ACHIEVING ACCESS TO JUSTICE THROUGH ALTERNATIVE DISPUTE RESOLUTIONS:

A CRITICAL ANALYSIS ON KENYAN LEGAL FRAMEWORK

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DECLARATION

I, LYDIAH WAMBUI MBACHO, do hereby declare that this is my original work and that it has not been submitted for the award of a degree or any other academic credit in any other university.

Signature…….…….Date….. 23rd September 2021

LYDIAH WAMBUI MBACHO

This research project has been submitted for examination with my approval as the University Supervisor

Signature……..……...Date……23rd September 2021

DR. KARIUKI MUIGUA

DEDICATION

To my dear parents Joseph Mbacho and Esther Mbacho for teaching me the importance of hard work and for your sacrifice to ensure I achieved the best education. Being my Mum and Dad is the best gift God ever gave me. I will forever remain grateful. God bless you.

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National Land Commission Act, No 5 of 2012, Laws of Kenya.

National Land Transport Act, Act 5 of 2009 (SA).

Rules Board for Courts of Law Act, Act 107 of 1985 (SA).

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Tax Appeals Tribunal Act, No 40 of 2013, Laws of Kenya.

Tax Procedures Act, No 29 of 2015, Laws of Kenya.

The Marriage Act, No 4 of 2014, Laws of Kenya.

LIST OF ABBREVIATIONS

ADR- Alternative Dispute Resolution

ADRASA- Alternative Dispute Resolution Association of South Africa

CCMA- Commission for Conciliation, Mediation and Arbitration

GJLOSRP- Governance, Justice, Law and Order Sector Reform Program

IMSSA- Independent Mediation Service of South Africa

JTF- Judicial Transformation Framework

KLRC- Kenya Law Reform Commission

KRA- Kenya Revenue Authority

LSSA- Law Society of South Africa

NCIA- Nairobi Centre for International Arbitration

NCOP- National Council of Provinces

NGOs- Non-Governmental Organizations

NLC- National Land Commission

SJT- Sustaining Judiciary Transformation

TDRM- Traditional Dispute Resolution Mechanism

TJS- Traditional Justice Systems

UK-United Kingdom

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ABSTRACT

Kenyan courts are required to promote alternative forms of dispute resolution and safeguard timely administration of justice by ensuring timely disposal of proceedings and efficient disposal of their businesses. It is assumed that ADR is an effective tool of achieving these objectives and clearing case backlog. However, despite various judiciary-driven initiatives designed to institutionalize ADR, the Judiciary continues to demonstrate that case backlog remains a major challenge to the timely administration of justice in Kenya. Thus, the study sought to investigate the legal challenges that impede the use of ADR as a tool for achieving timely administration of justice in Kenya. The study employed doctrinal and comparative research methodologies.

The study reveals that Kenya lacks a substantive statute on ADR and a national policy. The existing framework is characterized by piecemeal legislations on ADR and the sectoral approach which have occasioned coordination challenges, legal gaps and disharmony amongst normative rules and the established institutions. In addition, TDRMs and TJS disregard principles of natural justice, human rights, equality and the non-discrimination. Further, the efficacy of ADR has also been compromised by antagonism between the formal legal system and the informal legal system. Lastly, culture is equally to blame as Kenyans have litigious tendencies, a negative attitude against ADR mechanisms and advocates discourage their clients from resolving to ADR. By way of comparison, South Africa has a better legal and institutional framework designed to enhance professionalism, competency and institutional jurisprudence. The study recommends the enactment of a single unifying statute to regulate and monitor ADR mechanisms, standardization of TDRMs so as to uphold natural justice, non-discrimination and gender balance. Other recommendations include demystifying TJS, Rethinking the role of advocates, developing a policy framework and conducting civic education to detoxify Kenyans' litigious culture.

CHAPTER ONE

INTRODUCTION

1.1 Introduction and Background of the Study

There is general agreement amongst scholars and policy makers on the meaning of the term Alternative Dispute Resolution (ADR) with regard to its nature. It has been defined as those processes for resolving disputes other than litigation. It can take different forms including dispute prevention, negotiation, hybrid between mediation and arbitration, mediation, hybrid between arbitration and mediation, and arbitration.[1] ADR has special advantages over litigation. These include the flexibility of the process, the time-consuming nature of the proceedings and the confidentiality of the process.[2] This study will however major on negotiation and mediation.

There is every indication that the Kenyan legal framework presupposes that disputes should be heard and determined expeditiously in pursuit of wider constitutional principles of access to justice and timely administration of justice. The Constitution of Kenya 2010 requires the courts and the tribunals to ensure that justice is not delayed and that they promote alternative forms of dispute resolution.[3] Under the overriding objective, civil courts are enjoined to ensure timely disposal of the proceedings and efficient disposal of the court's business.[4] Similarly, appellate

[1] Kenya Law Resource Center, 'Alternative Dispute Resolution' (*Kenya Law Resource Center*, January 2020) <http://www.kenyalawresourcecenter.org/2011/07/alternative-dispute-resolution.html>accessed 27 January 2020.
[2] STA, 'United Arab Emirates: Comparative Analysis of ADR Methods With Focus On Their Advantages And Disadvantages'(*STA Law Firm*, February 2019) <https://www.mondaq.com/x/777618/Arbitration+Dispute+Resolution/Comparative+Analysis+of+ADR+Methods+with+focus+on+their+Advantages+and+Disadvantages>accessed 27January 2020.
[3] Constitution of Kenya 2010, Article 159 (b) and (c).
[4] The Civil Procedure Act, Cap 21, s 1B.

courts are obligated to ensure the timely disposal of the proceedings and all other proceedings in the court.[5]

Government policies, taskforces and judiciary reports have in the past proposed the use of ADR as a suitable recommendation on addressing backlog of cases. The groundbreaking taskforce chaired by Justice William Ouko on judicial reforms recommended that introduction of alternative dispute resolution mechanisms would be a long term measure for addressing backlog of cases.[6] In 2012, the Judicial Transformation Framework (JTF), 2012-2016 recommended on the use of ADR mechanisms as a way to arrest case backlog.[7] The Kenyan Judiciary has similarly taken the view that ADR could be an effective cure to case backlog. In the past, it has revealed its plans to hire more arbitrators in its bid to promote ADR as it seeks to reduce case backlog.[8]

It has been authoritatively argued that ADR mechanisms and access to justice are intertwined such that a proper utilization of ADR would surely lead to improved access to Justice.[9] In addition, it has been argued that case-management mediation in criminal cases can reduce case backlog and increase the chances of pre-trial plea bargains.[10] Celebrated scholars have recommended far-reaching reforms in the judicial processes to ensure inclusion of ADR

[5] Appellate Jurisdiction Act, Cap 9, s 3B.
[6] Government Printer, Final Report of the Taskforce on Judicial Reforms, (2010) 56.
[7] Government Printer, Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda 2017-2021, (2016) 19.
[8] Strathmore University, 'Judiciary moves to cut case backlog through arbitrators' (*Strathmore University Dispute Resolution Centre*, 30 November 2018). <https://strathmore.edu/sdrc/2018/11/30/judiciary-moves-to-cut-case-backlog-through-arbitrators/>accessed 10 December 2019.
[9] Kariuki Muigua, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' 2. <http://kmco.co.ke/wp-content/uploads/2018/09/ACCESS-TO-JUSTICE-AND-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA-23rd-SEPTEMBER-2018.pdf> accessed 15 December 2019.
[10] Leonard TC, 'Pressure to Plead: How Case-Management Mediation Will Alter Criminal Plea-Bargaining' (2014) 2014 (1) Journal of Dispute Resolution 168.

mechanisms to enhance expedition in adjudication of disputes.[11] During the National Alternative Dispute Resolution Stakeholders Forum, participants from the civil society, the government, academia and private sector expressed their hope that ADR can be a very crucial tool in achieving access to justice. The participants expressed their strong conviction that ADR could reduce the time it takes to resolve disputes eventually addressing case backlog.[12] A similar view has been shared by professional stakeholders who also believe that ADR mechanisms help reduce backlog in the court.[13]

Over the years, the judiciary has undertaken conscious initiatives designed to address case backlog through institutionalization of ADR in the judicial system. The Judiciary has since launched court annexed mediation in the Family and Commercial Divisions with a view to improving access to justice and cure case back log.[14] Under the Pilot Project rules, the Mediation Deputy Registrar would subject every civil action instituted in court to mandatory screening and those found suitable for mediation would be referred to mediation.[15]

The advocacy for ADR as a means of clearing case backlog has led to the establishment of several institutions to buttress and promote the use of ADR in solving civil disputes. Such institutions include the Nairobi Centre for International Arbitration (NCIA) and the Strathmore

[11] Kibaya Imaana Laibuta, 'Access to Civil Justice in Kenya: An Appraisal of Policy and Legal Framework' (Doctor of Laws thesis, University of Nairobi 2012) 50.

[12] International Development Law Organization, 'Enhancing Access to Justice through Alternative Dispute Resolution in Kenya' (*IDLO,* April 2018) <https://www.idlo.int/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya>accessed 10 December 2019. The forum was supported by NCIA, the Taskforce on Alternative Dispute Resolution and IDLO.

[13] ICPAK, 'Alternative Dispute Resolution' (*ICPAK,* February 2016) 18. <https://www.icpak.com/wp-content/uploads/2019/04/8.0-Alternative-Dispute-Resolution-CPA-Caroline-Nganga.pdf> accessed 10 December 2019. Presentation by CPA Caroline Ng'ang'a who is an arbitrator and accredited mediator.

[14] Government Printer (n 7) 20. Among other recommendations was the enactment of a Small Claims Act, amendment of various laws and recruitment of more Judges, Magistrates and Researchers.

[15] Florence Shako, 'Mediation plan will enhance access to justice, clear backlog' *Business Daily* (Nairobi, 8 February 2016) 6.

Dispute Resolution Centre which were intended to handle thousands of commercial disputes which were stuck in the courts.[16]

In addition, the parliament has progressively enacted host of legislative amendments with a view to entrenching ADR into mainstream judicial system. For instance, the Civil Procedure Act was in 2009 amended to introduce changes which would enjoin the courts in ensuring timely administration of Justice.[17] The amendment introduced the overriding objective of the court as ensuring expeditious resolution of the civil disputes, efficient disposal of the business of the court and timely disposal of the proceedings.[18] The Act was also amended in 2012 to create the Mediation Accreditation Committee and the procedures by which the court could refer parties to mediation or other alternative dispute resolution methods, and how the final agreement would be enforced.[19]

All these interventions notwithstanding, there is every indication that case backlog remains a major challenge to the timely administration of justice and realization of the constitutional right of access to justice. The Sustaining Judiciary Transformation (SJT), 2017-2021 points out that backlog still remains a major problem.[20] More interventions have since been sought, including carrying out of Service Weeks, ensuring proper documentation during trials and other measures designed to facilitate timely administration of justice.[21]

On 27th April 2018, a report by the Chief Justice revealed that the Judiciary was still grappling with a backlog of cases, and that a high percentage of cases are not being heard and determined

[16] Ibid.
[17] The Statute Law (Miscellaneous Amendment) Act, No. 6 of 2009.
[18] Civil Procedure Act s 1A & 1B.
[19] Civil Procedure Act s 59B. This was via the Statute Law (Miscellaneous Amendments) Act No. 12 of 2012.
[20] Government Printer (n 7) 21.
[21] Ibid 22-25. Some measures were the operationalization of the Small Claims Court Act, amending the Civil Procedure Rules to allow Deputy Registrar to dismiss inactive cases and constitution of an implementation Team to fully implement the Court Annexed Mediation.

within a reasonable time.[22] Notwithstanding, as of June 2018, the Directorate of Performance Management revealed that there were 549, 556 cases pending in courts countrywide.[23] By March 2019, studies showed that an estimated 45% of the backlog cases as at June 2018 had been pending before the courts for more than three years.[24] In March 2019, the Chief Justice admitted that case backlog continued to be one of the major challenges facing the Judiciary.[25] In May 2019, the Chief Registrar of the Judiciary hinted that backlog was still troubling the Judiciary, and that it might take longer for the Judiciary to clear the backlog.[26] In addition, it has been argued that case backlog is a major challenge to the efficacious operation of the criminal justice system.[27]

There is a general agreement amongst distinguished scholars that the Judiciary's consistent attempt to employ ADR to curb case backlog has not been very successful. The amendment of key laws especially the Civil Procedure rules has occasioned little success in reducing case backlog.[28] It has been lamented that even though arbitration is the mostly utilized and advanced amongst the various forms of ADR mechanisms, its prevalent use has not been sufficiently appreciated towards the reduction of case backlog.[29] In addition, it has been argued that despite the implementation of the ambitious Judicial Transformation Plan, case backlog remains a major

[22] Kamau Muthoni, 'Lawyers, courts take blame for delays in handling cases' *Standard Digital* (Nairobi, 28April 2018) 5.
[23] Anne Amadi, 'How Judiciary plans to deal with case backlog in courts' *Business Daily* (Nairobi, 5 March 2019) 4.
[24] Patrick Alushula, 'Agony as half of lawsuits in Kenya drag on past three years' *Business Daily* (Nairobi, 18 March 2019) 10.
[25] Government Printer, State of the Judiciary and the Administration of Justice, Annual Report 2017-2018, (2018) Foreword.
[26] Kamau Muthoni, 'Case backlog crisis bites hard amid cash crunch in Judiciary' *Standard Media* (Nairobi, 18 May 2019) 3. The Registrar spoke at the launch of a performance report released on 17th May 2019 by Chief Justice David Maraga.
[27] ICJ, 'Human Rights Report: The Impact of County By-Laws on the Prisons and Pre-Trial Remand Facilities in Nairobi and Nakuru Counties' (*The Kenyan Section of the International Commission of Jurists*, July 2014) 9.
[28] Kariuki Muigua, (n 9) 3.
[29] Kyalo Mbobu, 'Efficacy of Court Annexed ADR: Accessing Justice through ADR' (2013) 1 ADR Journal 96.

hindrance to the timely administration of justice hence barricading the realization of the constitutional right of access to justice.[30]

1.2 Problem Statement

Kenyan legal framework presupposes that disputes should be heard and determined expeditiously in pursuit of wider constitutional principles of access to justice and timely administration of justice. The Constitution of Kenya 2010 requires the courts and the tribunals to ensure that justice is not delayed and that they promote alternative forms of dispute resolution. Civil courts are enjoined to ensure timely disposal of the proceedings and efficient disposal of the court's business.

Over the years, the judiciary has undertaken conscious initiatives designed to address case backlog through institutionalization of ADR in the judicial system including the launching of the court annexed mediation. The advocacy for ADR as a means of clearing case backlog has led to the establishment of several institutions to buttress and promote the use of ADR in solving civil disputes like the Nairobi Centre for International Arbitration (NCIA) and the Strathmore Dispute Resolution Centre. In addition, the parliament has progressively enacted host of legislative amendments with a view to entrenching ADR into mainstream judicial system, especially the appeals to the Civil Procedure Act. It is expected that with these various legislative interventions, delay in disposing matters and case backlog would be a thing of the past.

However, with all these interventions notwithstanding, there is every indication that case backlog remains a major challenge to the timely administration of justice and realization of the constitutional right of access to justice. On 27th April 2018, a report by the Chief Justice revealed

[30] Peter Oduor Ooko, 'The Implication of Case backlog on the right to access to justice in Kenya: A case study of Mavoko Law Courts' (Master of laws thesis, University of Nairobi 2018) 80.

that the Judiciary was still grappling with a backlog of cases, and that a high percentage of cases are not being heard and determined within a reasonable time.[31]There is a general agreement amongst distinguished scholars that the Judiciary's consistent attempt to employ ADR to curb case backlog has not been very successful.

The study seeks to examine why the use of ADR has not been effective in achieving the timely adjudication of disputes and the clearance of case backlog. It will also investigate why the various legislative amendments on the legal framework governing ADR has borne little success in achieving timely access to justice and the clearance of case backlog. For comparative analysis, the study will analyse the experiences of other jurisdictions with a view of identifying any positive lessons which Kenyan can emulate. It will investigate these legal problems with a view to propose the necessary legislative reforms which can effectively address the apparent inefficacy of the legal framework governing ADR.

1.3 Research Objectives

1. To investigate the Kenya's legal framework on ADR.
2. To examine the legal challenges that impede the use of ADR mechanisms as a tool for achieving timely administration of justice in Kenya.
3. To investigate the extent to which the South Africa's experience on ADR provide lessons which Kenya can emulate in the pursuit of timely administration of justice.
4. To propose the necessary amendments on the Kenya's legal framework which can be employed to achieve timely administration of justice.

[31] Kamau Muthoni, 'Lawyers, courts take blame for delays in handling cases' *Standard Digital* (Nairobi, 28April 2018) 5.

1.4 Research Questions

1. What is Kenya's legal framework on ADR?
2. What are the legal challenges that impede the use of ADR mechanisms as a tool for achieving timely administration of justice in Kenya?
3. To what extent does the South Africa's experience on ADR provide lessons which Kenya can emulate in the pursuit of timely administration of justice?
4. What are the necessary amendment/reforms on the Kenya's legal framework in the pursuit of reduction of backlog and timely disposal of suits?

1.5 Significance of the Study

The study has far reaching benefits touching on the achievement of Vision 2030, the realization of constitutional requirements with regard to timely administration of justice and access to justice. Under Vision 2030, the Government has planned to undertake various initiatives with a view to improving the efficacy of the financial system. One of such initiatives is to reform the commercial justice system with a view to expediting the settlement of commercial disputes.[32] With respect to advancing rule of law, the Government has planned, under the political pillar, to innovate strategies which should enhance access to justice by minimizing barriers to justice.[33] To this end, the study will be at fours with the Vision 2030, since it shall principally interrogate the efficacy of ADR mechanisms in achieving the timely administration of justice.

In addition, the study will go a long way in ventilating the discussion on the implementation of the constitutional principle that the court shall promote ADR when read together with the

[32] Government Printer, *Kenya Vision 2030: A Globally Competitive and Prosperous Kenya* (2007) 91.
[33] Ibid 160.

principle that justice shall not be delayed.[34] Furthermore, the study will advance the evergreen discourse propelled by the JTF and SJT, with respect to enhancing access to justice and clearance of case backlog. JTF has since recommended the use of ADR as one of the ways of arresting case backlog.[35]To achieve these goals, SJT has planned to roll out alternative justice systems programmes, expansion of ADR mechanisms and strengthening the Court-Annexed Mediation.[36] The study will come in handy to analyze the efficacy of these initiatives in achieving access to justice and clearing backlog with a view to propose the necessary reforms to enhance their utility.

1.6 Research Hypotheses

The study is based on the following hypotheses.

1. That ADR mechanisms are an effective tool of achieving timely administration and access to justice.
2. That the Kenyan legal framework for ADR is unstructured and has inherent legal challenges that impede its efficacy in attaining timely administration of justice.

1.7 Research Methodology

The study employs a mixed approach comprising doctrinal methodology as well as drawing up lessons from South Africa's experience on ADR. The research is qualitative as it will review and analyze the already available data. Doctrinal research methodology is very useful in analyzing the legal, institutional and policy framework of a particular jurisdiction. It essentially analyses the history behind a particular legal proposition and the impact of the proposition in the legal

[34] Constitution of Kenya 2010, Article 159 (2) (b) and (c).
[35] Government Printer (n 7) 19.
[36] Ibid, Executive Summary.

framework. The study will also analyze the experiences of other jurisdictions, especially South Africa, with a view to identifying lessons which Kenya can emulate. The choice of the jurisdiction is informed by several factors including the fact that they have a more developed legal framework on ADR. Furthermore, it will conduct desktop review and interrogate secondary sources of data especially statutes, government policies, journal articles, textbooks and government reports.

1.8 Conceptual Framework

For the purposes of this study, the following terms or phrases have the following meaning:

Alternative Dispute Resolution (ADR)

The term ADR refers to all those decision-making processes other than litigation and includes arbitration, expert determination, conciliation, mediation, enquiry and negotiation.[37]

Mediation

The word mediation refers to a dispute resolution process in which a neutral third party helps the parties to reach a negotiated solution.[38] It also includes where a neutral, impartial and acceptable third party is involved in assisting disputing parties to voluntarily reach their own mutual acceptable settlement.[39]

[37] Kariuki Muigua, 'Alternative Dispute Resolution and Article 159 of the Constitution' 2. <http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf>accessed 21 July 2021.
[38] P. Fenn, "Introduction to Civil and Commercial Mediation," in Chartered Institute of Arbitrators, *Workbook on Mediation* (CIArb 2002) 10.
[39] Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass Publishers, San Francisco, 1996) 14.

Traditional Dispute Resolution Mechanism (TDRM)

These are mechanisms are all those mechanisms that local or rural communities or peoples have applied in managing disputes/conflicts since time immemorial and have passed from one generation to the other.[40] They are the localized, cultural-specific dispute resolution mechanisms which also take the name traditional, African, indigenous or customary.[41] They include practices employed to resolve conflicts and maintain peace and stability in the rural communities.[42]

Traditional Justice System (TJS)

The term traditional justice system (TJS) refers to systems that have historically functioned as an alternative or as a complement to the formal state court system.[43] They are typically based on customary practices, traditions and rules of communities that have, over time, been deemed to be customary law. Moreover, there may be a significant number of traditional justice systems within a given country, as different communities often have their own customary law.[44]

1.9 Theoretical Framework

The study adopts the following two theories.

1.9.1 John Rawls' Theory of Justice

The study will be guided by the principle of Justice, which constructs Justice as fairness.

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[40] Francis Kariuki, 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR' 2. <http://kmco.co.ke/wp-content/uploads/2018/08/download1352184239.pdf>accessed 21 July 2021.
[41] Ibid.
[42] Tsegai Berhane, 'Traditional natural resource conflict resolution viv-a-vis formal legal systems in East Africa: The cases of Ethiopia and Kenya' AJCR 2017/1 (*Accord*, June 2017) <https://www.accord.org.za/ajcr-issues/traditional-natural-resource-conflict-resolution-vis-vis-formal-legal-systems-east-africa/>accessed 21 July 2021.
[43] United Nations, *Human Rights and Traditional Justice Systems in Africa* (New York and Geneva, 2016) 1.
[44] Ibid.

The Theory of Justice was propounded by John Rawls, in his famous and celebrated work of 1971 '*Theory of Justice*.'[45] It is John Rawls who offered the most detailed and concise definition of the term 'justice.' His conception of justice can be summarized into two basic principles. First, that each person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all which include political liberty, freedom of speech and conscience, right to hold personal property, fair equality and opportunity.[46] The rationale behind this principle is to ensure that persons have and enjoy basic human freedoms and liberties guaranteed under legal instruments. Since the principle places high premiums on personal liberty, it serves as the yardstick for measuring the efficacy of the current ADR framework in upholding fair equality and opportunity for litigants as well as its efficacy in enhancing emancipation of the marginalized groups like women.

The second principle is that inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage.[47] In the work, he argues that the concept of freedom and the concept of equality are not mutually exclusive. He opines that for justice to be really just, every individual ought to be granted equal rights under the law. In this context, the discussion will be on the realization of the constitutional right to have disputes adjudicated in a timely manner, as a constitutional liberty. The principle is central to this study as it acknowledges the possibility of inequalities in any legal system and offers a criterion for the inequalities to achieve legitimacy. Given that ADR mechanisms like TDRM and TJS have aspects of inequalities, the principle will be useful in assessing whether the identified inequalities meet the legal justification to acquire legitimacy.

[45] John Rawls, *A Theory of Justice* (Harvard University Press 1971) 34.
[46] Ibid.
[47] Daniel Gebrie and Hassen Mohamed, 'Ethiopian Justice and Legal Research Institute Teaching Material on Jurisprudence' (2008) 164. <https://chilot.files.wordpress.com/2011/06/jurisprudence.pdf>accessed 14 April 2020.

The reason this study has chosen this theory is because the theory places high premiums on personal liberty, fair equality and enhances emancipation of marginalized groups. The theory will be useful in investigating the extent to which the Kenya's legal framework for ADR promotes the realization of social-political liberties, especially the right to access justice and the right to timely administration of justice. It will be key in dissecting the discussion on how to balance several constitutional rights especially the right to access justice, right to timely adjudication of disputes and the Court's duty and role in promoting ADR in dispute resolution.

1.9.2 Legal Positivism

The study will also utilize the theory of Legal Positivism to advance its arguments. The theory, which was initially propounded by Jeremy Bentham and Hume, essentially postulates that law is a social fact which can be ascertained through a systematic process rather than a group of principles derived from the forces beyond the political sovereign.[48] But although the history of the theory can be traced to the works of Jeremy Bentham, it is actually John Austin who gave it a more definite shape by advancing the separability thesis, in which he argued that there is a necessary separation between law and morality.[49]Austin's conceptualization that the sovereign is above the law and that law must be backed by sanctions attracted much criticism especially from HLA Hart who advanced John's definition of law by drawing a distinction between primary and secondary rules.[50]

The theory was later advanced by Hans Kelsen whose contribution was advocating for a pure theory of law. He postulates that laws in a particular legal system derive their legal validity from

[48] Jonathan Brett Chambers, 'Legal Positivism: An Analysis' (2011) 79 Undergraduate Honors Thesis 1, 15.
[49] Daniel Gebrie and Hassen Mohamed (n 47) 46.
[50] Anthony Twonsend Kronman, 'Hart, Austin and the Concept of Legal Sanctions' (1975) 84 The Yale Law Journal 586.

their conformity with the grund norm.[51] The theory will be very instrumental in interrogating the role of the three arms of the Government in the promotion and advancement of ADR as means of achieving timely administration of justice.

The reason this study has chosen this theory is because the theory requires that all law be written or somehow communicated to the society and that all laws in a single legal system ought to conform to the grund norm, in our case the constitution. Given that the Kenyan Constitution is the grund norm in the Kenyan legal system, the study will use this theory to explain why the parliament should enact laws on ADR to give effect to the constitutional provisions. It will also underscore why all ADR laws must conform to the Constitution in terms of ensuring timely administration of justice.

1.10 Literature Review

1.10.1 Utility of ADR as a tool of Dispute Resolution

Gathumbi[52] writes on the utility of ADR mechanisms as a tool for dispute resolution in the devolved governance system in Kenya, in which he makes a case for the adoption and promotion of ADR methods to address intergovernmental disputes. He opines that ADR mechanisms are the most convenient methods for resolution of intergovernmental disputes for being faster. However, he observes that the legislative and policy framework on the use of ADR in intergovernmental disputes has not been developed. He posits that the Intergovernmental Relations Act, 2012 is deficient in detail and no regulations have been made to operationalize the constitutional

[51] Kendra Frew, 'Hans Kelsen's Theory and the key to his normativist dimension' (2001) 4 The Western Australian Jurist 285, 320.

[52] Gathumbi Gabriel, 'Alternative Dispute Resolution Mechanisms as a tool for Dispute Settlement in the Devolved Governance system in Kenya' (Master of Laws thesis, University of Nairobi 2018) 21.

provisions relating to the promotion of ADR as a devise for intergovernmental dispute settlement.[53]

However, his study is limited to intergovernmental disputes leaving out disputes between citizens themselves and between citizens and the government. This study concurs with Gathumbi on the extent to which legislative and policy framework on the use of ADR has not been developed. Given that the study was limited to intergovernmental disputes, the current study will take a bigger scope by discussing the utility of ADR mechanisms in solving disputes between citizens themselves and between citizens and the government.

Peter Ooko[54] investigates the legal implication of case backlog on the realization of the constitutional right to access to justice by using Mavoko law courts as a case study. He argues that despite the lofty ambitions on administration of justice and the constitutional right of access to justice, the achievement and realization of equal and full access to justice is still a mirage. He writes that case backlog is a major hindrance to the realization of the constitutional right of access to justice and that the current measures devised to address the problem are still inadequate. He holds the opinion that the introduction of mandatory ADR procedures before invoking court litigation has been an effective way of remedying undue delays in litigation.

He opines that the legal framework, especially enabling statutes and rules of procedure in ADR should be reformed to outline limited circumstances where ADR would be inappropriate.[55] He recommends conscious efforts towards promotion of ADR and decentralization of Court annexed mediation. This study will go further and investigate why the various legislative amendments on

[53] Ibid 76.
[54] Peter Oduor Ooko, 'The Implication of Case Backlog on the right to Access to Justice in Kenya: A case study of Mavoko Law Courts' (Master of Laws thesis, University of Nairobi 2018) 29.
[55] Ibid 91.

the legal framework governing ADR has borne little success in achieving timely access to justice and the clearance of case backlog

1.10.2 ADR and Civil Justice in Kenya

Laibuta[56] writes on the concept of civil justice in Kenya and evaluates the effectiveness of the policy and legal frameworks in attaining access to civil justice. His study seeks to address pertinent policy issues with a view to revealing major factors that impede access to civil justice in Kenya. He argues that the Kenya's policy and legal framework for the administration of justice is not well suited to guarantee effective delivery of civil justice and equal access to civil justice. He holds the opinion that the system of procedural justice is not suitable to deliver quality outcomes and effective remedies and goes ahead to make a case for statutory entrenchment of ADR mechanisms in the legal framework.

He recommends inclusion and adoption of ADR mechanisms to enhance administration of civil justice and expedite civil proceedings.[57] However, his study is limited to access to civil justice and it does not interrogate the efficacy of the current legal provisions on ADR mechanisms. This study will seek to fill the gaps and goes further to interrogate the efficacy of the current legal provisions on ADR mechanisms.

1.10.3 ADR and Access to Justice

Kariuki Muigua in his book[58] argues that ADR enhances access to justice for all which then promotes social, economic and political development in Kenya. He recognizes that the constitution of Kenya 2010 obligates courts to promote ADR in settling of disputes. He analyses

[56] Kibaya Laibuta, 'Access to Civil Justice in Kenya: An Appraisal of the Policy and Legal Frameworks' (Doctor of Laws thesis, University of Nairobi 2012) 9.
[57] Ibid 299.
[58] Kariuki Muigua, *Alternative Dispute Resolutions and Access to Justice in Kenya* (Glenwood Publishers 2015).

the legal framework on ADR in Kenya. He notes that various statutes promote ADR . He notes how procedural technicalities have been overly emphasized at the expense of substantive justice. This study concurs with DR. Kariuki Muigua on the extent to which ADR promotes access to justice. This study however seeks to examine why the use of ADR has not been effective in achieving the timely adjudication of disputes and timely access to justice.

Kariuki Muigua[59] argues that access to justice and ADR mechanisms are intertwined and that a proper utilization of ADR can enhance access to justice for Kenyans. He goes ahead and analyses the efficacy of the Court-Annexed Mediation Project by pointing out pertinent issues revolving around its nature, utility and legitimacy. He points several legal questions which bring into focus the legal implications of the Mediation project. He points out that it is still unsettled whether referring a case to mediation violates litigant's constitutional right to have their disputes resolved before a court.

He argues that it is still debatable whether the Mediation Deputy Registrar's direction requiring parties to go for mediation is a decision which can be appealed to a judge or whether it can be challenged through applying for judicial review. In addition, in situations where a matter has been screened and the parties have been referred to mediation, Muigua questions whether a party who is aggrieved by the referral can refuse to go for the mediation.

Although he argues that ADR mechanisms are effective tools of enhancing access to justice, Muigua postulates that there are gaps in their application, in the sense that they have not been harmonized and that there is a need for establishing a sound legal, institutional and policy framework to enhance the use of ADR mechanisms. Importantly, he argues that ADR should be benchmarked against the Bill of Rights and international best practices on human rights and

[59] Kariuki Muigua (n 9) 13.

access to justice. He recommends the felt necessity to design an over-arching structural framework for ADR in Kenya, which can be employed by stakeholders to develop further legislation.[60]He opines that increased application of ADR will lead to faster dispensation of cases and by extension curb backlog of cases. This study investigates the legality of the mandatory screening of cases at the High Court which determines cases that are ripe for mediation. It will also investigate whether the compulsory nature of the screening process vitiates the voluntary nature of ADR.

Prof. Musili Wambua[61] writes on the legal challenges that impede implementation of ADR as an alternative mode of access to justice in Kenya. He observes that despite the constitutional provisions anchoring ADR on the legal system, there is lack comprehensive legal framework to guide the ADR processes. He argues that there is no legislative framework on mediation in the Civil Procedure Act or the Civil Procedure Rules 2010. He also opines that there is no specific legislative framework mandating arbitration of disputes before approaching a court.

He posits that there is absence of comprehensive national policy on ADR mechanisms and access to civil justice. He concludes that ADR can be utilized as a crucial tool to promote access to civil justice because it offers an opportunity to remedy the menace of case backlog in the courts.[62] However, much has happened since the publication of the article in 2013, with respect to case law and institutional frameworks by the Judiciary on the utility of ADR mechanisms in the Kenyan legal system. This study will investigate and determine the jurisprudence emanating from the courts since then, as well as determine whether initiatives introduced since 2013 have made any difference with respect to reducing case backlog in the courts.

[60] Ibid 19.
[61] Paul Musili Wambua, 'The Challenges of Implementing ADR as an Alternative Mode of Access to Justice' (2013) 1 (1) Alternative Dispute Resolution Journal 1, 15.
[62] Ibid 33.

1.11 Chapter Breakdown

The study has five chapters. Each of the chapters will have an introductory paragraph and a concluding paragraph.

Chapter One: Introduction

The chapter will offer a general overview of the structure of the entire study. First, the chapter will offer some background information made to bring the study into context. It will also comprise the problem statement which will summarily state the legal question being investigated. It will also contain the study hypothesis which will outline the major hypotheses which the study is seeking to prove or disprove. It will also feature the literature review which will essentially bring out the gap in literature and a theoretical framework outlining the legal theories on which the arguments of the study are based.

Chapter Two: Legal Framework governing ADR in Kenya

The chapter will give an in depth analysis of the legal framework on the law on ADR in Kenya. It will comprise a chronological narration of past legislative events which inform the current legal framework on ADR. This historical narration will attempt to identify the particular legislative move, the trajectory of legal reforms in the sector and the rationale behind any legislation or amendment. The historical narration will be done in two parts. The first part will cover the period before the promulgation of the Constitution in 2010 while the second part covers the period immediately after the promulgation. Lastly, the chapter will offer a critical analysis of the current status, with a view to investigate its efficacy in attaining timely administration of justice.

Chapter Three: Legal Challenges Impeding the Efficacy of ADR in Kenya

The chapter will discuss the legal challenges that impede the use of ADR mechanisms as a tool for achieving timely administration of justice in Kenya. The discussion will be tailored to answer the key research questions of the study. It will investigate why the use of ADR has not been effective in achieving the timely adjudication of disputes and the clearance of case backlog. It will also investigates why the various past legislative amendments on the legal framework have borne little success in achieving timely access to justice and the clearance of case backlog.

Chapter Four: Comparative Analysis on South Africa's Legal Framework on Alternative Dispute Resolution

The chapter will contain a paragraph justifying the choice of the South Africa jurisdiction. In addition, it will offer a critical analysis of the South Africa's experience with a view to identify the positive achievements and attributes of the jurisdiction; and to identify the lessons which Kenya can emulate. Essentially, the chapter will highlight the positive attributes of South Africa jurisdiction and the unique features which have made their ADR mechanisms effective tools of achieving timely administration of justice.

Chapter Five: Research Findings, Conclusion and Recommendations

The chapter will offer a summary of the entire research. It will also sum up the findings reached by the study and discuss whether the hypotheses set out in chapter one were proved or disproved. Further, it will offer a conclusion and make recommendations with a view to enhancing the efficacy of ADR mechanisms as tools of achieving timely access to justice.

CHAPTER TWO

KENYA'S LEGAL FRAMEWORK ON ADR

2.1 Introduction

This chapter gives an in depth analysis of the legal framework on the law on ADR in Kenya. It comprises a chronological narration of past legislative events which inform the current legal framework on ADR. This historical narration attempts to identify the particular legislative move, the trajectory of legal reforms in the sector and the rationale behind any legislation or amendment. The historical narration has been done in two parts. The first part covers the period before the promulgation of the Constitution in 2010 while the second part covers the period immediately after the promulgation. Lastly, the chapter offers a critical analysis of the current status, with a view to investigate its efficacy in attaining timely administration of justice.

2.2 Historical Development of the Legal Framework on ADR

2.2.1 The Period between Pre-Independence and August 2010

The history of the Kenya's legal framework on ADR can be traced way back to colonial times. It was in 1914 when the Arbitration Ordinance of 1914 was enacted. The legislation was a replica of the English Arbitration Act 1889 which principally placed Arbitration under the absolute control of courts.[63] The Act later underwent significant metamorphosis over the years resulting in the current Arbitration Act 1995 as amended in 2009.

[63] Freda Moraa Nyakundi, 'Development Of ADR Mechanisms In Kenya And The Role Of ADR In Labour Relations And Dispute Resolution' (Master of Law Thesis, University of Capetown 2015) 14.

More interest in ADR was seen in early 2000s, when the debate on the promulgation of the 2010 Constitution was gaining momentum. The discourse on the legal framework on ADR found its way at the floor of the National Assembly in July 2004. The then Minister for Justice and Constitutional Affairs was put to task to explain what the ministry had done to incorporate ADR mechanisms into the judicial system.[64] It was during that time that the Kenya Law Reform Commission (KLRC) was undertaking the Governance, Justice, Law and Order Sector Reform Program (GJLOSRP). One of the targeted reforms in justice, law and order then was the adoption and operationalization of ADR systems.[65]

By 2008, there was every indication that institutionalization of ADR mechanisms through enactment of enabling statutes was at the top of Kenya's priority list. The First Medium Term Plan had a very clear roadmap on what would been necessary to achieve the long term goal. Among the things to be done was enactment of the Alternative Dispute Resolution (ADR) Bill.[66] The draft bill had been developed while a report by the Chief Justice-appointed Rules and Expeditious Disposal of Cases Committee on the efficacy of court rules and procedures (and alternatives such as ADR) was awaiting stakeholder validation.[67] It was felt that these institutional reforms would enhance access to justice.

The idea of promoting ADR mechanisms featured in the Constitution making process, during which Kenyans agitated for a regime under which ADR mechanisms could be employed in resolution of disputes. The public contemplated that the Commission on Human Rights and Administrative Justice should promote peaceful means of resolving conflicts, especially

[64]Kenya National Assembly Official Record (Hansard) 8 Jul 2004 p. 2507.
[65] Ibid 2508.
[66] Other bills which would also enhance access to justice were the Small Claims Court Bill, the Legal Aid Bill and the Court of Petty Sessions Bill.
[67]Government Printer, First Medium Term Plan (2008-2012), (2008) 125.

arbitration and mediation.[68] In addition, Kenyans felt that constitutional commissions should principally enhance the use of ADR mechanism through the exercise of their powers in a manner which enhances negotiation and mediation.[69] Furthermore, it was felt that the new dispensation should secure expeditious determination of cases as well as obliging judicial officers to dispense justice speedily.[70]

As time went by there was a growing concern amongst the key stakeholders that the then status of law on ADR mechanisms was grossly inadequate and that time was ripe for the state to take active role in the regulation of arbitration and mediation. The law did not protect end users against professional misconduct, conflict of interest and negligence on the part of mediators and arbitrators.[71] There was no institution responsible for accrediting, regulating and disciplining ADR practitioners. In fact, Kenyan mediators were being accredited by overseas organizations like the UK's Centre for Dispute Resolution, the France's International Chamber of Commerce, the UK's Chartered Institute of Arbitrators and the American Arbitration Association.[72] To curb these, stakeholders proposed the establishment of a statutory body which would among other things oversee accreditation of mediators, set standards and monitor and enforce the practice of ADR mechanisms.

2.2.2. Stakeholder Consultation and Taskforce Reports

The idea of introducing mediation into the judicial system and the establishing the Mediation Committee were based on wide consultations among key stakeholders in the legal fraternity. The

[68] Government Printer, The Final Report of the Constitution of Kenya Review Commission, (2005) 322. This was the report approved for Issue at the 95th plenary meeting of the Constitution of Kenya Review Commission held on 10th February 2005.
[69] Ibid 325.
[70] The Final Report of the Constitution of Kenya Review Commission (2005) 212.
[71] William Ouko Report on Judicial Reforms (n 6) 54.
[72] Ibid.

key contributors to the discourse were the Kenya Private Sector Alliance, the Law Society of Kenya and the Chartered Institute of Arbitrators.[73] The Policy makers also consulted widely by borrowing a leaf from more advanced jurisdictions like the US, the UK, New Zealand, India, South Africa, Australia and Canada.[74] Although there was a bit of resistance from the lawyers who feared possible loss of business, they later embraced the reform.[75] It was strongly felt that curbing case backlog was a collective responsibility necessitating collaboration amongst the Attorney –General's Office, judicial officers and other legal practitioners.[76]

Although the proposal to introduce mediation into the court system was first debated in May 2009, the amendments were not approved until 2012. In 2009, an attempt to institutionalize court annexed mediation failed when the bill, Statute Law (Miscellaneous Amendments) 2009 was tabled in parliament.[77] The reason for the delay and the procrastination on legislating on mediation was based on technicality of the reform. The Office of the Attorney General felt that there were technical difficulties on the operation of the proposed mediation, and argued the office needed more time for finer consultations. Based on the importance of the looming legislative amendment, the AG promised to work with the Rules Committee and the judiciary on proposals for fresh legislation on Mediation and accreditation committee.[78]

Post 2010 legislative developments on the legal framework on ADR were chiefly informed by the report of the Task Force on Judicial Reforms, better known as the *William Ouko Report on Judicial Reforms*. It is actually the recommendations of the Task Force which inform the current status of the legal framework on ADR. With respect to enhancing ADR, the task force

[73] Kenya National Assembly Official Record (Hansard) 26 May 2009 p. 29.
[74] Kenya National Assembly Official Record (Hansard) 26 May 2009 p. 29.
[75] Kenya National Assembly Official Record (Hansard) 26 May 2009 p. 29.
[76] Kenya National Assembly Official Record (Hansard) 26 May 2009 p. 25.
[77] William Ouko Report on Judicial Reforms (n 6) 54.
[78] Kenya National Assembly Official Record (Hansard) 26 May 2009 p. 45.

recommended four major items: First that the courts should encourage out of court settlements of claims especially in commercial and family disputes. Second, that parliament should enact a statute for mediation, mediation-arbitration, adjudication, conciliation and negotiation. Third, that judicial officers be trained on ADR mechanisms through the JTI and lastly, that a mechanism for addressing complaints be established as well as development of a Code of Conduct for mediators and arbitrators.[79]

2.2.3. Reforms to Enhance Timely Administration of Justice

Even before the promulgation of the Constitution in 2010, parliament had advanced ways of addressing case backlog and legal challenges to timely administration of justice. It was during this wave of reform, when the famous overriding objective, better known as the 'oxygen principle' was introduced with a view to facilitating the just and expeditious resolution of civil suits. This was through the amendment of the Civil Procedure Act and the Appellate Jurisdiction Act via the Statute Law (Miscellaneous Amendment) Act No. 6 of 2009.[80] Courts were now bound to ensure efficient disposal of the business of the court and the timely disposal of the proceedings.[81]

The amendments were done on principle and reasoned policy framework based on recommendations of the Rules Committee which had been appointed to investigate management of court cases. The committee had conducted a comparative analysis and benchmark with other developed countries especially Australia, the USA and the United Kingdom with the view of investigating lessons Kenya could learn from their experiences with respect to achieving timely

[79] William Ouko Report on Judicial Reforms (n 6) 55.
[80] The Civil Procedure Act, s 1A.
[81] The Civil Procedure Act, s 1A and 1B; The Appellate Jurisdiction Act, s 3A and 3B.

administration of Justice.[82] The statutory amendment was designed to revolutionalise the way the courts operated and make judicial officers more proactive in the management of cases.[83] It was believed that the overriding principle would bind both the judicial officer and the advocates in addressing court adjournments and case backlog.

Similarly, the Kenyan judiciary had long term strategic goals through which it sought to enhance access to justice and the efficacy of the judicial process. Under the Judiciary Strategic Plan 2009-2012, the Judiciary believed that such a goal would be achieved through the introduction of ADR into the mainstream judicial process. To this end, the Plan recommended for simplification and modification of rules and procedures in civil and criminal cases.[84]

2.2.4. The Period after the Promulgation of the Constitution 2010

The promulgation of the Constitution 2010 send shockwaves across the regulatory framework, and soon legislative enactments and amendments were introduced with a view to align the statutory law with the constitutional order. In 2012, the Civil Procedure Act was amended to introduce the famous section 59A, 59B and 59C.[85] The amendment established the Mediation Accreditation Committee, whose main agenda is to set standards and introduce some level of regulation on mediators. The Committee was to determine the criteria for the certification of mediators, set rules for their certification and enforce codes of ethics for mediators.[86] The

[82] Kenya National Assembly Official Record (Hansard) 26 May 2009 p. 28.
[83] Kenya National Assembly Official Record (Hansard) 26 May 2009 p. 28.
[84]Government Printer, Judiciary Strategic Plan 2009-2012, (2008) 34.<https://archive.org/details/KenyaJudiciaryStrategicPlan2009-2012/page/n44/mode/1up>accessed 24 February 2020.
[85] The Statute Law (Miscellaneous Amendments) Act No. 12 of 2012.
[86] The Civil Procedure Act, s 59A (4).

amendment also gave the court powers to refer litigants to try mediation in the circumstances where the court finds appropriate.[87]

Many more statutes enacted after the promulgation of the Constitution have substantiated the constitutional framework on ADR. Perhaps in a bid to realize the implementation of article 159 on ADR, the parliament has since enacted laws clothing all the courts with the power to entertain and implement ADR mechanisms. The Employment and Labour Relations court has powers to adopt ADR mechanisms initiated by parties or on its own motion.[88] The Environment and Land court and the High Court[89] have similar powers.[90]The obligation to allow ADR mechanisms extends to the tribunals as well. The Tax Appeals Tribunal has powers to allow parties settle their dispute through alternative mechanisms.[91]

2.3 The Efficacy of the Current Legal Framework on ADR

2.3.1 The Constitutional Framework on ADR

The Constitution of Kenya 2010 places high premium on the significant role of ADR in the administration of justice and their utility as effective tools of achieving access to justice. Throughout its several chapters, the Constitution recognizes ADR as a means of adjudicating disputes. The Kenyan courts are now obliged to promote alternative forms of dispute resolution including traditional dispute resolution mechanisms, mediation, reconciliation and arbitration.[92] The parliament is mandated to enact a national legislation on procedures for settling inter-

[87] The Civil Procedure Act, s 59B (1).
[88] Employment and Labour Relations Court Act, 2011 s 15.
[89] The High Court (Organization and Administration) Act, 2015 s 26 (3).
[90] Environment and Land Court Act, 2011 s 20. In situations where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court is mandated to stay proceedings until such condition is fulfilled.
[91] The Tax Appeals Act, 2013 s 8.
[92] The Constitution of Kenya, 2010 Article 159 (2) (c).

governmental disputes by ADR mechanisms.[93] In addition, the constitutional commissions and holders of independent offices have powers necessary for mediation, negotiation and conciliation.[94]

This legitimization of ADR under the Constitution 2010 brings into focus the realization of other constitutional principles especially on access to justice and efficacious administration of justice. And what is more is the manner in which the Constitution binds other state organs in a move to underscore timely adjudication of disputes. To begin with, Kenyan courts are required to ensure that justice is not delayed.[95] The Judicial Service Commission is under a duty to ensure efficient, effective and transparent administration of justice.[96]

2.3.2 ADR in Marriage Disputes

The idea of ADR has been anchored on almost all the statutes enacted after the promulgation of the Constitution 2010. What comes out from the trend is that ADR is now fully infiltrated into the legal system under various regimes binding citizens to utilize ADR in the resolution of their disputes. Parties to a customary marriage have an option of trying conciliation or any other customary dispute resolution mechanism before a court determines a petition seeking dissolution of their marriage.[97] The court is equally concerned with the legality of the ADR mechanism and the conduct of the entire process. To begin with, the entire process must conform to the principles of the Constitution. In addition, mediators overseeing the application of ADR in solving marriage disputes are under a duty to prepare a report on the process for the court.[98]

[93] The Constitution of Kenya, 2010 Article 189 (4).
[94] The Constitution of Kenya, 2010 Article 252 (1) (b).
[95] The Constitution of Kenya, 2010 Article 159 (2) (b).
[96] The Constitution of Kenya, 2010 Article 172 (1).
[97] The Marriage Act, 2014 s 68.
[98] The Marriage Act, 2014 s 68 (3).

In many instances, the law is worded in discretionary terms rather than mandatory terms. For instance, the parties to a customary marriage dispute or a Christian marriage *may* undergo a process of conciliation, making it a discretionary exercise.[99] This robs the ADR process off the compelling power of law. The inadequacies of the Marriage Act with respect to promotion of ADR in resolution of marriage disputes have also been identified by other distinguished academicians. Dr. Kariuki Muigua has criticized the application of ADR as provided for under the Marriage Act. He argues that the Act is silent on the manner of carrying out the process and on the person responsible for overseeing the ADR mechanism.[100] He faults the legislation for assuming that the parties to the dispute have access to numerous ADR fora in which they can resolve their dispute.[101]

The Kenyan framework does not provide for mandatory attempt of ADR by the parties. The court will only allow mediation on the request of parties, where it deems fit to do so, and lastly, *where the law so provides*.[102] The mandatory screening of cases for mediation has been abandoned majorly due to the lack of a statutory provision sanctioning the compulsory attempt ADR in certain cases. This is so because the functions of the Mediation Accreditation Committee do not include screening of cases to determine their suitability for mediation.[103]

Although wording ADR provisions in mandatory terms might vitiate the voluntary nature of ADR, there are still avenues through which ADR can be made compulsory without derogating its voluntary nature. One of them is the use of court mandated mediation, whereby litigants are

[99] The Marriage Act, 2014 s 64.
[100] Kariuki Muigua, 'Current Status of Alternative Dispute Resolution Justice Systems in Kenya' 4. <http://kmco.co.ke/wp-content/uploads/2018/10/CURRENT-STATUS-OF-ADR-JUSTICE-SYSTEMS-IN-KENYA-Kariuki-Muigua-5TH-OCTOBER-2018-00000002.pdf> accessed 25 February 2020.
[101] Ibid.
[102] The Civil Procedure Act s 59B.
[103] The Civil Procedure Act s 59A (4).

mandated to try mediation before the court adjudicates the dispute and it's sanctioned by procedural rules requiring the parties to attempt mediation before the first case management conference.[104] This approach was adopted by the Kenyan judiciary in 2016, where the courts introduced mandatory screening for all cases filed at the Commercial and Family Divisions of the High Court in Milimani.[105] The screening was to determine whether or not the cases are suitable for mediation, and the court would only hear the matter if mediation failed.[106] Through this approach, ADR would be mandatory in the sense that it must be given a chance, and the approach does not vitiate the voluntary nature of ADR because parties are not bound to agree with the mediation process.

2.3.3 ADR in Employment and Environment Disputes

On employment and labour disputes, parties to a labour dispute might be required to first try to employ ADR mechanisms before the matter is heard and determined by the court. The court has powers to adopt and implement these various means of dispute resolution and to turn down parties in circumstances where the parties have not attempted ADR mechanisms.[107] To establish the attempt, parties are required to produce a certificate issued by the conciliator together with the written minutes on how the conciliation went.[108]

Environment and land statutes enacted post the 2010 constitution have placed high premium on the institutionalization of ADR in land and environment related disputes. The National Land Commission (NLC) together with public officers are required to uphold ADR mechanisms in

[104] Kariuki Muigua, 'Court Sanctioned Mediation in Kenya-An Appraisal' 9. <http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf>accessed 21 July 2021.
[105] The Government of Kenya (2016) *Court Annexed Mediation* 3. <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya.pdf>accessed 21 July 2021.
[106] Ibid.
[107] Industrial Court Act, Cap 234B, s 15.
[108] Industrial Court Act, Cap 234B s 15 (3).

land-dispute handling and management whenever exercising their powers and discharging their functions.[109] In addition, the commission is required to encourage and develop ADR mechanisms in land dispute handling and management.[110] ADR mechanisms are also available to registered communities when settling any dispute or conflict involving community land.[111] In addition, the court has power to adopt and implement on its own motion , with the agreement of or at request of the parties any other appropriate means of ADR including conciliation, mediation and traditional dispute resolution mechanisms in accordance with article 159(2) of the constitution.[112]

2.3.4 ADR in the Kenya's Criminal Justice System

ADR mechanisms have also found their place in the criminal justice system pursuant to the constitutional principles mandating the courts to promote alternative dispute resolution. Criminal courts may promote reconciliation and encourage settlement of the matter at any stage of the criminal proceedings.[113] Equally relevant to the current discourse is the provision of plea agreements, which impliedly promote an alternative manner of solving criminal disputes. The law allows a prosecutor to enter into an agreement with an accused person with a view to reducing a charge to a lesser offence or withdraw the charge.[114]

And what is more about the Penal Code is that it outlines several safeguards which insulate the plea bargaining process from possible abuse. First, plea agreements arising in the course of private prosecutions cannot be recorded without the approval of the DPP.[115] Secondly, the

[109] Land Act, 2012 s 4.
[110] The National Land Commission Act, 2012 s 5 (2)(f).
[111] The Community Act, 2016 s 39.
[112] Environment and Land Court Act, 2011 s 20.
[113] Criminal Procedure Code, Cap 75 s 176.
[114] Criminal Procedure Code, Cap 75 s 137A.
[115] Criminal Procedure Code, Cap 75 s 137B.

prosecutor is bound to consult with the victim and the police officer investigating the case.[116] In addition, it must be a written agreement, the accused person must be granted the opportunity to review and accept the agreement as well as being signed by all the parties to the agreement; the accused person, the prosecutor and the complainant in case of compensation.[117] These positive attributes notwithstanding, the Kenyan regime on plea bargaining agreements has also been criticized in some academic quarters who believe that some provisions are out of touch with the Kenyan context coupled with the fact that parties to the criminal suit do not know the exact time of the trial when they can approach the trial court to permit them try ADR mechanisms.[118]

Perhaps in a bid to underscore the sensitivity of a criminal offence over a civil wrong, the Kenyan law seeks to set a threshold on the particular crimes or offences to which the ADR mechanism can be adopted, making a distinction between serious crimes and less serious crimes.[119] For instance, reconciliation is applicable to common assault, offences not amounting to felony and not aggravated in degree.

2.3.4.1 Case Law on Adoption of ADR in Criminal Cases

Remarkably, Kenyan courts put into consideration the nature of the criminal offence and the impact of the offence to the society when deliberating on whether to approve ADR. Through this avenue, courts have discouraged the application of ADR on economic crimes which have significant impact on the country's economy. Jurisprudence emanating from the courts indicates that the nature of corruption and bribery is that they are crimes against the entire population and

[116] Criminal Procedure Code, Cap 75 s 176.
[117] Criminal Procedure Code, Cap 75 s 137E.
[118] Kariuki Muigua (n 100) 11.
[119] Criminal Procedure Code, Cap 75 s 176.

hence are not suitable for ADR mechanisms.[120] Courts have reasoned that ADR mechanisms cannot possibly apply to circumstances where the crimes in question affect more than the person who reported them.[121] The rationale is that the fight against corruption, including being tried for corruption related acts such as bribery is a public interest issue and the prosecution of persons accused for these economic crimes is undeniably a matter concerning administration of justice.

The jurisprudence emanating from the Kenyan courts indicates that withdrawal of criminal proceedings pursuant to ADR requires the approval of the DPP. The High Court has held that even though the court can allow ADR mechanisms, the DPP has a necessary role in the agreement between the accused person and the complainant.[122] So crucial is the involvement of the DPP in the withdrawal process that the High Court has in some occasions declined to approve ADR agreements made without his approval. While declining to approve the ADR agreement which had been prepared without the concurrence of the DPP, the court in Rukwaru held that the DPP has a constitutional mandate to represent public interest under the Constitution.[123] In a later case, the High Court declined to withdraw a charge of robbery with violence in which the DPP had not approved.[124]

2.3.4.2 The Great Debate

However, even though the Constitution 2010 requires the courts to promote the use of ADR in the resolution of disputes, the discourse on the suitability of ADR in criminal cases is evergreen. At the center of the debate is a question whether the constitutional framework on ADR should be used to encourage ADR in serious criminal offences like murder. This dilemma came out more

[120] *DPP v. Nairobi Chief Magistrate's Court and Another* Petition. No 21 of 2015.
[121] Ibid.
[122] *Mary Kinya Rukwaru v. Office of the Director of Public Prosecutions & Another* Petition No. 285 of 2016.
[123] Constitution of Kenya, 2010 Article 157.
[124] *Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another* [2018] eKLR.

pronounced in 2013, during the case of *Republic v Mohamed Abdow Mohamed*, where an accused person had been charged with murder. In this case, the family of the accused person entered into an out of court settlement with the family of the deceased, which eventually occasioned the withdrawal of the case.[125] Although the rule in *Mohamed Abdow Mohamed* was later applied in *Republic v Ishad Abdi Abdullahi*,[126] this jurisprudence had sparked much academic debate on the applicability of ADR in serious crimes.[127]

As much as there is some form of agreement that traditional dispute resolution mechanisms (TDRMs) are applicable to criminal cases, the philosophical debate on the appropriateness of the practice is yet to be settled. On the one hand, there are scholars who argue for, while on the other hand distinguished academicians believe that TDRMs should not be applicable to criminal proceedings. The main antagonists argue that criminal cases are matters between the state and the accused persons and not between citizens inter se.[128] However, these criticisms have been fairly addressed by seasoned scholars who have made a strong case for applying TDRMs in criminal cases beyond the traditional conception of the criminal law system. Dr. Kariuki Muigua argues that criminality is not between the state and the accused person only since there are other constituents who are affected by the outcome of the criminal proceedings.[129] Emily posits that TJS does cover or apply to criminal proceedings and that it is not limited to civil cases.[130]

[125] *Republic v Mohamed Abdow Mohamed* (2013) eKLR.
[126] *Republic v Ishad Abdi Abdullahi* [2016] eKLR.
[127] Kariuki Muigua (n 40) 12.
[128] Ibid 22.
[129] Ibid.
[130] Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' (2015) Strathmore Law Journal 22, 22.

2.3.5 Mediation in the Civil Justice System

To some extent, the Kenya's legal system has a robust framework for application of mediation in civil cases. Amongst the many variants of the ADR mechanisms, arbitration and mediation have received more attention than the rest of the alternatives.[131] Arbitration has a separate regulatory regime and mediation has been institutionalized and anchored on a relatively sound and robust legal, institutional and policy framework. It is chiefly governed by the Civil Procedure Act[132] and the Appellate Jurisdiction Act[133] and the *Judiciary of Kenya Practice Direction on Court Annexed Mediation* hereinafter referred to as 'Practice Direction on Mediation.'[134] In addition to this is fairly established institutions including the Strathmore Dispute Resolution Centre, Chartered Institute of Arbitrators, Kenya (CIArb) and the Mediation Accreditation Committee.[135]

The Judiciary has over the years introduced, improved and reviewed the Practice Directions on Mediations in a bid to cover the growing acceptance of mediation in the courts. At first, the process was regulated by the Mediation (Pilot Project) Rules, 2015.[136] The pilot, which was to cover the Family and Commercial Divisions of the High Court at Milimani, had a life span of 6 months subject to extension. Upon the expiry of the six months, the Chief Justice extended the period for three months.[137] After the three months, the Chief Justice did away with the Pilot Rules by revoking the previous Gazette Notice, and instead issued Practice Direction on

[131] Constitution of Kenya, 2010 Article 159 (2) (c). Other forms of dispute resolution include reconciliation and traditional dispute resolution mechanisms.
[132] Civil Procedure Act, Cap 21, Laws of Kenya.
[133] The Appellate Jurisdiction Act, Cap 9, Laws of Kenya.
[134] The Judiciary of Kenya Practice Direction on Court Annexed Mediation (2018).
[135] The Mediation Accreditation Committee (MAC) is a committee established under section 59A of the Civil Procedure Act (Chapter 21, Laws of Kenya).
[136] Mediation (Pilot Project) Rules, 2015. The rules came onto force on 9th October 2015 via Kenya Gazette Supplement No. 170. The Pilot Project Rules were intended for the pilot period and were restricted to the Family and Commercial Divisions of the High Court at Milimani.
[137] Gazette Notice No. 3234 of 2017.

Mediation- *High Court of Kenya Family and Commercial and Tax Division, Nairobi Practice Direction on Mediation*.[138]

The Practice Direction was, like its predecessor, covering the two Divisions of the High Court at Nairobi. In the following year, the Chief Justice did an amendment to the Practice Direction with a view to extending their application beyond the High Court at Nairobi, making the practice direction applicable to civil suits filed anywhere throughout the country.[139] Noteworthy, the amendment renamed the principal practice directions to *The Judiciary of Kenya Practice Direction on Court Annexed Mediation*.[140]

The legal framework establishes a fair regime for mediation which apportions duties and responsibilities amongst the various players in the legal system. The Mediation Deputy Registrar is required to mandatorily screen civil cases at the commencement level, with a view of identifying cases suitable for mediation. At the completion of the screening process and upon referring a case to mediation, the Mediation Deputy Registrar is required to inform the parties within seven days of the completion of the screening process. The person to oversee the mediation process must be registered mediator with the Mediation Accreditation Committee.[141] And what is more is the way the regime underscores the essence of time in the adjudication of disputes. The mediation process is required to be undertaken within sixty days of the date of referral.

[138] Gazette Notice No. 5214 of 30th May 2017.
[139] The Kenya Gazette, Vol. CXX-No.85 p. 2299. The amendment was done through adoption of the Practice Direction on Court Annexed Mediation (Amendment) 2018. This made the practice direction applicable to civil actions filed in the High Court, the Environment and Land Court, Employment and Labour Relations Court, Subordinate courts and Tribunals throughout the country which the Chief Justice has designate by gazette notice.
[140] Ibid.
[141] The Judiciary of Kenya Practice Direction on Court Annexed Mediation (2018).

The Mediation Rules places the court at the center of the mediation process and insulates it against possible abuse by non-willing litigants. In case a party is not complying with the directions issued by the mediator, or fails to show up in mediation sessions, the mediator is required to file a certificate of non-compliance with the Mediation Deputy Registrar, who is then required to refer the dispute back to court.[142] At this stage, the courts have wide powers, which are punitive to the non-complying party. Although the court can again refer the matter back to the mediation process, it can also strike out the pleadings of the non-complying party or compel the party pay costs.[143] In addition, judgments and orders of the court which arose from the mediation process are not appealable.

The framework outlines a clear procedure of adopting the mediation agreement in terms of acquiring legal validity and enforcement. In those cases where the mediation has been successful, and the parties have agreed on an issue, the parties are required to file the signed agreement with the Mediation Deputy Registrar within ten days of concluding the mediation.[144] The agreement is then adopted by the courts making it enforceable as a Judgment or order of the court. In addition, the mediator has immunity equivalent to that applicable to judges and judicial officers.[145]

2.4 Conclusion

The chapter shows that the Kenya's legal framework on ADR has evolved from a basic framework and developed into a relatively well-established regime. History reveals that this evolution is reactionary and crisis-driven. Noteworthy, the trajectory of the past legal reforms on

[142] The Judiciary of Kenya Practice Direction on Court Annexed Mediation (2018).
[143] The Judiciary of Kenya Practice Direction on Court Annexed Mediation (2018).
[144] The Judiciary of Kenya Practice Direction on Court Annexed Mediation (2018).
[145] The Judiciary of Kenya Practice Direction on Court Annexed Mediation (2018).

this subject matter has been informed by extensive consultations amongst key stakeholders, taskforces and the Judiciary's various strategic plans. The chapter concludes that the Kenya's framework on ADR is well established under the Constitution and several statutes which have since been enacted or repealed to align themselves with the constitutional dictates.

As such, ADR is being applied in marriage disputes, employment disputes, environmental disputes and criminal cases, although it remains debatable on the extent to which ADR should be applied in criminal cases. However, even with this framework, the chapter reveals that the use of ADR is yet to achieve its main goal, namely timely administration of justice and clearance of case backlog in mainstream courts.

CHAPTER THREE

LEGAL CHALLENGES IMPEDING THE EFFICACY OF ADR IN KENYA

3.1 Introduction

This chapter discusses the legal challenges that impede the use of ADR mechanisms as a tool for achieving timely administration of justice in Kenya. The discussion is tailored to answer the key research questions of the study. It investigates why the use of ADR has not been effective in achieving the timely adjudication of disputes and the clearance of case backlog. It also investigates why the various past legislative amendments on the legal framework have borne little success in achieving timely access to justice and the clearance of case backlog.

3.2 Absence of a National Legal and Policy Framework

The piecemeal legislations on ADR and the sector al approach have occasioned coordination challenges in the application of ADR mechanisms. The several regimes established by different statutes at different times have borne legal gaps and disharmony amongst the legal and the institutional framework.[146] And what is more is that Kenya does not have a single unifying legislation on ADR, after almost ten years since the promulgation of the Constitution. Also missing is a national policy framework on ADR mechanisms.[147] The upshot is that Kenya lacks a compass direction and essential guidance on the use of ADR mechanisms in achieving timely administration of justice.

The lack of a robust framework on ADR has had overreaching impacts on resolution of commercial disputes. It has been argued that the lack of an overall legal, institutional and policy

[146] IDLO, Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes, July 2018.
[147] Kariuki Muigua (n 9) 18.

has discouraged practitioners and disputants from utilizing ADR mechanisms in commercial disputes.[148] Although there has been commendable advocacy for the use of ADR in creating conducive business environment, the business community fraternity is yet to adopt the new approach. This explains why there has been minimal evidence of ADR proceedings before specialized bodies which adjudicate business related disputes. An example of such specialized bodies is the Business Premises Rent Tribunal,[149] which is a suitable forum for adjudicating commercial disputes amongst small businesses.[150]

To some extent, the absence of a policy framework has diminished the role of state agencies in assimilating ADR into their corporate charter. Thus, state agencies like KRA are yet to fully operationalize ADR mechanisms into their dispute resolution structures. The Kenya Revenue Authority has incorporated ADR mechanisms disputes on compliance, excise duty, Value Added Tax, Income Tax among other disputes.[151]However, even though most of state agencies have since adopted self-made rules on ADR procedures within their systems, such initiatives are yet to realize their expected results. The significant measures at the KRA still suffer some legal challenge in that the ADR Regulations are not yet anchored in law.[152]

The national government has exhibited laxity in operationalizing the use of ADR mechanisms in resolving intergovernmental disputes between itself and county governments. Both the

[148] Kariuki Muigua, 'Towards an Overarching Policy: Understanding Kenya's Alternative Dispute Resolution Mechanisms Landscape and Culture' (Nairobi Centre for International Arbitration (NCIA) Alternative Dispute Resolution (ADR) National Conference, Intercontinental Hotel, Nairobi, June 2018). 19.
[149] It is a Tribunal established in 1965 through an Act of Parliament - The Landlord and Tenant (Shops, Hotels and Catering Establishments Act) Cap.301, Laws of Kenya.
[150] Ministry of Industry, Trade and Cooperatives, State Department for Trade, Business Premises Rent Tribunal <http://www.industrialization.go.ke/index.php/departments/state-department-of-trade/432-businesspremises-rent-tribunal> accessed 14 April 2020.
[151] Gemma Gachai, 'Alternative Dispute Resolution (ADR)' (Deloitte - Tax Dispute Resolution Workshop, November 2018). 9. At the time of the presentation, Gemma was the Chief Manager, Alternative Dispute Resolution.
[152] Ibid 19.

Constitution and the IGR Act install ADR as the main avenue of resolving intergovernmental disputes while reserving judicial intervention as a matter of last resort.[153] However, the national government is yet to formulate guidelines and procedures for the purposes of operationalizing the use of ADR mechanisms in these matters.[154] Similarly, courts have also acknowledged the need to have special procedures and legal structures on actualization of the process.[155] The government's inaction has occasioned a lacuna which has in turn prejudiced the utility of ADR in achieving timely access to justice in intergovernmental disputes.

In addition, some scholars have associated low uptake of ADR in intergovernmental disputes to the generality of the IGR Act. Muigua argues that given the volatility and sensitivity of intergovernmental disputes, the Act should have gone further and identify the most appropriate ADR mechanism for these disputes.[156]

However, key stakeholders in the ADR sector are in the process of formulating a national policy framework to address this challenge. The Alternative Dispute Resolution Policy draft, otherwise known as the 'Zero Draft,' seems to capture what a comprehensive policy framework ought to. The draft, which is a joint initiative by NCIA and the Judiciary, seeks to enhance access to justice by strengthening, guiding and supporting the growth of ADR in Kenya.[157] Largely, the Zero Draft's outlined objectives will bring sanity and streamline the application of ADR in

[153] Constitution of Kenya, 2010 Article 159 and 189 and the IGR Act, Cap 5G ss 31, 32, 33, 34, 35, 36 and 37.
[154] Gathumbi Gabriel (n 52) 35.
[155] *Isiolo County Assembly Service Board* eKLR (High Court Petition No 370 of 2015) para 59.
[156] Kariuki Muigua, 'alternative Dispute resolution, access to Justice and Development in Kenya' (2015) Strathmore Law Journal 5.
[157] National Centre for International Arbitration, *Alternative Dispute Resolution Policy (Zero Draft)* (*NCIA*, August 2019) 7. <https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf>accessed 10 December 2019.

Kenya. Its notable policy objectives include outlining the scope of ADR, defining key ADR terms and strengthening the institutional and legal framework on ADR.[158]

Seemingly, a successful formulation of the Zero Draft policy will form a solid policy framework on which the parliament will enact a specific legislation and establish key institutions. A key institution to be established is a National Council for Alternative Dispute Resolution which will be mandated to oversee the implementation of the policy. The Council will be the oversight body responsible for the national framework on ADR.[159] The policy will also establish Practice Area Oversight Committees, which will be designed to focus on specific ADR practice areas.[160]To crown it all, the proposed Alternative Dispute Resolution Act will professionalize ADR by accrediting ADR practitioners as well as setting quality standards in the practice of ADR.[161]

3.2.1 Inadequacy of the Law on Traditional Dispute Resolution Strategies

The Kenyan framework is yet to incorporate more novel and dynamic dispute resolution mechanisms like traditional dispute resolution strategies. Although the constitution recognizes the essence of TDRMs in enhancing access to justice, the constitutional recognition remains a mirage and a pipe dream. Muigua attributes this state of affairs to the lack of a supporting legal framework institutionalizing TDRMs as well as other community justice systems.[162] Such a legislative framework, based on a substantive policy would offer a useful guide to the promotion of these novel mechanisms in dispute resolution.[163] These statutory, administrative and policy

[158] Ibid 31.
[159] Ibid 38.
[160] Some of the practice areas will be Mediation, Arbitration, Religious bodies, TDRMs, tribunals, Court-Annexed ADR and informal mechanisms.
[161] National Centre for International Arbitration (n 144) 43.
[162] Kariuki Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' (July 2015) 3.
[163] Ibid.

measures would in effect locate and rightly place TDR strategies within the conventional judicial system.

To some extent, the law has unjustifiably limited the use of ADR and other TDRMs in resolving disputes featuring domestic violence. For instance, the Protection against Domestic Violence Act, 2015 does not contemplate the use of ADR in resolving disputes within its scope. In addition, family law practitioners have discouraged the use of ADR in the resolving such disputes. In fact, according to the practice, the practitioners disregard the use of ADR mechanisms with exception of mediation.[164]

While as the rationale for both the practice and the Act might be justified on some policy reasons, the constitutionality of the Act comes into focus nonetheless, considering its apparent non-conformity to the constitutional principles which call for promotion of ADR in resolution of disputes.[165] In this respect, the Act derogates from the Constitutional principles and it inhibits the use of ADR in resolution of disputes. Arguably, the best the Act would have done was to put in safety mechanisms to protect victims of domestic violence in circumstances where other ADR and TDRMs are employed to resolve such disputes.

3.2.2 TDRMs and the Principles of Natural Justice

The current legal framework on TDRMs has been criticized for its failure to observe principles of natural justice and the rule of law. It has been argued that most TDRM processes are characterized by procedural challenges, which fundamentally erode the notion of justice and fairness in the processes. Adjudicators are not bound to give reasons for their decisions, subjects

[164] Kariuki Muigua, 'Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities' (Chartered Institute of Kenya Branch International Conference, Diani, November 2018) 10.
[165] Constitution of Kenya, 2010 Article 159.

have not concrete right to be heard and the adjudicators are not bound to recuse themselves in circumstances where there is possibility of bias.[166] Principally, the practice contravenes Rawls' Theory of procedural justice which emphases that justice is achieved through equal distribution of opportunities between disputing parties and fair procedures.[167]

To a large extent, the usefulness of TRDMs has been distorted by the repugnancy clause. Although scholars readily agree that the clause is a necessary statutory filter, they also agree that the wording of the constitutional clause leaves the future and scope of TDRMs questionable. For instance, the constitution fails to define the key operating phrase 'standards of morality and justice,' leaving it for the courts to interpret.[168] However, considering the diversity of Kenyan communities, which have different conceptions of justice and morality, it becomes probable whether courts will define the phrase in a manner which fits the uniqueness of every community.[169]

This unpleasant position has been aggravated by the parliament's laxity in regulating the application of TDRMs. There is no policy or regulatory framework indicating how and when TDRMs should be adopted. As it stands, there are no basic guidelines on utilization of TDRMs in conformity with the Bill of Rights. It has been opined that parliament should enact and pass basic guidelines applicable to all communities as far as TDRMs are concerned. Such guidelines should define the repugnancy clause with a view to guiding the elders in identifying and eliminating rules that would not be meeting the standards of justice and morality.[170] Until these

[166] Joseph Sergon and Scholastica Omondi, 'An Analysis of the Weaknesses of Traditional Dispute Resolution Mechanisms (TDRMS) As an Avenue of Dispute Resolution in Kenya.' (2019) 24 (9) (9) IOSR Journal of Humanities And Social Science (IOSR-JHSS) 5.
[167] John A Rawls (n 45) 52.
[168] Constitution of Kenya, 2010 Article 159 (3) (b).
[169] Joseph Sergon and Scholastica Omondi (n 166) 6.
[170] Ibid.

measures are undertaken, the application of TDRMs in resolving disputes remains to be surrounded by ambiguity and uncertainty.

3.2.3 ADR and Human Rights, Democracy and the Problem of Gender Balance

To some extent, the development of ADR into the mainstream legal system has sidelined and ignored matters of gender balance. In some respects, the system has been influenced by biased perspectives on the role of women in the ADR process. A past in-depth research has indicated that people believe men are better negotiators than women.[171] The upshot has been a system which underutilizes and undervalues the role of women in resolving conflicts. In the Kenyan context, the practice of ADR has been discriminative against women and does not encourage women to participate in negotiation discussions.[172] These biased perspectives have had real prejudicial impact on the ability of women to propel the ADR narrative. For instance, there are relatively few accredited women arbitrators in Kenya.[173]

In addition, the current practice of TDRMs violates equality and non-discrimination principles of the constitution. The nature of Kenyan TDRMs is defined by applicable customary laws which are by design inherently patriarchal.[174] With this gender-biased approach, women receive limited opportunity to participate thus they have limited chances of benefiting from TDRMs.[175] Most communities have no regard to issues of gender balance when constituting their dispute resolution forums. As a result, women have been left out in these community forums thus

[171] Kray L. and Babcock L., *Gender in Negotiations: A Motivated Social Cognitive Analysis, in Negotiation Theory and Research* (Leigh L. Thompson 2006) 210.
[172] Kariuki Muigua (n 9) 11.
[173] Chartered Institute of Arbitrators-Kenya, 'Women in Arbitration Conference 2018' (April 2018). <https://www.ciarbkenya.org/women-in-arbitration-conference-2018/>accessed 15April 2020.
[174] T Murithi, 'All-Africa Conference on African Principles of Conflict Resolution and Reconciliation' (United Nations Conference Centre - ECA, Addis Ababa, Ethiopia, 8-12, 1999, 2000) 14.
[175] Joseph Sergon and Scholastica Omondi (n 166) 5.

blocking them from expressing their views, concerns and interests in the processes of the forum.[176]

In addition, Kenyan traditional justice systems have a hostile relationship with human rights and democracy. In some aspects, the Kenyan application of traditional justice systems contravenes the Rule of Law and the concept of fundamental freedoms. The rulings of traditional council of elders are usually influenced by knowledge and the moral values of an individual mediator, as opposed to universal standards of justice.[177] In addition, the systems have inefficient enforcement mechanisms which have been aggravated by modern civilization and mass rural to urban migration.[178] Although the community adjudication bodies are supposedly composed of elderly members, the appointment process does not promote transparency and it is susceptible to bribery and manipulation.[179]

3.2.4 Court-Annexed Mediation Project and Pertinent Legal Issues

The framework establishing the Pilot Court-Annexed Mediation Project has serious legal issues bearing uncertainty to litigants and practitioners. Much of these issues revolve on the interaction between the mediation project and the mainstream judicial systems. Much uncertainty arises where the screening officer has referred parties to mediation, but one of them is aggrieved by the referral. It is not yet authoritatively settled whether a party can decline the referral or whether both parties can oppose the referral.[180] Essentially, the main question for litigants remains as to

[176] Ibid.
[177] Eugene Owino Wanende, 'Assessing the Role of Traditional Justice Systems in Resolution of Environmental Conflicts in Kenya' (Master of Environmental Law Thesis, University of Nairobi 2013) 48.
[178] Pkalya R, M Adan, I Masinde, *Indigenous Democracy: Traditional Conflict Resolution Mechanisms Pokot, Turkana, Samburu and Marakwet* (Practical Action East Africa 2004) 4.
[179] FIDA Kenya, *Informal Justice System simplified guide- The Peoples Version* (2011) 74.
[180] Kariuki Muigua (n 9) 13.

whether the direction by the MDR fits to be treated as a decision, which can be challenged through judicial review or which can be appealable in a higher court.[181]

In addition, the framework on ADR is yet to define its relationship with other key stakeholders in terms of its mandate and its expectations from them. It is yet to define the role of advocates in ADR mechanisms and what it expects from them. In addition, there are no very clear guidelines to determine the remuneration of mediators and arbitrators.[182] Worse still, there is no clear reimbursement system for expenses incurred in the process, legal fees as well as a special provision on taxation of costs.[183] It has also been argued that Kenya does not have sufficient personnel to solve disputes through ADR and scarcity of expertise in how some ADR processes should be undertaken.[184]

3.2.5 Erroneous Interpretation and Implementation of ADR in Tax Disputes

The current legal framework does not establish a sound framework for ADR in Tax disputes. Both the Tax Appeals Tribunal Act and the Tax Procedures Act do not offer useful insights of the use of ADR in tax matters. Parties before the Tax tribunal can request the tribunal to have their matter settled out of the tribunal, after which they are required to report back to the tribunal.[185] Even though this is a good foundation on which to base ADR in tax disputes, the

[181] Ibid.
[182] Ibid 16.
[183] Allan Munyao, 'The Various Alternative Dispute Resolution (ADR) Mechanisms and Access to Justice in Kenya' (2016) 5 (1) Kenya Law Review Journal 7.
[184] Ibid.
[185] Tax Appeals Act, 2013 s 28 and Tax Procedures Act, 2015 s 55.

regime is not prudent because it lacks special procedural rules as it is the case in other jurisdictions like South Africa.[186]

In practice, some of in-house ADR structures adopted by some key state agencies are faulty and depict a narrow interpretation of the constitution and the enabling statutes. The KRA ADR approach has been criticized for several reasons. For starters, it has been criticized for contravening Article 159 of the Constitution because it provides for facilitated mediation as the only channel to be applied for any ADR mechanisms within KRA.[187] The preference for mediation in KRA disputes is unjustified in light of the Kenya's constitutional framework which understands ADR to include mediation, arbitration, reconciliation and negotiation.[188]In addition, the KRA framework restricts the taxpayer's entitlement to enjoy a variety of ADR forms particularly when mediation fails or is not preferred by the taxpayer.[189]

In addition, the KRA approach deprives litigants special rights granted under tax statutes. Both the Tax Appeals Tribunal Act and the Tax Procedures Act give parties to a dispute the right to settle their conflict by reaching an out of tribunal settlement.[190] Arguably, the generality of the statutes implies that parties should be free to choose any of their favorite ADR mechanism and that they have the permission to explore the entire spectrum of ADR processes.[191] Therefore, based on this interpretation, it becomes apparent that the KRA's restriction to facilitated mediation is an unnecessary limitation of a statutory right.

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[186] The South Africa Tax Administration Act, 2011 s 107 (5). The section provides that 'by mutual agreement, SARS and the taxpayer making the appeal may attempt to resolve the dispute through alternative dispute resolution under procedures specified in the rules.'
[187] Kenya Revenue Authority, *The Alternative Dispute Resolution (ADR) Framework* (June 2015) 6.
[188] Kashindi Ashiono, 'Tax Dispute Resolution in Kenya: Viability of Including Alternative Dispute Resolution Mechanisms' (Master of Law Thesis, University of Nairobi 2017) 66.
[189] Ibid.
[190] Tax Appeals Tribunal Act, 2013 s 28.
[191] *See also* Tax Procedures Act, 2015 s 55.

Furthermore, the KRA ADR framework treats ADR as a subordinate to litigation. This contravenes recent discourses which advocate that ADR is not inferior to litigation but rather an equal counterpart.[192] In many respects, the framework is nothing other than an 'internal non-binding policy.'[193] The framework does not have statutory basis in terms of substantive law provisions or regulations. In addition, the framework requires the litigants to rely on formal dispute resolution steps and the substantive law.[194] All these factors demonstrate that KRA's conception of ADR views ADR as secondary to litigation. And what is more is that the approach contravenes the constitutional principles of access to justice.[195]

3.2.6 Challenges facing application of ADR in Environmental Disputes

The application of ADR in environmental disputes faces several challenges which decelerate the utility of ADR in achieving environmental justice. ADR has not been adequately utilized in the arena of the environment because Kenya lacks an effective legal and institutional framework for the resolution of environmental conflicts.[196] In addition, the current legal and institutional framework for environmental management is fragmented in that the various facets of environmental law and policy are divided across different institutions.[197] Muigua argues that the legal framework does not recognize and legitimize the role of informal methods of conflict

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[192] Laxmi Kant Gaur, 'Why I Hate 'Alternative' in "Alternative Dispute Resolution"' 4. <http://delhicourts.nic.in/Why_I_Hat1.pdf>accessed 14 April 2020.
[193] Kashindi Ashiono (n 188) 67.
[194] Kenya Revenue Authority, *The Alternative Dispute Resolution (ADR) Framework* (June 2015) 8. <https://www.kra.go.ke/images/publications/ADR-FRAMEWORK.pdf>accessed 14 April 2020. The framework insists that all ADR negotiations and settlements must have legal basis within the Tax laws.
[195] Constitution of Kenya, 2010 Article 48.
[196] Kariuki Muigua, 'Environmental Conflict Management in the Kenyan Context-enhancing the use of Alternative Dispute Resolution Mechanisms' 2. <https://land.igad.int/index.php/documents-1/countries/kenya/conflict-3/554-environmental-conflict-management-in-the-kenyan-context-enhancing-the-use-of-alternative-dispute-resolution-mechanisms/file>accessed 22 July 2021.
[197] Ibid 24.

resolution in the resolution of environmental conflicts.[198] Indeed, there is essentially no legal framework incorporating mediation and the other ADR methods within the framework of environmental conflict resolution.[199] The use of ADR has also been occasioned by lack of education and awareness on the role of environmental ADR in settling environmental disputes.[200]

Currently, ADR and TDRMs stand little chances in resolving conflicts over natural resources. The Constitution underscores the need to protect and enhance intellectual property in genetic resources and biodiversity of the Kenyan people and communities. This requirement brings into focus protection of natural resources which includes the indigenous knowledge and genetic resources. However, the law does not illuminate the discussion on how the TDRMs should be utilized in these circumstances. There are no set guidelines indicating how they should be applied and there is no defined process or threshold of determining whether to submit a dispute to the courts or to TDRMs.[201]

3.2.7 Kenyan Tribunals and Operationalization of ADR Processes

To some extent, Kenyan Tribunals are yet to adopt and operationalize ADR mechanisms into their operations. Even though the Constitution of Kenya 2010 binds both the courts and tribunals with respect to the use of ADR, there is growing concern amongst scholars that the two bodies are not pulling in the same direction.[202] While as the courts seem to be very determined towards fulfilling the constitutional mandate, the tribunals on the other had has very little to show. Majority of the laws establishing these tribunals still reflect and insist on the adversarial nature

[198] Kariuki Muigua, 'Resolving Environmental Conflicts through Mediation in Kenya' (PhD Thesis, University of Nairobi, 2011) 93.
[199] Ibid 94.
[200] Renson Inyonga, 'Alternative Dispute Resolution in Environmental Disputes: A Case of the Specialized Environment and Land Court in Kenya' (2018) 2 (1) Journal of Cmsd 33.
[201] Ibid 6.
[202] Constitution of Kenya, 2010 Article 159.

of conducting matters, and create no room for settlement of disputes out of court.[203] Similarly, it has been suggested that the current fragmented framework does not integrate ADR mechanisms in conflict management within Kenyan tribunals.[204]

3.3 ADR and Challenges of Legal Pluralism

The efficacy of the Kenya's framework has been compromised by legal challenges which come with legal pluralism. One of those challenges is the manifested antagonism between the formal legal system and the informal legal system. Kenya's legal system has been criticized for emphasizing on legal formalism and discouraging legal plurality, by neglecting and undermining the informal justice systems at the expense of litigation.[205] And although Kenya has in the recent past tried to equalize the two antagonistic legal systems, it appears that the influence of the historical perspective on 'the formal system superiority' is yet to be shed off.[206]

The antagonism between the two legal systems has been fueled by their different conception of justice. The formal legal system emphasizes that justice as achieved through a combination of procedural rules and substantive legal propositions prescribed in law books. Informal legal systems on the other hand equate justice with peace and harmony.[207] Under the informal systems, there is no regard to human rights, fundamental freedoms and the protection of individual rights. Instead, all what matters is whether parties have achieved communal peace and general

[203] Judiciary of Kenya, State of the Judiciary and the Administration of Justice Annual Report 2017 – 2018, (2019) 73.
[204] Kariuki Muigua, 'Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management' (Building on Experience: Practical Skills for Tribunals in the Judiciary, Sarova Whitesands Beach Hotel, Mombasa, May 2019) 12. (The author makes a case for rethinking the Tribunals' modes of operation by encouraging greater use of ADR mechanisms).
[205] Kariuki Muigua and Kariuki Francis, 'ADR, Access to Justice and Development in Kenya' (Justice and Jurisprudence: Nation Building through Facilitating Access to Justice, Strathmore University Law School, July 2014) 8.
[206] Article 159 of the Constitution legitimizes the idea that both the formal and the informal legal systems form part of the Kenyan legal system.
[207] K. Mkangi, Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contexualised Paradigm for Examining Conflict in Africa <www.payson.tulane.edu> accessed 13 April 2020.

agreement. These two variant positions have been a major source of friction between the two legal systems in Kenya.

The antagonism is much real in the Kenyan context, as it played out in the famous *Republic v Mohamed Abdow Mohamed* case, where parties employed ADR to settle a murder case. In the formal justice system perspective, the accused person had allegedly committed an offence (murder) contrary to a prescribed legal norm.[208] On the other hand, the family of the deceased was ready and willing to settle the matter out of court and indeed accepted some compensation from the family of the accused person.[209] The family of the deceased was satisfied that the offence had been fully compensated under Islamic laws and local customs which applied to such matters.[210]

These events precipitated into a real tussle between the informal justice system and the formal justice system. Upon the receipt of the compensation, the family of the deceased was no longer interested in the criminal proceedings and their witnesses were not willing to testify in court. Even though the DPP opposed the approach, and was willing to press on the charges, he could not make progress leading to the eventual withdrawal of the charges. This is a classical case which reveals the real strangulations between the two legal systems.

To a large extent, the continued ambiguity on the relationship between the two legal systems can be attributed to paucity of research on the item. Scholars argue that the complexity of the relationship deserves special research with a view to illuminating on their interactions and points

[208] Penal Code s 206.
[209] *Republic v Mohamed Abdow Mohamed* (2013) eKLR.
[210] Allan Munyao, 'The Various Alternative Dispute Resolution (ADR) Mechanisms and Access to Justice in Kenya' (2016) 5 (1) Kenya Law Review Journal 2. This was obtained from a letter written by the family of the deceased to the DPP requesting that the charge be withdrawn.

of interjection.[211] Indeed, there has been no special research undertaken to investigate on this research area. The silence of the academicians and scholars on the issue has disadvantages the entire legal fraternity including judges, administrators, students and law practitioners.

3.4 The Role of Advocates in the ADR Process

Lawyers and advocates have greatly decelerated the ability of ADR mechanisms to make significant achievements in the timely administration of justice. Given the central role played by advocates in the society, majorly as advocates of change and social engineers, it would be expected that they would be major proponents for timely administration of justice. However, the Kenyan practice has proved the contrary. In practice, it has been established that advocates do indeed discourage their clients from resolving to ADR mechanisms.[212] Scholars have associated this attitude to the aggressive professional training which nurtures arguments and the perceived loss of income.[213]

For the longest time, legislators and policy makers have had a major concern that the promotion of ADR might receive hesitation from some quarters of the legal system, especially the advocates. This factor has much to do with the argumentative trainings given to advocates. Equipped with this kind of trainings, there is a reasonable fear that the involvement of the advocates in ADR processes might significantly jeopardize their efficacy.[214] The prejudice

[211] M. Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 19 Journal of Legal Pluralism 34.
[212] IDLO, Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes, (July 2018).
[213] Kariuki Muigua (n 9) 15.
[214] Geoffrey Nyamasege, Muhammad Swazuri and Tom Chavangi, 'Alternative Dispute Resolution as a viable tool in Land Conflicts: A Kenyan Perspective' (Responsible Land Governance: Towards an Evidence Based Approach, Washington DC, March 2017) 13.

appears to be real considering that ADR mechanisms are not defensive in nature but rather take the form of dialogues and mutual involvement of the parties.[215]

The potency of ADR mechanisms in land disputes has been compromised by the role of advocates and information asymmetry amongst key stakeholders. Although the NLC has well-structured ADR mechanisms, their usefulness has been aborted by various stakeholders. For instance, they have received hostility and resistance from advocates who view the initiative by the commission as a strategy to interfere and take away their businesses.[216] In addition, the commission suffers from insufficient funding for its much-needed services and there is information asymmetry thanks to land officials' reluctance to giving proper information.[217]

3.5 The Element of a Litigious Culture

In the Kenyan context, the issue of culture is equally to blame for the slower uptake of ADR mechanisms. In fact, past researches indicate that Kenyans have litigious tendencies coupled with a negative attitude against ADR mechanisms. Muigua argues that when advocates are given autonomy over a matter, they are more willing to litigate.[218] Gabrielle, who is a distinguished professor at the University of Warwick opines that Kenyans are overly litigious, when compared to citizens from other jurisdictions like the UK.[219] Similarly, researches conducted during mediation pilot programmes across African countries raise doubts on the viability of ADR in Kenya, and paints a picture of a county whose citizenry has little regard for ADR mechanisms.[220]

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[215] Ibid.
[216] Geoffrey Nyamasege (n 214) 17.
[217] Ibid.
[218] Kariuki Muigua (n 9) 16.
[219] Garielle Lynch, 'Kenyans are litigious, but they are not fools' *Daily Nation* (15 August 2014) 11.
[220] The Judicial Service of Ghana, *Strategic Plan for Judicial Service ADR Programme*, (2008–2013) 5 <https://africacenter.org/publication/alternative-dispute-resolution-in-africa-preventing-conflict-and-enhancing-stability/#fn10>accessed 14 April 2020.

According to past researches, a successful uptake of ADR in Kenya may take longer time than it would take other African counties like Ghana and Nigeria. This observation is inevitable when one does a comparison of the feasibility studies conducted at the launch of medication piloting programmes in the three countries. In Ghana, the first week into the mediation programme saw successful conclusion of 300 cases within 5 days. A later follow up ADR round in 2007 saw conclusion of 155 commercial cases within 4 days, 118 of which resulted to settlement agreements.[221] The country witnessed a similar success story in 2011 when an ADR Center was launched in one of its major towns. A group of 5 mediators took 6 months to settle 476 cases out of 493 which had been submitted before them. Familiar successful stories were found in Nigeria.[222]

To some extent, the Kenyan performance in the mediation piloting project questioned the feasibility of ADR in the Kenyan context. Her performance was extremely poor and dismal especially when compared with her counterparts. Although the court-annexed mediation programme was launched in May 2016, the programme had received only 317 cases by March 2017, exactly ten months into the project.[223] And what is more is that within these 10 months, the programme had concluded only 82 cases out of the 317, which translates to 25.868%. Worse still, 33 out of the 82 concluded cases did not reach a settlement. In fact, only 37 reached full settlement while 7 others reached partial settlement.

[221] Ernest Uwazie, 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability' (2011) Africa Center for Strategic Studies 3.
[222] Ibid. In Nigeria, the study shows that 200 cases were mediated monthly and resolution or settlement rates were ranging from 60 to 85 percent.
[223] Caroline Kendagor, 'The Judiciary Court Annexed Mediation: A Solution by you for you' (ICPAK Professional Forum: Excel 101 For Accountants, Mombasa, March 2017). <https://www.icpak.com/wp-content/uploads/2017/03/Court-Annexed-Mediation-Hon.-Caroline-Kendagor.pdf> accessed 14 April 2020).

3.6 Paucity of Research and Sensitization Initiatives

There has been a fallacious notion that ADR mechanisms are inferior to judicial proceedings. Some writers argue that the common practice which requires that litigants must first exhaust ADR mechanisms before approaching a court insinuates that judicial proceedings are superior to ADR mechanisms.[224] Similarly, Muigua argues that ADR mechanisms should be referred to as 'Appropriate' dispute resolution mechanisms because the use of the term 'alternative' falsely implies that they are inferior to litigation.[225] It has been argued that this misconception is unfounded since both ADR mechanisms and the court process are made to achieve the same ultimate goal of resolving disputes and that ADR mechanisms are independent from other adjudicatory processes.[226]

There has been inadequate public sensitization on ADR Mechanisms and their place in the Kenyan legal system. The public holds different perceptions about ADR mechanisms and are ignorant of its existence as provided for under the law.[227] In fact, many Kenyans do not recognize ADR as a fully pledged legal system. Instead, their understanding is essentially misinformed and flawed. They construe the term ADR restrictively to refer to traditional dispute resolutions leaving out a better chunk of its constituents.[228]

[224] Gathumbi Gabriel (n 52) 61.
[225] Ibid 14.
[226] Laxmi Kant Gaur, 'Why I Hate 'Alternative' in "Alternative Dispute Resolution"' 4. <http://delhicourts.nic.in/Why_I_Hat1.pdf>accessed 11 April 2020. *See also* Gathumbi Gabriel (n 52) 61.
[227] Geoffrey Nyamasege (n 214) 14.
[228] Ibid.

The practice of TDRMs is also facing external threats especially from the political establishment. In addition to the legal challenges, the usefulness of TDRMs has been decelerated by constant allegations of corruption and political patronage.[229]

3.7 Conclusion

The chapter concludes that there are several legal challenges which impede the use of ADR mechanisms as a tool for achieving timely administration of justice in Kenya and which by extension slows clearance of case backlog in mainstream courts. The major identifiable challenge is the absence of a national legal and policy framework on ADR mechanisms. The piecemeal legislations on ADR and the sector al approach have occasioned coordination challenges in the application of ADR mechanisms. In addition, lawyers and advocates have greatly decelerated the ability of ADR mechanisms to make significant achievements in the timely administration of justice. Further, the framework establishing the Pilot Court-Annexed Mediation Project has serious legal issues bearing uncertainty to litigants and practitioners.

Furthermore, the efficacy of the Kenya's framework has been compromised by legal challenges which come with legal pluralism. One of those challenges is the manifested antagonism between the formal legal system and the informal legal system. Also, the issue of culture is equally to blame for the slower uptake of ADR mechanisms. Past researches indicate that Kenyans have litigious tendencies coupled with a negative attitude against ADR mechanisms. Lastly, TDRMs have been criticized for their failure to observe principles of natural justice and the rule of law as well as the constant allegations of corruption and political patronage all of which have decelerated their usefulness.

[229] Joseph Sergon and Scholastica Omondi (n 166) 5.

CHAPTER FOUR

SOUTH AFRICA'S LEGAL FRAMEWORK ON ALTERNATIVE DISPUTE RESOLUTION

4.1 Introduction

This chapter does a critical analysis of the South Africa's legal framework on Alternative Dispute Resolution mechanisms. The objective of the analysis is twofold: to identify the positive achievements and attributes of the jurisdiction; and to identify any positive lessons which Kenya can learn or emulate. The chapter starts with a justification for the choice of South Africa for this current study. The justification is followed by profound discussion of the entire legal system, but classified into several thematic areas for ease of reading and order. Some of the thematic areas include ADR in law-making processes, ADR in environmental disputes, ADR in corporate sector, ADR in civil proceedings, the place of traditional justice systems, the role of civil society and the utility or efficacy of ADR institutions. It ends with a conclusion on the chapter.

4.2 The Suitability of South Africa for the Study

The choice of South Africa for this study is well based on her commendable achievements with respect to her alternative dispute resolution regime. It has been argued that the country has one of the fastest developing ADR regimes in Africa.[230] Freda argues that South Africa is a well-established jurisdiction with regard to the practice of ADR.[231] In addition, scholars opine that the South Africa's regime on ADR serves as a model for many African countries.[232]

[230] Petrina Ampeire, 'ADR in South Africa: A Brief Overview' (International Mediation Institute, 12 June 2018).
[231] Freda Moraa Nyakundi (n 63) 51.
[232] Ibid.

The rise of ADR mechanisms in South Africa is largely pinned to her historical background namely the apartheid rule. To a large extent, the preference of ADR mechanisms amongst South Africans is reactionary to the discriminative judicial system established during the apartheid era.[233] Majority of the blacks felt excluded by the then formal judicial system and perceived the system as a tool of oppression. It is this feeling of exclusion which made the blacks result to alternative means of achieving justice including ADR mechanisms.[234] This agitation for a fairer and friendly justice system led to the emergence of community and traditional courts, which still form part of South Africa's informal judicial system.[235]

4.3 An Overview of Conciliation and Mediation

South Africa has a vibrant legislative framework for conciliation and mediation which basically legitimizes and eases these ADR processes. Although the country does not have a specific statute regulating the application of mediation, the framework has generated comprehensive rules on the matter. Mediation is primarily governed by the Rules of Voluntary Court-Annexed Mediation[236] and the Labour Relations Act.[237] The mediation rules establish court-annexed mediation in civil proceedings before magistrates' courts while the Labour Relations Act establishes the Commission for Conciliation, Mediation and Arbitration (CCMA) whose mandate is to employ ADR mechanisms to resolve labour disputes.[238]

[233] Van Niekerk G J, 'People's Courts and People's Justice in South Africa - new developments in community dispute resolution' (1994) 1 De Jure 19.
[234] Carjlenter G A, 'Public Opinion, The Judiciary and Legitimacy' (1996) 11 SAPL 110.
[235] Faris J, 'ADR, Community Dispute Resolution and the Court System' *Community Mediation Update* (CDRT Newsletter No 10 April 1996) 7.
[236] South Africa, Chapter 2 of the Magistrates' Courts Rules. The rules were operationalized in December 2014.
[237] South Africa, Labour Relations Act, Act No. 66 of 1995.
[238] Grégor Wolter, Jac Marais, Andrew Molver and Renée Nienaber, 'South Africa' in Damian Taylor (ed.), *The Dispute Resolution Review* (Law Business Research Ltd 2017) 493.

In addition, the South African government has invested in conducting civic education and public sensitization with a view to building capacity for litigants and members of the public to embrace ADR. These include launching of various strategies to sensitize local communities on the concept of ADR, its various forms and the underlying benefits.[239] And just like in the Kenyan context, the introduction of, and advocacy for ADR mechanisms in South Africa has been done with a view to enhancing access to justice as well as to curbing case backlog.[240]

The legislative framework offers clear demarcations on occasions where mediation is a mandatory procedure, and areas where parties are free to go for mediation on their own volition. Compulsory mediation is reserved for disputes relating to gender equality,[241] minor transgressions by health professionals[242] and disputes on inclusions or amendments to existing land transport contracts among others.[243] On the other hand, mediation is a voluntary option recommended for a host of disputes. Victim-offender mediation is recommended where a child is the offender, and it's done with a view to agreeing on how the child might compensate to the victim.[244]Mediation is also recommended on consumer protection disputes,[245] disputes on land development[246] among others.

4.3.1 Mediation in Law-Making Processes

The South African constitutional dispensation has a special place for mediation as a form of ADR. The Constitution obligates national legislative authorities to use mediation to resolve any disputes emanating from the two houses of the parliament in the course of discharging their law

[239] Petrina Ampeire (n 230) 14.
[240] Grégor Wolter, Jac Marais, Andrew Molver and Renée Nienaber (n 238) 493.
[241] South Africa, The Commission on Gender Equality Act, Act No. 39 of 1996 s 11(1) (e).
[242] South Africa, The Health Professions Act 56 of 1974 s 42.
[243] South Africa, The National Land Transport Act, Act 5 of 2009 s 46 (2).
[244] South Africa, The Child Justice Act, Act 75 of 2008 s 62(1) (a).
[245] South Africa, The Consumer Protection Act, Act 68 of 2008 s 70.
[246] South Africa, The Development Facilitation Act, Act 67 of 1995 s 16 (b) (iii).

making responsibilities. The South Africa's legislative authority is vested in the parliament which comprises of two houses: the National Assembly and the National Council of Provinces (NCOP). The design of the legislative process and procedures requires the two houses to work harmoniously for the parliament to discharge its constitutional mandate.

Ordinarily, a Bill should first pass through the National Assembly before it finds its way to the NCOP for approval. If the NCOP fails to approve a bill, or if the National Assembly fails to adopt a bill which has been amended by NCOP, the Constitution requires the two organs to submit the dispute to a Mediation Committee which would then negotiate and settle the matter.[247] The same process also applies if a similar dispute arises with respect to bills which should originate from the NCOP and be adopted by the National Assembly.[248]

4.3.2 ADR in the Corporate Sector

ADR has taken a very central role in South Africa's corporate sector. In essence, the country has appreciated the role of ADR in creating a friendly commercial environment and enhancing economic growth. Her framework establishes a Companies Tribunal and empowers it to resolve disputes through ADR mechanisms namely mediation, arbitration and conciliation.[249] And what is more is that the ADR services of the tribunal are offered at no costs. Its establishment is a conscious attempt by the South Africa's parliament to enhance the realization of the constitutional right to timely administration of justice through other forums other than mainstream courts.[250]

[247] The South African Constitution, 1996 section 76(1) (d).
[248] The South African Constitution, 1996 section 76(3).
[249] South Africa, The Companies Act of 2008 s 166.
[250] South African Constitution, 1996 s 34.

The establishment of the tribunal was a reactionary measure designed to redress historical challenges which hindered effective resolution of company disputes. The historical challenges were characterized by highly formal, slow and expensive mechanisms of resolving company disputes.[251] Policy makers have justified that the use of ADR mechanisms in resolving corporate disputes is an effective management tool to promote good corporate governance.[252] Specifically, it has been reasoned that ADR mechanisms manage financial risks as well as reputational risks which are associated with litigation.[253]

4.3.3 ADR in Environmental Disputes

South Africa has a rich history on the incorporation of ADR in environmental disputes, which dates back to 1978. It all began in 1978 when a policy was published to guide resolution of environment-related conflicts via ADR mechanisms. In the policy, the South African Environmental Agency outlined the government's intention to enhance the use of ADR mechanisms to resolve potential conflicts emanating enforcement and implementation of environmental laws.[254] The publication of the policy was followed by training of its officials with a view to equipping them with requisite skills on ADR mechanisms.[255] This was a calculated move to remedy disputes between victims of pollution and oil companies, which were then a major concern.[256]

[251] Department of Trade and Industry, 'Alternative dispute resolution mechanism should be made accessible to all' *Tralac Trade Law Centre* (18 February 2016) 4.
[252] Ibid.
[253] MacDonald Netshitenzhe, 'Promoting a culture of resolving commercial disputes through the Alternative Dispute Resolution (ADR)' (The Gallagher Convention Centre, Midrand, February 2016).
[254] Tropill, A. T, *Alternative dispute resolution in a contemporary South African context* (1991).
[255] M. van der Bank and C. M. van der Bank, 'Alternative Dispute Resolution in the Settlement of Environmental Disputes in South Africa' (2017) 11 (11) World Academy of Science, Engineering and Technology International Journal of Humanities and Social Sciences 2521, 2523.
[256] Ibid.

The 1978 policy intentions were extensively reflected in subsequent legislations, which wholesomely underscore the role of ADR mechanisms in environmental disputes. The first statute to substantially provide for ADR in environmental disputes was enacted in 1989. The Act, which was later repealed in 1998, basically acknowledged the utility of ADR in enhancing environmental sustainability and justice.[257] It is noteworthy that the statute gave prominence to ADR mechanisms in environmental concerns, even way before these mechanisms could receive such recognition in the 1996 South African Constitution.[258] The Constitution requires the parliament to enact a special legislation promoting environmental protection.[259]

The 1978 policy materially informs the current framework which comprises of a host of statutes and various institutions. The legislative framework comprises two major statutes, one of which was enacted in 1996[260] and the other one in 1998.[261] The latter has an entire chapter on conflict management in which it provides for the use of ADR procedures like arbitration, mediation and conciliation.[262] The two statutes outline the roles and apportion duties to various stakeholders in the environment sector. For starters, they establish important institutions like the National Environmental Advisory Forum and the Committee for Environmental Coordination which oversee and monitor the application of ADR mechanisms in environmental disputes.

In addition, the framework stipulates the role of the Minister for Environmental Affairs and Tourism and that of the Director-General for Environmental Affairs and Tourism which are worth mentioning. The Minister is required to generate a panel of qualified individuals from

[257] South Africa, Environment Conservation Act 79 of 1989 (Repealed).
[258] Sithe Odwa Ngombane, 'Alternative Dispute Resolution: A Mechanism for Resolving Environmental Disputes in South Africa' (LL.M Thesis, University of the Free State 2015) 23.
[259] The South African Constitution, 1996 s 24 (b).
[260] South Africa, Land Reform (Labour Tenants) Act, 1996.
[261] South Africa, National Environmental Management Act 107 of 1998.
[262] South Africa, National Environmental Management Act 107 of 1998 ss 17, 18 & 19.

which prospective litigants can appoint an arbitrator or a facilitator.[263] The Director-General, on the other hand, is empowered to occasionally appoint organizations or individuals with the relevant expertise and knowledge to provide mediation and conciliation services, especially where parties have failed to appoint a mediator of their choice.[264] The mediator or conciliator to be appointed must be possessing special expertise in mediating environmental disputes.[265]

In addition, the Director has reporting obligations which are designed to gauge the extent to which ADR mechanisms are being implemented in environmental disputes. The duties include keeping of records as well as preparing annual reports on management of environmental conflicts. The director is mandated to submit the reports to supervisory bodies and committees which then evaluate the level of compliance.[266] More importantly, the South Africa's framework brings forth an ideal alternative environmental dispute resolution regime, which underscores key tenets of effective dispute resolution. The regime pays high premiums on expeditious and cost-effective resolution of environmental disputes.[267]

South African courts have progressively entrenched environmental mediation in the county's environmental jurisprudence. In 2013, a court applauded environmental mediation as a very effective tool of averting serious environmental crises.[268] It also held that parties entangled in an environmental dispute ought to engage in the mediation process with a view to mediating the matter.[269] The courts have endorsed mediation as a suitable procedure for attaining environmental justice on the grounds that it facilitates mutual give-and-take between the parties,

[263] South Africa, National Environmental Management Act 107 of 1998 s 14.
[264] M. van der Bank and C. M. van der Bank (n 255) 2523.
[265] South Africa, National Environmental Management Act 107 of 1998 s 21.
[266] South Africa, National Environmental Management Act 107 of 1998 s 22 (2) (a).
[267] M. van der Bank and C. M. van der Bank (n 255) 2523.
[268] *Space Securitization (Pty) Ltd v Trans Caledon Tunnel Authority and Others* 2013 4 All SA 624 (GSJ).
[269] Ibid.

it is less expensive, and promotes respect for human dignity.[270] The Constitutional court has held that parties ought to engage honestly and pro-actively in pursuit of mutually acceptable solutions.[271]

4.3.4 Mediation in Civil Proceedings

The application of the South Africa's mediation rules is very much a kin to the Kenyan Mediation Rules in many aspects. For starters, the rules empower a magistrate to refer a dispute to mediation.[272] The rules relate to civil proceedings and the referral can be made at any stage of the proceedings, so long as judgment has not been made. A successful mediation process culminates to a settlement agreement. The agreement is a binding contract enforceable among the parties as a court order.[273] On the other hand, if parties fail to reach a settlement, the dispute is referred back to the court for the conventional litigation process to take its cause.[274] In addition, if the matter is settled partially under mediation, the parties refer the unresolved issues back to the court for litigation.[275]

The South Africa's regime for voluntary court-annexed mediation is based on a sound framework comprising of statutes and comprehensive rules. Voluntary mediation is based on two key Acts of Parliament namely the Jurisdiction of Regional Courts Amendment Act[276] and the Rules Board for Courts of Law Act.[277] The latter empowers the Board to make and review court

[270] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 40.
[271] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) para 12.
[272] Rule 75(2) of the Amended Magistrates' Court Rules.
[273] Grégor Wolter, Jac Marais, Andrew Molver and Renée Nienaber (n 238) 493.
[274] Rule 75(1) of the Amended Magistrates' Court Rules.
[275] Joubert J 'Mandatory mediation will soon arrive in South Africa, and should be warmly welcomed by the legal profession' (*Legalbrief Today*, 9 November 2011) <http://www.legalbrief.co.za/article.php?story=20111109093439544> accessed 16 May 2020.
[276] South Africa, the Jurisdiction of Regional Courts Amendment Act, Act 31 of 2008.
[277] South Africa, the Rules Board for Courts of Law Act, Act 107 of 1985.

rules with a view to enhancing uniform, expeditious and efficient administration of justice in the courts.[278] The former seeks to ensure that mediation rules are well incorporated and adopted by courts of regional divisions in a manner which underscores expeditious and simplified procedures.[279] It is on the basis of these two statutes that the country came up with comprehensive rules on voluntary mediation which are better known as 'the Amended Magistrates' Court Rules.'[280]

The South Africa's framework on voluntary court-annexed mediation is the culmination of a consultative law making process. Although the drafting of the rules is the primary responsibility of the Rules Board, the Board endeavors to incorporate the views and inputs from other key stakeholders. The board has in the past consulted academic institutions, the Law Society of South Africa (LSSA), mediation forums, the judiciary, the office of the Family Advocate and sheriffs' associations.[281] The Board also consults the Department of Justice and Constitutional Development to ensure constitutionality of its activities.

The history behind the Amended Magistrates' Court Rules brings into focus the legality of introducing mandatory court-annexed mediation in a legal system. The history demonstrates how South Africa has grappled with and responded to legal challenges posed by a mandatory court-annexed mediation. In 2011, the Rules Board developed rules to facilitate mandatory court based mediation in South African Courts.[282] The rules sought to establish a procedure under which

[278] South Africa, the Rules Board for Courts of Law Act, Act 107 of 1985 ss 6 (1) and 6 (2).
[279] South Africa, the Jurisdiction of Regional Courts Amendment Act, Act 31 of 2008 s 9.
[280] Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014.
[281] Barbeau N 'Mediation pilot project for 2012'<http://www.iol.co.za/dailynews/news/mediation-pilotproject-for-2012-1.1195243#.USHKTx1kRYV>accessed 16 May 2020).
[282] The rules were titled 'Mandatory Mediation Rules of the High Courts and the Magistrates' Courts' ('the 2011 Draft Set of Rules'). Law Society of South Africa 'Draft mediation rules' <http://www.lssa.org.za/upload/DRAFT%20MEDIATION%20RULES%20APPROVED%20BY%20BOARD%2019%2011.pdf>accessed 16 May 2020.

litigants would mandatorily refer their disputes to mediation, and later refer back to court in case mediation failed.[283]

However, the Department of Justice and Constitutional Development raised constitutionality concerns on the mandatory nature of the rules pointing out that such a move would contravene the Constitution in several aspects. The unconstitutionality of the mandatory rules revolved around the fact that there was no specific Act of parliament sanctioning the mandatory rules.[284] Indeed, the Constitution required that court procedures and rules must be anchored on a national statute.[285] In addition, it was also debated on whether it was constitutional to compel parties to attend initial mediation sessions. It was argued that parties to a dispute cannot be compelled to mediate since the very nature of mediation contemplates a voluntary process.[286]

Based on these concerns, the 2011 draft rules were referred back to the Rules Board, which reviewed and converted the rules into voluntary court-based mediation rules.[287] The rules leave it open for parties to a dispute to attempt mediation at any time of their volition; before they commence litigation or during the proceedings but before a judgment is given.[288] In addition, a presiding magistrate can out of their own motion enquire from the parties the possibility of settling the matter through mediation and give them a chance to refer the dispute to mediation.[289]

The mediation rules have inbuilt attributes which insulates it against abuse by litigants while at the same time enhancing flexibility. For instance, where civil proceedings have already commenced, the parties cannot revert back to mediation without first seeking permission from

[283] Rule 1 of the 2011 Draft Set of Rules. Law Society of South Africa 'Draft mediation rules.'
[284] Department of Justice and Constitutional Development *Strategic Plan 2013-2018* (2013) 17.
[285] The South African Constitution, 1996 Section 171.
[286] M. van der Bank and C. M. van der Bank (n 255) 2524.
[287] Whitney Maclons, 'Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System.' (LL.M Thesis, University of the Western Cape 2014) 121.
[288] Rule 75 of the Amended Magistrates' Court Rules.
[289] Rule 75(2) of the Amended Magistrates' Court Rules.

the court.[290] With regards to flexibility, the rules in some way flex the adversarial nature of the civil proceedings. This flexibility enhances access to justice by facilitating cost effective and expeditious resolution of disputes.[291] And what is more is that the rules enhance timely administration of justice by assisting the parties determine in good time whether proceeding to trial is in their best interests or not.[292]

4.4 The Role of Civil Societies and Non-Governmental Organizations

The success of the South Africa's framework is a consulted effort, bringing together the role of civil society, NGOs, multiple donors and the government. Long before the promulgation of the 1996 constitution, notable non-governmental organizations (NGOs) have been in the forefront advocating for introduction and recognition of ADR in the South African justice system. The Independent Mediation Service of South Africa (IMSSA) is a NGO which has actively facilitated and advanced ADR mechanisms in South Africa.[293] Two more NGOs, namely, the Community Peace Foundation and the Community Dispute Resolution Trust have been in the frontline lobbying for the introduction of more efficacious dispute resolution forms.[294]

Indeed, some NGOs have played a central role in availing ADR services as a way of complementing the formal judicial organs. The Muslim Judicial Council is an NGO which offers ADR services on disputes revolving around Muslim law especially marriage and divorce.[295] The decisions of the council are generally accepted by the Muslim community and are binding inter

[290] Rule 75(1) of the Amended Magistrates' Court Rules.
[291] Rules 71(d) of the Amended Magistrates' Court Rules.
[292] Rules 71(e) of the Amended Magistrates' Court Rules.
[293] The NGOs undertook ADR efforts before the transition of government during apartheid.
[294] A A Okharedia 'The Emergence of Alternative Dispute Resolution in South Africa: A Lesson For Other African Countries' (IIRA African Regional Congress Of Industrial Relations, Lagos Nigeria, January 2011).
[295] Christa Rautenbach, 'Traditional Courts as Alternative Dispute Resolution (ADR) – Mechanisms in South Africa' (2014) Max Planck Institute for Comparative and International Private Law 288, 288.

partes.[296] Another organization is the Arbitration Foundation of Southern Africa which offers mediations and arbitrations across the country. The Foundation is a joint venture featuring lawyers, accountants and business persons.[297] There is also Tokiso Dispute Settlement, which is the largest private dispute resolution provider in the country.[298]

In practice, the South African judicial system has learned to co-exist with the NGOs, and has seemingly defined their place in the hierarchy. The place of the Muslim Judicial Council in the judicial system is very much like that of a subordinate court. The Council is bound and guided by the pronouncements of the High Court. Needless to note, the High Court is not guided by the ruling or opinions of the council.[299] Although the courts have recognized the central role played by the council, they have also rightly maintained that the council does not have religious or statutory authority to determine with finality matters concerning Muslim law.[300]

4.5 The Place of Traditional Justice Systems

The regime also recognizes the centrality of traditional justice systems. The country's legal system, which is pluralistic in nature, embraces ADR mechanisms founded on traditional values and norms. The most notorious traditional justice institution in South Africa is 'traditional courts,' which are the equivalent of the Kenyan Meru's Njuri Njeke.[301] They are also known as 'customary courts,' 'traditional authorities' courts,' or 'chiefs' courts.'[302] Even though they bear the name 'court,' it has been agreed that they are not courts in the conventional sense. They do

[296] Ibid.
[297] Available at <http://www.arbitration.co.za/pages/default.aspx>accessed 18 May 2020. The Foundation has a number of branches in major centres throughout South Africa and a fully administered dispute resolution service.
[298] Accessible at <http://tokiso.com/.> accessed 18 May 2020.
[299] *Faro v Bingham* (case no 4466/2013 delivered on 25 October 2013 unreported) para 34.
[300] Ibid.
[301] Christa Rautenbach (n 295) 290.
[302] SALC Discussion Paper 87 on *Community Dispute Resolution Structures: Project 94* (Pretoria 1999).

not fall under any of the three kinds of courts provided for under the 1996 constitution, which are special courts, ordinary courts and the Constitutional Court.[303]

The traditional courts have enjoyed constitutional recognition during the colonization era and under the current constitutional order. Her colonial powers permitted African communities to employ traditional justice systems to resolve disputes touching on their personal laws.[304] The Constitution expressly provides for the retention of traditional courts.[305] In addition, the Constitutional court has since confirmed that the traditional courts have a constitutional backing and recognition.[306] Thus, although the traditional courts are not in the list of courts provided for under section 166, they nonetheless enjoy equal constitutional recognition.

Seemingly, operations of the traditional courts resemble the Kenya's traditional council of elders in terms of flexibility of proceedings. The courts do not have legalistic procedures, there are no standard procedural rules, there are no recorded proceedings and its officials do not have to undergo legal training.[307] Based on this flexibility, the courts have won fame for being less expensive, more accessible and speedy than the conventional courts. To this end, the courts have been recognized as effective tools of dispensing traditional justice.[308]

However, unlike the Kenyan traditional council of elders, the traditional courts are based on a robust legal framework. The major statute regulating traditional courts is the Black

[303] The South African Constitution, 1996 section 166. Ordinary courts comprises of the Supreme Court of Appeal, the High Courts, and the Magistrates' Courts.
[304] Thomas W Bennett, *Application of Customary Law in Southern Africa: The Conflict of Personal Laws* (Juta 1985) 39.
[305] The South African Constitution, 1996: Schedule 6, section 16(1).
[306] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa* 1996(4) SA 744 (CC) para 199.
[307] Digby S Koyana, 'Traditional Courts in South Africa in the Twenty-First Century' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgens (eds) *The Future of African Customary Law* (Cambridge University Press 2011) 228.
[308] Ibid.

Administration Act.[309] Basically, the Act establishes a national system for recognizing and applying customary law as well as creating a distinct system of justice for traditional communities.[310] Even though the Act attracts much criticism based on its disregard of human rights and constitutional values,[311] and that it has been repealed severally, the specific provisions donating criminal and civil jurisdiction to traditional leaders have remained intact.[312]

The South African government has taken positive steps to monitor and regularize traditional justice systems. It has made commendable efforts to formalize, control, acknowledge and integrate the traditional justice system. The government has established advisory boards, town councils, community and urban councils with a view to controlling the traditional justice institutions.[313] It is noteworthy that even though the government has made significant achievement to this end, the formalization exercise has encountered sociological challenges meaning it might take longer to integrate traditional justice institutions. The major challenge is the institutions' desire to operate independent of any external control.[314]

4.5.1 Specialized regime for Traditional Courts

The operations of the traditional courts are well monitored under comprehensive rules and regulations. There are two sets of rules which govern the exercise of the criminal and the civil jurisdictions of the courts. The first set was published in 1961 to regulate the conduct of criminal

[309] South Africa, The Black Administration Act 38 of 1927.
[310] Christa Rautenbach (n 295) 300.
[311] South African Law Reform Commission *Report on the Repeal of the Black Administration Act 38 of 1927: Project 25: Statute Law* (Pretoria 2004).
[312] South Africa, The Black Administration Act 38 of 1927 s 12 & s 20. Section 12 deals with civil jurisdiction, while section 20 deals with criminal jurisdiction.
[313] Freda Moraa Nyakundi (n 63) 51.
[314] A A Okharedia (n 294) 14.

appeals in the traditional courts.[315] The other set, which was published in 1967 governs procedures and the practice of the civil jurisdiction of the traditional courts.[316] And just like their mother statute, the Black Administration Act, the two set of regulations have remained intact since then. Both the Act and the regulations do not create a 'court' per se, but rather confer criminal and civil jurisdiction on traditional leaders especially chiefs, chief's deputy and headmen.[317]

Apparently, the regime on the traditional courts has inbuilt mechanisms designed to regularize traditional justice systems. Traditional leaders presiding over disputes must obtain authorization from the Minister of Justice and Constitutional Development.[318] The framework prescribes the procedure for executing judgments, issuing summary judgments when one of the parties is absent and adjourning a case.[319] Noteworthy, the government has adopted a minimalist and hands-off approach in regulating the operations of the traditional justice systems. Other than authorizing the traditional leader, the government keeps off the substantive details of the court processes and only assumes control later when the matter escalates to the mainstream magistrate's courts as an appeal.

The law has safeguards to galvanize the courts from abuse by litigants and minimize injustice. To some extent, this has been enhanced by rules which seemingly incorporate accountability and transparency of the traditional courts. The traditional leader is obligated to record of the proceedings and to register the judgment at the clerk of a magistrate's court.[320] It also provides

[315] Government Notice R45 published in *Extraordinary Government Gazette* 6609 of 13 January 1961 (*Regulations for Criminal Appeals*).
[316] Government Notice R2082 published in *Extraordinary Government Gazette* 1929 of 29 December 1967 (*Chiefs' and Headmen's Civil Courts Rules*).
[317] Christa Rautenbach (n 295) 301.
[318] South Africa, the Black Administration Act s 12 (1) (a).
[319] South Africa, *Chiefs' and Headmen's Civil Court Rules* rule 1, 2 & 8.
[320] South Africa, *Chiefs' and Headmen's Civil Court Rules* rule 6-7.

remedies exercisable by a litigant where a traditional leader delays a matter unreasonably[321] as well as the procedure for appealing the judgment to a magistrate's court.[322] And what is more is that the leader is obligated to supply his reasons for the judgment to the court's clerk, in writing, after which the magistrate may re-try and re-hear the matter.[323]

4.6 ADR Institutions and their Efficacy

The South African regime has a robust institutional framework composing various institutions, bodies and organs designed to advance the idea of ADR. Such institutions include the National Land Reform Mediation Panel, the Commission for Conciliation, Mediation and Arbitration (CCMA),[324] local community courts, family mediation boards and other government agencies.[325] In addition, the Alternative Dispute Resolution Association of South Africa (ADRASA) has been designed to institutionalize mediation.[326]

The institutions have well spelt mandates with respect to their powers, scope and jurisdiction. The Commission, for instance, is reserved for labour related disputes and its services apply to those parties who have chosen to submit and refer their dispute to the commission.[327] Also, the jurisdiction of the traditional courts is clearly established. A civil dispute must have emanated from customary law, both parties to the dispute must be Africans and the parties, especially the

[321] South Africa, *Chiefs' and Headmen's Civil Court Rules* rule 3.
[322] South Africa, *Chiefs' and Headmen's Civil Court Rules* rule 9.
[323] South Africa, *Chiefs' and Headmen's Civil Court Rules* rule 12(4). *See also* section 29A of the Magistrates' Courts Act.
[324] CCMA is an independent dispute resolution body established under South Africa's Labour Relations Act, Act 66 of 1995. It was established in 1996.
[325] Petrina Ampeire (n 230) 24.
[326] Freda Moraa Nyakundi (n 63) 52.
[327] The World Bank Group, 'Alternative Dispute Resolution Center Manual: A Guide for Practitioners on Establishing and Managing ADR Centers' (Investment Climate Advisory Services of the World Bank Group, June 2011) 9.

defendant must be residing within the geographical jurisdiction of the traditional leader.[328] They do not have jurisdiction to determine serious matters in marriages like separation, divorce or nullity.[329]

The Commission has adopted in-built systems designed to enhance professionalism of its commissioners, as well as the competency of new recruits. Fresh recruits undergo thorough training and induction sessions in which they are taught about ADR processes, especially mediation and conciliation.[330] In addition, the new commissioners are taken through a mandatory mentorship program through which more experienced commissioners assist newly recruited commissioners apply their theoretical knowledge acquired at the training and induction stage. At the end of the program, a report is prepared on each mentee, outlining their strengths, weaknesses and their drafting skills.[331]

The mentorship exercise is a deliberate effort to safeguard the jurisprudence of the Commission and its continuity. New commissioners who do not pass the mentorship program have their programs extended until they demonstrate competence to practice. For continuity purposes, the program ensures that the new recruits understand the operations of the commission. Some of the operations considered essential include processing of ruling and awards, allocation of matters to commissioners and making claims for finance. The program ensures that by the time the recruit is appointed to serve in the commission, they are well placed to administer justice within the auspices of the commission as well as meet its efficiency and performance goals.[332]

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[328] Thomas W Bennett, *Customary Law in South Africa* (Juta Lansdowne 2004) 45.
[329] South Africa, the Black Administration Act s 12(1) proviso. However, they have jurisdiction on return of bride price and actions for damages for adultery in terms of customary law.
[330] The World Bank Group (n 327) 23.
[331] Ibid.
[332] The World Bank Group (n 327) 23.

4.7 Conclusion

The South African jurisdiction has numerous achievements and positive attributes from which Kenya can learn and emulate. Her legal framework is supported by powerful institutions especially CCMA and the Companies Tribunal, which promote the use of ADR in labour disputes and corporate sector respectively. She has a robust framework enhancing ADR in environmental disputes based on policies, statutes and supported by efficacious institutions. Importantly, her judicial system recognizes the centrality of traditional justice systems and has a specialized regime for traditional courts. Lastly, the South Africa's framework enables and recognizes the role of civil societies and non-governmental organizations in the promotion of ADR mechanisms in the pursuit of timely administration of justice and access to justice.

CHAPTER FIVE

RESEARCH FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The study's interest in this area was prompted by a host of legal challenges facing the Kenyan judicial system, and which have seemingly rendered timely administration of justice a mirage. With a constitutional order which promotes the use of ADR in courts and tribunals, it is to be expected that the courts will utilize ADR as a tool to achieve timely adjudication of disputes and clearance of case backlog. This expectation has been strengthened by numerous legislative enactments as well as various judiciary-driven initiatives designed to institutionalize ADR into the mainstream judicial system. However, given every opportunity, the Kenyan Judiciary continues to demonstrate that case backlog remains a major challenge to the timely administration of justice in Kenya.

Based on this background, the objectives of the study were three-fold. First, it sought to examine the efficacy of the Kenya's legal framework for ADR in attaining timely administration of justice. Secondly, it sought to examine the legal challenges that impede the use of ADR mechanisms as a tool for achieving timely administration of justice in Kenya. By way of comparison, the study also sought to investigate the extent to which the South Africa's experience on ADR provide lessons which Kenya can emulate in the pursuit of timely administration of justice. Incidental to these objectives, the study would propose the necessary amendments on the Kenya's legal framework which can be employed to achieve timely administration of justice.

The study was based on two hypotheses. It postulated that ADR mechanisms are an effective tool of achieving timely administration and access to justice and that the Kenyan legal framework for ADR is unstructured and has inherent legal challenges that impede its efficacy in attaining timely administration of justice. It applied two legal theories to support the hypotheses of the study.

One of the theories was the John Rawls' Theory of Justice and the other was the Legal Positivism theory. The study utilized the latter theory to underscore why all ADR laws must conform to the Constitution in terms of ensuring timely administration of justice. The study employed Hans Kelsen's *Pure Theory of Law* to argue that the Parliament should enact substantive statutes to give effect to the constitutional provisions on ADR. It uses John Rawls' theory to investigate the extent to which the Kenya's legal framework for ADR promotes the realization of social-political liberties, especially the right to access justice and the right to timely administration of justice.

The study employed several research methodologies to test its hypotheses namely comparative and doctrinal methodologies. It utilized a qualitative approach to review and analyze the already available data, which involved interrogation of secondary sources of information especially statutes, government policies, journal articles, textbooks and government reports. It employed doctrinal research to analyze the Kenya's legal, institutional and policy framework on ADR mechanisms. It used this approach to analyze the history behind the existing legal framework on ADR, and to determine the actual impact of the framework in the Kenyan legal system. Lastly, it offered a critical analysis of South Africa's legal framework of ADR, with a view to identifying lessons which Kenya can emulate.

5.2 Research Findings

In a nutshell, each of the four research questions was answered separately in the four chapters of the study. The first research question concerning the extent to which Kenya's legal framework for ADR is efficient in attaining timely administration of justice was answered in chapter two. The second question on the legal challenges that impede the use of ADR mechanisms was answered in chapter three. The third research question concerning the extent to Kenya can learn and borrow from South Africa's experience was addressed in chapter four. Lastly, the question on the necessary amendments/reforms was answered in chapter five.

Noteworthy, the study objectives identified in chapter one were met. With respect to the first research objective, the study found that even though Kenya's framework on ADR has developed gradually, it is yet to achieve optimal performance with respect to achieving timely administration of justice. As to the second research objective, the study has identified a host of legal challenges which have impeded the use of ADR as a tool for achieving timely administration of justice. For the third research objective, the study has found that Kenya has indeed much to learn from South Africa's experience on regulation ADR.

Importantly, the study has proved the two study hypotheses identified in chapter one. Specifically, it has proved that ADR mechanisms are an effective tool of achieving timely administration and access to justice. It has also confirmed that Kenyan legal framework for ADR is unstructured and has inherent legal challenges that impede its efficacy in attaining timely administration of justice.

The study reveals that the history of Kenya's legal framework on ADR can be traced way back to colonial times in form of Ordinances. But the once basic framework has since undergone

significant metamorphosis over the years resulting into a fully-fledged legal framework. This gradual evolution has been marked by several legislative developments and achievements spearheaded by taskforces, stakeholder consultations and the Constitution of Kenya Review Commission. All these legislative interventions were crises-driven and were designed to remedy the felt necessities of their times.

The greatest and remarkable landmark achievement was the promulgation of the Constitution in 2010, which authoritatively legitimized ADR mechanisms by mandating judicial bodies to promote ADR in resolution of disputes. Subsequent achievements included amendment of the Civil Procedure Act in 2012 to introduce the famous section 59A, 59B and 59C which established the Mediation Accreditation Committee. Some legislative intervention preceded the promulgation of the Constitution, especially the amendment of the Civil Procedure Act and the Appellate Jurisdiction Act in 2009, which required courts to ensure efficient disposal of their businesses and timely disposal of the proceedings.

Various statutes enacted post 2010 have in different lengths attempted to incorporate the use of ADR mechanisms in various sectors especially labour disputes, land and environment disputes, tax disputes and marriage disputes. Kenya's legal framework has made considerable achievements in incorporating ADR in civil suits. Mediation is conducted within the guidelines of Practice Direction on Court Annexed Mediation, which required Mediation Deputy Registrar to mandatorily screen civil cases at the commencement level, with a view of identifying cases suitable for mediation. The guidelines place the court at the center of the mediation process and insulate it against possible abuse by non-willing litigants.

ADR mechanisms have also found their place in the criminal justice system, and criminal courts may promote reconciliation and encourage settlement of the matter at any stage of the criminal

proceedings. Remarkably, Kenyan courts put into consideration the nature of the criminal offence and the impact of the offence to the society when deliberating on whether to approve ADR. Also, withdrawal of criminal proceedings pursuant to ADR requires the approval of the DPP.

The use of ADR in civil disputes seems to be less problematic than the use of ADR in criminal cases. While as the Kenya's framework has generated several rules to govern ADR in civil proceedings, it has not come up with equivalent rules to govern ADR in criminal proceedings. Even though the Constitution 2010 requires the courts to promote the use of ADR in the resolution of disputes, the discourse on the suitability of ADR in criminal cases is evergreen. At the center of the debate is a question whether the constitutional framework on ADR should be used to encourage ADR in serious criminal offences like murder. As much as there is some form of agreement that TDRMs are applicable to criminal cases, the philosophical debate on the appropriateness of the practice is yet to be settled.

Further, the study reveals the legal challenges that impede the use of ADR mechanisms as a tool for achieving timely administration of justice in Kenya. It reveals why the use of ADR has not been effective in achieving the timely adjudication of disputes and the clearance of case backlog. It also shows why the various past legislative amendments on the legal framework have borne little success in achieving timely access to justice and the clearance of case backlog.

The most conspicuous legal challenge is the lack of a single unifying legislation on ADR and a national policy. This explains why the framework is characterized by piecemeal legislations on ADR and the sector al approach which have occasioned coordination challenges in the application of ADR mechanisms. The several regimes established by different statutes at different times have borne legal gaps and disharmony amongst the legal and the institutional

framework. This has also diminished the role of state agencies in assimilating ADR into their corporate charter. It has also discouraged practitioners and disputants from utilizing ADR mechanisms in commercial disputes.

Another challenge is the inadequacy of the law on traditional dispute resolution strategies. The Kenyan framework is yet to incorporate more novel and dynamic dispute resolution mechanisms like traditional dispute resolution strategies. In addition, ADR and TDR mechanisms stand little chances in resolving conflicts over natural resources. To some extent, the law has unjustifiably limited the use of ADR and other TDR mechanisms in resolving disputes featuring domestic violence. In practice, family law practitioners have discouraged the use of ADR in the resolving such disputes, with exception of mediation.

An additional legal challenge is that the interface between TDRMs and the principles of natural justice and non-discrimination is at best problematic. The current legal framework on TDRMs has been criticized for its failure to observe principles of natural justice and the rule of law. In addition, the current practice of TDRM violates equality and non-discrimination principles of the constitution because it is defined by applicable customary laws which are by design inherently patriarchal and which grant women limited opportunity to participate.

There is still the problem with how ADR relates with human rights, democracy and the problem of gender balance. To some extent, the development of ADR into the mainstream legal system has sidelined and ignored matters of gender balance and the system has been influenced by biased perspectives on the role of women in the ADR process. In addition, Kenyan traditional justice systems have a hostile relationship with human rights and democracy. In some aspects, the Kenyan application of traditional justice systems contravenes the Rule of Law and the concept of fundamental freedoms.

The framework establishing the Pilot Court-Annexed Mediation Project has serious legal issues bearing uncertainty to litigants and practitioners. It is not yet authoritatively settled whether a party can decline the referral or whether both parties can oppose the referral. Essentially, the main question for litigants remains as to whether the direction by the MDR fits to be treated as a decision, which can be challenged through judicial review or which can be appealable in a higher court. It is yet to define the role of advocates in ADR mechanisms, what it expects from them and clear guidelines to determine the remuneration of mediators and arbitrators.

The study also reveals that the efficacy of Kenya's framework has been compromised by legal challenges which come with legal pluralism. There is manifested antagonism between the formal legal system and the informal legal system. Kenya's legal system has been criticized for emphasizing on legal formalism and discouraging legal plurality, by neglecting and undermining the informal justice systems at the expense of litigation. The antagonism between the two legal systems has been fueled by their different conception of justice. While as the formal legal system emphasizes that justice is achieved through legal propositions prescribed in law books, informal legal systems on the other hand equate justice with peace and harmony.

Furthermore, lawyers and advocates have greatly decelerated the ability of ADR mechanisms to make significant achievements in the timely administration of justice. They discourage their clients from resolving to ADR mechanisms and legislators, policy makers have a major concern that the promotion of ADR might receive hesitation from some quarters of the legal system, especially the advocates.

Lastly, the issue of culture is equally to blame for the slower uptake of ADR mechanisms in Kenya. Past researches indicate that Kenyans have litigious tendencies coupled with a negative attitude against ADR mechanisms. It has been opined that Kenyans are overly litigious, when

compared to citizens from other jurisdictions like the UK. According to past researches, a successful uptake of ADR in Kenya may take longer time than it would take other African counties like Ghana and Nigeria. To some extent, the Kenyan performance in the mediation piloting project questioned the feasibility of ADR in the Kenyan context. Her performance was extremely poor and dismal especially when compared with her counterparts.

However, key stakeholders in the ADR sector are in the process of formulating a national policy framework to address this challenge. The Zero Draft policy seems to capture what a comprehensive policy framework ought to. Largely, the Zero Draft's outlined objectives will bring sanity and streamline the application of ADR in Kenya. Seemingly, a successful formulation of the Zero Draft policy will form a solid policy framework on which the parliament will enact a specific legislation and establish key institutions. To crown it all, the proposed Alternative Dispute Resolution Act will professionalize ADR by accrediting ADR practitioners as well as setting quality standards in the practice of ADR.

By way of comparison, the study reveals that Kenya has much to learn from the South Africa's experience on the practice of ADR. It shows that South Africa is the most suitable choice for this study because the country has one of the fastest developing ADR regimes in Africa and that her regime on ADR serves as a model for many African countries. The country has a vibrant legislative framework for conciliation and mediation which basically legitimizes and eases these ADR processes. The legislative framework offers clear demarcations on occasions where mediation is a mandatory procedure, and areas where parties are free to go for mediation on their own volition.

The study shows that ADR has taken a very central role in South Africa's corporate sector, through the establishment of a Companies' Tribunal which is empowered to resolve corporate

and commercial disputes through ADR mechanisms at no cost. In addition, the country has a robust legal and policy framework on application of ADR in environmental conflicts. The framework establishes supporting institutions with clear mandates and less chances of institutional overlap. It also professionalizes the application of ADR in environmental disputes by setting minimum appointment qualifications in terms of expertise, knowledge and experience. It also imposes reporting obligations on certain persons for the purposes of gauging the extent to which ADR mechanisms are being implemented in environmental disputes.

The country's regime for voluntary court-annexed mediation is based on a sound framework comprising of statutes and comprehensive rules, which is a culmination of a consultative law-making process incorporating views and inputs from key stakeholders. In addition, the country's pluralistic legal system acknowledges the centrality of traditional justice systems by recognizing traditional courts, which fundamentally embrace ADR mechanisms founded on traditional values and norms. The traditional courts have enjoyed constitutional recognition during both the colonization era and under the current constitutional order. Seemingly, operations of the traditional courts resemble the Kenya's traditional council of elders in terms of flexibility of proceedings.

However, unlike the Kenyan traditional council of elders, the South African traditional courts are based on a robust legal framework. There is a substantive statute establishing a national system for recognizing and applying customary law as well as creating a distinct system of justice for traditional communities. The operation of the courts is monitored under comprehensive rules and regulations, with inbuilt mechanisms designed to regularize traditional justice systems and insulate the courts from abuse by litigants and minimize injustice.

Noteworthy, the government has adopted a minimalist and hands-off approach in regulating the operations of the traditional justice systems. Other than authorizing the traditional leader, the government keeps off the substantive details of the court processes and only assumes control later when the matter escalates to the mainstream magistrate's courts as an appeal. The government has taken positive steps to monitor and regularize traditional justice systems with a view to incorporating contemporary human-rights perspectives into the operations of the traditional courts.

The South African regime has a robust institutional framework composing various institutions, bodies and organs designed to advance the idea of ADR. Key institutions, especially the CCMA have adopted in-built systems designed to enhance professionalism, competency of new recruits and to safeguard the jurisprudence of the Commission. The success of her framework can in many ways be attributed to the role of the civil societies and NGOs, which have played a central role in availing ADR services as a way of complementing the formal judicial organs.

In practice, the judicial system has learned to co-exist with the NGOs, and has seemingly defined their place in the hierarchy to be very much like that of a subordinate court. In addition, the South African government has invested in conducting civic education and public sensitization with a view to building capacity for litigants and members of the public to embrace ADR.

RECOMMENDATIONS

Based on research findings demonstrated in chapters two, three and four, and summarized in the study findings' section of chapter five, the study makes the following recommendations. The recommendations are divided into short term, medium term and long term.

Short-term recommendations

i. Enactment of a statute on ADR

The Parliament should enact a single unifying statute to regulate and monitor ADR mechanisms. The study revealed that the major legal challenge impeding the success and efficacy of ADR in Kenya is the absence of a substantive legislation regulating ADR processes. It also revealed that South Africa's framework is based on two substantive statutes monitoring application of ADR. Based on these observations, the study recommends that the Kenyan parliament should enact a statute on ADR mechanisms. This will cure disharmony and legal gaps occasioned by the several regimes established by different regimes.

ii. Standardization of TDRMs

Parliament should standardizing TDRMs to uphold natural justice, non-discrimination and gender balance. The study revealed that TDRMs do not observe principles of natural justice in their processes, which are prone to procedural challenges and disregard rules of fair hearing. The study also revealed that the South African government has assumed regulatory role with respect to traditional justice systems, in a bid to incorporate principles of natural justice into their operations. Therefore, the study recommends that the parliament should come up with set of rules outlining minimal requirements to promote the concept of natural justice in TDRMs.

iii. Establishment of efficacious ADR institutions

The Parliament should amend the existing law or enact a new statute with a view to establishing more powerful and efficacious ADR institutions. The study reveals that South Africa's regime comprises powerful ADR institutions, with clear mandates with respect to their powers, scope and jurisdiction. And what is more is that the Commission for ADR has in-built systems designed to enhance professionalism, competency of new commissioners and safeguard the jurisprudence of the Commission. Thus, the study recommends that the institutional framework provide clear demarcation of mandates with a view to minimizing or preventing institutional overlap and disharmony.

Medium-term recommendations

i. Amplifying the role of civil societies and NGOs

Civil societies and NGOs should take a more active role in the advancement of ADR in Kenya. The study revealed that the South Africa's regime has benefited from the role of civil societies and NGOs, both of which have been in the forefront advocating for ADR mechanisms and availing ADR services as a way of complementing the formal judicial organs. The study recommends that the Kenyan legal system should recognize the role of these organs and learn to co-exist with them, by outlining their role and scope.

ii. Demystifying TJS

The Office of the Attorney General's department of Justice and the Judiciary should develop and adopt regulations with a view to demystifying TJS and their interface with the mainstream judicial system. The study indicated that the Kenya traditional dispute resolution forums are susceptible to bribery, manipulation and the appointment process to those bodies does not

promote transparency. It also showed that South Africa's regime recognizes the centrality of traditional justice systems famously known as the traditional courts, by establishing a special regulatory regime outlining their operations, scope and mandate. Therefore, the study recommends that regulations be generated to regularize the operations of traditional dispute resolution forums and their relationship with the formal courts.

iii. Rethinking the Role of Advocates

The LSK and the Judiciary should come up with mechanisms with a view to capitalizing on the role of advocates as social engineers in the promotion of ADR. The study revealed that Kenyan lawyers and advocates have to some extent decelerated the ability of ADR to make significant achievements towards timely administration of justice. It shows that advocates do indeed discourage their clients from resolving to ADR and that promotion of ADR has received hesitation from some quarters of the legal system, especially the advocates. The study recommends that the LSK comes up with in-house rules for the purposes of encouraging and offering incentive for the advocates to utilize ADR in resolution of disputes.

Long-term recommendations

i. Development of a Policy Framework

The Cabinet should develop and adopt a comprehensive national policy on application of ADR mechanisms. The study showed that Kenya lacks a comprehensive policy framework on the application of ADR mechanisms. It also revealed that South Africa's regime on ADR is based on elaborate and consultative law making process drawing and incorporating views from all stakeholders. Thus, the study recommends that the Ministry of Justice should carry out extensive

consultations and come up with a robust policy on ADR, on the basis of which the parliament will enact a substantive statute regulating ADR processes in Kenya.

ii. Conducting civic education to detoxify the litigious culture

The Judiciary, with the aid of NGOs and civil societies should conduct public sensitization to detoxify the litigious culture and enhance ADR. The study revealed that culture is equally to blame for the slower uptake of ADR mechanisms because Kenyans have litigious tendencies coupled with a negative attitude against ADR mechanisms. It also showed that the South African government has invested in conducting civic education and public sensitization with a view to building capacity for litigants and members of the public to embrace ADR. It is recommended that the Kenyan government, with the aid of NGOs and civil societies should budget for, finance and carry out more civic education to promote ADR mechanisms.

Further Areas of Research

The current study has investigated the efficacy of Kenya's legal framework on ADR as well as the legal challenges that impede the use of ADR and has given recommendations on what ought to be done to redress the legal challenges and enhance the use of ADR as tools for achieving timely administration of justice. Looking forward, the study acknowledges that there are several issues open for future research. Future works in this area include studying the non-legal factors which occasion case backlog in the Kenyan Judiciary. In addition, future researchers can as well investigate factors which give litigation preference over ADR mechanisms in Kenya.

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