

# **ADR, Access to Justice and Development in Kenya**

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**Kariuki Muigua\* & Kariuki Francis\*\***

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\* Ph.D in Law, LL.B, LL.M (Env. Law, Nairobi), FCIArb, FCPSK, MKIM, Advocate, Lecturer, CASELAP, University of Nairobi.

\*\*LL.B, LL.M, MCIArb, Assistant Lecturer, Strathmore Law School.

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## ***Abstract***

*Development is not feasible in a conflict situation. Conflicts and disputes must be managed effectively and expeditiously for development to take place. Formal mechanisms for conflict management have not always been effective in managing conflicts. Mechanisms such as courts have been inaccessible by the poor owing to technicalities, complex procedures, high costs and delays. There has been a shift towards informal mechanisms for conflict management, including alternative dispute resolution (ADR) and traditional dispute resolution mechanisms (TDRM).*

*ADR and TDRM processes contribute to enhanced access to justice by all, and in particular among the poor people. Enhanced access to justice strengthens the Rule of Law. Existing literature in development studies has shown a correlation between the Rule of Law and levels of development. ADR and TDRMs are thus quintessential from a developmental perspective. The Kenyan legal framework has recognized the role of ADR and TDRM in development. Existing laws require the use of ADR and TDRM in resolving a myriad of disputes such as those relating to land, family matters, commercial and political questions.*

*In this paper the authors argue that the recognition of ADR and TDRMs within the legal framework in Kenya, will contribute towards economic, social, cultural and political development. This recognition expands the array of mechanisms that parties to a dispute can employ in ventilating their disputes. Enhanced access to justice will also contribute to respect for the rule of law, which is an essential precondition to development. ADR is also becoming a lucrative economic venture with many professionals now working as full-time or part-time ADR practitioners. In addition, a number of organisations have established ADR centres. Some of these centres are expected to be major attractions for foreign investments in the country as they will handle international arbitrations. ADR is also being taught in schools and in universities, and is thus expected to contribute to social development.*

## 1.0 Introduction

Development is not feasible in a conflict situation. Conflicts and disputes must be managed effectively and expeditiously for development to take place. Conflicts and disputes management mechanisms consist of alternative dispute resolution mechanisms (ADR) such as negotiation, mediation, conciliation, expert opinion, mini-trial, ombudsman procedures, arbitration; traditional dispute resolution mechanisms and also formal mechanisms namely court adjudication. Formal mechanisms for conflict management have not always been effective in managing conflicts. They have been inaccessible by the poor due to legal technicalities, complex procedures, high costs and delays.<sup>1</sup> This has necessitated a shift towards informal mechanisms for conflict management, including ADR and traditional dispute resolution mechanisms (TDRM).

ADR and TDRM processes contribute to enhanced access to justice by all, especially the poor. Enhanced access to justice strengthens the Rule of Law. Existing literature on development studies has shown a correlation between the Rule of Law and levels of development. ADR and TDRMs are thus quintessential from a developmental perspective. The Kenyan legal framework has recognized the role of ADR and TDRM in development. Existing laws require the use of ADR and TDRM in resolving a myriad of disputes such as those relating to land, family matters, commercial and political questions.

In this paper, the authors argue that the recognition of ADR and TDRMs within the legal framework in Kenya, will contribute towards economic, social, cultural and political development. This recognition expands the array of mechanisms that parties to a dispute can employ in ventilating their disputes. Enhanced access to justice also contributes to respect for the Rule of Law, which is an essential precondition for development. ADR is also becoming a lucrative economic venture with many professionals now working as full-time or part-time ADR practitioners. In addition, a number of organisations have established ADR centres. Some of these centres are expected to be major attractions for foreign investments in the country as they will handle international arbitrations. ADR is also being taught in schools and in universities, and is thus expected to contribute to social development.

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<sup>1</sup> ICJ, "Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution," *ICJ Kenya, Vol. III* (2002); See also K. Muigua, "Avoiding Litigation through the Employment of Alternative Dispute Resolution," pp 6-7, a Paper presented at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8<sup>th</sup> & 9<sup>th</sup> March, 2012, available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf>, (accessed on 10/05/2014).

## 2.0 ADR in Kenya

ADR refers to all decision-making processes other than litigation, including but not limited to negotiation, enquiry, mediation, conciliation, expert determination and arbitration. Article 33 of the UN Charter outlines the various conflict management mechanisms that Parties to any dispute may resort to. One of the objectives of the UN is to maintain international peace and security through peaceful means including the settlement of international disputes.<sup>2</sup> As such, Article 33 of the Charter enjoins parties to an international dispute, to first seek a solution to their dispute by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement*, resort to regional agencies or arrangements, or other peaceful means of their own choice.<sup>3</sup> Essentially, the Charter provides a legal basis for the use of ADR in dispute resolution at the international level.<sup>4</sup>

ADR mechanisms mainly consist of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures.<sup>5</sup> Some writers have classified ADR mechanisms into: facilitative, evaluative or determinative processes.<sup>6</sup> Facilitative processes include mediation, where parties are assisted in identifying issues in dispute and in coming to an agreement about the dispute.<sup>7</sup> In evaluative processes, such as early neutral evaluation or expert appraisal, the third party is more actively involved in advising the parties about the issues and various possible outcomes.<sup>8</sup> In a determinative process, such as arbitration and expert determination, after the parties' have presented their arguments and evidence of a dispute, the third party makes a determination.<sup>9</sup> This classification leaves out negotiation which may not fit in the three categories. In negotiation

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<sup>2</sup> Article 1.1, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>3</sup> *Ibid*, Article 33.1.

<sup>4</sup> There are numerous international instruments providing for the use of ADR such as the *New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards* and the *ICSID*.

<sup>5</sup> See generally, K. Muigua, *Setting Disputes through Arbitration in Kenya*, (Glenwood Publishers Limited, 2012), pp.1-19.

<sup>6</sup> Z. Xie, "The Facilitative, Evaluative and Determinative Processes in ADR," 2011-10-12, available at <http://www.xwqlaw.com/info/c47f5ff15b464882ad5c9a7f97338652>, (accessed on 16/04/2014).

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid*.

parties meet to identify and discuss issues at hand so as to arrive at mutually acceptable solutions without the help of a third party.

ADR prides itself for being a simple, quick, flexible and accessible dispute resolution system compared to litigation.<sup>10</sup> It emphasises win-win situations for both parties, increases access to justice, and improves efficiency and it is expeditious.<sup>11</sup> It is also a cost-effective means for dispute resolution that fosters parties' relationships. ADR mechanisms are applicable to a wide range of disputes<sup>12</sup> including commercial, land, intellectual property, family, succession, criminal,<sup>13</sup> and political disputes.<sup>14</sup> ADR and traditional justice systems strengthen the Rule of Law and contribute to development.<sup>15</sup> This is because they enhance access to justice which is an essential component of the Rule of Law. The Rule of Law is the foundation for both justice and security.<sup>16</sup>

In Kenya, ADR mechanisms are anchored in the law. Article 159 of the Constitution stipulates that in exercise of judicial authority, courts and tribunals are to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.<sup>17</sup> ADR mechanisms including negotiation, mediation and arbitration are also available in the settlement of intergovernmental disputes.<sup>18</sup> Procedures for settling such

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<sup>10</sup> *Ibid.*

<sup>11</sup> S. Mishra, "Justice Dispensation through Alternate Dispute Resolution System In India," available at <http://www.legalindia.in/justice-dispensation-through-alternate-dispute-resolution-system-in-indiab>, (accessed on 19/04/2014).

<sup>12</sup> F. Kariuki, "Redefining 'Arbitrability:' Assessment of Articles 159 & 189(4) of the Constitution of Kenya," *Alternative Dispute Resolution Journal*, Vol.1, (CIArb, 2013), pp.175-189. See also, Articles 159 (2), 67 (2) (f) and 189(4), Constitution of Kenya.

<sup>13</sup> *Republic v Mohamed Abdow Mohamed* [2013] eKLR.

<sup>14</sup> A good example is the 2008 political mediation in Kenya by the former Secretary-General of the United Nations, Mr. Kofi Annan, to resolve the conflict resulting from the 2007 Post-Election Violence.

<sup>15</sup> J. Michel, "Alternative Dispute Resolution and the Rule of Law in International Development Cooperation," *J&D Justice & Development Working Paper Series*, (2011), p.2.

<sup>16</sup> UNDP, "Access to Justice and Rule of Law," available at [http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus\\_areas/focus\\_justice\\_law/](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/), (accessed on 9/03/ 2014).

<sup>17</sup> Article 159(2) (c), Constitution of Kenya, 2010.

<sup>18</sup> *Ibid*, Article 189(4).

disputes are to be provided by an Act of Parliament.<sup>19</sup> In land conflicts, the National Land Commission is required to encourage the application of traditional dispute resolution mechanisms.<sup>20</sup> Moreover, there are Acts of Parliament that provide procedures for the use of various ADR mechanisms. The Arbitration Act<sup>21</sup> governs the application of arbitration in Kenya, while the Civil Procedure Act has provisions dealing with the use of both mediation<sup>22</sup> and arbitration. Recognition of ADR and TDRM processes in the Constitution is meant to enhance access to justice as guaranteed in Article 48 thereof.

### 3.0 Access to Justice

Justice can be viewed from different perspectives. It can be viewed as distributive justice or economic justice which is concerned with fairness in sharing; procedural justice which entails the principle of fairness in sense of fair play; restorative justice (corrective justice) or retributive justice.<sup>23</sup> Justice can thus mean different things for different people. This paper is concerned with enhancing procedural and substantive justice through ADR, and how enhanced access to justice can contribute to development by creating more avenues for ventilating disputes. Despite the centrality of justice in national development, there still exist diverse impediments to justice particularly among the poor, *to wit*, weak economic position; high court fees; poor infrastructure/capacity of state's legal system; marginalization of minority group; gender; and language barriers.<sup>24</sup> These impediments prevent people from realizing their full potential in society.

What then does the term access to justice mean? Access to justice as a concept is not easy to define. It may refer to a situation where people in need of help, find effective solutions

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

<sup>20</sup> *Ibid*, Article 67(2) (f).

<sup>21</sup> Arbitration Act, Cap. 49, Laws of Kenya (Revised, 2010).

<sup>22</sup> See generally Section 59, Civil Procedure Act, Cap. 21; See also Order 46, Civil Procedure Rules 2010 (Legal Notice No. 151).

<sup>23</sup> Available at [http://changingminds.org/explanations/trust/four\\_justice.htm](http://changingminds.org/explanations/trust/four_justice.htm), (accessed on 19/04/ 2014).

<sup>24</sup> Democracy Promotion and Conflict Resolution: The Role of Access to Justice, Working Paper, Democratic Progress Institute, 2012, available at <http://www.democraticprogress.org/wp-content/uploads/2012/12/The-Role-of-Access-to-Justice.pdf>, (accessed on 28/2014/2014).

available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution.<sup>25</sup> It could also refer to judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue. Further, it refers to a fair and equitable legal framework that protects human rights and ensures delivery of justice.<sup>26</sup> It also refers to the opening up of formal systems and structures of the law to disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.<sup>27</sup> Access to justice could also include the use of informal dispute resolution mechanisms such as ADR and traditional dispute resolution mechanisms, to bring justice closer to the people and make it more affordable. In the case of *Dry Associates Limited v Capital Markets Authority & anor*, the court was of the view that, access to justice includes the enshrinement of rights in the law; awareness of and understanding of the law; access to information; equality in the protection of rights; access to justice systems particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.<sup>28</sup>

The right to have access to justice is now a basic and inviolable right guaranteed in international human right instruments and national constitutions.<sup>29</sup> As a basic right, access to justice requires us to look beyond the dry letter of the law. It thus acts as a reaction to and a protection against legal formalism and dogmatism.<sup>30</sup> As a consequence, access to justice seems to have two important dimensions: procedural access (fair hearing before an impartial tribunal)

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<sup>25</sup> M.T. Ladan, "Access To Justice As A Human Right Under The Ecowas Community Law," available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07->, (accessed on 19/04/2014).

<sup>26</sup> *Ibid.*

<sup>27</sup> Global Alliance against Traffic in Women (GAATW), Available at <http://www.gaatw.org/atj/> (accessed on 09/03/2014).

<sup>28</sup> *Dry Associates Limited v Capital Markets Authority & anor* Nairobi Petition No. 358 of 2011, (Unreported).

<sup>29</sup> Article 48 of the Constitution of Kenya 2010, guarantees the right of access to justice for all. See also Article 159(2).

<sup>30</sup> *Kenya Bus Service Ltd & another v. Minister of Transport & 2 others [2012]eKLR.*

and substantive access (fair and just remedy for a violation of one's rights).<sup>31</sup> Access to justice would require equality in accessing legal services by all persons regardless of means, and access to effective dispute resolution mechanisms necessary to protect their rights and interests. It also requires national equity in that all persons should enjoy, as nearly as possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy. In addition, it requires equality before the law, by ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in all fields, use of community facilities and access to services.<sup>32</sup> Arguably, therefore, in the absence of access to justice, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision-makers accountable.<sup>33</sup> However, justice is not found only in official justice forums such as courts. Justice can be experienced also in informal forums such as, homes, villages and workplace. It is thus critical to investigate the impact of Article 159(2) of the Constitution and other statutory provisions of the law in Kenya that seek to formalize some ADR and TDRM processes. Such formalization can be a source of injustice to poor Kenyans, if it will erect barriers to accessing justice through the TDRM.

Realization of the right of access to justice requires an effective legal and institutional framework not only internationally but also nationally. This is so because access to justice can only be as effective as the available mechanisms to facilitate the same. It is also important to highlight Proclamation 1.2 of the *Vienna Declaration and Programme of Action*<sup>34</sup> which states that all peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development. Notably, Article 19.1 of the Constitution of Kenya 2010 states that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Further, clause (2) thereof is to the effect that the purpose of recognising and protecting human

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<sup>31</sup> *Ibid.*

<sup>32</sup> See L. Schetzer *et. al.*, "Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW," available at [www.lawfoundation.net.au/ljf/site/articleIDs/.../\\$file/bkgr1.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/.../$file/bkgr1.pdf), (accessed on 10/03/2014).

<sup>33</sup> Available at [http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus\\_areas/focus\\_justice\\_law/](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/), (accessed on 09/03/2014).

<sup>34</sup> UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. This lends credence to the need to support the application of ADR and TDRM in enhancing access to justice and furthering development in Kenya.

#### **4.0 ADR and Access to Justice**

The problems and challenges that bedevil the justice sector in Kenya are immense.<sup>35</sup> The problems are compounded by the fact that there is no single institution, dispute resolution mechanism or single process that can deal with all injustices, produce a just ordering of society, ensure a fair distribution of material and legal resources, safeguard the Rule of Law, promote equality, ensure proportionality in punishment, and protect entitlements and legitimate expectations.<sup>36</sup> Whereas this is the case, the justice system has emphasized on legal formalism and has not encouraged plurality. As a consequence, informal justice systems have been neglected and undermined at the expense of litigation. It is only recently that the law began recognizing informal justice systems. This has been the trend in Kenya despite the demands of substantive and procedural justice being so monumental and multi-dimensional that no law, institution or method is adequate to the task.<sup>37</sup>

In every society a large number of legal and non-legal, formal and informal, contemporary and customary principles, methods and institutions exist to rectify wrongs and promote remedies.<sup>38</sup> Litigation is only one amongst many viable alternatives. However, access to justice has been hindered by legal, institutional, structural, procedural, social barriers, and practical and economic challenges.<sup>39</sup> Overemphasis on litigation as the main dispute resolution mechanism is one of the main hindrances to accessing justice in Kenya. This should not be the

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<sup>35</sup> The sector faces legal, social, cultural, political and economic challenges.

<sup>36</sup> S.S. Faruqi, "Justice outside the Courts: Alternative Dispute Resolution and Legal Pluralism," <http://www.nadr.co.uk/articles/published/ADR/ADRandLegalPluralism.pdf>, (accessed on 19/04/2014).

<sup>37</sup> *Ibid.*

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

<sup>39</sup> Available at <http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/ConceptNoteAccessToJustice.pdf>, (accessed on 19/04/2014).

case. According to Galanter courts comprise only one hemisphere of the world of regulating and disputing.<sup>40</sup> To enhance access to justice there is need for research that will illuminate the complex relations between formal dispute resolution forums and informal forums such as ADR and TDRM.<sup>41</sup>

Litigation has been associated with a number of challenges that hamper access to justice including though not limited to: high cost, delays, geographical location, complexity of rules and procedure and the use of legalese.<sup>42</sup> If the right of every person to access justice is to be realised, then these hurdles must be addressed. One possible solution is the adoption of ADR mechanisms which are not affected by these challenges. ADR techniques such as negotiation, conciliation, and mediation increase accessibility to justice since they are flexible, informal, cost-effective, expeditious, efficient, foster parties' relations and produce win-win outcomes.<sup>43</sup> In fact, a large number of disputes are resolved by parties through negotiations or resort to some forum that is part and parcel of the social setting within which the dispute arose. For instance, many disputes are resolved by managers at the workplace, school principals, administrators and other officials before disputes are lodged in court.

As already pointed out elsewhere in this discussion, the concept of access to justice comprises of both procedural justice and substantive injustice. Litigation process has in many cases failed to achieve either or both of the two forms of justice thus resulting in outcomes that satisfy the legal requirements and not necessarily equity or justice requirements of the parties. Overemphasis on procedural technicalities, at the expense of substantive aspects of the matters in question, has often resulted in the perpetuation of injustice. In litigation, it is not about justice, but a matter of 'winning or losing' the case. It is a zero-sum game, where success largely depends on the expertise of the advocates. As such, the financial might of a disputant influences the outcome of a case. Therefore, the poor disputant who cannot afford the high fees for hiring a lawyer is denied an opportunity to seek judicial enforcement of his/her rights. In such a context,

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<sup>40</sup> M. Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law," *Journal of Legal Pluralism*, Vol. 19 (1981), p.34.

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

<sup>42</sup> ICJ, "Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution," *Op. cit.*: D. Reiling, L. Hammergren & A. Di Giovanni, *Justice Sector Assessments: A Handbook*, (World Bank, 2007).

<sup>43</sup> S. Mishra, "Justice Dispensation through Alternate Dispute Resolution System in India," *Op. cit.*

litigation elicits feelings of bitterness, resentment, and disdain for the judicial system by the poor. Such scenarios impact negatively on the Rule of Law and development in the long run. It creates feelings of exclusion, discrimination and marginalization by the legal system. Poor people lack the incentives for adhering to and upholding rules or laws that have no positive impact on their lives and welfare in general. It is arguable, that this undermines the Rule of Law in the country, forcing people to turn to unorthodox methods of addressing their problems.<sup>44</sup>

Further, ADR would proffer ‘legal empowerment’ within the governance framework in the context of decentralisation programmes. In such instances development and reform of legal services must include, among other things, a focus on “mediation, negotiation, and other forms of non-judicial representation” including alternative dispute resolution and non-state legal orders.<sup>45</sup>

## **5.0 Access to Justice, Rule of Law and Development: The Interface**

Access to justice plays an important role in the development process albeit indirectly. By having access to justice people feel more secure and empowered as their rights are guaranteed and enforceable. Legally empowered people are able to enjoy wider economic, political and social freedoms as they can make sound decisions, have their property protected and also exploit available opportunities in law. Essentially, access to justice strengthens the rule of law. What then, is meant by the phrase, rule of law? It could refer to a situation where subjects are governed by the law and all government actions are authorized by law.<sup>46</sup> The cardinal tenets of the rule of law were espoused by AV Dicey.<sup>47</sup> However, disagreements exist regarding the validity of Dicey’s postulates. Be that as it may, the rule of law remains as a key developmental imperative that ensures and provides conditions whereby all people can enjoy the rights and

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<sup>44</sup> The 2007/2008 Post Election Violence in Kenya erupted partly due to a perception by one of the camps, that courts could not be trusted as impartial arbiters while handling election petitions. Previous experience had demonstrated the difficulties in challenging presidential elections results in courts.

<sup>45</sup> ICHRP, “When Legal Worlds Overlap: Human Rights, State and Non-State Law,” International Council on Human Rights Policy, (2009) available at [http://www.ichrp.org/files/reports/50/135\\_report\\_en.pdf](http://www.ichrp.org/files/reports/50/135_report_en.pdf), accessed on 10/03/2014.

<sup>46</sup> J. Raz, *The Authority of Law*, (Oxford University Press, 1977), p. 211.

<sup>47</sup> They include the absolute supremacy of law as opposed to arbitrary power; equality of all citizens before the law and the protection of fundamental rights and freedoms by courts following the ordinary laws of the land.

freedoms enshrined in the law.<sup>48</sup> This creates a conducive environment for people to engage in valuable life-enhancing ventures, which in turn spurs development. Therefore, a correlation exists between access to justice and rule of law on one hand, and rule of law and development on the other. Whitford supports this view by noting that access to justice is essential to the actualization of the rule of law. Persons aggrieved by wrongful action by the government or another individual, must have the practical ability to bring their complaint to some dispute resolution agency, to assess the consistency of the action with the law.<sup>49</sup>

The Rule of Law is associated with societies in which the arbitrary rule of the powerful is curtailed, because the behavior of all society members (including its rulers) is guided by law. Under the Rule of Law, even when there are disputes, society members expect that the said disputes will be settled objectively and peacefully in accordance with predefined rules and procedures.<sup>50</sup> The Rule of Law is said to be inclusive in that all members of the society must have equal access to legal procedures based on a fair justice system applicable to all. It promotes equality before the law and should be measured against the international law in terms of standards of judicial protection.<sup>51</sup> Further, Rule of Law is said to encompass, *inter alia*, a defined, publicly known and fair legal system protecting fundamental rights and the security of people and property; full access to justice for everyone based on equality before the law; and transparent procedures for law enactment and administration.<sup>52</sup> Therefore, without the Rule of Law, access to justice becomes a mirage. If the Rule of Law fails to promote the foregoing elements, then access to justice as a right is defeated.

Adherence to the tenets of rule of law has been shown to spur development. Some have argued that the rule of law and development are so inextricably intertwined that if there is no rule of law, any development becomes a mirage. However, if there is rule of law, development must

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<sup>48</sup> G.K. Rukwaro, "The Rule of Law and Development," in Y. Vyas *et al* (eds), *Law and Development in the Third World*, (University of Nairobi, 1994), p.72.

<sup>49</sup> W. C. Whitford, "The Rule of Law: New Reflections on an Old Doctrine," *East African Journal of Peace and Human Rights* Vol. 6(2), pp. 159-161.

<sup>50</sup> N. Hachez & J. Wouters, "Promoting the Rule of Law: A Benchmarks Approach." *Leuven Centre for Global Governance Studies Working Paper* No. 105–April 2013, available at [www.fp7-frame.eu/wp-content/materiale/.../WP105-Hachez-Wouters.pdf](http://www.fp7-frame.eu/wp-content/materiale/.../WP105-Hachez-Wouters.pdf), (accessed on 18/04/2014).

<sup>51</sup> Available at [http://www.sida.se/PageFiles/89603/RoL\\_Policy-paper-layouted-final.pdf](http://www.sida.se/PageFiles/89603/RoL_Policy-paper-layouted-final.pdf), (accessed on 9/03/ 2014).

<sup>52</sup> *Ibid.*

necessarily follow.<sup>53</sup> In spite of this correlation, a number of factors may exist that threaten the rule of law. Critical to this study are factors such as poverty, illiteracy, lack of access to legal information, legal formalism and dogmatism (including complex court procedures and technicalities) and inaccessibility to courts. Such factors impede access to justice and in turn threaten the rule of law. Breakdown in the rule of law can also stifle development as it can result in civil wars/conflicts, deaths and breakdown in property and economic relations.<sup>54</sup> The thesis of this paper is that ADR mechanisms enhance access to justice to all, which reinforces and strengthens the rule of law and consequently spurs development. Expeditious, efficient and cost-effective settlement of all types of disputes through ADR saves peoples' time and resources. People use the time and resources saved through the use of ADR to carry out other development activities.

What is development? The term development does not lend itself to easy definition. Some have equated it with 'change' in man and society which increases in quantitative and qualitative terms.<sup>55</sup> Classical and neo-classical scholars equated development with economic growth.<sup>56</sup> Others viewed the process of development as a series of successive stages of economic growth through which all countries must undergo.<sup>57</sup> Most of these views on development have been discredited since development involves radical institutional, social and administrative changes; and can also be driven by local/indigenous innovations without necessarily following the linear-stages theory.<sup>58</sup> Some view development as a process by which societies become stable, just, prosperous and people benefit from increased freedom, security, and rising standards of living.<sup>59</sup> In recent years, development has been assessed in terms of

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<sup>53</sup> G.K. Rukwaro, "The Rule of Law and Development," *Op. cit.*, p.64.

<sup>54</sup> *Ibid.*

<sup>55</sup> O. Owiti, "Law, Ideology and Development: Dialectics or Eclecticism at Play?" in Y. Vyas *et al (eds)*, *Law and Development in the Third World*, (University of Nairobi, 1994), pp. 18-19.

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

<sup>57</sup> M.P. Todaro, *Theories of Development: A Comparative Analysis*, (Addison Wesley, 2000), pp.77-78.

<sup>58</sup> *Ibid.*

<sup>59</sup> J. Michel, "Alternative Dispute Resolution and the Rule of Law in International Development Cooperation," *Op. cit.*

human freedoms. According to Sen, development is the process of expanding the real freedoms that people enjoy.<sup>60</sup> Access to justice is a freedom that is essential as it helps in advancing and safeguarding other freedoms. Access to justice can expand people's capabilities to avoid deprivations, denial, violation or infringement of their other freedoms and rights such as freedom from hunger, diseases, political representation etc. As such freedoms are part and parcel of enhancing the process of development.

The development process must give people the opportunity to shape their destiny.<sup>61</sup> It should expand people's freedoms and capabilities to lead lives that they value and have reason to value.<sup>62</sup> People cannot lead a valuable life, if they do not have access to a dispute resolution forum for the vindication and protection of their rights and freedoms. Fora for dispute resolution should give the underprivileged people opportunities to participate in the decisions that are most important to their life and link them to the mainstream of modern society.<sup>63</sup> Such fora should be easily accessible, cost-effective and expeditious in delivering justice. It is for this reason that human development has as its central focus the concerns of disadvantaged people.<sup>64</sup>

In addition, within development theories, there is consensus that legitimate laws and credible enforcement mechanisms, can expand opportunities for women and other disadvantaged groups to participate in economic and political life.<sup>65</sup> This is so because, the rule of law as a multidimensional concept, encompasses a variety of discrete components from security, property rights, checks and balances on government and control of corruption.<sup>66</sup> This is in line with other studies which view development as progress on dimensions such as human rights, access to justice, good governance, rule of law and security.<sup>67</sup> Advancing the rule of law is essential for

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<sup>60</sup> A. Sen, *Development as Freedom*, (Oxford University Press, 1999), pp.36-37.

<sup>61</sup> *Ibid*, p.53.

<sup>62</sup> UNDP, *Human Development Report 2011*, (UNDP, 2011).

<sup>63</sup> E. Owens & R. Shaw, *Development Reconsidered: Bridging the Gap between Government and the People*, (Lexington Books, 1984), p.3.

<sup>64</sup> *Ibid*.

<sup>65</sup> Available at [www.worldwewant2015.org/file/420789/download/457741](http://www.worldwewant2015.org/file/420789/download/457741), (accessed on 25/04/2014).

<sup>66</sup> S. Haggard & L. Tiede, "The Rule of Law and Economic Growth: Where are We?" *World Development Vol. 39, No. 5*, (2011), pp. 673–685, at p. 673.

<sup>67</sup> 'Security, the Rule of Law and the post 2015 development agenda'

the full realization of sustainable development, inclusive economic growth, the eradication of poverty and hunger.<sup>68</sup> Conversely, progress in these dimensions of development may reinforce the rule of law more generally.<sup>69</sup> This is the reason why the UN puts a lot of emphasis on improving governance, and strengthening of justice and security institutions, to ensure that they are accessible and responsive to the needs and rights of all individuals.<sup>70</sup> It creates the need for legal frameworks that can be enforced in a predictable and transparent manner, and that ensure that *‘all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.’*<sup>71</sup>

Sustainable development is also acclaimed as being capable of ensuring the well-being of the human person by integrating social development, economic development, and environmental conservation and protection.<sup>72</sup> By social development, is meant that the basic needs of the human being are met through the implementation and realization of human rights including the right of access to justice. Social development promotes democracy through public participation in determining policy, and in creating accountable governance.<sup>73</sup> It empowers the poor to expand their use of available resources in order to meet their own needs, and change their own lives.<sup>74</sup> On the other hand, economic development expands the availability of work and the ability of individuals to secure an income to support themselves and their families. Social and economic developments reinforce and are dependent on one another for full realization.<sup>75</sup>

It cannot be overstressed that access to justice is essential for poverty eradication and human development. The United Nations Development Programme identifies some of the ways

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<sup>68</sup> The 2012 UN Declaration of the High-level Meeting of the General Assembly on the Rule of Law, available at [www.unrol.org/article.aspx?article\\_id=192](http://www.unrol.org/article.aspx?article_id=192), accessed on 25/04/2014.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> Sustainable Development, available at [http://www.hrea.org/index.php?base\\_id=166](http://www.hrea.org/index.php?base_id=166), (accessed on 27/04/2014).

<sup>73</sup> *Ibid.*

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

<sup>75</sup> *Ibid.*

that this can be achieved. Firstly, it comes to aid of the groups such as the poor and disadvantaged who suffer from discrimination and other forms of human rights violations. Secondly, justice systems can provide remedies which will minimize or redress the impact of crime and illegality on poor and disadvantaged people's lives, where it would be harder for them to obtain redress. Thirdly, justice mechanisms can be used as tools to overcome deprivation by ensuring, for instance, access to education by girls and minorities, or by developing jurisprudence on access to food, health or other economic, cultural or social rights. Lastly, fair and effective justice systems are the best way to reduce the risks associated with violent conflict. The elimination of impunity can deter people from committing further injustices, or from taking justice into their own hands through illegal or violent means.<sup>76</sup> Development is thus, intrinsically connected with human rights protection and promotion. One cannot talk of any form of positive development without addressing human rights and particularly human development.

## **6.0 ADR/TDRM in the Development process**

Legal institutions play a key role in the distribution of power and rights. They also underpin the forms and functions of other institutions that deliver public services and regulate market practices.<sup>77</sup> In addition to this, justice systems can provide a vehicle to mediate conflicts, resolve disputes, and sustain social order. Inequitable justice systems may perpetuate inequality traps by maintaining or reproducing elite interests and discriminatory practices, thus making equitable justice systems crucial to sustained equitable development.<sup>78</sup> However, as already pointed out elsewhere in this discourse, the judicial system in Kenya suffers from a number of challenges which interferes with its efficiency in discharging this role. To make access to justice achievable for the poor, it is imperative to explore other viable means of facilitating the same. One such alternative is ADR which is associated with a number of advantages including

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<sup>76</sup> UNDP, "A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice," available at <http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/chapter1.pdf>, (accessed on 27/04/2014).

<sup>77</sup> J. Michel, "Alternative Dispute Resolution and the Rule of Law in International Development Cooperation," *Op. cit.*; See also [http://wdronline.worldbank.org/worldbank/a/c.html/world\\_development\\_report\\_2006/part\\_iii\\_leveling\\_economic\\_political\\_playing\\_fields](http://wdronline.worldbank.org/worldbank/a/c.html/world_development_report_2006/part_iii_leveling_economic_political_playing_fields), (accessed on 19/04/2014).

<sup>78</sup> *Ibid.*

providing cost effective, speedy and less formalistic remedy to the aggrieved party and that is appropriate to the particular case.<sup>79</sup>

ADR could relieve congested court dockets while also offering expedited resolution to parties. Second, ADR techniques such as negotiation, mediation and party conciliation could give parties to disputes more control over the resolution process. The flexibility of ADR is also said to create opportunities for creative remedies that could more appropriately address underlying concerns in a dispute than could traditional remedies in litigation. From a development perspective, the principal interest in alternative dispute resolution is a concern for expanding rights and opportunities for poor people who do not fully benefit from the protection of the law in their daily lives.<sup>80</sup> Further, other interests in ADR, such as in commercial arbitration and court-annexed mediation in civil litigation, also have important positive implications for development. The principal focus for development is on the non-formal processes intended to expand access to justice. These include traditional systems that provide the vast majority of dispute resolution services in many African countries; and systems of mediation and conciliation operated by public and private entities throughout the world.<sup>81</sup> Alternative Dispute Resolution is today being increasingly acknowledged in the field of law as well as in the commercial sector. Informal justice systems are associated with being: timely and effective; impartial and free of improper influence; and respectful and protective of fundamental rights.<sup>82</sup>

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<sup>79</sup> See A. Dutta, "Origin Of Alternative Dispute Resolution System In India," available at [https://www.academia.edu/4371674/origin\\_of\\_alternative\\_dispute\\_resolution\\_system\\_in\\_india](https://www.academia.edu/4371674/origin_of_alternative_dispute_resolution_system_in_india), (accessed on 19/04/2014).

<sup>80</sup> J. Michel, "Alternative Dispute Resolution and the Rule of Law in International Development Cooperation," *Op. cit.*

<sup>81</sup> *Ibid.*

<sup>82</sup> Available at [http://www.worldjusticeproject.org/sites/default/files/WJP%20Rule%20of%20Law%20Index%202010\\_2\\_0.pdf](http://www.worldjusticeproject.org/sites/default/files/WJP%20Rule%20of%20Law%20Index%202010_2_0.pdf), accessed on 10/03/2014.

## 7.0 Opportunities and Way Forward

The State is no longer the main actor on the international scene, and its relevance will continue to diminish as the process of globalization gains momentum.<sup>83</sup> With globalization reliance on domestic laws and institutions only especially in the development agenda has increasingly been minimized. The international legal and institutional frameworks have as much as possible attempted to come up with what is referred to as international best practices. These are meant to provide useful references for countries in advancing the development agenda in their territories. However, it is important, as in any development effort, to balance reliance on international best practices with reliance on locally owned institutions.<sup>84</sup> There is need to examine how existing systems in developing countries function, at least initially, by reference to only general notions of what is considered good international practice. The principal focus should be on considering how existing justice institutions, including ADR institutions, contribute to a country's development objectives and the framework of the Millennium Development Goals.<sup>85</sup> Working on the basis of an existing system, one rooted in local needs, values, and customs, is the most likely way to achieve a sustainable desirable result. The alternative of trying to introduce an alien system, no matter how well designed from a developed-country perspective, is rarely a path to success.<sup>86</sup> There has been a major shift towards use of ADR both in Kenya and internationally as one of the options available to help address civil conflicts and disputes.

Regionally, most African countries still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common. Across Africa traditions, customs and norms have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.<sup>87</sup> This

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<sup>83</sup> International Forum for Social Development, "Social Justice in an Open World: The Role of the United Nations," ST/ESA/305, (United Nations, 2006), p. 23.

<sup>84</sup> J. Michel, "Alternative Dispute Resolution and the Rule of Law in International Development Cooperation," *Op. cit.*

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

<sup>86</sup> *Ibid.*

<sup>87</sup> K. Mkangi, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualised Paradigm for Examining Conflict in Africa*, available at [www.payson.tulane.edu](http://www.payson.tulane.edu), (accessed on 30/04/2014).

also creates a conducive environment for economic, social, cultural and political development. The need of the hour, therefore is to find ways of implementing and working traditional dispute resolution mechanisms as enshrined in the law. There will be need to identify when and when not to use TDRM. It will also be necessary to identify category of cases to which they will apply.

The Constitution of Kenya 2010 has provided for two levels of Government. It has also provided for management of various resources for purposes of promoting development in the country. Naturally, there is bound to arise conflicts or disagreements as to how the accruing benefits should be shared amongst regions or levels of government. With the development and escalation of conflicts at various levels, the need for conflict resolution thus becomes more critical than ever before. Litigation does not guarantee fair administration of justice due to a number of factors.<sup>88</sup> Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. Litigation is so slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world.<sup>89</sup> Therefore, there has been a realization by the government that more resources and time need to be set apart for managing conflicts and that the efforts for peace and stability has to done by harnessing the use of several mechanisms of conflict management at different levels. As such, the Constitution has placed a strong emphasis on the use of ADR mechanisms to address such inter-community as well as inter-governmental conflicts. The Constitution states that the territory of Kenya is divided into the counties specified in the First Schedule, and the governments at the national and county levels are distinct and inter-dependent and are to conduct their mutual relations on the basis of consultation and cooperation.<sup>90</sup> This impliedly means that even when and where conflicts or disagreements arise, they must be handled in a way that promotes cooperation and consultation.

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<sup>88</sup> These include high court fees, geographical location, complexity of rules of procedure and use of legalese.

<sup>89</sup> See P. Kamari-Mbote *et al.*, "Justice Sector and the Rule of Law," Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011, available at <http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-2011>, (accessed on 27/04/2014).

<sup>90</sup> Article 6, Constitution of Kenya.

The Constitution also outlines the national values and principles of governance which are to bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.<sup>91</sup> These values and principles include, *inter alia*: patriotism, national unity, sharing and devolution of power, the Rule of Law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.<sup>92</sup> It therefore follows that any development activity as well as any conflict management mechanisms must reflect these values and principles.

The Constitution further recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.<sup>93</sup> As such it obligates the state to, *inter alia*, promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; and recognise the role of science and indigenous technologies in the development of the nation.<sup>94</sup> The effect of this is that it rubber stamps the use of traditional dispute resolution mechanisms in the management of conflicts affecting the concerned communities. This is backed by the provisions of Article 44(1) which guarantees every person's right to use the language and to participate in the cultural life, of the person's choice.

In addition to the above, Article 60(1)(g) is to the effect that one of the guiding principles of land policy is that land in Kenya must be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution. This is also affirmed in one of the functions of National Land Commission which is to encourage the application of traditional dispute resolution mechanisms in land conflicts.<sup>95</sup> This provides an

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<sup>91</sup> *Ibid*, Article 10(1).

<sup>92</sup> *Ibid*, Article 10(2).

<sup>93</sup> *Ibid*, Article 11(1).

<sup>94</sup> *Ibid*, Article 11(2).

<sup>95</sup> *Ibid*, Article 67(2) (f).

opportunity for the use of ADR and TDRM in conflict management in the land sector and is meant to enhance access to justice.

Article 112(1) thereof is to the effect that if one House passes an ordinary Bill concerning counties, and the second House rejects the Bill, it is to be referred to a mediation committee appointed under Article 113; or passes the Bill in an amended form, it shall be referred back to the originating House for reconsideration. Article 113(1) provides that if a Bill is referred to a mediation committee under Article 112, the Speakers of both Houses are to appoint a mediation committee consisting of equal numbers of members of each House to attempt to develop a version of the Bill that both Houses will pass. This provision demonstrates the important role ADR can play in the law making process and subsequently in promoting the development agenda.

Article 189 which provides for cooperation between national and county governments requires, *inter alia*, that in any dispute between governments, the governments must make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation; such national legislation must provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.<sup>96</sup> This will obviously save a lot of money as well as promote a harmonious environment for implementing the development agenda.

As per the Constitution, the President must, *inter alia*, promote respect for the diversity of the people and communities of Kenya; and ensure the protection of human rights and fundamental freedoms and the Rule of Law.<sup>97</sup> Recognition of diversity should go hand in hand with promoting the positive aspects of such diversity of the people of Kenya, including traditional dispute resolution mechanisms.

Regarding the exercise of judicial authority, the Constitution states that courts and tribunals must be guided by, *inter alia*, these principles: that justice is to be done to all irrespective of status and shall not be delayed; and promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution

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<sup>96</sup> *Ibid*, Article 189(3) (4).

<sup>97</sup> *Ibid*, Article 131(2).

mechanisms subject to clause (3).<sup>98</sup> Courts play an important role in all aspects of the development of the country in that even where ADR has been used, some of the ADR mechanisms need court backing for them to work effectively.<sup>99</sup> For instance, arbitral awards need court recognition and enforcement.

The objects of the devolution of government as provided for under the Constitution are, *inter alia*, to recognise the right of communities to manage their own affairs and to further their development; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; and to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya.<sup>100</sup> The people in the counties must therefore be empowered to participate in conflict management in all matters touching on development. It is possible where a dispute or conflict arises between two communities regarding use and access to natural resources that the Government or formal institutions like the courts should be able to facilitate the ADR or TDRM processes to enable the parties come up with mutually satisfying outcomes. This is because some of these communities may, more often than not, fail to understand the formal mechanisms of conflict management and they are also usually very far from their locality. For instance, the clan/tribal clashes in Northern Kenya have proved to be beyond the capabilities of the Courts.<sup>101</sup> ADR and TDRM could offer viable options in the management of these conflicts thus enabling these people engage in meaningful self-development activities.

It is noteworthy that even before the promulgation of the current constitution of Kenya 2010, a few other laws also provided for recognition and use of ADR mechanisms in the legal process.<sup>102</sup> However, with constitutional recognition of the same, ADR is bound to benefit from

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<sup>98</sup> *Ibid*, Article 159(2). Clause (3) stipulates that traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law.

<sup>99</sup> See generally, G. Hazel (2012) "What Is Civil Justice For? Reform, ADR, and Access to Justice," *Yale Journal of Law & the Humanities*: Vol. 24(1) (2012).

<sup>100</sup> Article 174, Constitution of Kenya.

<sup>101</sup> See generally M. Adan & R. Pkalya "Conflict Management in Kenya: Towards Policy and Strategy Formulation," available at [http://practicalaction.org/docs/region\\_east\\_africa/practical\\_action\\_conflict\\_management.pdf](http://practicalaction.org/docs/region_east_africa/practical_action_conflict_management.pdf), (accessed on 30/04/2014).

<sup>102</sup> See Arbitration Act, 1995, Arbitration Rules 2010, S. 59, Civil Procedure Act (Cap 21, Revised Edition 2010), Order 46, Civil Procedure Rules 2010.

the compulsory requirement for its exploration and utilisation in conflict management as stipulated by the Constitution. The government especially the Judiciary and the other key players in ADR need to realign their priorities and resources to ensure that adequate resources are generated for conflict management and peace building. The underlying problems that fuel conflicts must be addressed through the appropriate means which are capable of getting to the root cause of the problems, thus achieving feelings of satisfaction for the parties that are seeking justice since this is important in national development. Proper framework must be put in place to facilitate implementation of the constitutional provisions on access to justice as well as ADR.

## **8.0 Conclusion**

It is indeed possible to realize the right of access to justice as envisaged by Article 48 of the current Constitution of Kenya 2010. To achieve this, there is need to bring on board viable options as a pathway to the realization of the same. One such option as discussed in this paper is the adoption and actualization of the use of ADR. This will in turn strengthen the rule of law in the country. Strengthening the Rule of Law, ensuring access to justice and addressing and resolving conflict are essential for human security and the development of stable economic states where all citizens' voices can be heard and economic opportunities realized.<sup>103</sup>

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<sup>103</sup> Available at <http://www.britishcouncil.org/partner/international-development/sector/justice-security-conflict-resolution>, (accessed on 28/04/2014).

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