KEY HIGHLIGHTS

ALTERNATIVE DISPUTE RESOLUTION POLICY, 2019

MARCH, 2021

Compiled by:

Kimaren ole Riamit,

Team Leader, Indigenous Livelihood Enhancement Partners (ILEPA)
Managing Editor: Lorna Seneiya Sempele

Design: Empiris Creative Communication Ltd

Title: Key Highlights: Alternative Dispute Resolution Policy, 2019

Copyright © Indigenous Livelihood Enhancement Partners (ILEPA) Kenya, 2021

All Rights Reserved including the right of reproduction in whole or in part in any form. The text of this book or any part thereof may not be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, storage in any information retrieval system, or otherwise, without the written permission of the copyright holder.

Any person who contravenes the above condition without authorization from the copyright holder shall be liable to criminal prosecution and civil claims damages under Kenyan and international intellectual property laws.

Published by:

Empiris Creative Communication Ltd
P. O. Box 37131 00200
Nairobi,
Kenya
Tel: +254798330724 / E-mail: empiris101@gmail.com
CONTENTS

I. BACKGROUND, STATUS, AND RATIONALE OF ALTERNATE DISPUTE RESOLUTION (ADR) MECHANISMS IN KENYA ............ 1

II. CATEGORIES/APPROACHES AND PRACTICE OF ADR MECHANISMS ........................................................................... 5

III. THE PRACTICE OF ADR IN DIFFERENT SECTORS ............... 6

IV. POLICY PROBLEM, CHALLENGES, GAPS AND NEEDS IN THE ADR SECTOR .................................................. 7

V. ADR MECHANISMS' SPECIFIC CHALLENGES: .................. 12

VI. PROPOSED REMEDIES TO IDENTIFIED CHALLENGES AND GAPS ........................................................................... 15

VII. POLICY IMPLEMENTATION ARRANGEMENT ...................... 17

VII. CONCLUSIONS .......................................................................................................................... 18
The Alternative Dispute Resolution Policy, 2019, of Kenya appreciates the Alternative Dispute Resolution (ADR) processes are critical apparatus for accessing justice in the society, outside of the formal judicial determination. The Policy has enabled respect for, and the safeguarding of individual and collective human rights, in compliance with the Kenya Constitution, 2010, and international human rights standards.

Access to justice is a right recognized in major international and regional human rights instruments and treaties to which Kenya is signatory.¹ Access to justice grants social actors a voice and enhanced agency to influence trajectories and efforts to overcome human poverty, in the quest for development. It also facilitates checks on

¹ The Charter of the United Nations; The Universal Declaration of Human Rights (UDHR); The International Covenant on Economic, Social and Cultural Rights (CESCR); The International Covenant on Civil and Political Rights (ICCPR); The United Nations Convention on the Rights of the Child (UNCRC); The African Charter on the Rights and Welfare of the Child (ACRWC); The UNCITRAL Model Law; and The African Community Treaty;
government power, ensures and presumes judicial independence, and ultimately enables the realization and protection of property rights as well as the institutions required to protect these right.

The Alternative Dispute Resolution (ADR) processes, including Traditional Dispute Resolution Mechanisms (TDRM), are constitutionally provided avenues for accessing justice outside of the formal court system.\textsuperscript{2} Other recognized forms of ADR include \textit{reconciliation}, \textit{mediation}, and \textit{arbitration}. The national legislative environment for the promotion and application of ADR is also positive and progressive, with several relevant legislations already in place.\textsuperscript{3}

The growing recognition and promotion of ADR is essential given that, only 10\% of Kenyans seek for justice through the court system. ADR, therefore, serves a majority of the Kenyan population.

\textsuperscript{2} Kenya Constitution, 2010. \{Cok 2010 art. 159 (2) and art., 67 (2) (f)\}

The judiciary’s current strategy document, the ‘Sustaining Judicial Transformation’ (SJT) has as a core goal ‘a people-focused delivery of justice’, including through ‘promoting and facilitating the Alternative Dispute Resolution (ADR) process’.

The ADR Policy of Kenya is anchored in the country’s Kenya Constitution, 2010, as well as in international and regional human rights instruments such as: The Sustainable Development Goals (SDGs), specifically, Target: 16.3 on the rule of law and access to justice; the political pillar of the Kenya Vision, 2030; and the Judiciary’s ‘Sustaining Judiciary Transformation Framework, 2017-2021’.

This document provides key highlights of Kenya’s Alternate Dispute Resolution Policy, 2019.

**RATIONALE:**

Promotion of ADR mechanisms, including Traditional Dispute Resolution approaches in the country is necessary due to:

- 90% of Kenyans access justice through Alternative Dispute Resolution (ADR) mechanisms yet the
mechanisms have not been supported to ensure quality, affordable and available service

ADR is useful in de-clogging the country’s court system

ADR, through its reconciliatory and non-adversarial nature is a major contributor to peace and cohesion in the country.

ADR is a driver of Foreign Direct Investment on account of the Court Annexed Mediation program at the judiciary. Inadequate access to justice reduces development.

The purpose of the ADR policy is to:

Strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) practice and uptake in the country in order to optimize the delivery of access to justice for all Kenyans.

Create an efficient ADR system that will provide quality justice services, strategically linked to the formal system, while at the same time maintaining its autonomy as an informal system.
II. CATEGORIES/APPROACHES AND PRACTICE OF ADR MECHANISMS

The Policy identifies a range of ADR mechanisms in the country including: i) The adjudication-based process where the decision by arbiter is binding by consent or force of law\(^4\); ii) The recommendation-based process where the arbiter makes non-binding suggestions to the parties\(^5\), iii) The facilitation-based processes (the neutral sets up the process and facilitates the parties’ communication towards decision making and has no formal role in the substantive decision making\(^6\)), and iv) The traditional dispute resolution mechanisms\(^7\).

Of these mechanisms of ADR, the Traditional Dispute Resolution mechanisms (TDRMs) are among those widely utilized in Kenya.

The Policy situates the problem, and identifies the challenges, needs and gaps associated with ADR mechanisms in the country including:

---

\(^4\) arbitration, expert evaluation, adjudication and tribunals  
\(^5\) conciliation and early neutral evaluation  
\(^6\) mediation; stakeholder facilitation; dispute resolution boards, and ombudsman processes  
\(^7\) councils of elders, provincial administration and faith-based providers
Lack of uniform understanding of key ADR terms and concepts; and inadequate institutional, legal and policy infrastructure.

Inadequate governance and regulatory mechanisms

Weak intra-sector coordination and linkage with the formal sector

Inadequate availability, accessibility and demand of ADR services

Inadequate capacity within ADR practice areas

Inadequate resources

Lack of harmonized standards; and

Weak sectoral governance and oversight, among other things.

III. THE PRACTICE OF ADR IN DIFFERENT SECTORS

ADR mechanisms have taken root in the country and are practiced in various key industries and sectors including: electoral justice; commercial; family; environmental justice; land and environment; taxation; energy; construction; employment and labor, and in the criminal justice system, among others.
Arising from the vibrant practice of ADR in the country, there is a relatively well established and growing network of laws and institutions promoting and providing ADR services at different levels and sectors in Kenya. Some examples include:

- **Public Sector Mediation** – These includes mandated institutions such as Constitutional Commissions; electoral mechanisms; land and environmental agencies, and national peace infrastructure with connection to the court system, among others.

- **Private and non-State sector institutional actors** such as: The Arbitration –Traditional Dispute Resolution Mechanisms, Civil Society Organizations, Faith-based organizations, and the Provincial Administration, among others.

**IV. POLICY PROBLEM, CHALLENGES, GAPS AND NEEDS IN THE ADR SECTOR**

The Alternative Dispute Resolution Policy, 2019, identifies several challenges including its conceptual, definitional, and scope clarity aspects, which are critical in the guidance of practitioners, users and
regulators, especially regarding the common terminologies used to ensure uniformity of understanding and usage. Additionally, there is the issues of clarity in the foundation of conception of justice, regarding the legal conception based or social and distributive justice (distribution of wealth and opportunity and communal interests).

**Foundational ADR related challenges include:**

- **Unclear Scope of ADR**, which undermines a holistic appreciation of the extent of its application

- **Lack of clarity of the jurisdictional limits of ADR**, which also undermine the scope of ADR including the extent to which criminal justice can be dispensed through ADR. This is so, especially given that the two key parties in a formal criminal matter are the State and the accused. It includes questions on how to balance the State’s aim of protecting public goods and with the restorative and reconciliatory approach in ADR, which focuses on the interests of the victim, the accused, and the social goods of communal cohesion and peace.
The challenge of justiciability - Justiciability is a legal concept that concerns the limits on legal issues, over which a court can exercise its judicial authority. That is, who/which body has the legal standing to bring the matter to court, and which court has the legal mandate to determine a referral from the ADR. This includes evidence of threatened injury to the plaintiff and ensures that all other means have been exhausted.

Legal Gaps in the Context of ADR:
- Inadequate implementation of existing laws: While there are several legislations in support of application of ADR including TDRM in dispute resolution, there is little evidence of their application.

- Lack of framework legislation: While existing legislation is progressive, they are limited, fragmented, and lack an enforcement mechanism. They also lack common guiding principles in their development and application, and are least coordinated, regulated, and standardized for practice.
- Lack of legislative framework for TDRMs and other informal justice systems: This inhibits the development of these mechanisms, as well as their recognition, and support,

Inadequate and *ad hoc* Institutional development in the sector:
- Overall, there is inadequate Institutional development, as it is mostly *ad hoc* and unstructured. There is also insufficient infrastructure for promoting the practice

- Traditional Dispute Resolution Mechanisms (TDRMS) lack any institutional support and often operating through virtual cultural institutions, which have not been formally recognized, and which are governed by customary norms. They also have weak links and collaboration with other ADR and formal justice institutions.

- Silo approach: Existing ADR institutions operate in silos with little coordination and collaboration
- Inadequate utilization of potential in other institutions: There is need to tap the institutional capital for dispensing ADR services within existing ADR relevant institutions across levels

- Lack of an oversight institution within the ADR Sector: Occasioning fragmented growth, and lack of common standards, coordination and effective regulation and governance is lacking.

Linkage and coordination challenges:
- The relationship, linkage, and interface between the formal justice system and ADR mechanisms are critical for de-clogging the courts, hence increasing their efficiency and enforcement of ADR settlements, which are mutually beneficial

Enforcement Challenges:
- Utilized mechanism for example within TDRMs, may be seen unconstitutional. There is a need for custom-made linkage between courts and ADR mechanisms to address the common delays
Technological gaps:
- Tapping the opportunities occasioned by ICT by developing its capacity in the sector, including legal infrastructure to support e-ADR is essential

Gaps in sector regulation and governance:
- There is a need for a framework of principles guiding development of national standards and regulatory institutions to ensure discipline and enforcement.

V. ADR MECHANISMS’ SPECIFIC CHALLENGES:

a) **Challenges in Arbitration:** These include: inhibitive costs, increasing legal procedures, unethical behavior amongst some practitioners; inefficient linkage of arbitration with the court system, for adoption and enforcement, and lack of a regulatory framework or standardized training curriculum or code of conduct

b) **Challenges in Mediation:** While the use of the ADR mechanisms are increasing, the silo
approach to institutional development has given rise to duplication, disparate standards and a disjointed practice, inadequate training, and competition between lawyers and non-lawyer practitioners.

c) **Challenges in Negotiation:** This is the most widely used method of conflict resolution, yet its optimal benefits are inhibited by a lack of enforcement mechanism, and exploitation of some parties by others due to a power and negotiation skills imbalance. There is also a tendency for deadlocks to arise, lack of a time limit, and sometimes the ADR process may degenerate into confrontation.

d) **Challenges in Conciliation:** *This includes* lack of institutional and legislative support, compounded by the minimal professional expertise available

e) **Challenges in Adjudication:** This is mostly restricted to the construction sector and it is entrenched within contracts in the sector. There is failure to distinguish between court- and non-court practiced adjudication, and
there is also the absence of training programs on the use of ADR.

f) **Challenges with the Ombudsman:** This ADR avenue is little known and accessed by Kenyans in the rural areas. Though, the mechanism is promoted by the Commission on Administrative of Justice (CAJ), it is still under-developed and under-utilized in the Country.


g) **Challenges with Traditional Dispute Resolution Mechanisms (TDRM):** These include: clarity of the scope of their jurisdiction; uniformity of procedures; a framework law governing TDRM practice; an oversight institution to manage governance and set and enforce standards in the practice area; a code of conduct for practitioners; sufficient capacity building for practitioners in order to adhere to the principles of justice and of the Kenya Constitution, 2010; insufficient enforcement mechanisms and guidance as to acceptable and constitutional awards and enforcement mechanisms; inadequate linkages with the formal justice systems and other ADR practice mechanisms; and lack of a remuneration framework of practitioners.
VI. PROPOSED REMEDIES TO IDENTIFIED CHALLENGES AND GAPS

1. Adopt an inclusive approach to articulating the definition and scope of ADR.

2. Situate the oversight mandate for the sector in the Nairobi Center for International Arbitration (NCIA).

3. Establish the Practice Area Committees (PACs) for ADR practice areas in charge of growth of their respective areas of practice.

4. Encourage the establishment of an ADR Centre at the Judiciary as the focal point for linkage and coordination with the ADR sector, and promotion of ADR at the judiciary.

5. Establish regional ADR centers at the locational level, hosted by Chiefs in a collaborative initiative with the Provincial Administration Services, under the Ministry of Interior and Coordination of National government.

6. Enact an Alternative Dispute Resolution Act, which shall be the framework legislation for the ADR sector.
7. Encourage the establishment of a special ADR Registry at the judiciary, for the adoption and recognition of ADR decisions, awards and settlements.

8. Propose strategies and modalities for the promotion of availability, accessibility, and uptake of ADR in the country.

9. Inculcate ADR as a way of life through embedding, integrating, and mainstreaming it in all spheres of life, such as through school curricula and agents of social change.


11. Establish programs for capacity development, quality control, research and knowledge management, and leveraging of ICT, for ADR development.

12. Develop a National Action Plan for the implementation of the ADR Policy, as well as a Financing Strategy for it, and a Monitoring and Evaluation Framework, for progress monitoring.
VII. POLICY IMPLEMENTATION ARRANGEMENT

A five-year National Action Plan (NAP) will be developed as a strategic document for the implementation of the ADR Policy with the requisite Annual Operational Plans developed to guide and pace the NAP’s implementation.

An ADR Development Fund will be established by the proposed ADR Act in addition to being open to mobilize and receive funds from Private Sector, development partners, voluntary organizations (NGOs, CBOs, FBOs, and Foundations). This Fund will be managed by the National Centre for International Arbitration (NCIA).

Nairobi Center for International Arbitration (NCIA) will prepare annual monitoring and evaluation reports and share these with all stakeholders on the progress of ADR implementation. The Department of Justice shall report to Parliament on the implementation of the Policy.
VII. CONCLUSIONS

This document covers the scope of Alternate Dispute Resolution approaches practiced in the country, inherent challenges, and gaps, and it recommends robust and forward-looking remedies.

The role the ADR sector plays in the promotion of justice, reconciliation and peaceful co-existence in the country is clearly underscored and acknowledged as the main avenue through which most citizens access justice.

The weak interface and interlinkages between the informal justice system and State-administered justice system is equally acknowledged, and targeted actions are proposed to bridge the gap, including requisite institutional/coordination, legal, planning, financing, monitoring, and reporting mechanisms.

It is incumbent upon practitioners of the various ADR mechanisms, including those relying on the indigenous justice system of conflict resolution, to familiarize themselves with the provisions of the policy, self-organize to engage with proposed approaches to addressing inherent gaps, and to tap into the opportunities occasioned by the Policy.
Ole Riamit is an indigenous peoples’ leader from the Pastoralists Maasai Community in southern Kenya, a Founder-Director of Indigenous Livelihood Enhancement Partners (ILEPA) a community-based non-Profit Indigenous Peoples Organization, based in Kenya working on indigenous pastoralist communities’ concerns.

Kimaren is a holder of a Master of Arts degree in Development Anthropology, a Post-Graduate Diploma in Project Planning and Management, and a Bachelor of Science degree in Foods, Nutrition and Dietetics.