whereby Justice J.B Ojwang gives credence to common law over customary law.

The foregoing begs the question on the place of TDRM and customary law in Kenya. Niccolo Machiavelli advises that “there is nothing more difficult to plan, more uncertain of success, or more dangerous to manage than the establishment of a new order of government; for he who introduces it makes enemies of all those who derived advantage from the old order and finds but lukewarm defenders among those who stand to gain from the new one...”<sup>9</sup>

Immediately after colonization, the British imposed English law. The East African Order in-Council was adopted in 1897, which applied both the British and Indian Acts of Parliament in Kenya.<sup>10</sup> Minimum opportunity was given to customary law under the 1902 Order in-Council.<sup>11</sup> It has been agreed that the greatest impediment to African dispute resolution mechanisms was the ‘repugnancy’ clause to morality or justice, which was put as a qualifier to African customary law.<sup>12</sup> This subjective test assumed the superiority of the British culture and established it as the undisputed standard of what is moral or just.<sup>13</sup> Morality and justice was not an issue within African law, but within the ‘supreme, civilized’ European culture.<sup>14</sup>

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<sup>9</sup> Niccolo Machiavelli, “The Prince”, Chapter 6

<sup>10</sup> Nancy Barasa, *Family Law Reform in Kenya: An overview, Paper Presented at Heinrich Boll Foundation’s Gender Forum in Nairobi*, 30 April 2009.

<sup>11</sup> As C.S Lewis puts it, “Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron’s cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end, for they do so with the approval of their own conscience.”

<sup>12</sup> See Section 3(2), Judicature Act, Cap 8, laws of Kenya and Section 2, Magistrate’s Act, Cap 10, Laws of Kenya.

<sup>13</sup> See generally, Kariuki Muigua, “Effective Justice for Kenyans: Is ADR Really Alternative?” (May 2014) 3, 1-18.

<sup>14</sup> Id.

It is against the above background that the current courts and legislation continue to discriminate against African customary law and dispute resolution mechanisms, considering that the above reservation on African customary law is against the 2010 constitution which sought to be a de-colonizing agent by protecting the African traditional justice system, laws and culture. Article 159 (2) (c) of the Constitution seeks to entrench alternative forms of dispute resolution including Traditional Dispute Resolution Mechanisms (TDRM) and arbitration.<sup>15</sup> However, it is very hard to change the attitude of those who are used to the old order, and the court system that continues to perpetuate the language that African systems as repugnant and opposed to morality and justice.

Fortunately, the Constitution also offers real opportunities for the recognition of African culture. Article 11 recognizes culture as the foundation of the nation; article 7 of the 2010 Constitution of Kenya obliges the state to promote and protect the diversity of language. Under the Bill of Rights, Article 44 gives every person a right to use the language and participate in the cultural life of his/her choice.<sup>16</sup>

While it is clear that the current Constitution seeks to give traditional justice systems prominence, it is very hard to persuade those who are only trained in formal laws and the colonized legal traditions, that laws are a social construction and are as a result of policy choices.<sup>17</sup> It is today an accepted argument that each law is a creation of a particular type of culture and there is no such thing as 'neutral laws'.<sup>18</sup> There have thus evolved sophisticated indigenous mechanisms of solving disputes including mediation and arbitration, though not described in such charismatic terms. In spite of the developed legal system in European countries, only 5% of legal disputes are adjudicated in formal court.<sup>19</sup> This

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<sup>15</sup> Constitution of Kenya, 2010, Article 159.

<sup>16</sup> *Ibid.*, Art. 11, 7 and 44.

<sup>17</sup> See generally, Kenneth B. Nunn "Law as a Eurocentric Enterprise" *Law and Inequality*, Spring 1997 pp. 323-370.

<sup>18</sup> *Id.*

<sup>19</sup> *Ibid.*

is also the case in Kenya, where majority of disputes are still resolved informally, and using some form of arbitration or traditional justice mechanism.<sup>20</sup> Interestingly, majority of human interactions remain under informal and customary norms.<sup>21</sup>

Some of the pre-colonial realities that Africa had to face were how to protect their customary law and traditional institutions, while also remaining modern and competitive. This balance is complicated with the strong influence and discriminating impact of the modern legal systems that are more Eurocentric. Law schools and legal systems were reduced to simply providing legitimacy and superiority to the European system and laws over any non-white institutions or laws. Though it might be easy to demonstrate, at conceptual level, that traditional justice systems can meet any known justice standard, the real challenge is the negative attitude by the jurists.

Against this background, there is nothing as hard as changing set legal traditions. The reality is that Eurocentric law and the use of law as a tool for European cultural hegemony and cultural domination<sup>22</sup>, still dictate the legal tradition, 50 years after independence, especially the commoditization, materialism, competition and individualism, which are stronger in European culture, as opposed to the egalitarian African culture; it remains the driving force of most modern law.<sup>23</sup>

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<sup>20</sup> See Okoth Ogendo: (Claassens A & Ngubane S, 'Women, land and power: the impact of the Communal Land Rights Act' 2010 in Claassens A & Cousins B, *Land, Power and Custom* (Cape Town: Juta 2008), 99).

<sup>21</sup> Leila Chirayath, Caroline Sage and Michael Woolcock, "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems" (July 2005), 2.

<sup>22</sup> See generally, Kenneth B. Nunn "Law as a Eurocentric Enterprise" *Law and Inequality*, Spring 1997 pp. 323-370

<sup>23</sup> Id. "The Eurocentric world-view produces a culture of acquisition and narcissism. Since the Eurocentric perspective conceives of reality in material terms, the amount of resources available for well-being and survival are perceived to be finite."

The highest duty is for one to be cultured. <sup>24</sup>However, one can still critically analyze their culture. Equality, non-discrimination and tolerance are important aspects of self-determination that put individuals and groups to move from colonization and dominations to control their own system and laws.<sup>25</sup> It has been argued that to the extent that our contemporary law has not escaped and redeemed itself of its racially discriminatory ...we all share in the responsibility as human beings to engage them.<sup>26</sup> Further, self-determination tenets are embedded in the "right of cultural groupings to the political institutions necessary to allow them to exist and develop according to their distinctive characteristics."<sup>27</sup>

### **3. HOW EUROPEANS CONCEPTUALIZE LAW IN EXCLUSION OF AFRICAN CUSTOMS**

This section seeks to provide an understanding on how western laws depart from African concepts. It seeks to discuss why most jurists with Eurocentric thinking cannot support traditional justice systems and law. Western jurisprudence has deeply rooted historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system and about the way law is or should be made, applied, studied, perfected and taught, and is different from the African traditional justice and customary laws.<sup>28</sup>

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<sup>24</sup> Locke ob 5. Alain Locke, "The Ethics of Culture", in *The Philosophy of Alain Leroy Locke: Harlem Renaissance and Beyond*, ed. Leonard Harris (Philadelphia: Temple University Press, 1989), 176.

<sup>25</sup> S. James Anaya, *Indigenous Rights Norms In Contemporary International Law*

<sup>26</sup> Robert Williams: 'Columbus legacy: law as an instrument of racial discrimination against indigenous peoples' rights of self- determination', (1991) 51, *Arizona Journal of International & Comparative Law* 8

<sup>27</sup> See S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989, *Harvard Indian Law Symposium* 191, 219 (1990)

<sup>28</sup> John Henry Merryman, Rogelio Pérez-Perdomo, "The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America" p. 2

The Eurocentric culture of law is different from other non-western cultures in seven “distinctive” ethos, as it emphasizes the dichotomous, hierarchical, analytical, objective, abstract, rational, complex and the secular.<sup>29</sup> The discussion below elaborates only hierarchy and dichotomous reasoning as ways European jurisprudence conceptualize law which is different from African reasoning.

The first one is the ethos of Hierarchies, where western knowledge ranks and puts everything in a hierarchy. The idea of the “repugnancy” test for only customary law was based on a hierarchy of law and civilization. Only those customs that were similar or reconcilable to the European notion of justice, equity and morality could be allowed by the courts. This was one of the basis of extending racism to laws in colonies. It is because of these hierarchies based on racism and discrimination of Africa custom and justice system that Europeans succeeded in using law as an instrument of dominating Africans.

As the hierarchy on superiority of western law and legal institution crystallized, the tribal way of living and law was regarded as inadequate.<sup>30</sup> Because of these hierarchies, you can see why our legal training has kept the customary law on the periphery. A case in point is the fact that the

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<sup>29</sup> See generally, Kenneth B. Nunn “Law as a Eurocentric Enterprise” *Law and Inequality*, Spring 1997 pp. 323-370 i.e. western concept emphasizes third element of Analytical reasoning. That an idea must first be broken down into its constituent parts and then examined one by one in turn. The emphasis is in disconnecting ideas and not synthesizing ideas. The fourth one is Objectification. Unlike emphasis on human relationship, this allows for bond and relationships between one and objects. It is common to explain things in terms of subject –object terms and not object-subject terms. The fifth one is Abstraction. Ideas are considered in abstract more than in the reality. Abstract therefore become a way of explaining. This is the reason for preference of written over unwritten laws. The sixth one is Extreme Rationalism. Everything can be explained in rational terms. This gives much emphasis to cause and effect as a way of explaining everything in the universe. And the seventh one is Desacralization. Because of the attempt to explain everything for rationalization, the logical step is to have no room for sacred consideration.

<sup>30</sup> Robert Williams: ‘Columbus legacy: law as an instrument of racial discrimination against indigenous peoples’ rights of self- determination’, (1991) 51, *Arizona Journal of International & Comparative Law* 8.

School of Law at the University of Nairobi has gone years without a course in customary law.

The so-called inferiority of the African customary law and justice system was simply based on hierarchy and any difference was considered inadequacy. According to Oginga Odinga, "with this attitude Christianity could not be accepted without the rejection of African customs and religion."<sup>31</sup> This has also been described as cultural racism.<sup>32</sup> However, because it was packaged in terms of standards, it remained an "absolution" and justification for the European discrimination against the African laws.<sup>33</sup>

According to the ethos of hierarchy, any difference is simply considered a deficiency: they are inferior because they do not own land the way we do or do not have written laws the way we do.<sup>34</sup> Since in the western thinking, any difference translates to inferiority, the law must also reflect the hierarchy. Legislation and enforcement, with all privileges and power are based on the superiority of the western laws or formal laws, which informs the attitude of customary law and systems as retrogressive and repugnant to morality and justice.<sup>35</sup> Whose justice?

Even for laws, justice and morality according to western reasoning is first ranked, and then value is given depending on the hierarchy given. The African customary laws were automatically ranked the lowest after the principles of equity. This offers the excuse to make one aspect to dominate the rest, leading to domination of the superior and neglecting what is

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<sup>31</sup> Oginga-Odinga, *Not Yet Uhuru*, p. 63 as quoted by Onyango op cit at ip.

<sup>32</sup> Robert Williams: 'Columbus legacy: law as an instrument of racial discrimination against indigenous peoples' rights of self- determination', (1991) 51, *Arizona Journal of International & Comparative Law* 8.

<sup>33</sup> Albert Memmi, *The Colonizer and the Colonized* (1965); Frantz Fanon, *The Wretched of the Earth* (1963) "racism is the racist's way of giving himself absolution, "the injustice of an oppressor toward the oppressed, the former's permanent aggression or the aggressive act he is getting ready to commit, must be justified. And isn't privilege one of the forms of permanent aggression, inflicted on a dominated man or group by a dominating man or group

<sup>34</sup> See supra 31.

<sup>35</sup> *Id.*



considered inferior. For example, formal laws are better than customary law.

The second one is the western emphasis on Dichotomous Reasoning. Words are defined by comparing them to an incompatible opposite. This emphasis forces a clear “either/or” conclusions and does poorly with grey areas. The weakness in reducing concepts neatly to ‘either, or’, is that it is possible to miss the big picture and its holistic sense unlike diunital reasoning, common in Africa, that leads “both/and” conclusions and allows a nuanced view that is not perfectly neat and forced to some boxes.

For example one of the major arguments is the unitary argument as opposed to legal pluralism. Legal pluralism is a hybrid system that recognizes traditional African institutions and customary law, while at the same time, has the modern legal and institutional system.<sup>36</sup> This is an argument that Kenyans should have a uniform legal system and law. The strength of this argument is that law and justice should be unitary and color blind. Since Kenya has different ethnic communities, and traditional justice systems are only distinct to a particular community, the different systems and standards have the potential to erode the rule of law.

The weakness of the one-size-fits-all approach above, is that it is based on several assumptions. One major misplaced assumption is that there is a total unitary system in Kenya. What assurance do the persons with the above opinion have that what they are calling unitary is not majorly Eurocentric? The Europeans made their culture and law the starting point, and therefore European laws are what they equate with commonality.

The main assumption is that law is color blind. Today, there is a strong argument that law is effective and the rule of law is achieved not by being color blind, but when it accounts for the history, culture, religion, ethnicity, economy, and politics of a community.<sup>37</sup> It is a reality that laws

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<sup>36</sup> Pimentel, David. “Legal pluralism in post-colonial Africa: linking statutory and customary adjudication in Mozambique,” *Yale Human Rights and Development Law Journal* 14 (2011): 59. Web-accessed

<sup>37</sup> See Brian Z. Tamanaha, “The Primacy of Society and the Failure of Law and Development (October 2, 2009),” *Cornell International Law Journal*, Forthcoming; Washington U. School of Law Working Paper No. 10-03-02, available at SSRN: <http://ssrn.com/abstract=1406999>, the “law and development” initiatives around

and formal justice system have historically been used to exclude Africans and the poor from access to political, economic power, and other social privileges. Even today, several years after independence, the constitution is seeking to legitimize majority access to justice and protect the society from the failure of some formal laws and systems.<sup>38</sup> Law is sometimes perverted to prevent the natural outcome of dominant public opinion but serve the interest of those in power or with economic interest.<sup>39</sup>

Color blindness becomes an absolution to how law is used to maintain oppression of the majority and maintain social stratification.<sup>40</sup> Therefore the argument that law does not consider identity and culture but should be similar to all may sound moral, but it is an erroneous argument because the formal law takes care of a certain class.

This is the limited possibility for locating common ground between the Traditional Dispute Resolution Mechanism and formal court system. This Straight-jacket test does not allow overlaps. It sometimes fails in Africa because it ignores the complexity and over simplifies things to black and white. An integrated approach, where even human rights is included and anchored in the African culture as an internal cultural transformation has been suggested. However, the dichotomous reasoning of western culture cannot accept this practical method. This universalization fails as opposed

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the world focus on “enhancing legal education, implementing judicial reform, constitution or code drafting, transplanting laws and institutions, law enforcement training, combating corruption, educating lay people about law, providing access to law for the poor, and supplying material assistance for legal in institution building (including basics like office supplies, computers, and legal material).

<sup>38</sup> Ibid, 33.

<sup>39</sup> Justice Holmes, *LOCHNER V. NEW YORK*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 [1905]).

<sup>40</sup> Reva B. Siegel “Discrimination in the Eyes of the Law: How ‘Colour Blindness’ Discourse Disrupts and Rationalizes Social Stratification”, 1998-99 *Brennan Center Symposium Lecture, California Law Review, Jan 2000*. Also see, Spivak Gayatri, *A Critique of Post-Colonial Reason: Towards a History of the Vanishing Present*, Cambridge, MA: Harvard University Press (1999).<sup>22</sup>

to finding those values that resonate from the indigenous culture that will speak to the right and move it from the core value.<sup>41</sup>

#### 4. CONCLUSION

Is law only from some societies but not for others? There is nothing wrong with the TDRM system; however radical shift of attitude by Kenya jurists is necessary in order to 'mainstream' it. The difficulty in implementing TDRM does not only lie on substantial laws but change of attitude. The major hindrance to the effective implementation of Traditional Dispute Resolution Mechanism (TDRM) under Article 159 (2) (c) of the Constitution, is the negative stereotype and theoretical understanding of judges, lawyers, and prosecutors, that makes it difficult to use traditional justice system and not any defect in the traditional systems or customary law.

As President Thabo Mbeki said on the role of customs and traditional system in Africa:

*"We do have a past to be proud of; we do have a heritage that helps us face modern challenges and we do have a value-system that guides our behavior at the individual, family and community levels."<sup>42</sup>*

If we are to achieve access to justice then we must embrace the Africa customary law. Anybody who has studied jurisprudence will know that not all laws are reducible to written laws and cultural values and norms are crucial in interpreting law.

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<sup>41</sup> Id.

<sup>42</sup> President Thabo Mbeki at the Heritage Day Celebration in Taung in 2005 explained the place for African culture. The President said:

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