

Alternative Dispute Resolution, Access to Justice and Development in Kenya

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Abstract

The Constitution of Kenya, 2010, envisions a prominent role for alternative dispute resolution, including traditional dispute resolution mechanisms. This is in addition to other legislative frameworks which provide for non-formal methods of dispute resolution. A thesis is made that formal forums such as litigation through courts of law have various disadvantages including complexity, high costs, and technical procedures, delays, amongst others, which make a strong case for the usually convenient and available ADR mechanisms. Put to good use, these mechanisms have potential to spur economic development through enhanced access to justice and the rule of law. The authors, indeed, argue that there is a golden thread that weaves across the themes of rule of law, human rights and access to justice and development.

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 tech-

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nicalities, complex procedures, high costs and delays.¹ This has necessitated a shift towards informal mechanisms for conflict management, including alternative dispute resolution (ADR) and traditional dispute resolution mechanisms (TDRMs). ADR and TDRMs processes contribute to enhanced access to justice for 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.² ADR and TDRMs are thus quintessential from a developmental perspective. The Kenyan legal framework has recognised the role of ADR and TDRMs in development. As will be demonstrated later in this article, existing laws require the use of ADR and TDRMs in resolving a myriad of disputes such as those relating to land, family matters, commercial and political questions. In this article, 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.

ADR in Kenya

ADR refers to all decision-making processes other than litigation, including but not limited to negotiation, enquiry, mediation, conciliation, expert determi-

¹ International Commission of Jurists, Kenya Section, 'Strengthening judicial reform in Kenya: public perceptions and proposals on the judiciary in the new Constitution,' *ICJ Kenya, Vol. III* (2002); See also Muigua K, 'Avoiding litigation through the employment of alternative dispute resolution,' 6-7, a paper presented at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012, available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf>, on 10 May 2014.

² Michel J, 'Alternative dispute resolution and the rule of law in international development cooperation,' *J&D Justice & Development Working Paper Series*, (2011); de Vries M, 'The challenges of good governance,' 18 *The Innovation Journal: The Public Sector Innovation* (2013); Rukwaro GK, 'The rule of law and development,' in Vyas Y *et al* (eds), *Law and development in the Third World*, University of Nairobi, 1994; Whitford WC, 'The rule of law: New reflections on an old doctrine,' *East African Journal of Peace and Human Rights Vol. 6*(2), 159-161.

nation and arbitration. ADR mechanisms mainly consist of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures.³ Some writers have classified ADR mechanisms into: facilitative, evaluative or determinative processes.⁴ Facilitative processes include mediation, where parties are assisted in identifying issues in dispute and in coming to an agreement about the dispute. 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. 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.⁵ This classification leaves out negotiation which may not fit in the three categories. In negotiation, 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. It emphasises win-win situations for both parties, increases accesses to justice, and improves efficiency and is expeditious.⁶ It is also a cost-effective means for dispute resolution that fosters parties' relationships. ADR mechanisms are applicable to a wide range of disputes⁷ including commercial, land, intellectual property, family, succession, criminal,⁸ and political disputes.⁹

Traditional dispute resolution mechanisms refer to all those conflict management mechanisms that African communities have used since time immemorial and passed from one generation to the other. Different tags have been used to describe these mechanisms. Terms such as African, community, traditional, non-formal, informal, customary, indigenous and non-state justice systems, are often used interchangeably in describing localised and cultural-specific dispute

³ See generally, Muigua K, *Setting disputes through arbitration in Kenya*, Glenwood Publishers, 2012, 1-19.

⁴ Xie Z, 'The facilitative, evaluative and determinative processes in ADR,' 2011-10-12, available at <http://www.xwqlaw.com/info/c47f5ff15b464882ad5c9a7f97338652>, on 16 April 2014.

⁵ *Ibid.*

⁶ Mishra S, 'Justice dispensation through alternate dispute resolution system in India,' available at <http://www.legalindia.in/justice-dispensation-through-alternate-dispute-resolution-system-in-india>, on 19 April 2014.

⁷ Kariuki F, 'Redefining 'arbitrability': Assessment of Articles 159 & 189(4) of the Constitution of Kenya,' *Alternative Dispute Resolution Journal*, (2013), 175-189. See also, Articles 159 (2), 67 (2) (f) and 189(4), Constitution of Kenya.

⁸ *Republic v Mohamed Abdow Mohamed* [2013] eKLR.

⁹ A good example is the 2008 political mediation in Kenya by the former Secretary-General of the United Nations, Kofi Annan, to resolve the conflict resulting from the 2007-2008 Post-Election Violence.

resolution mechanisms.¹⁰ Traditional justice systems are firmly embedded in the culture and customs of African communities.¹¹ Their effectiveness in enhancing access to justice would thus largely depend on the recognition of African customary law.¹² To a great extent, traditional justice systems seek, to promote restorative justice as opposed to retributive justice.¹³ They aim at reconciliation by restoring parties' relationships, peace-building and focusing on parties' interests rather than allocating rights between disputants. Traditional justice systems have been resilient despite non-recognition in law for decades. It is only recently, that they have received strong legal backing in the law, an indication that they are critical in enhancing access to justice particularly in rural areas. Just like the other ADR processes, they are cheap, flexible, and easily accessible, and unlike the other processes they use local languages and do not require legal representation.¹⁴

ADR and traditional justice systems strengthen the rule of law and contribute to development.¹⁵ 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.¹⁶ This explains their importance at the global and local sphere. One of the objectives of the UN is to maintain international peace and security through peaceful means including the settlement of international disputes.¹⁷ In resolving disputes at the global level, Article 33 of the UN Charter enjoins parties, 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.¹⁸ Essentially, the Charter provides a legal basis for the use of ADR in dispute resolution at the international level.¹⁹

In Kenya, ADR and traditional dispute resolution mechanisms are recognised in the law. Article 159 of the Constitution enjoins courts and tribunals in

¹⁰ Penal Reform International, Access to justice in Sub-Saharan Africa, 2000, 11, available at <http://www.gsdr.org/docs/open/SSAJ4.pdf>, on 1 April 2014.

¹¹ *Ibid.*

¹² Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of *Republic v Mohamed Abdow Mohamed [2013] eKLR*,' 2 *Alternative Dispute Resolution Journal* (2014), 202-228.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Michel J, 'Alternative dispute resolution, 2.

¹⁶ 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/, on 9 March 2014.

¹⁷ Article 1.1, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

¹⁸ Article 33.1, *Charter of the United Nations*.

¹⁹ There are international instruments providing for the use of ADR such as the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)* and the *1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)*.

the exercise of judicial authority, to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.²⁰ Recognition of ADR and TDRM processes in the Constitution is meant to enhance access to justice as guaranteed in Article 48 thereof. ADR mechanisms including negotiation, mediation and arbitration are also available in the settlement of intergovernmental disputes.²¹ Procedures for settling intergovernmental disputes are provided for in the Intergovernmental Relations Act. However, the Act fails to identify the most suitable ADR mechanism for settling intergovernmental disputes due to their sensitivity and volatility. For labour disputes, section 15(1) of the Industrial Court Act provides that the court may adopt and implement on its own motion or at the request of the parties, any other appropriate means of dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.²² In land conflicts, the National Land Commission is required to encourage the application of traditional dispute resolution mechanisms.²³ Moreover, there are other Acts of Parliament that provide procedures for the use of various ADR mechanisms. The Arbitration Act²⁴ governs the application of arbitration in Kenya. The Act covers the different aspects of the arbitral process including the preliminaries, general provisions, composition and jurisdiction of the arbitral tribunal, conduct of the proceedings, award and termination of arbitral proceedings, recourse to the High Court against an arbitral award and recognition and enforcement.

Under the Civil Procedure Act, there are provisions dealing with the use of both mediation²⁵ and arbitration. The Act gives the court jurisdiction to refer any dispute to ADR mechanisms where parties have agreed or where the court considers it appropriate.²⁶ Under the Civil Procedure Rules 2010, where all parties have agreed, the court has jurisdiction to refer any matter in difference between them to arbitration.²⁷ Further, a court can adopt and implement of its own motion or at the request of parties, any other appropriate means of dispute resolution including mediation for the attainment of the overriding objective

²⁰ Article 159(2) (c), Constitution of Kenya, 2010.

²¹ Article 189(4), Constitution of Kenya.

²² Section 15(1), Industrial Court Act 2011.

²³ Article 67(2) (f).

²⁴ Arbitration Act, Cap. 49, Laws of Kenya (Revised, 2010).

²⁵ See generally Section 59, Civil Procedure Act, Cap. 21; See also Order 46, Civil Procedure Rules 2010 (Legal Notice No. 151).

²⁶ Sections 59, 59B and 59C.

²⁷ Order 46 Rule 1 of the Civil Procedure Rules 2010.

under sections 1A and 1B of the Civil Procedure Act.²⁸ The overriding objective under the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. There are many other laws which provide for the use of ADR mechanisms,²⁹ suggesting that ADR mechanisms can be employed in a wide array of matters to enhance access to justice and contribute to development in Kenya.

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.³⁰ Justice can thus mean different things for different people. This article 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; marginalisation of minority group; gender; and language barriers.³¹ These impediments prevent people from realising 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 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.³² It could also refer to judicial and administra-

²⁸ Order 46 Rule 20.

²⁹ See generally, The Media Council Act 2013, Consumer Protection Act No. 46 of 2012, Nairobi International Arbitration Centre No. 26 of 2013, Labour Relations Act No. 14 of 2007, National Cohesion and Integration Act No. 12 of 2008 and Commission on Administrative Justice Act No. 23 of 2011.

³⁰ Available at http://changingminds.org/explanations/trust/four_justice.htm, on 19 April 2014.

³¹ *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>, on 28 April 2014.

³² Ladan MT, 'Access to justice as a human right under the ecowas community law,' available at <http://www.google.com/url?sa=t&rcrt=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->, on 19 April 2014.

tive 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.³³ 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.³⁴ 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.³⁵

Access to justice is a basic and inviolable right guaranteed in international human rights instruments and national constitutions.³⁶ 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.³⁷ As a consequence, access to justice seems to have two important dimensions: procedural access (fair hearing before an impartial tribunal) and substantive access (fair and just remedy for a violation of one's rights).³⁸ 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

³³ *Ibid.*

³⁴ Global Alliance against Traffic in Women (GAAIW), Available at <http://www.gaatw.org/atj/>, on 9 March 2014.

³⁵ *Dry Associates Limited v Capital Markets Authority & anor* Nairobi Petition No. 358 of 2011, (Unreported).

³⁶ Article 48 of the Constitution of Kenya 2010, guarantees the right of access to justice for all. See also Article 159(2).

³⁷ *Kenya Bus Service Ltd & another v. Minister of Transport & 2 others* [2012]eKLR.

³⁸ *Ibid.*

origins, gender or disability, are entitled to equal opportunities in all fields, use of community facilities and access to services.³⁹

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.⁴⁰ 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 formalise some ADR and TDRM processes. Such formalisation can be a source of injustice to poor Kenyans, if it will erect barriers in accessing justice through the TDRMs.

To realise access to justice, there is need for an effective legal and institutional framework at the international and national levels. This is so because access to justice can only be as effective as the available mechanisms to facilitate the same. All peoples have the right of self-determination,⁴¹ by virtue of which right they can freely determine their political status, and freely pursue their economic, social and cultural development. 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.⁴² The purpose of recognising and protecting human rights and fundamental freedoms, is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.⁴³ This lends credence to the need to support the application of ADR and TDRMs in enhancing access to justice and furthering development in Kenya.

ADR and Access to Justice

The problems and challenges that bedevil the justice sector in Kenya are immense.⁴⁴ The problems are compounded by the fact that there is no single

³⁹ See Schetzer L *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), on 10 March 2014.

⁴⁰ Available at http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/, on 9 March 2014.

⁴¹ UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23. See in particular Proclamation 1(2) thereof.

⁴² Article 19(1), Constitution of Kenya, 2010.

⁴³ Article 19(2), Constitution of Kenya, 2010.

⁴⁴ The sector faces legal, social, cultural, political and economic challenges.

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.⁴⁵ Whereas this is the case, the justice system has emphasised 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 recognising 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.⁴⁶

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.⁴⁷ 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.⁴⁸ 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 case. According to Galanter, courts comprise only one hemisphere of the world of regulating and disputing.⁴⁹ 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.⁵⁰

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.⁵¹ 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,

⁴⁵ Faruqi SS, 'Justice outside the courts: alternative dispute resolution and legal pluralism,' <http://www.nadr.co.uk/articles/published/ADR/ADRandLegalPluralism.pdf>, on 19 April 2014.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Available at <http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/Concept-NoteAccessToJustice.pdf>, on 19 April 2014.

⁴⁹ Galanter M, 'Justice in many rooms: Courts, private ordering and indigenous law,' 19 *Journal of Legal Pluralism*, (1981), 34.

⁵⁰ *Ibid.*

⁵¹ ICJ Kenya, 'Strengthening judicial reform'; D. Reiling, L. Hammergren & A. Di Giovanni, *Justice sector assessments: A handbook*, World Bank, 2007.

conciliation, and mediation increase accessibility to justice since they are flexible, informal, cost-effective, expeditious, efficient, foster parties' relations and produce win-win outcomes.⁵² 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 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 rights.

In such a context, 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 marginalisation 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.⁵³ 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.⁵⁴

⁵² Mishra S, "Justice Dispensation".

⁵³ 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.

⁵⁴ 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, on 10 March 2014.

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 authorised by law.⁵⁵ The cardinal tenets of the rule of law were espoused by AV Dicey.⁵⁶ 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 freedoms enshrined in the law.⁵⁷ 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 actualisation 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.⁵⁸

The rule of law is associated with societies in which the arbitrary rule of the powerful is curtailed, because the behaviour 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.⁵⁹ 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

⁵⁵ Raz J, *The authority of law*, Oxford University Press, 1977, 211.

⁵⁶ They include 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.

⁵⁷ Rukwaro, 'The rule of law and development,' 72.

⁵⁸ Whitford, 'The rule of law: new reflections on an old doctrine,' 159-161.

⁵⁹ Hachez N & Wouters J, '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, on 18 April 2014.

equality before the law and should be measured against international law in terms of standards of judicial protection.⁶⁰ 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.⁶¹ 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 necessarily follow.⁶² 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.⁶³ The thesis of this article is that ADR mechanisms enhance access to justice to all, which reinforces and strengthens the rule of law and consequently spurs development. Expedient, 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.⁶⁴ Classical and neo-classical scholars equated development with economic growth.⁶⁵ Others viewed the process of development as a series of successive stages of economic growth through which all countries must undergo.⁶⁶ Most of these views on development have been

⁶⁰ Available at http://www.sida.se/PageFiles/89603/RoL_Policy-paper-layouted-final.pdf, on 9 March 2014.

⁶¹ *Ibid.*

⁶² Rukwaro, 'The rule of law and development,' 64.

⁶³ *Ibid.*

⁶⁴ Owiti O, 'Law, ideology and development: dialectics or eclecticism at play?' in Y. Vyas *et al* (eds), *Law and development in the third world*, 18-19.

⁶⁵ *Ibid.*

⁶⁶ Todaro M.P, *Theories of development: a comparative analysis*, Addison Wesley, 2000, 77-78.

discredited since development involves radical institutional, social and administrative changes; and can also be driven by local or indigenous innovations without necessarily following the linear-stages theory.⁶⁷ 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.⁶⁸

In recent years, development has been assessed in terms of human freedoms. According to Sen, development is the process of expanding the real freedoms that people enjoy.⁶⁹ 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.⁷⁰ It should expand people's freedoms and capabilities to lead lives that they value and have reason to value.⁷¹ 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.⁷² 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.⁷³

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.⁷⁴ 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.⁷⁵ This is in line with other

⁶⁷ *Ibid.*

⁶⁸ Michel J, "Alternative dispute resolution.

⁶⁹ Sen A, *Development as freedom*, Oxford University Press, 1999, 36-37.

⁷⁰ Sen, *Development as freedom*, 53.

⁷¹ UNDP, *Human development report 2011*.

⁷² Owens E, Shaw R, *Development reconsidered: Bridging the gap between government and the people*, Lexington Books, 1984, 3.

⁷³ *Ibid.*

⁷⁴ Available at www.worldwewant2015.org/file/420789/download/457741, on 25 April 2014.

⁷⁵ Haggard S, Tiede L, "The rule of law and economic growth: where are we?" 39 *World Development*,

studies which view development as progress on dimensions such as human rights, access to justice, good governance, rule of law and security.⁷⁶

Advancing the rule of law is essential for the full realisation of sustainable development, inclusive economic growth, the eradication of poverty and hunger.⁷⁷ Conversely, progress in these dimensions of development may reinforce the rule of law more generally. This explains why the UN has put a lot of emphasis on improving governance, and strengthening of justice and security institutions. The aim is to ensure that these institutions are accessible and responsive to the needs and rights of all individuals.⁷⁸ It, thus, becomes necessary to ensure that legal frameworks are enforced in a predictable and transparent manner, and 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.⁷⁹

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.⁸⁰ By social development, is meant that the basic needs of the human being are met through the implementation and realisation 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. It empowers the poor to expand their use of available resources in order to meet their own needs, and change their own lives. 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 realisation.⁸¹

It cannot be overstressed that access to justice is essential for poverty eradication and human development. The United Nations Development Programme identifies the ways this can be achieved. Firstly, access to justice aids certain groups such as the poor and disadvantaged who suffer from discrimination and

(2011), 673–685, at 673.

⁷⁶ 'Security, the rule of law and the post 2015 development agenda'.

⁷⁷ 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, on 25 April 2014.

⁷⁸ The 2012 UN Declaration of the High-level Meeting of the General Assembly on the Rule of Law.

⁷⁹ *Ibid.*

⁸⁰ Sustainable Development, available at http://www.hrea.org/index.php?base_id=166, on 27 April 2014.

⁸¹ *Ibid.*

human rights violations. Secondly, justice systems can provide remedies which will minimise 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.⁸² 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.

ADR and TDRMs 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.⁸³ 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.⁸⁴ 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 providing cost effective, speedy and less formalistic remedy to the aggrieved party and that is appropriate to the particular case.⁸⁵

⁸² 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>, on 27 April 2014).

⁸³ Michel J, "Alternative dispute resolution"; See also http://wdronline.worldbank.org/worldbank/a/c.html/world_development_report_2006/part_iii_leveling_economic_political_playing_fields, on 19 April 2014.

⁸⁴ *Ibid.*

⁸⁵ See Dutta A, "Origin of alternative dispute resolution system in India," available at https://www.academia.edu/4371674/origin_of_alternative_dispute_resolution_system_in_india, on 19 April 2014.

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.⁸⁶ 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.⁸⁷ ADR 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.⁸⁸

Opportunities and Way Forward

The State is no longer the main actor on the international scene, and its relevance continues to diminish as the process of globalisation gains momentum.⁸⁹ With globalisation, reliance on domestic laws and institutions only especially in the development agenda has increasingly been minimised. The international legal and institutional frameworks, have as much as possible, tried 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.⁹⁰

⁸⁶ Michel J, "Alternative dispute resolution".

⁸⁷ *Ibid.*

⁸⁸ Available at http://www.worldjusticeproject.org/sites/default/files/WJP%20Rule%20of%20Law%20Index%202010_2_0.pdf, on 10 March 2014

⁸⁹ International forum for social development, "Social justice in an open world: The role of the United Nations," ST/ESA/305, (United Nations, 2006), 23.

⁹⁰ Michel J, "Alternative dispute resolution".

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. 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.⁹¹

Working on the basis of an existing system, 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.⁹² ADR and traditional justice systems are some of the local solutions or options available to spur development in Kenya through the management of conflicts and disputes.

Regionally, most African countries still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common. In fact, traditional justice mechanisms are premised on African customary laws. Traditional justice systems emphasise on harmony, humanness and togetherness over individual interests as 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.⁹³ It 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 operationalising traditional dispute resolution mechanisms as enshrined in the law. There is need to identify and clarify when to apply traditional justice systems and when not to apply them. It is also necessary to identify the category of cases that are amenable for resolution using traditional justice systems.

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, conflicts or disagreements are bound to arise regarding 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

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ Mkangi K, *Indigenous social mechanism of conflict resolution in Kenya: A contextualised paradigm for examining conflict in Africa*, available at www.payson.tulane.edu, on 30 April 2014.

to a number of factors.⁹⁴ Litigation is time consuming and expensive and may at times lose the commercial and practical credibility necessary in the corporate world.⁹⁵ Therefore, there has been a realisation by the government that more resources and time need to be set apart for managing conflicts. To realise peace and stability there is need to harness 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 inter-community and 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.⁹⁶ Where there are inter-governmental disputes between the national and county governments, the Constitution requires the governments to make every reasonable effort to settle the dispute by means of procedures provided under national legislation including by alternative dispute resolution mechanisms such as negotiation, mediation and arbitration.⁹⁷ This will obviously save a lot of money as well as promote a harmonious environment for implementing the development agenda.

This implicitly means that when conflicts or disagreements arise, they must be handled in a way that promotes cooperation and consultation. ADR processes and other non-coercive justice mechanisms are best placed in promoting cooperation and consultation compared to courts.

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 the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.⁹⁸ 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 govern-

⁹⁴ These include high court fees, geographical location, complexity of rules of procedure and use of legalese.

⁹⁵ See Kameri-Mbote P, *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>, on 27 April 2014.

⁹⁶ Article 6, Constitution of Kenya.

⁹⁷ Article 189(3) (4), Constitution of Kenya.

⁹⁸ Article 10(1), Constitution of Kenya.

ance, integrity, transparency and accountability; and sustainable development.⁹⁹ It, therefore, follows that any development activity and conflict management mechanisms must reflect these values and principles.

Further, the Constitution recognises culture as the foundation of the nation and as the cumulative civilisation of the Kenyan people and nation.¹⁰⁰ 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.¹⁰¹ 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, the Constitution provides 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.¹⁰² 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.¹⁰³ This provides an opportunity for the use of ADR and TDRMs in conflict management in the land sector and is meant to enhance access to justice.

The Constitution further provides that if one House of Parliament passes an ordinary Bill concerning counties, and the second House rejects the Bill, the matter is to be referred to a mediation committee appointed under Article 113.¹⁰⁴ The mediation committee is to be appointed by the Speakers of both Houses and is to consist of equal numbers of members of each House.¹⁰⁵ The work of the Committee is then 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.

⁹⁹ Article 10(2), Constitution of Kenya.

¹⁰⁰ Article 11(1), Constitution of Kenya.

¹⁰¹ Article 11(2), Constitution of Kenya.

¹⁰² Article 60(1) (g), Constitution of Kenya.

¹⁰³ Article 67(2) (f), Constitution of Kenya.

¹⁰⁴ Article 112(1), Constitution of Kenya.

¹⁰⁵ Article 113(1), Constitution of Kenya.

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 mechanisms subject to clause (3).¹⁰⁶ 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.¹⁰⁷ 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; 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.¹⁰⁸ The people in the counties must be empowered to participate in conflict management in all matters touching on development. It is possible where a dispute or conflict arises between communities regarding the use and access to natural resources that ADR or TDRM processes be applied to 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.¹⁰⁹ ADR and TDRMs could offer viable options in the management of these conflicts thus enabling these people to engage in meaningful self-development activities.

It is noteworthy that even before the promulgation of the Constitution 2010 a few other laws also provided for recognition and use of ADR mechanisms in the legal process.¹¹⁰ However, with constitutional recognition, ADR is

¹⁰⁶ Article 159(2), Constitution of Kenya. 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.

¹⁰⁷ See generally, Hazel G, "What is civil justice for? Reform, ADR, and access to justice," 24 *Yale Journal of Law & the Humanities*, (2012).

¹⁰⁸ Article 174, Constitution of Kenya.

¹⁰⁹ See generally Adan M & Pkalya R 'Conflict management in Kenya: Towards policy and strategy formulation,' available at http://practicalaction.org/docs/region_east_africa/practical_action_conflict_management.pdf, on 30 April 2014.

¹¹⁰ See Arbitration Act, 1995, Arbitration Rules 2010, S. 59, Civil Procedure Act (Cap 21, Revised Edition 2010), Order 46, Civil Procedure Rules 2010.

bound to benefit from 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.

Conclusion

It is indeed possible to realise 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 realisation of the same. One such option, is the adoption and actualisation 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 realised.¹¹¹

¹¹¹ Available at <http://www.britishcouncil.org/partner/international-development/sector/justice-security-conflict-resolution>, on 28 April 2014.