

ALTERNATIVE DISPUTE RESOLUTION POLICY (ZERO DRAFT)

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Acronyms

ADR	Alternative Dispute Resolution Mechanism/s
AJS	Alternative Justice System/s
CPA	Civil Procedure Act
ICESR	International Convention on Economic Social and Cultural Rights
ICCPR	International Convention on Civil and Political Rights
UNCRC	UN Convention on the Rights of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
UDHR	Universal Declaration on Human Right
UNICITRAL	United Nation's Commission on International Trade Law
MTP	Medium Term Plan
SDG	Sustainable Development Goals
JTF	Judiciary Transformation Framework
STF	Sustaining Judicial Transformation Framework
TDRM	Traditional Dispute Resolution Mechanism
CAM	Court Annexed Mediation
DRC	Dispute Resolution Mechanism
SDRC	Strathmore University Dispute Resolution Centre
DRB	Dispute Resolution Board
CAJ	Commission on the Administration of Justice
IEBC	Independent Electoral and Boundaries Commission
PPDT	Political Parties Disputes Tribunal
NCIC	National Cohesion and Integration Commission
CIPK	Council of the Imams of Kenya
LSK	Law Society of Kenya

Foreword

Acknowledgements

Executive Summary

This policy has been developed through the joint efforts of the Judiciary, the Department of and the Nairobi Center for International Arbitration (NCIA).

The policy is anchored in the Constitution of Kenya 2010, International and regional human rights instruments; SDG 16.3 on the Rule of Law and Access to Justice; Vision 2030; and the Judiciary's Sustaining Judicial Transformation Framework.

The purpose of this policy is to strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) in the Country in order to achieve optimal delivery of access to justice for all Kenyans. It is intended to create a well-coordinated, well capacitated and cohesive ADR system that is strategically linked to the formal system, while at the same time maintaining its autonomy as an informal system and providing quality justice services to Kenyans across the country.

The policy presents the current status of the ADR system in the country, and in discerning the problem identifies challenges, needs and gaps including: challenges with key concepts in ADR; 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 uptake of ADR services; and inadequate capacity within ADR practice areas; inadequate resources; lack of harmonised standards; and weak sectoral governance and oversight among other things.

The policy stipulates government commitments towards addressing these challenges and gaps, and towards these ends has among other things:

- a) taken an inclusive approach to articulating the definition and scope of ADR
- b) established the National Council for Alternative Dispute Resolution as the framework oversight body for the sector;

- b) established the Practice Area Committees for the ADR practice areas in charge of governance, regulation and growth of their respective areas of practice;
- c) provided for the establishment of the ADR Division of the High Court which shall be the focal point for linkage and coordination with the ADR sector;
- d) provided for the establishment of regional ADR centers mapped on already existing court and other state, non-state, and community institutional infrastructure;
- c) provided for the enactment of an Alternative Dispute Resolution Act which shall be the framework legislation for the ADR sector
- d) stipulated various strategies and modalities for the promotion of availability, accessibility and uptake of ADR in the country
- e) stipulated a commitment to inculcate ADR as a way of life through embedding, integrating and mainstreaming it in the social, economic, political and cultural spheres of life
- f) provided for self-regulation and governance whereof the National Council is to provide general sectoral guidance and oversight and the Practice Area Oversight committees are to be in charge of practice area regulation and governance.
- g) provided for the establishment of programmes for capacity development; quality control; research and knowledge management and leveraging of ICT for ADR development
- h) provided for the development of a National Action Plan for the implementation of the policy, a financing strategy for it, and a Monitoring and evaluation framework for progress monitoring

The policy document is divided into five parts:

- Part 1. Presents the background, and status of ADR in the country which form the policy context
- Part 2. Presents Policy problem, that is, the challenges, gaps and needs in the ADR sector
- Part 3. Articulates the Policy Strategic framework, stipulating, vision, mission, objectives and rationale of the policy
- Part 4. Proclaims government commitments in policy statements mapped on identified problem areas
- Part 5. Presents the policy implementation arrangements

1. POLICY CONTEXT

1.1 Background

1.1.2 ADR is a major apparatus for access to justice

Access to justice is a fundamental right that generally guarantees every person access to an independent apparatus and impartial process when that individual's liberty, property or other interests are at stake. It entails the availability of accessible, affordable, timely and effective means of redress of remedies through formal or informal processes and institutions of justice in compliance with human rights standards.

From a human rights perspective therefore, it is an enabling right that helps individuals enforce other rights. From a development perspective it is an important means to prevent and overcome human poverty as it broadens and strengthens disadvantaged people's choices to seek and obtain a remedy for grievances, and increases their agency to procure for themselves the goods and abilities they need to live decent lives..

From a governance perspective access to justice is an essential element of the rule of law and democracy. The rule of law is essential for democracy and economic growth and is the backbone of human rights, peace, security, and development. It is the principle in governance that requires that all persons, institutions and entities, public and private, including the state itself are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with the international human rights norms and standards. The justice sector is critical to the rule of law because the legitimacy of any government depends on the fair and impartial administration of laws.

From an economic perspective, access to justice facilitates checks on government power, ensures and presumes judicial independence, and facilitates enforcement of contracts hence enabling realisation and protection of property rights and the institutions required to further them. The restraint on government from predation on private property is essential to economic performance, and so is security, fairness, equality, cohesion and effective application of the law which are products of the rule of law.

Constitutionally under Article 159, the legal apparatus of the state, which facilitates access to justice consists both formal (the court system) and informal alternative dispute resolution (ADR) mechanisms. Justice has however traditionally been associated with the formal court systems. It has nevertheless been established that majority of citizens in

Kenya access justice through the informal and alternative dispute resolution mechanisms. Studies by the Governance, Justice, Law and Order Sector (GJLOS) program, and the Judiciary jointly with the World Bank found that between 4-10% access justice through alternative dispute resolution mechanisms. As such (ADR) is an essential pillar in the project of access to justice as it serves majority of the population. It is also globally viewed as a commercial necessity that provides a range of advantages over litigation in resolving both domestic and international commercial disputes.

This acknowledgement of the utility of ADR to access to justice delivery has increased in Kenya in recent years especially after the promulgation of the 2010 Constitution which created a constitutional legitimacy base for it under Article 159(2). The realisation of the critical role of ADR in: the delivery of justice to majority of citizens; in the de-clogging the courts; settlement of commercial disputes; and expanding the surface for access to justice for poor and disadvantaged groups, have all led to its acknowledged growth in the country.

1.1.2 The normative framework for ADR

Constitutional provision

The Constitution of Kenya is elaborate in its provisioning on access to justice. Article 48 provides that: *"The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice"*. It further provides the power through which this right may be provided by vesting judicial authority in the judiciary. Article 159(1) of the 2010 Kenya Constitution states that: *'Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.'*

Article 159(2) goes on to stipulate how the judicial authority is to be exercised by stating: *'In exercising judicial authority, the courts and tribunals shall be guided by the following principles: justice shall be done to all irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3) which states that ' justice shall be administered without undue regard to procedural technicalities'; and that 'the purpose and principles of this Constitution shall be protected and promoted'.*

The promotion of ADR is therefore an undergirding constitutional principle for the exercise of judicial authority. Article 159 (2) (e) expressly mandates the judiciary to promote ADR but with a caveat in regard to the promotion of Traditional Dispute Resolution Mechanisms in Article 159 (3) by providing 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.*

Several other provisions including Article 67 (2) (f) promote the use of ADR. Through these provisions, the constitution widens the arenas whereof justice may be sought and delivered to include alternative dispute resolution mechanisms including traditional dispute resolution mechanisms.

International instruments

Within the international normative framework, access to justice is a right recognized under the major international and regional human rights instruments including: 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) and the African Charter on the Rights and Welfare of the Child (ACRWC). The core instruments on the right, the UDHR and the ICCPR, state that everyone has *'the right to effective remedy against violations of fundamental rights'*. The UDHR states that: *"everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"*. The ICCPR provides for the same right in more detail by requiring each State Party to the Covenant to undertake: *'To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity'; 'To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy'; and 'To ensure that the competent authorities shall enforce such remedies when granted'*.

The ICESCR does not contain similar provision, but obliges the State Party to, among other things, *'develop the possibilities of judicial remedy'*. Nevertheless, a State Party seeking to justify its failure to provide any domestic legal remedies for violation of economic, social and cultural rights would need to show either that such remedies are not *'appropriate means'* within the terms of article 2/1 of the ICESCR or that, in view of the other means used, they are unnecessary.

There has further been increasing growth of normative development at the international level especially in the area of arbitration resulting in many international and regional instruments. These are relevant to Kenya as it has ratified some of them, and they anchor the practice of international arbitration in the country. For instance, Kenya acceded to the New York Convention on February 10, 1989. There have also been significant developments in bilateral treaties and soft law development in ADR at the international level. Kenya has also signed the East African Community Treaty which provides for arbitration as one of the available means of settling disputes (Article 32). Furthermore, in its enactment of the Arbitration Act 1995 Kenya adopted verbatim the

UNCITRAL Model Law. The 2010 amendments then filled in lacunae in the law by including clauses on arbitrator immunity, the general duty of parties, costs, interest, expenses and the effect of an award.

National legislation

At the national level, there has been growing legislative development on ADR. The Civil Procedure Act (CPA) and rules, Cap 21 embodies the procedural law and practice in civil courts in Kenya. The Act was amended in 2012 to introduce the aspect of mediation of court cases as an aid to the streamlining of the court process. It is under this amendment that the Mediation Accreditation Committee is established and the Mediation (Pilot Project) Rules have been developed. The CPA and Rules also have provisions that encourage settlement of disputes by Arbitration. Section 59 of the Civil Procedure Act, 2010 provides that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by the rules. It also provides that '*...any interested parties who are not under disability and agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference*'. Order 46 Rule 20 gives provisions for application of ADR and is sufficiently comprehensive since it complements the provisions of the Arbitration Act, 1995.

The Arbitration Act, 1995 and the Arbitration Rules 1997 form the principal legal framework governing Arbitration in Kenya. The Act contains provisions relating to arbitral proceedings, recognition and enforcement of arbitral awards, irrespective of the state in which it was made subject to certain limitations. The Nairobi Centre for International Arbitration Act No. 26 of 2013 establishes the Nairobi Centre for International Arbitration (NCIA) as a Centre for promotion of international commercial arbitration and other alternative forms of dispute resolution, with the objective among others to: coordinate and facilitate, in collaboration with other lead agencies and non-State actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation.

Other important laws that promote the use of ADR include: The Intergovernmental Relations Act, 2012; the Land Act 2012; The Industrial Court Act, 2011; Environmental and Land Court Act, 2011; Small Claims Act, No 2 of 2016; and The Commission on Administration of Justice Act, 2011 among others.

1.1.3 National Development Context

Kenya has been a top advocate of Agenda 2030. Agenda 2030 is a commitment by the global community to eradicate poverty and achieve sustainable development

by 2030 world-wide, ensuring that no one is left behind. The Sustainable Development Goals that constitute Agenda 2030, are the global development policy blueprint. They address the global challenges the world faces, including those related to poverty, inequality, climate, environmental degradation, prosperity, and peace and justice. Kenya has mapped each of the 17 SDGs with Vision 2030 Second Medium Term Plan (MTP) objectives to ensure the global development framework and its implementation is directly linked towards achieving both Vision 2030 and SDGs.

SDG 16.3 commits the international community to promote the rule of law at the national and international levels and to ensure equal access to justice for all by 2030. It is considered an important accelerator of progress across the entire 2030 agenda, as it contributes to the achievement of poverty eradication (SDG 1), gender equality (SDG 5), decent work (SDG 8), reduced inequalities (SDG 10), among others.

Vision 2030 primarily aims to transform Kenya into a globally competitive and prosperous nation with a high quality of life. Under its political pillar, the Vision pinpoints specific strategies which must be employed to ensure enactment and implementation of a policy, legal and institutional framework vital for promoting and sustaining fair, affordable and equitable access to justice. These include: aligning the national policy and legal framework with the needs of a market-based economy and national human rights and gender equity commitments; increasing service availability and access (or reducing barriers) to justice; streamlining the functional organization (including professionalization) of legal and judicial institutions to enhance inter-agency cooperation; inculcating a culture of compliance with laws and decent human behaviour; and constitutional reforms.

The judiciary as the national constitutional mandate for justice developed the Judiciary Transformation Framework (JTF) as a guiding tool for institutional transformation to make it the legitimate, effective and independent custodian of justice mandated by the Constitution. One of the major goals or pillars of the JTF was *“a people-focused delivery of justice”*, with the specific objective to among others *‘increase access to and expeditious delivery of justice’*. One key strategy that the judiciary sought to apply to realise these goals was *‘promoting and facilitating Alternative Dispute Resolution (ADR)’*. In furtherance of these ends, the judiciary in the successor strategy to the JTF the *‘Sustaining Judicial Transformation’* (SJT) strategy document, maintains this goal and strategy. Furthermore, significant achievements have been made towards this goal as is evidenced by the establishment of the Court Annexed Mediation system, and its attendant institutions such as the Mediation Accreditation Committee and the Alternative Justice Systems Task Force. The judiciary partners with stakeholders in the ADR sub-sector towards the development and promotion of ADR, as is evidenced by the joint efforts with the NCIA,

development partners and other stakeholders in the development of this policy document.

1.2 Sector Overview

1.2.1 Types of ADR mechanisms

In Kenya a broad range of ADR mechanisms and processes are used in different sectors of the society. The key types include arbitration; mediation; negotiation; facilitation; convening; fact finding/Neutral fact finding; traditional dispute resolution mechanisms (TDRMS); special dispute resolution mechanism; mini trial; ombudsperson; Peer review panels; private judging; and hybrid ADR among others.

1.2.2 ADR practice in different sectors

Further, ADR has taken root and is practiced in various key sectors including electoral justice; commercial sector; family matters; environmental justice; land matters; and criminal justice among others.

ADR in Electoral Justice.

Electoral Code of Conduct Enforcement Committee. The Second Schedule of the Elections Act provides for two specific entities that have a role in the pre- election dispute resolution process; the Electoral Code of Conduct Enforcement Committee (ECCEC) and the Constituency Peace Committees (CPCs). The ECCEC is established under Section 15 of the Electoral Code of Conduct to address complaints received with regard to infringement of the provisions of the Electoral Code of Conduct. It is set up by the IEBC. The Committee also hears appeals from the Peace Committees when not satisfactorily resolved at that level.

Constituency Peace committees. Under section 17 of the Electoral Code of Conduct, the IEBC is mandated to establish CPCs in every constituency during an election and referendum period. The committees have the power to among other things reconcile warring parties and mediate political disputes in the constituencies.

The Political Parties Dispute Tribunal. Section 39 of the Political Parties' Act establishes the Political Parties Disputes Tribunal (PPDT) whose members are appointed by the Judicial Service Commission. Under Section 40, the jurisdiction of the Tribunal includes the mandate to resolve: disputes between members of a political party; disputes between a member of a political party and a political party; disputes between political

parties; disputes between an independent candidate and a political party; disputes between coalition partners; and appeals from the decisions of the Registrar under the Act.

Internal Political Party Mechanisms. According to section 23 of the Schedule provides that all parties must outline the internal political party dispute resolution mechanism.

ADR in family law

Section 68 of the Marriage Act provides for mediation of disputes in customary marriages. It stipulates that parties to a customary marriage may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of marriage. The Children's Act 2001 the office of the Director of Children's Services is among other things empowered to mediate, in so far as permitted under the Act, in family disputes involving children, and their parents, guardians or other persons who have parental responsibility in respect of the children, and promote family reconciliation. Court annexed mediation at the judiciary has targeted family matters, as it has been piloted in the family division of the high court and is being rolled out to other divisions and to magistrate levels across the country. Other actors in ADR including the National Legal Aid Services Board, and CSOs such as FIDA(K) also apply mediation in family matters especially child neglect and support matters. TDRMs and other informal ADR mechanisms such as through the local administration are also widely utilised to resolve family disputes.

ADR in the Commercial Sector

Arbitration. Arbitration is the most established mechanism of ADR utilised in the commercial sector. Mediation is also becoming widely used in the sector especially through the Court Annexed Mediation project of the Judiciary which was set up within the Family and Commercial and Tax Division of the High Court (Milimani Law Courts) to deal with commercial and tax matters to enhance efficiency of the courts in promoting commerce in the country. Other actors in the mediation sub-sector also utilise mediation in commercial matters of different magnitudes.

Consumer protection. The Consumer Protection Act 2012 provides that after a dispute over which a consumer may commence an action in the High Court arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law. The Act also established the Kenya Consumers Protection Advisory Committee whose functions includes among other things: creating or facilitating the establishment of conflict resolution mechanisms on consumer issues, investigation of any complaints received regarding consumer issues, among other things.

Taxation. The Tax Appeals Tribunal Act, 2013 was enacted to make provision for the establishment of a Tribunal; for the management and administration of tax appeals; and for connected purposes. Notably, the Act provides that parties may, at any stage during proceedings, apply to the Tribunal to be allowed to settle the matter out of the Tribunal, and the Tribunal should grant the request under such conditions as it may impose. All Tax Disputes can be resolved through ADR except if : the settlement would be contrary to the Constitution, the Revenue Laws or any other enabling Laws; the matter borders on technical interpretation of law; it is in the public interest to have judicial clarification of the issue; there are undisputed judgments and rulings; or a party is unwilling to engage in ADR process.

ADR in Environmental disputes

Traditional conflict resolution mechanisms have always been employed in resolving environmental conflicts where the council of elders, peace committees, land adjudication committees and local environmental committees play a pivotal role in managing conflicts. *Mediation* is the most utilised method. The constitution provides for the encouragement of communities to settle land disputes through recognized local community initiatives consistent with the constitution. Further, the Environment and Land Court Act 2011 allows the court to adopt and implement on its own motion with the agreement or at the request of the parties any other appropriate means of alternative dispute resolution including conciliation, mediation, and traditional conflict resolution mechanisms in accordance with Article 159 (2) (c) of the Constitution.

Land disputes

One of the functions of the National Land Commission established under Article 67 of the constitution is to encourage the application of traditional conflict resolution mechanisms in land conflicts. Section 4 of the Land Act 2012 lays down the guiding values and principles of land management and administration which include: encouragement of communities to settle land disputes through recognized local community initiatives; and alternative dispute resolution mechanisms in land dispute handling and management. Along the same lines, Section 39(1) of the Community Land Act 2016 provides that a registered community may use alternative methods of dispute resolution.

ADR in Civil Justice

The bulk of ADR services are provided within the civil justice sub-sector, and mostly by private ADR service providers without initiative or connection with the formal judicial system. The court system however, in its efforts to implement the constitution has created legislative imperatives for court promoted ADR, and especially so at the High Court level. The High Court (Organization and Administration) Act, 2015 provides that *'in civil proceedings before the Court, the Court may promote reconciliation amongst the parties*

thereto and shall encourage and permit the amicable settlement of any dispute'. The Act further provides that: 'nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution'. Further, 'Where an alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall by order, stay the proceedings until the condition is fulfilled'.

Furthermore, the objective of the Magistrates' Courts Act, 2015 is to enable magistrate courts to facilitate just, expeditious, proportionate and accessible judicial services in exercise of the criminal and civil jurisdiction in the Act or any other written law. The Act does not however refer to ADR mechanisms hence limiting the referral to these mechanisms by the courts. Practice directions by the Chief Justice however, in furtherance of the use of Court Annexed Mediation, have instructed the adoption of Court Annexed Mediation practice in Magistrates Courts, and in all divisions of the court over and above the family and commercial divisions.

ADR in Criminal Justice

Section 176 of the Criminal Procedure Code provides for the promotion of reconciliation. Reconciliation is promoted in proceedings for common assault, any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court. Courts have however taken bold steps to allow ADR even in felonious matters as witnessed in two recent cases of murder of *Republic v Mohamed Abdow Mohamed [2013] eKLR*, and *Republic v Ishad Abdi Abdullahi [2016] eKLR*. Reconciliation efforts must be initiated before the court makes its final decision or discharged its duty in the matter. The use of mediation in the plea-bargaining process has also been promoted by courts as provided for under section 137A of the Criminal Procedure Code provides and further facilitated by the Criminal Procedure (Plea Bargaining) Rules 2018. The courts have also been using reparation and reconciliation, amongst other forms of ADR, with the only challenge being that parties sometimes make the request too late in the process.

ADR in Labour and Employment

The Industrial Court Act, 2011 contains provisions allowing the court to stay proceedings and refer the matter to conciliation, mediation or arbitration. The court may adopt alternative dispute resolution and traditional conflict resolution mechanisms as envisaged in Article 159 of the constitution.

ADR in the Energy and Mining Sectors

The Energy (Energy Management) Regulations, 2012 provide that where a dispute arises between an energy facility owner or occupier and the energy auditor, the dispute shall be referred to the Commission for determination. A person aggrieved by a decision of the Commission may appeal to the Energy Tribunal. The Energy (Complaints and Dispute Resolution) Regulations, 2012 provide that where a dispute has been referred to the Commission under the Rules, the Commission is required to appoint a mediator who shall assist the parties to reach a settlement within thirty days from the date of such appointment. Under Regulation 16, the Commission may refer the dispute filed with it to experts or to a Dispute Resolution Panel, appointed from among persons in the database. The First Schedule to the *Energy (Complaints and Dispute Resolution) Regulations, 2012* provides for Guidelines for Complaints Handling Procedures.

ADR in Mining

The Mining Act 2016 under section 154 provides that *'a mineral agreement shall include terms and conditions relating to, inter alia: the procedure for settlement of disputes; and resolution of disputes through an international arbitration or a sole expert. It also provides that 'any dispute arising as a result of a mineral right issued under this Act, may be determined in any of the following manners: by the Cabinet Secretary in the manner prescribed in this Act; through a mediation or arbitration process as may be agreed upon by the disputing parties or as may be stated in an agreement; or through a court of competent jurisdiction'*.

ADR in Public Administration and Intergovernmental Disputes

Article 189 (4) of the Constitution of Kenya provides for the use of alternative dispute resolution mechanisms in settling intergovernmental disputes. Similarly, the commissions and independent offices established under Chapter 15 of the constitution have been clothed with the necessary powers for reconciliation, negotiation and mediation under Article 252 91) (b) of the Constitution which provides that: *' Each commission, and each holder of an independent office has the powers necessary for conciliation, mediation and negotiation'*.

The functions of the Commission on Administrative Justice under the 2011 Act, include, among others, to: *'...work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration'*.

The *Intergovernmental Relations Act, 2012* was enacted to among other things: *'...establish mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the Constitution, and for connected purposes. Section 30(2) provides for resolution of disputes arising: between the national government and a county government; or amongst county governments. The national and county governments are required to*

take all reasonable measures to: resolve disputes amicably; and apply and exhaust the mechanisms for alternative dispute resolution provided under the Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution. According to section 32(1) of the Act any agreement between the national government and a county government or amongst county governments should: *'...include a dispute resolution mechanism that is appropriate to the nature of the agreement; and provide for an alternative dispute resolution mechanism with judicial proceedings as the last resort'*.

ADR in National Peace Building Initiatives

The National Steering Committee on Peace Building and Conflict Management was established in 2001 by the Government of Kenya as part of the framework on addressing threats and challenges to national unity which have become increasingly sophisticated and complex over time. The establishment of this multi-agency peace architecture to coordinate peacebuilding and conflict management in the country was borne out of the need to incorporate traditional justice resolution mechanisms into the formal legal-judicial system of conflict mitigation and partner with Government and Civil Society Organizations (CSOs) in order to engender conflict sensitivity to development as it has been largely accepted that a peaceful, stable and secure society is a prerequisite for sustainable development.

The *National Cohesion and Integration Act, 2008* established the National Cohesion and Integration Commission whose object and purpose is to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya, and to advise the Government on all aspects thereof. One of the ways provided for achieving this is through promoting arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace.

National Policy on Peacebuilding and Conflict Management, 2012

The policy was formulated to among other things: establish a Mediation Support Unit to provide and coordinate mediation and preventive diplomacy capacity to Kenya and its neighbouring states. One of the pillars of the policy is mediation and preventive diplomacy. The policy also recognized the critical role of traditional conflict resolution mechanisms such as community declarations and social contracts in line with the Constitution.

1.2.3 Institutional framework in ADR

Mediation

The Judiciary has led the way in the development of institutional infrastructure for mediation. The Court Annexed Mediation program and its attendant institutional and administrative elements of the Mediation Accreditation Committee, and the Task Force on Alternative Justice Systems which oversees the CAM and issues relating to ADR provide the foundation for mediation service delivery and further development of mediation practice and ADR in the country.

The NCIA, a statutory body providing mostly arbitration services also offers mediation services and has developed the administrative tools for this purpose including training, rules of practice and accreditation. The Legal Aid Service established under the Legal Aid Act of 2016 offers mediation services. Other institutional actors in the mediation practice area include; the Strathmore University Dispute Resolution Centre (from academia); and FIDA(k), Tatua Centre, Dispute Resolution Centre, and Kituo cha Sheria from the non-profit sector, among others.

The Civil Procedure Act establishes the Rules committee which is mandated to enact rules of practice for efficient dispensation of justice by the civil courts, including among others rules for selection of mediators and hearing of matters referred to mediation pursuant to court mandated mediation as stipulated in the Civil Procedure Act. The Committee is therefore an important institutional feature for the further development of ADR and TDRM in the country.

Arbitration

Institutional actors in arbitration in Kenya are mainly: The Chartered Institute of Arbitrators (Kenya Branch); Dispute Resolution Centre (DRC); The Strathmore Dispute Resolution Centre (SDRC); The Nairobi Centre for International Arbitration (NCIA) and Kenya Sports Disputes Tribunal whose mandate for this emanates from the Sports Act 2013. Whereas these actors are guided by the Arbitration Act 1995 in their practice and are therefore to their practice is linked to the courts for enforcement and other stipulated purposes, the actors are essentially de-linked from each other in their training, accreditation and other such practice facilitating efforts.

Traditional Dispute Resolution Mechanisms

Courts and Tribunals. The judiciary, in exercising its constitutional mandate is obligated to promote ADR and TDR. This is further explicated by the Civil Procedure Act, 2010 which seeks to facilitate the just, expeditious, proportionate and affordable resolution. The court's administrative and institutional infrastructure impliedly should therefore be available and used for these purposes. However even though ADR and TDRM are core

parts of the chain of access to justice, the bulk of the institutional infrastructure dispensing this service is outside the court system and operating parallel and independent to the system. This exposes these institutions to various challenges including: inadequate infrastructure; lack of government financial and institutional support; inadequate regulation, among others. The Judiciary has established the Alternative Justice Systems Task Force (AJS) with the mandate to oversee the roll out of CAM and look into other issues of ADR in the country. The AJS taskforce constitutes an important foundational institution for the development of ADR within and without the formal court system. Councils of elders in various communities in the country also constitute important institutions that are championing development of ADR, and which merit support for further capacity and development.

County Governments

Whereas the justice system is not devolved, the court system permeates each one of the 47 counties. The county governments provide certain basic services to the citizens and have the infrastructure to reach the furthest corner of the country. ADR may be one of the areas where the national government through the judiciary and county governments can collaborate. The county governments could provide the institutional infrastructure for promotion of ADR and provision of a quality service in an organised way. This would apply to both mainstream ADR mechanisms, and substantially TDRMs. The constitution provides for the objects of county governments to promote public participation.

Constitutional Commissions

The mandates of the Constitutional commissions and their institutional infrastructure can leveraged for the promotion of ADR and especially TDR, because of their national mandates and infrastructure. These include: The National Land Commission; the National Commission on Integration and Cohesion; Commission on Administrative Justice; and the Kenya National Human Rights.

Civil Society Organizations

CSOs are champions of ADR in their service delivery work, including their community outreach programs. They engage in ADR development through research and advocacy, and contribution in the development of the law and policy. As such they represent a major segment of the institutional framework for ADR and TDRM because of their community reach. These include NGOs and religious organisations. Some relevant and active CSOs in this regard include: The National Council of Churches of Kenya and the Council of Imams and Preachers of Kenya (CIPK), Maendeleo ya Wanawake, FIDA Kenya, Kenya Human Rights Commission, Muslims for Human Rights, Kituo Cha Sheria, International Commission of Jurists ICJ(K) amongst others.

Community institutions including Council of Elders

In most ethnic communities, there exist various institutions established to maintain order, peace, and community cohesion at the broad community level, clan level, age mate levels and even household levels. These institutions include: community councils of elders, clan elders, age mate group panels, matriarchs, and patriarchs of extended households. A core responsibility of these institutions is dispute resolution.

Local Administration

The local administration also provides an avenue for dispute resolution for communities. Chiefs preside over local administration and attend to local communities including providing dispute resolution services. Chiefs are by statute allowed to summon people in their locality and conduct hearings involving minor conflicts such as family feuds, inheritance/succession and breach of peace. This is done working in tandem with community leaders and elders to promote peace and harmony in the community.

2. THE PROBLEM

The challenges, gaps and needs in the sector describe certain existing dysfunctional conditions that inhibit or undermine the full realisation of the goals of ADR in the country. These goals are: facilitating faster access to formal justice by decongesting the courts; promoting commercial activity by providing faster means of contract enforcement and dispute resolution; extending access to justice to more people especially the poor and disadvantaged; and to extend more widely the protections and benefits of the rule of law- that is: security; inclusive society; order and lawfulness.

2.1 Conceptual and Definitional gaps

To conceptualise is to form an idea about something, including its dimensions, scope, qualities, and other core elements that lead to understanding it and defining it, and ultimately engaging with it. It therefore has to do with definition and scope.

Definitions. Definitional problems in ADR have to do with the concept of ADR itself, its component terms of 'Alternative'; 'Dispute' and 'Resolution'; and key terminologies used in ADR such as: 'parties'; 'ADR practitioner'; 'mediation'; 'arbitration'; 'negotiation'; 'conciliation'; 'diversion'; 'expert determination' and 'adjudication' among others. There is also a lack of a resource such as a 'Glossary of terms in ADR' to guide practitioners, users and regulators on common terminologies used in ADR and to bring a uniformity of understanding and usage. There is also lack of clarity as to whether the conception of justice applied in ADR is the idealistic, legalistic and positivist one that is traditionally applied in the formal system of justice or is it a more social conception that focuses more on reducing social injustice. 'Justice' within the idea of ADR would therefore need to be clearly conceptualised.

Unclear Scope of ADR. The inadequate articulation of the Scope of ADR is also an important conceptual gap, which undermines a holistic understanding and appreciation of the ambit of ADR in the country. ADR is often narrowly viewed as consisting only certain specific commonly known areas of practice such as arbitration and mediation. It is also wrongly assumed to be a service mostly offered in civil matters, and mostly by lawyers. This situation undermines the understanding of ADR for users and potential users, policy makers and even practitioners and hence limiting its utility towards the goal of access to justice.

Jurisdictional Challenges. Lack of clarity of the jurisdictional limits of ADR also undermine the scope of ADR. For instance, there is lack of consensus on the extent to which criminal justice can be dispensed through ADR. This is because the two key

parties in a criminal matter are the state and the accused person. The victim is an observer third party. The underlying concern in traditional criminal justice is with the public goods of security, order and lawfulness, and not the restoration to the victim for violation and suffering. Often times when ADR is used in criminal justice, restoration and reconciliation are the main goals. For instance, family conferencing opens up new opportunities in restorative justice for crime victims to become directly involved in imposing sanctions on the offender. In plea bargaining, accused persons agree to plead guilty, or provide crucial information to the prosecutor in return for some concession from the prosecutor. The dilemma that ADR presents in criminal justice is how to balance the state's retributive approach to protecting the public goods of security and order through criminal justice, with the restorative and reconciliatory approach in ADR which focuses on the rights of the victim, and the social goods of cohesion and peace. It is also unclear whether, even if criminal justice were to be dispensed through ADR, mechanisms such as TDRMs are appropriate for those purposes.

Question of Justiciability. Another issue of scope of ADR is the question of whether the matters falling within ADR are limited by the notion of justiciability. Are matters falling within jurisdiction of ADR only those legal matters over which a court of law can exercise its judicial authority? Does an actual and substantial controversy have to be at hand for a matter to be brought to ADR? Lack of clarity on these matters limits the exploitation of the potential of ADR in certain realms such as criminal justice and social issues which though may not be legal may benefit from some of the processes of ADR.

2. 2 Legal gaps and challenges.

Inadequate implementation of existing laws. Pursuant to the 2010 constitution, many statutes have provided for the application of ADR including TDRM in dispute resolution in their areas of focus. There has however been inadequate leveraging of these provisions for the development of the ADR in the country. These include: The Intergovernmental Relations Act, 2012; the Land Act 2012; The Industrial Court Act, 2011; Environmental and Land Court Act, 2011; Small Claims Act, No 2 of 2016; and The Commission on Administration of Justice Act, 2011 among others.

Lack of framework legislation. These legislative developments though progressive are still very limited and fragmented and lack an enforcement mechanism. Different mechanisms and areas of practice have developed various forms of legislation such as practice directions, rules of practice and codes of conduct. These are however disparate in form and quality, and lack common guiding principles in their development and

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application. This points to a need for a framework legislation, which would among other things: provide for coordination; sector regulation; provide guiding principles for legislative development in practice areas, and in training and accreditation of practitioners; and also establish an oversight institution for the sector.

Lack of legislative framework for TDRMs and other informal justice systems. TDRMs and other informal dispute resolution mechanisms such as the provincial administration are not supported by any enabling legislation. This is a major gap that has inhibited the further development of these mechanism, their recognition, their ability to coordinate with other mechanisms, and therefore their efficacy and efficiency. Such legislation would provide for an institutional framework for the promotion of these mechanisms, and for their linkage with the formal system and other ADR mechanisms among other things. It would also make provision for key matters such; as the issue of 'standing' and equality in accessing the TDRM forums; awards and enforcement mechanisms; basic principles of procedure; training and accreditation of service providers; regulation; cost; and constitutionality among other important issues facing these mechanisms.

2.3 Inadequate Institutional development in the sector

Inadequate Institutional development. Inadequate Institutional development in ADR has been *ad hoc* and unstructured. It is concentrated in arbitration and mediation and it is also city centric, which limits the reach of these services to city dwellers. Even though there are well entrenched organisations, such as the Institute of Chartered Arbitrators (Kenya Chapter), they are still very few relative to the legal and justice needs of Kenyans.

TDRMS lack any institutional support. Some ADR mechanisms such as TDRMs lack any level of institutional support. They operate through virtual cultural institutions governed by customary norms with inadequate governance and accountability structures, and with little surface for proper collaboration with formal institutions.

Silo approach. Existing institutions operate in siloes with little coordination and collaboration. This occasions duplication and limits sectoral development and the development of a community of practice in ADR.

Inadequate utilisation of potential in other institutions. There are institutions with potential for anchoring provision of ADR services within their enterprises such as universities; the Law Society of Kenya and other professional associations; government agencies and private corporations; and CSOs especially those at the grassroots levels. The utilisation

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of the institutional capital that these organisations already have for dispensing ADR services needs to be encouraged and structured.

Lack of an oversight institution. The ADR sector also lacks an oversight institution hence occasioning fragmented growth, and lack of common regulation, standards, coordination and effective governance. Also, in order to increase public confidence in the sector, the existing institutions and any new ones also need institutional capacity building so as to improve internal governance and increase efficiency.

2.4.1 Arbitration

Challenges in arbitration include: escalating costs which are sometimes higher than court costs; increasing legal procedures which complicates the process and therefore takes almost as much time as the courts; unethical behaviour amongst some practitioners where they deliberately slow down the process to their benefit; the linkage of arbitration process with court system for adoption and enforcement sometimes defeats the purpose as the court process may end up delaying the matter. Furthermore, the arbitration practice area does not have a regulatory framework or standardised training curriculum or code of conduct and an enforcement mechanism. Institutions operate in their own siloed environments with little coordination and collaboration. There is also general lack of awareness about arbitration in the country, and an inadequate number of qualified arbitrators.

2.4.2 Mediation

Mediation is the fastest growing ADR practice in the country. Development of the practice has been marked by the silo approach to institutional development with each of the key actors developing their own different rules, curricula and training programs. This has led to duplication, disparate standards and a disjointed practice. The sector also faces the challenges of inadequate numbers of trained and training personnel, and also generally poor quality of training programs by some providers. Because mediation is a multi-disciplinary practice, a competitive dynamic has developed between lawyers and non-lawyer mediators with lawyers claiming loss of business to non-lawyers in mediation (including court in annexed mediation). Lawyers are therefore not likely to refer their clients to mediation or to promote it.

2.4.3 Negotiation

Negotiation is the most widely used method of dispute resolution in everyday life. It has the potential of assisting in resolving disputes before they escalate to unmanageable levels, and also to promote peace and order through resolution of daily human conflicts and disputes. It is however undermined by various challenges including: lack of enforcement mechanism; prone to exploitation of some parties by others due to power and negotiation skills imbalance; it is prone to deadlocks; it does not have a time limit; and may degenerate into confrontation. Many people do not have basic negotiation skills, and this makes it difficult for them to diffuse and or resolve simple disputes in their lives.

2.4.4 Conciliation

One major challenge in conciliation is that it is little known even though it is often used in many social disputes. It also lacks institutional and legislative support and professional capacity building for its delivery.

2.4.5 Adjudication

A major challenge in regard to adjudication is that even though it renders justice expeditiously, it is mostly restricted to the construction sector as it is usually entrenched within contracts in the sector. The Small Claims Act institutionalises adjudication within the judiciary. This may create perceptions that all adjudication falls under the Act and is court based. Further, it creates the impression that adjudication generally is restricted to the pecuniary jurisdiction of two hundred thousand established under the Act. Furthermore, section 5 of the Act by indicating that the small claims courts shall be presided over by an adjudicator who must be an advocate of the high court of Kenya, seems to restrict the practice of adjudication to the legal profession. This would undermine the important element of the use of experts in all sectors that adjudication would apply.

2.4.6 Ombudsperson

This mechanism is little exploited in Kenya. Even though it is mostly associated only with the Commission on Administrative Justice, this office and its mandate is little known and accessed by Kenyans in the rural areas. Its services are also mostly available in the capital city. In established jurisdictions the ombudsman office is highly utilised in large corporations and organisations as the referral and resolution mechanism for disputes. This phenomenon is under-developed in Kenya.

2.4.7 Traditional Dispute Resolution Mechanisms (TDMRM)

Key challenges in TDRMs include: lack of uniformity of procedures; lack of a framework law governing TDRM practice; lack of an oversight institution to manage governance and set and enforce standards in TDRM practice; lack of code of conduct for practitioners; lack of capacity building for practitioners in order to adhere to the principles of justice and of the constitution; inadequate enforcement mechanisms and in many instances unconstitutional awards and enforcement mechanisms; inadequate linkages with the formal justice systems and other ADR practice mechanisms; and lack of remuneration of practitioners which affects availability of the service. Many TDRMs also engage in unconstitutional practices based on cultural beliefs and custom.

2.5 Linkage and coordination challenges

The relationship and linkages between the formal justice system and ADR mechanisms is undefined, even though under constitutional logic, the ADR mechanisms are executing the mandate of the judiciary through their informal methods. This gap creates a bifurcated justice system, of parallel forms and apparatus with a lot of lost potential and opportunity in non-collaboration and inadequate mutual support. While caution should be taken not to co-opt ADR and TDRM within the formal justice systems (as this would rob them of their core characteristics), there is need to map out collaboration and coordination opportunities between the courts and these alternative systems.

2.6 Enforcement Challenges

Some of the weaknesses in some forms of ADR such as mediation is lack of an enforcement mechanism by conceptual design of the mechanism. Mechanisms such as TDRMs, whereas may have some enforcement mechanisms, the enforcement mechanisms provided may be unconstitutional and therefore unavailable. Innovative inter-mechanism collaboration including with the formal courts or other mechanisms that have enforcement may assist in such instances. In those mechanisms that require court assisted recognition and enforcement, the quality of timeous delivery of justice, and confidentiality are compromised due to delays in the court process, and its public nature. There is need for custom made linkage between courts and ADR mechanisms for enforcement purposes in order to complete the delivery of 'effective remedy'.

2.8 Technological gaps

ADR is slowly being transformed by technology, with some forms like mediation being conducted online globally not only in the commercial sector but also in the family and other sectors. There is inadequate exploitation of this opportunity in Kenya despite the high mobile penetration and Kenyans being one of the leading users of ICT on the continent. This situation undermines the potential for reducing the cost of ADR by cutting costs associated with travel to venues repeatedly for sessions. An attendant issue is the lack of legal infrastructure to support e-ADR. Furthermore, ICT has the potential to disrupt working models within ADR, hence requiring in-tandem development of ICT capacity in the sector.

2.9 Gaps in sector regulation and governance

Some areas of practice have developed standards of practice especially mediation and arbitration. These are however developed through silo approaches with different institutions in mediation for instance developing their own codes and rules of practice. There are no standards in some areas such as TDRMS. There is no framework of principles guiding development of standards, and no regulatory institution to enforce the codes. There is further no oversight body to enforce the standards.

3. POLICY STRATEGIC FRAMEWORK

3.1 The Rationale for the policy

Access to justice is an important right that enables the realisation of other rights and of the rule of law, and ultimately development. There is a major access to justice gap in the country, with the formal justice apparatus only accessible to less than 10% of Kenyans.

ADR mechanisms offer access to justice for over 90% of the population and have been constitutionally recognised as legitimate mechanisms of justice within constitutional parameters.

ADR is anchored in the constitution under Article 59(2) which provides for the promotion of ADR; international and regional human rights instruments; in SDG 16.3; Vision 2030; and the Judiciary's Sustaining Judicial Transformation Framework.

Inaccessibility to justice is negatively co-related with development, contributes to growing poverty and social exclusion and can undermine investment, commercial activity, economic growth and democracy.

It is within this context that the development of the policy is imperative with a view to enhance the further development of the ADR as an apparatus of justice to increase its effectiveness, availability and accessibility to all Kenyans.

3.2 Policy Vision

The vision of the policy is that of:

'A cohesive, well-governed, multi-disciplinary, self-regulated, and efficient sector, offering easily accessible and available quality ADR services that are the preferred mode of access to justice for all Kenyans.'

3.3 Policy Mission

The mission of the policy is:

'To promote the development of an ADR sector that will offer easily accessible and available quality ADR services for all Kenyans.'

3.4 Policy Objectives

The objectives of the policy are:

- a) To outline the scope of ADR, and to provide definitions for key ADR terms
- b) To promote and inculcate the culture of ADR in Kenya, and to make it the preferred mode of dispute resolution for all Kenyans
- c) To strengthen the legal and institutional frameworks supporting the ADR sector
- d) To enhance coordination, collaboration and linkage within the sector, and between ADR actors and the formal justice system in order to increase harmony and efficiency
- e) To strengthen sector governance, regulation and capacity building in order to enhance quality, availability, accessibility of ADR services
- f) To strengthen different mechanisms of ADR for provision of best quality, available and accessible ADR services in the business sector and all sectors of the Kenyan society
- g) To strengthen the ADR sector through research, knowledge development, community of practice and leveraging of ICT.
- h) To Strengthen the practice of ADR in the social, economic and political sectors where it is practiced and promote its practice in other sectors.
- i) To promote dispute and conflict prevention by inculcating in Kenyans a dispute resolution mentality and harmonious everyday living

3.5. Guiding principles

The principles guiding the formulation and implementation of the policy include:

- a) *Article 10 of the Constitution, and especially-* human dignity; equity; social justice; inclusiveness; equality; human rights; non-discrimination; protection of the marginalised; good governance; integrity; transparency; accountability; rule of law; and participation of the people
- b) *Subsidiarity (self-determination)-* the idea that a community of higher order should not interfere with the life of a community of a lower order, taking over its functions. Under the principle, in order to protect basic justice, government should restrict its hegemony

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and undertake only those initiatives which exceed the capacities of individuals or private groups acting independently. Government should support the smaller community and help to co-ordinate its activities in the rest of society for the sake of common good.

c) *Programmatic principles*- leadership; effective partnership; and evidence-based programming

3.6 Policy Approach

3.6.1 Human rights- based approach

The human rights-based approach is about empowering people to know and claim their rights and increasing the ability and accountability of individuals and institutions who are responsible for respecting, protecting and fulfilling rights. It is about ensuring that both the standards and the principles of human rights are integrated into policymaking as well as the day to day running of organisations. Fundamental principles in applying a human rights-based approach in practice include: participation; accountability; non-discrimination and equality; empowerment and legality. These principles are integrated into this policy and its envisaged implementation.

3.6.2 Transformative approach

The transformative approach adopted here is based on the idea of transformative constitutionalism which is the anchoring philosophy adopted by the judiciary in implementing its constitutional justice mandate. It connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law. The transformation envisaged is in redistribution of power and levelling the economic playing field and provision of services to along egalitarian lines. It is about making any endeavour in implementation of the constitution, an endeavour to change the realities of the lives of Kenyans towards greater human dignity and increased abilities to realise their human potential. The policy envisages the promotion of ADR in this light

3.6.3 Inclusivity approach

The inclusivity approach is about recognising and valuing diversity in the methods, apparatus and approaches of access to justice; and also in the involvement of different disciplines in ADR.

3.7 Gender and equality considerations

- a) In the formulation and implementation of the policy, the issue of difference and the power asymmetries and disadvantage it creates along *gender, age, disability, sexuality, religion, class, profession, culture, immigration status; and nationality* among others shall be taken cognisance of.
- b) The National Council on ADR shall organise for the development of a gender and equality strategy for the ADR sector, including the adoption of gender and equality mainstreaming in all elements and activities of the sector.

3.8 Risks and assumptions

Risks

Risks that may undermine policy implementation if they materialise include:

- a) Over-formalisation of the ADR sector which will undermine its utility as a more flexible, faster, informal mechanisms for justice;
- b) Technology disruption of working models in ADR;
- c) Resistance to change by stakeholders and users of ADR
- d) Inadequate resources to implement the policy
- e) Competition between formal and ADR mechanisms, and legal and non-legal practitioners

Assumptions

- a) That resources will be available for the implementation of the policy
- b) That stakeholders will maintain the momentum for ADR sector reform agenda that is outlined in the policy

3.9 Policy Development process

The policy development process commenced in 2018 with the undertaking of the baseline survey on ADR in the country as a background resource for the policy formulation process. It was followed by the development of the National Alternative Dispute Resolution Policy Memorandum in April 2019. The memorandum laid out the parameters of the proposed policy as well as the process to be followed in its formulation. On recommendation from the Policy memorandum, a Policy Formulation Consultation Paper was developed in July 2019. The consultation paper formed the key resource in a participatory policy formulation workshop held in Naivasha in July 2019. The workshop was attended by 45 participants drawn from a full representation of the sector stakeholders. The core product of the workshop deliberations was a Draft zero policy document. This draft policy document is to be discussed and deliberated on by over 600 stakeholders in eight representative and participatory regional forums. It will further be scrutinised by the legal committee of the national parliament. The Zero draft will be refined with input from the forums and the legal committee to produce the green paper for a national validation forum with representation from across the country. The green paper draft shall be refined with the comments from the validation to produce the final copy (white paper) of the ADR policy. This copy shall thereafter be subjected to the formalisation and adoption processes to produce the formal national ADR policy.

4. POLICY STATEMENTS

4.1 Definitions of Key Terms,

4.1.1 Meanings and definitions of key ADR terms

a) The meanings of the following key terminologies in ADR for purposes of the policy are as follows:

“Alternative Dispute Resolution” for purposes of this policy refers to constitutionally compliant mechanisms, processes and methods of dispute resolution, other than judicial determination.

“Alternative” as used in the policy is broad and inclusive and may mean in different circumstances: other than judicial determination; assisted; additional; appropriate; primary; informal; rights-based; interest-based; and among other similar terms.

“Dispute” refers to an unresolved complaint, grievance or disagreement. It is used inclusively to include situations where no dispute exists but where there is need for; clarification of a matter; establishing whether a dispute exists; fact finding; or where parties do not see themselves as being in disagreement or aggrieved.

“Resolution” is used broadly and inclusively to include determination of a dispute; narrowing the scope of a dispute; exchanging of information on a ‘without prejudice basis’; preparing parties to decide on forum; transforming understanding of the matter/ dispute, relationships or behaviour.

“ADR Practitioner” refers to a person offering ADR services to the public, and who is trained by accredited institutions to offer services in that specific area of practice of ADR; is certified and accredited by the relevant accrediting institution and is holding a current practicing certificate.

In regard to TDRMs, *‘ADR Practitioner’* refers to a person offering TDR service to the public, who is by traditional custom recognised as possessing the skills and wisdom required to offer that service, is accepted and therefore by custom certified to offer the service, and who is also trained in human rights, mediation and conciliation.

This definition is exclusive to persons offering ADR services *to the public*. It is important to recognise that ADR services are also widely offered in informal set-ups on an *ad hoc* basis by persons not trained in ADR and not offering the service to the public. These are important actors in the continuum of ADR who are also recognised as ‘practitioners’ for the purpose of the impromptu unplanned services they offer. However, where a person habitually offers such a

service, except in the case of TDRMs, they are required to get training and register as ADR practitioners.

“Adjudication” This is an informal, speedy, flexible and inexpensive process where a neutral third party called the Adjudicator makes a rapid fair binding decision within disputes arising from contracts.

“Arbitration” refers to a dispute settlement mechanism where a neutral third party is appointed by parties or an appointing authority to determine disputes between parties and give a final and binding award.

“Conciliation” is a dispute resolution process where an independent third party, the conciliator, helps people in a dispute to identify the disputed issues, develop options, consider alternatives and try to reach an agreement by way of clarifying misconceptions and perceptions to reduce tension and promote effective communication with the aim to facilitate continued negotiations

“Mediation” is the voluntary, informal, consensual, non-coercive, strictly confidential and non-binding process in which the disputants submit to the facilitation of a neutral third party who assists them to reach a negotiated solution.

“Court annexed mediation” is a type of mediation where disputants are statutorily coerced to submit to the mediation process, enter an arrangement and arrive at an agreement which they are forced to live with, while exercising little or no autonomy over their choice of mediator. Parties are however still free to exercise their autonomy within the mediation.

“Traditional Dispute Resolution mechanisms” are methods and practices employed by Kenyan ethnic communities in the management of conflict and resolution of disputes, and which are facilitated by groups of elders identified by clan elders, age mate panels, or identified family personalities such as a family patriarch or matriarch, parents, or other respected personalities and conducted and decided according to custom, often employing mediation and conciliation techniques.

“Tribunals” Tribunals are bodies established by Acts of Parliament to exercise judicial or quasi-judicial functions. Some of the semi-judicial processes they employ sometimes give them characteristics of ADR. They supplement ordinary courts in the administration of justice in civil justice administration and have no penal jurisdiction. Most tribunals are subject to supervision of the high court. Out of the over 50 tribunals in Kenya, 20 have been transited to the Judiciary in compliance with the Constitution and are now coordinated through the office of Registrar Tribunals established by the Judicial Service Commission.

“Negotiation” is the dispute resolution mechanism where parties have complete autonomy over the forum, the process and the outcome, and often reach a mutually acceptable decision without assistance from third parties.

“Ombudsperson”. The Ombudsman, who is an organizationally designated person, receives, investigates and facilitates the resolution of complaints, systemic problems and resolves disputes from individual complainants

b) The National ADR Council to be established by statute pursuant to this policy shall, in collaboration with practice area committees (established pursuant to this policy), cause to be developed a glossary of all other important and emerging ADR terms which shall be periodically revised.

4.2 The scope of ADR

a) The policy takes an inclusive approach to the scope of ADR, to encompass:

i) all concepts and typologies of ADR practices, processes, and services, normally found in ADR practice globally;

ii) civil, justiciable and non-justiciable issues, and all the practice mechanisms and sectors of application covered by the policy

iii) criminal jurisdiction to the extent that shall be progressively articulated by law, keeping a balance between the state goals of security, order and lawfulness, and the competing goals of the interests of the victim, community peace and cohesion, and rehabilitation of the offender.

In this regard, the scope leaves room for considered integration of new forms of ADR such as in criminal justice such as: victim offender mediation; family group conferencing; offender-panels; victim assistance programs; community crime prevention programs; sentencing circles; ex-offender assistance among others.

iv) private and public disputes, taking a liberal approach to disputes to include instances where no definitive dispute has crystallised but where parties may seek clarity in one form or another or are taking dispute pre-emptive action.

v) innovation towards the growth of ADR.

4.3 Strengthening the Institutional Framework for ADR

a) There shall be established by statute, a National Council for Alternative Dispute Resolution which shall be the national ADR framework and oversight body, with its own secretariat. The Council shall have organisational representation from: the judiciary; department of justice; oversight committees of key ADR practice areas including: Arbitration; Mediation; Adjudication; Tribunals; TDRMs; Ombudsman; local administration; religious organisations; and private sector, universities, and CSOs among others.

The core role of the Council shall be to oversee the implementation of this policy by ensuring the realisation of its objectives. Accordingly, its functions shall be among others to:

- i. promote the understanding of ADR as an apparatus of justice, including the understanding of ADR terminologies and its scope of ADR.
- ii. promote and inculcate the culture of ADR in Kenya, and to make it the preferred mode of dispute resolution for all Kenyans
- iii.
- iv. strengthen the legal and institutional frameworks supporting the ADR sector
- v. enhance and strengthen coordination, collaboration and linkage within the sector, and between ADR actors and the formal justice system in order to increase harmony and efficiency
- vi. strengthen sector governance, regulation and capacity building in order to enhance quality, availability, accessibility of ADR services
- vii. strengthen different mechanisms of ADR for provision of best quality, available and accessible ADR services in the business sector and all sectors of the Kenyan society
- viii. strengthen the ADR sector through research, knowledge development, community of practice and leveraging of ICT.
- ix. strengthen the practice of ADR in the social, economic and political sectors where it is practiced and promote its practice in other sectors.
- x. promote dispute and conflict prevention by inculcating in Kenyans a dispute resolution mentality and harmonious everyday living

The National Council shall report to the National Assembly through the Department of Justice as the relevant line ministry.

b) There shall be established Practice Area Oversight Committees for the practice areas of arbitration; mediation; TDRMs; informal mechanisms; religious bodies; tribunals; and court annexed/ based ADR. The functions of the committees shall be to:

- i) carry out governance responsibilities and to provide oversight in their area of practice;
- ii) develop remuneration schemes for practitioners
- iii) develop practice specific codes of conduct and establish and manage their compliance mechanisms;
- iv) develop area specific harmonised training curriculums and accreditation mechanisms for practitioners;
- v) develop Continuous Professional Development (CPD) programs;
- vi) promote public awareness of the practice and service;
- vii) participate in the National Council of ADR;
- viii) promote knowledge development and to grow a community of practice of ADR;
- ix) promote coordination and collaboration with other practice areas and with the formal justice system;
- x) facilitate policy and legislative reforms in their areas of practice to create alignment with the policy, and the Alternative Dispute Resolution Act.

The committees shall consist of the institutional actors in each sector and with representation from the National Council. They shall report to the National Council.

c) The National Council shall in collaboration with the judiciary and other stakeholders establish ADR Centers across the country adopting the multi-door approach whereof justice seekers find available different ADR services in one center and where basic public awareness of ADR may be provided.

i) In establishing the Centers the Council shall leverage on the already existing institutional infrastructure that may be utilised to house the centers including: the court infrastructure; public and private universities; county government institutional infrastructure (to the smallest unit); local administration infrastructure; CSOs and community groups; state and semi-autonomous agencies; and religious institutions.

d) The National Council shall have oversight authority over the Practice Area committees, and over mechanisms for ADR that have been established by law, including those in: electoral justice; family law; taxation; construction; land; environment; mining; energy; investment; consumer protection; labour and employment; criminal justice; public administration and intergovernmental disputes; national peace building initiatives; and any others.

d) The Council shall, in collaboration with AJS, JTI and other relevant stakeholders collate information on the institutional infrastructure for TDRMs in Kenyan communities and develop modalities and programs to strengthen them including councils of elders; clan mechanisms; age mate mechanisms; patriarch and matriarch mechanisms among others.

e) The Council shall also:

i) develop programmes to map emergent conceptions of communities in both the rural and urban areas, such as neighbourhood groups, *chamas*, self-help groups, and other groups formed along emergent affinities, and promote the use of ADR in their dissolution of disputes.

ii) leverage and strengthen other informal dispute resolution mechanisms including the local administration such as chief's offices and religious organisations across the country.

iii) develop programmes to strengthen organisational and institutional development of all entities delivering ADR services to increase quality and efficiency.

f) The judiciary shall establish the ADR Division of the High Court which shall be a fully-fledged division administered by a judge and shall:

i) house and expand the CAM,

ii) promote ADR within the judiciary by expanding the multi-door model within the judiciary in line with international best practice including offering ADR in criminal justice

iii) be the judiciary focal point for linkage with the non-court annexed ADR systems.

iv) collaborate with the National Council and practice area committees for effective coordination and harmonisation of the ADR sector.

g) The Department of Justice shall establish an ADR office which shall:

i) be the focal point on ADR in the Department.

- ii) collaborate with the judiciary ADR Division, and the National Council
- iii) be the link between the National Council and parliament

4.5 Strengthening the Legal Framework for ADR

a) There shall be enacted an Alternative Dispute Resolution Act, which shall be the framework legislation for ADR in the country. The Act shall among other things:

i) Establish the National Council on Alternative Dispute Resolution

ii) Provide for the establishment of: Practice Area Oversight Committees; ADR Centers across the country; and the ADR Division in the Judiciary; and ADR focal point at the Department of Justice.

ii) Provide for establishment of mechanisms for linkage and coordination between the formal justice system and ADR system; sector governance; regulation; standards setting; enforcement of decisions; among other things.

b) The National Council in liaison with stakeholders shall promote the full implementation of existing laws that promote ADR, and advocate for similar legal provisions in other needy sectors. Existing laws include: The Elections Act; The Intergovernmental Relations Act, 2012; The Land Act, 2012; The Industrial Court Act, 2011; Environmental and Land Court Act, 2011; Small Claims Act, 2016 and the Civil Procedure Act, among others.

c) The Small Claims Courts Act 2016 shall be reviewed in order to refer to the adjudication it seeks to institutionalise in the courts as 'Court-Based Adjudication' (CBA). This distinction is important in order to remove the perception it creates that adjudication is a legal discipline to be practiced only by lawyers, and to distinguish it from general adjudication. This review will restore the disciplinary flexibility of adjudication, which relies heavily on expertise from different disciplines.

d) All new legislation enacted in the country at both levels of government shall, where relevant be required to incorporate ADR provisions for their areas of focus; and all existing legislation shall where relevant be reviewed to align to this requirement.

e) Practice Area Oversight Committees, in liaison with the National Council are required to promote legal and policy development in their areas of practice, in furtherance of the goals of this policy.

4.6 Strengthening Linkages, Coordination and Harmonisation in the ADR sector

- a) The policy adopts the principle of subsidiarity in regard to linkage between the ADR systems and the formal court system. This is intended to stem the hegemony of the judiciary, and to allow autonomous operation and growth of ADR without the trappings of judicial conceptions of justice, procedures, retributive approaches, and the individual interests that underpin the method and goals of the formal justice sector.
- b) The linkage between the formal justice system and non-court ADR mechanisms will therefore be in areas of mutual benefit such as enforcement, research, and accountability systems.
- c) Mechanisms and modalities will be developed for promotion of coordination and harmonisation between the formal justice system and the ADR sector, and also between actor in the ADR sector itself.

4.7 Enhancing quality and efficacy of ADR Services

4.7.1 Regulation and governance

- a) The policy takes a self-regulatory approach for the sector with the National Council being the frame work centralised structure that coordinates and provides global oversight and guiding principles and models, but leaving the Practice Area Oversight Committees in charge of day to day governance and regulation within their areas of practice.
- b) As the apex sector governance body, the National Council will be required to:
 - i) develop and enforce the tools for sector governance bench-marked on best practice including: model laws and policies; guiding principles; model standards and codes of ethical conduct, and enforcement institutional forms;
 - ii) collaborate with area practice committees to enforce and strengthen sector governance
- b) Area practice committees will be required to:
 - i) be in charge of area practice governance, and shall, guided by the model governance tools, and guiding principles developed by the National Council, and any area specific peculiarities, develop and enforce tools of governance for each practice area.

- ii) report to the National Council on governance and regulation in their practice areas, and in this regard file annual returns of: codes of conducts; process standards; training curriculum and number of trainings; number of accreditations; number of disciplinary cases and results; and other governance related issues from the area of practice.
- c) The National Council, shall collate the returns filed by practice area committees, and file returns to the Department of Justice.

4.7.2 Quality and Standards of Practice in ADR

- a) The National Council will develop for each practice area, guiding principles for the development of Codes of Ethical Conduct, Standards of Operational Procedures (SOPs) which shall be the benchmark.. It shall also develop model Codes of Ethical Conduct and SOPs for each practice area, benchmarked on international best practice.
- b) Each practice area will have a Code of Ethical Conduct. In developing these, the Oversight Committees shall be guided by the principles developed by the National Council or may adopt the model codes and SOPs developed by the Council for their practice areas.
- c) Each ADR practitioner shall be trained in their area of practice in training programmes organised by the Practice Area Oversight committees in collaboration with the National Council.
- d) All accreditation of ADR practitioners shall be by the National Council, but administered by the Practice Area Oversight Committees. Practitioners will therefore apply for accreditation to the National Council through their Practice Area Oversight Committees, and the Practice Area Committees shall in consideration of set accreditation rules for the area of practice, and in collaboration with the National Council award the National Council Accreditation Certificate. This is meant to create uniformity of professional quality, and to centralise professional regulation while at the same time leaving the practice area committees to be at the forefront of regulation for their areas of practice.
- e) The National Council, in liaison with the Kenya Institute of Curriculum Development, and Practice Area Committees will develop guidelines for the development of training curriculum; and will also develop model training curricula for each area of practice.

- f) Practice Area Oversight Committees shall, in developing training curriculum for their areas of practice be guided by the guidelines developed by the National Council or may adopt the model curriculum developed by the Council.
- g) The National Council, in liaison with Practice Area Oversight Committees shall develop model accreditation rules for each practice area, which may be adopted by the Practice Areas, or be used by Practice Area Committees in the development of their own accreditation rules, which shall be approved by the National Council.
- h) ADR practitioners shall obtain annual practicing certificates from their Practice Area Oversight Committees upon production of National Council accreditation certificates and fulfilment of Continuous Professional Development requirements
- i) Practice Area oversight Committees shall organise Continuous Professional Development (CPD) programs for practitioners, and certification from these trainings shall form a prerequisite for annual practice certificates.
- h) Practice Area Oversight Committees, in filing their annual returns with the National Council, shall deposit with the National Council the Codes of Conduct; the SOPs; the training curriculum; the accreditation rules; and CPD program schedules developed for their area of practice or amendments thereof.
- i) All institutional providers of ADR services will be required to register with the National Council, and to obtain certificate of registration as an institutional ADR service provider. This certification will be contingent upon production of accreditation certificates for the key practitioners applying for registration.

4.7.3 Enforcement of ADR decisions

In order to ensure that ADR services fulfil the right of effective remedy which a corner stone of access to justice, the National Council on ADR in collaboration with practice area committees, and the judiciary shall establish a working group to develop a framework for efficient recognition, adoption and enforcement of ADR decisions from the respective practice areas.

4.7.4 Capacity Building

- a) Over and above professional training, the National Council, in liaison with Practice Area Oversight Committees will be required to:
 - i) organise other trainings for practitioners on relevant matters,

- ii) organise benchmarking and peer learning events in the region and internationally
- iii) organise trainings for Training of Trainers

4.7.5 ICT

The National Council in collaboration with area practice committees and stakeholders be required to:

- a) develop an ICT strategy for the ADR sector and promote the use of ICT in order to harness the benefits of ICT for ADR;
- b) through training ensure that the sector keeps in tandem with ICT development to prevent disruption of ADR working models in the different practice areas;
- c) review the strategy periodically.

4.9 Increasing Availability, Accessibility and Uptake of ADR services

4.9.1 Availability

- a) The ADR centers across the country proposed under this policy, and the training of professional practitioners, among other initiatives proposed in this policy for embedding, entrenching and mainstreaming ADR will increase physical availability of the service to majority of Kenyans
- b) The Practice Area Oversight Committee on TDRMs and the one on other informal mechanisms, in liaison with the National Council and AJS shall establish mechanisms to remove barriers to the use of TDRMs for certain groups such as women, youth, children, and foreigners, and any other elements of the practice that makes the mechanism unavailable constitutionally.

4.9.2 Accessibility

- a) The National Council in liaison with the Oversight Committees shall establish a working group for purposes of developing a harmonised service cost and remuneration scales for ADR services under each area of practice, with a view to make ADR services affordable and accessible in alignment with article 48 of the constitution which provides that: *'The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.'*

b) The National Council and Practice Area Committees shall promote ICT for the ease of accessibility of ADR services.

4.9.3 Uptake

a) All written contracts and agreements executed in the country shall be required to include an ADR clause. Contracts without such clause shall be presumed to include it.

b) All litigants in civil matters shall be required to first submit their dispute to ADR, and to only submit their matter to the court upon failure of such ADR process to resolve the dispute, or for recognition, or enforcement of the ADR decision. They shall be required to present a certificate from the ADR practitioner confirming the occurrence of the ADR process.

c) The pecuniary jurisdiction of the Small Claims Court shall be increased in order to have more matters processed through adjudication.

d) ADR shall be integrated into the national school curriculum from early childhood education to higher education levels and be taught as a core subject in all university disciplines.

e) All government agencies, and semi-autonomous agencies at both national and county levels shall be required to have an ADR policy, and to have an ombudsperson within the agencies

f) All government agencies and semi-autonomous agencies at both levels of government are required to first submit all disputes between them and other parties to ADR.

g) The National Council in liaison with the Practice Area Oversight Committees, shall organise public awareness programmes in collaboration with various agents of social change including: the media, religious organisations; schools system and CSOs shall undertake public awareness campaigns to educate the public on ADR, its various forms and benefits, and where to access them.

h) The National Council together with stakeholders shall;

i) promote innovation, learning and integration of other types of ADR not yet adopted in Kenya as shall be appropriate

ii) establish mechanisms to introduce ADR in needy areas such as in client advocate fees disputes, which keep justice seekers trapped in adversarial dispute after their primary dispute is resolved. This one could for instance be subjected to compulsory ADR.

i) All tribunals shall establish a mandatory ADR door through which all disputants must pass before submitting their disputes to the tribunal, with the exception of those seeking urgent injunctive relief. This door shall be within the tribunal or through

linkage with ADR providers including court-annexed/based ADR. The tribunals that have moved to the judiciary shall be subjected to Court Annexed Mediation. The capacity of tribunals to offer this ADR service shall be developed.

4.10. Building Knowledge and strengthening Community of practice in the sector

4.10.1 Research

The National Council, and Practice Area Committees shall initiate research programmes and collaborate with JTI, and academia on various areas of ADR with a view to generate information that will inform growth and development of the sector.

4.10.2 Knowledge management

The National Council and Practice Area Committees shall develop a strategy for knowledge management within practice areas and in the ADR sector generally. To this end they shall among other things:

- i) identify and disseminate lessons learnt and good practices in collaboration with all stakeholders
- ii) Ensure technical skills and knowledge are shared within and among all stakeholders
- iii) Establish, manage and monitor a sectoral knowledge platform and innovative approaches in practice areas, and stakeholder institutions.

4.10.3 Community of practice

- a) The National Council shall jointly with the practice area committees organise a bi-annual international conference on ADR and publish a Journal on ADR;
- b) The National Council shall organise activities aimed at building cohesion, and community of practice in the ADR sector and respective practice areas such as: brown bag sessions; webinars; shared blogs; awards for best practice achievements; among other things.

5. POLICY IMPLEMENTATION ARRANGEMENTS

5.1 National Action Plan

A five-year term National Action Plan (NAP) shall be developed as the strategic document for the implementation of the policy. Annual operational plans shall be developed to guide and pace NAP implementation.

5.2 Resourcing

a) ADR implements and fulfils the Judiciary's mandate on access to justice. To the extent that it serves estimated 90% of the population as opposed to an estimated 10% by the formal courts, it deserves commensurate resource support. In light of its commitment to the realisation of the right to access to justice under Article 48, and its acknowledgement of the huge role the ADR sector plays in accessing justice to Kenyans, the Government shall allocate ring-fenced funding for the implementation of this policy through the Department of Justice based on need and affordability. This funding shall be managed by the National Council on ADR.

b) The Government shall further endeavour to:

i) Ensure that adequate resources are allocated to ADR in a predictable, gradual, and long-term manner.

iii) Increase public expenditures to support ADR

iv) Encourage the use of devolved funds for implementing the ADR policy.

v) Adopt a taxation policy that ensures that there are adequate resources available to ADR through tax relief

vi) Through the National Council, establish regulatory frameworks and systems to ensure the accountability, transparency, and reporting of all contributions to social protection.

c) Funding shall also be sourced from non state actors including:

i) *Private Sector Funding:* The private sector is a principal beneficiary of ADR and has an interest in ensuring timely and quality ADR services for fast enforcement of contracts and resolution of commercial disputes. Therefore, the Policy expects the private sector

to contribute to the strengthening of ADR mechanisms as part of corporate social responsibility (CSR).

ii) *Development Partners*: The Government and its development partners will work closely together to ensure that ADR is funded in a regular, predictable, and sustainable way. The Government shall put mechanisms in place to consolidate the funding for ADR

iii) *Community Funding*: The National Council shall in consultation with communities, develop a mechanism for strengthening the existing TDRMs. The Government shall help communities to forge and sustain strategic links and to identify opportunities for ADR support.

iv) *Voluntary Organizations*: Voluntary organizations including NGOs, CBOs, FBOs, foundations, and trusts will be coordinated and assisted by the National Council to review, strengthen, and align their interventions with those of other actors to take advantage of any synergies in programming to strengthen and support ADR.

vi) *Sector Development Fund*. The National Council shall establish the ADR Development Fund. This fund shall be supported by the revenue collected from various services to stakeholders such as registration; and training and any other income generation activities that the Council may engage in. The resources will go towards supporting unfunded activities of the National Council.

5.3 Monitoring and Evaluation

A monitoring and evaluation framework will be developed to evaluate the progress made in the implementation of this policy. The National Council will prepare annual monitoring and evaluation reports and share with all stakeholders on the implementation progress. The Department of Justice shall report to parliament on the implementation of the policy.

5.4 Policy Review

This policy will be reviewed after a period of five years in tandem with the NAP, or any other period as shall be determined by the ministry responsible.