ALTERNATIVE DISPUTE RESOLUTION POLICY

DRAFT

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Acronyms

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

Executive Summary

This policy has been developed through the joint efforts of the Nairobi Center for International Arbitration (NCIA); Judiciary; the Department of Justice; stakeholders from across the country.

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; the political pillar of Vision 2030; and the Judiciary's 'Sustaining Judiciary Transformation Framework'.

The rationale of the policy includes the fact that: 90% of Kenyans access justice through Alternative Dispute Resolution(ADR) mechanisms yet it has not been supported to ensure quality, affordability and availability of the service; it de-clogs the court system; ADR, through its reconciliatory and non-adversarial nature is a major contributor to peace and cohesion in the country; and it is a driver of Foreign Direct Investment as evidenced by the improvement of Kenya's rating on the World Bank report on Ease of Business Index 2017 to position three in Sub-Saharan Africa as a result of among other named reasons, the Court Annexed Mediation program at the judiciary. Furthermore, inadequate access to justice is negatively correlated to development.

The purpose of this policy therefore is to strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) practice and uptake in the Country in order to achieve optimal delivery of access to justice for all Kenyans. It aims to create an efficient ADR system that will provide quality justice services, is strategically linked to the formal system, while at the same time maintaining its autonomy as an informal system.

The policy presents the current status of the ADR system in the country, and in discerning the problem identifies challenges, needs and gaps including: lack of uniform understanding of key ADR terms and concepts; inadequate institutional, legal and policy infrastructure; inadequate governance and regulatory mechanisms; weak intra-sector coordination and linkage with the formal sector; inadequate availability, accessibility and demand of ADR services; inadequate capacity within ADR practice areas; inadequate resources; lack of harmonised standards; and weak sectoral governance and oversight among other things.

The document stipulates proposed government commitments towards addressing these challenges and gaps, including:

a) taking an inclusive approach to articulating the definition and scope of ADR
b) situates the oversight mandate for the sector in the Nairobi Center for International Arbitration (NCIA);

b) establishing the Practice Area Committees (PACs) for ADR practice areas in charge of growth of their respective areas of practice;

c) encouraging the establishment of the ADR Centre at the Judiciary as the focal point for linkage and coordination with the ADR sector, and promotion of ADR at the judiciary;

d) establishing of regional ADR centers at the locational level, hosted by Chiefs offices in a collaborative initiative with the Provincial Administration Services under the Ministry of Interior and Coordination of National government;

e) enactment of an Alternative Dispute Resolution Act which shall be the framework legislation for the ADR sector;

f) encouraging the establishment of a special ADR registry at the judiciary for the adoption and recognition of ADR decisions, awards and settlements;

g) proposing strategies and modalities for the promotion of availability, accessibility and uptake of ADR in the country;

e) inculcating ADR as a way of life through embedding, integrating and mainstreaming it in all spheres of life such as through school curricula and through agents of social change;

f) promoting self-regulation and governance of the sector;

g) establishing of programmes for capacity development; quality control; research and knowledge management and leveraging of ICT for ADR development;

h) developing 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, rationale, vision, mission, objectives and risks and assumptions of the policy

Part 4. Proclaims government commitments in policy statements mapped on identified problem areas

Part 5. Presents the policy implementation arrangements

THE 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 nationwide. The core product of the workshop deliberations was a Draft zero policy document. This draft policy document was discussed and deliberated on by over 600 stakeholders in eight representative and participatory regional forums. The Zero draft was refined with input from the forums to produce the Draft Policy for a national validation forum with representation from across the country. This Draft Policy will be refined with the comments from the validation forum to produce the Green Paper Version of the ADR policy. This is the version that will be subjected to the formalisation and adoption processes to produce the White Paper Version policy document which shall be the formal national policy on ADR.

1. POLICY CONTEXT

1.1 Background

1.1.2 A major apparatus for access to justice

ADR is commonly defined as any process or procedure for resolving a dispute other than judicial determination by a judge/magistrate in a standard statutory court. To the extent that ADR results in resolution or settlement of disputes, it is considered an apparatus for access to justice.

Access to justice is a fundamental right that generally guarantees every person access to an independent justice apparatus and an 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 and remedies through formal or informal processes and institutions of justice in compliance with constitutional and international human rights standards.

From a human rights perspective, 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, including the state itself are accountable to the properly promulgated laws of the country. 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 also 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 in post-independence Kenya has however mostly 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 only between 4-10% of the population access justice through the courts, and 90-96% do so through alternative dispute resolution mechanisms. As such ADR is an essential pillar in the project of access to justice as it serves a 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 the delivery of justice, has increased the uptake and infrastructure of ADR in Kenya especially after the promulgation of the 2010 Constitution which created a constitutional legitimacy base for its promotion under Article 159(2).

This growth has however been sporadic and unregulated, leading to fragmentation, duplication, inconsistency of standards and confusion among service providers over various sector issues such as ADR qualifications, standards, practices and inter-disciplinary competition among other challenges identified in the policy.

1.1.2 The normative framework for ADR

The normative framework for ADR has grown significantly over the last nine years after promulgation of the constitution, as evidenced by provisions in many laws supporting and promoting the use of ADR. Frameworks for Internal rules of procedure for key areas of practice have also significantly developed such as in mediation and arbitration. Various forms and levels of legislation entailing referral and triggering mechanisms for ADR have also developed in various sectors of the country.

a) Constitutional provision

Of direct relevance to ADR is Article 159(2) which stipulates how 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*'. Article 159 (3) provides for the promotion of traditional dispute resolution 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) (which mandates the National Land Commission to use TDRM) promote the use of ADR. Through these provisions, the constitution widens the scope of the use of ADR in dispute resolution including traditional dispute resolution mechanisms.

b) International instruments

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 ICCPR for instance requires 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'.*

There has further been increasing normative development on ADR 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 developments 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 to the Arbitration ACT 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.

c) National legislation

The Civil Procedure Act (CPA) and rules, Chapter 21 contain provisions with some of the greatest potential for triggering ADR in the country. They provide an opportunity for parties to a matter before the court to utilise arbitration (section 59); mediation (section 59A, 59B & 59D; and any other method of alternative dispute resolution where the parties agree or the court considers the case suitable for such referral. It is under these provisions that the Court Annexed Mediation, and the Mediation Accreditation Committee is established. Furthermore, Order 46 Rule 20 of the Civil Procedure Rules provides that the court may utilise at its discretion any form of alternative dispute resolution.

The Arbitration Act, 1995 and the Arbitration Rules 1997 form the principal legal framework governing Arbitration in Kenya**.** The Nairobi Centre for International Arbitration Act No. 26 of 2013 establishes the Nairobi Centre for International Arbitration (NCIA) as a Centre for the promotion of international commercial arbitration and other alternative forms of dispute resolution, with the objective among others to: coordinate and facilitate, in collaboration with stakeholders 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 2of 2016; and The Commission on the Administration of Justice Act, 2011 among others.

1.1.3 The National Development Context

The Sustainable Development Goals (SDGs) that constitute Agenda 2030, are the global development policy blueprint. 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. Kenya strategically maps each of the 17 SDGs with Vision 2030 Medium Term Plans (MTPs) 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.

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, including: increasing service availability and access (or reducing barriers) to justice.

The judiciary's current strategy document, the 'Sustaining Judicial Transformation'(SJT)has as a core goal *''a people-focused delivery of justice''*, with the specific objective to among others '*increase access to and expeditious delivery of justice'.* One key strategy towards this goal is *'promoting and facilitating Alternative Dispute Resolution (ADR)'*.

1.2 ADR Sector Overview

1.2.1 Types of ADR mechanisms

A number of different mechanisms are applied in the practice of ADR in Kenya. The differentiation between the mechanism is mostly a function of the role of the third party or the 'neutral' in the ADR process. Based on this element, ADR can be classified into three primary types of mechanisms: adjudication-based process; recommendation-based process and facilitation-based processes. In some instances, there may be a combination of these processes.

In *adjudication-based processes*, the role of the neutral is to make a decision for the parties after some form of hearing or decision-making process. That decision is binding on the parties either by consent or by force of law. In these processes preserving the relationship of the parties is not an important consideration of the parties. Mechanisms falling in this classification in Kenya include arbitration, expert evaluation, adjudication and tribunals.

In *recommendation-based processes*, the neutral makes suggestions to the parties on how the dispute should be resolved. Although the parties are free to reject these recommendations, the neutral party's position and influence can be highly persuasive. Examples of mechanisms falling in this classification in Kenya are: conciliation and early neutral evaluation. In these processes preserving the relationship of the parties is an important consideration of the parties.

In *facilitation-based processes*, the neutral party has no formal role in the substantive decision making on how to resolve the dispute as that responsibility rests with the parties themselves. The neutral's role is to set up the process, merely facilitating the parties' communication towards decision making. Mechanisms falling within this classification that are practiced in Kenya include: mediation; stakeholder facilitation; dispute resolution boards, and ombudsman processes, although the latter two combine facilitation and adjudication-based processes. In these processes preserving the relationship of the parties is an important consideration of the parties.

Key providers of ADR in Kenya that utilise a combination of adjudication, recommendation and facilitation processes, depending on the nature of dispute and circumstances of the matter include traditional dispute resolution mechanisms such as councils of elders, provincial administration and faith-based providers.

Other mechanisms applied in Kenya include hybrid ADR which combine different mechanisms such as mediation and arbitration; convening, fact finding, private judging, and peer review panels among others.

The mechanisms that are most widely utilised in Kenya are: mediation, arbitration, and TDRMS, provincial administration and faith-based providers.

1.2.2 ADR practice in different sectors

ADR has taken root and is practiced in various key industries and sectors including electoral justice; commercial sector; family matters; environmental justice; land; environment; taxation; energy; construction; employment and labour and also in criminal justice among others.

a) *ADR in Electoral Justice*.

The Second Schedule of the Elections Act provides for establishment of various mechanisms for alternative dispute resolution including the Electoral Code of Conduct Enforcement Committee (ECCEC); the Constituency Peace Committees (CPCs). In addition, section 23 of the Schedule provides that all parties must outline the internal political party dispute resolution mechanisms. Further, section 39 of Political Parties Act establishes the Political Parties Disputes Tribunal (PPDT) to hear and determine disputes from political parties.

b) ADR in family law

Section 68 of the Marriage Act provides for mediation and conciliation of disputes in customary marriages. Under the Children's Act 2001, the office of the Director of Children's Services is among other things empowered to mediate 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 the National Legal Aid Services (NLAS), and CSOs such as FIDA(K), TDRMs also apply mediation in family matters.

c) ADR in the Commercial Sector

Arbitration is the most established mechanism of ADR that is 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 to deal with commercial and tax matters. Commercial mediation is also offered and promoted by the NCIA.

d) 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 include 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.

e) 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 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.

f) ADR in Environmental disputes

Traditional conflict resolution mechanisms have been employed for a long time 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. *Mediatio*n 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.

g) 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.

h) ADR in Civil Justice

The bulk of ADR services are provided within the civil justice area, and mostly by private 'free standing' or institutional ADR service providers without initiative or connection with the formal judicial system. The Civil Procedure Act and Rules creates the opportunity for this for matters already before the court. The court system also has created legislative imperatives for court promoted ADR. The High Court (Organization and Administration) Act, 2015 for instance 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'*.

i) 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 through TDRM 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 plea-bargaining as an ADR mechanism has also been promoted by courts and Department of Public Prosecutions (DPP) as provided for under section 137A of the Criminal Procedure Code and further facilitated by the Criminal Procedure (Plea Bargaining) Rules 2018. The courts have also been using reparation and reconciliation, and increasingly diversion in juvenile matters amongst other forms of ADR, with the only challenge being that parties sometimes make the request too late in the process. Magistrates also utilise the insights provided by social

context, and pre-bail reports from probation and children's officers' reports to screen the cases that can be settled by ADR and to encourage parties to settle certain matters out of court.

j) 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. It also provides the court may also adopt alternative dispute resolution and traditional conflict resolution mechanisms as envisaged in Article 159 of the constitution.

k) 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.

l) 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'.*

m) ADR in Intergovernmental Disputes

Article 189 (4) provides that *'national legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms including negotiation, mediation and arbitration.'* Accordingly the Intergovernmental Relations Act, 2012 was enacted to, among other things: *'…establish mechanisms for the resolution of intergovernmental disputes ..'*. Section 30(2) requires national and county governments 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. 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 a last resort'.* Intergovernmental Relations (Alternative Dispute Resolution) Regulations 2018 were developed to operationalise these provisions.

n) Constitutional Commissions

The commissions and independent offices established under Chapter 15 of the constitution have been clothed with the necessary powers for ADR under Article 252 (1) (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'*.

o) ADR in administrative justice

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

p) ADR in National Peace Building Initiatives

*T*he 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 among other things incorporate traditional justice resolution mechanisms into the formal legal-judicial system of conflict mitigation. Furthermore, the *National Policy on Peacebuilding and Conflict Management, 2012* 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. The policy also recognized the critical role of traditional conflict resolution mechanisms such as community declarations and social contracts in line with the Constitution.

Furthermore, 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 people of 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.

1.2.3 Institutional framework in ADR

Institutional typology on ADR in Kenya is mainly public or private. Public institutions are those created by law such as the Nairobi Centre for International Arbitration; the judiciary which houses the Court Annexed mediation; tribunals; constitutional commissions; and any other infrastructure that is given an ADR mandate by law.

Private ADR institutions include for-profit and non-profit organisations, religious organisations, and community-based entities such as councils of elders. The levels of institutional development vary depending on the area of practice.

a) Mediation

In the public sector, the Judiciary through its Court Annexed Mediation program, provides an institutional framework for court connected mediation. The NCIA and the National Legal Aid Service (NLAS) are some of the state institutions offering mediation services. Many other state, or semi-autonomous institutions have been given mandates to utilise mediation as illustrated in the sections above on the analysis of the legal framework including constitutional commissions; electoral mechanisms; land and environmental agencies and national peace infrastructure among others. In the private and non-state sectors institutional actors include: the Strathmore University Dispute Resolution Centre; and FIDA(k), Tatua Centre, Dispute Resolution Centre, Wasilianahub Mediators Africa and Kituo cha Sheria, among others.

b) Arbitration

In the public sector, Institutional actors in arbitration in Kenya are mainly: The Nairobi Centre for International Arbitration (NCIA) and Kenya Sports Disputes Tribunal whose mandate for this emanates from the Sports Act 2013. In the private and non-state sectors actors include the Chartered Institute of Arbitrators (Kenya Branch); Dispute Resolution Centre (DRC); The Strathmore Dispute Resolution Centre (SDRC).

c) Traditional Dispute Resolution Mechanisms

In most rural communities, there exist various institutions established through tradition to maintain order, peace, and community cohesion. 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. They are mainly established by the customs of the various mainly rural communities in Kenya. Furthermore, 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 and has taken special initiative to strengthen TDRMs.

d) Civil Society Organizations

CSOs are champions of ADR in their access to justice work, through their community outreach programs. They engage in ADR development through research and advocacy, and contribution in the development of the law and policy. Some relevant and active CSOs in this regard include: The *Maendeleo ya Wanawake*, FIDA Kenya, Kenya Human Rights Commission, Muslims for Human Rights, Kituo Cha Sheria, International Commission of Jurists ICJ(K) amongst others.

e) Faith-based organisations

Faith-based organisations represented by the religious leaders are major actors in dispute resolution for the members of their congregations. The position of trust and eminence granted priests, pastors, Imams, Sheikhs, pujaris, and other religious leaders by the communities often finds them invited to facilitate resolution of family and other disputes or conflicts. For Islam for instance, ADR is practiced under the *maslah* system, which is a principle of shariah law, and generally denotes prohibition or permission of a thing on the basis of whether it serves the public interest of the Muslim community (*ummah*). Determination of disputes under this system is based to a great extent on this principle. In some communities applying *maslah* such as the Somali in Northern Kenya however, the principles and institutions of religious law may be combined with cultural norms in a bid to adapt to the realities of the parties and communities and to arrive at a realistic/practical decision/award. National level institutions representing faith-based organisations include: National Council of Churches of Kenya and the Council of Imams and Preachers of Kenya (CIPK), and Hindu Council of Kenya among others.

f) Provincial Administration

The provincial administration also provides an avenue for dispute resolution for communities. Chiefs 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.

There is therefore a significantly established and growing network of laws and institutions promoting and providing ADR services at different levels and sectors in Kenya.

2. THE POLICY PROBLEM

Despite the noted legislative and institutional growth in the ADR sector, certain challenges, gaps and needs present dysfunctional conditions that inhibit or undermine the full realisation of the potential of ADR in the country and inhibit its further development.

2.1 Conceptual and Definitional challenges and unclear scope of ADR

a) *Conceptual and definitional problems.*

Conceptual issues in ADR have to do with the definitions of key 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 no resource such as a 'glossary of terms' to guide practitioners, users and regulators on common terminologies used in ADR for uniformity of understanding and usage. There is also inadequate clarity as to what conceptions of justice are applied in ADR- whether it is the legal conception based on clearly stipulated rules, principles and individual rights, or other forms such as social and distributive justice which are based on distribution of wealth and opportunity and on communal interests.

b) Unclear Scope of ADR.

The inadequate articulation of the scope of AD*R* is also an important conceptual gap, which undermines a holistic 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 practitioners and hence limiting its utility towards the goal of access to justice.

c) *Jurisdictional Challenges.*

Lack of clarity of the jurisdictional limits of ADR also undermine the scope of ADR. For instance, there is a lack of consensus on the extent to which criminal justice can be dispensed through ADR. This is because the two key parties in a formal criminal matter are the state and the accused person. The underlying concern in criminal justice is primarily with the public goods of security, order and lawfulness and not restoration or reconciliation. The challenge that ADR presents in criminal justice is how to balance the state's aim of protecting the public goods of security and order with the restorative and reconciliatory approach in ADR which focuses on the interests of the victim and the accused, and the social goods of communal 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. Further it is not clear in what matters and circumstances ADR is not appropriate or legally acceptable.

d) *Question of Justiciability.*

Justiciability is a legal concept that concerns the limits upon legal issues over which a court can exercise its judicial authority. Elements of this include the concept of 'standing' which is used to determine if the party bringing the suit is the appropriate one to do so, and also whether the court before which the matter is brought possesses the ability to provide adequate resolution of the dispute. Other elements have to do with the substance of the matter as for instance whether parties are just seeking an advisory opinion. There must also be an actual controversy between the parties, that is the parties should not be seeking the same result, but different outcomes. Furthermore, the issue or question before the court must neither be unripe nor moot. An unripe question is one for which there is not yet at least a threatened injury to the plaintiff or where the available judicial alternatives have not all been exhausted. A moot question is one for which the potential for an injury has ceased to exist, or where the injury has been removed. Non-justiciable matters may also be matters which are impossible to resolve because of unavailability of judicially discoverable and manageable standards for resolving them or there are no remedies available for it such as for instance claims of witchcraft.

There is no clarity whether these are matters of concern to ADR forums as dispute resolution forums.

2. 2 Legal gaps and challenges.

a) *Inadequate implementation of existing laws*.

As illustrated in analysis further above, 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 ADR in the country. These include: The Intergovernmental Relations Act, 2012; The Civil Procedure Act and Rules; the Land Act 2012; The Industrial Court Act, 2011; Environmental and Land Court Act, 2011; Small Claims Act, No 2of 2016; and The Commission on the Administration of Justice Act, 2011 among others.

b) Lack of framework legislation.

*T*hese 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 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 standards development in training and accreditation of practitioners; and also establish an oversight institution for the sector.

c) *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 mechanisms, their recognition and support, and their ability to coordinate with other mechanisms.

2.3 Inadequate and *ad hoc* Institutional development in the sector

d) *Inadequate Institutional development*.

Institutional development in ADR has been *ad hoc* and unstructured. In both the public and private and non-state sector 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. Most public institutions with ADR mandates have not developed sufficient infrastructure for promoting the practice and those ADR mandates are harldy known by the public.

e) *TDRMS lack any institutional support*.

TDRMs have inadequate institutional support. They operate through virtual cultural institutions which have not been formally recognised and which are governed by customary norms. These institutions lack adequate governance and accountability structures and standards of operation within constitutional principles, and have few links and collaboration with other ADR and formal justice institutions.

f) *Silo approach*.

Existing ADR institutions operate in silos with little coordination and collaboration. This occasions duplication, confusion and limits sectoral harmony, and the development of a community of practice in ADR.

g) *Inadequate utilisation of potential in other institutions*.

There are institutions with potential for anchoring,promoting and being access points for provision of ADR services within their insfrastructure such as: chamber of commerce; industry associations; 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 of the institutional capital that these organisations already have for dispensing ADR services needs to be encouraged and structured.

h) *Lack of an oversight institution*.

The ADR sector also lacks an oversight institution hence occasioning fragmented growth, and lack of common standards, coordination and effective regulation and 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 Challenges in Arbitration

Challenges in arbitration include: escalating costs of the service which are sometimes higher than court costs; increasing legal procedures which complicates the process and increases process timeframes; unethical behaviour amongst some practitioners where they deliberately slow down the process to their benefit; inefficient linkage of arbitration with court system for adoption and enforcement leads to long processes in the courts which compromises the efficiency gains of the arbitration process. 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 inadequate awareness about arbitration in the country, and an inadequate number of qualified arbitrators.

2.4.2 Challenges in Mediation

Mediation is the fastest growing ADR practice in the country, and the most utilised process even in other mechanisms such as TDRMs, provincial administration and faith-based mechanisms. 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, there is the perception of a competition dynamic between lawyers and non-lawyer mediators with lawyers said to be claiming loss of business to non-lawyers in mediation. There is also inadequate specialist mediation expertise for instance in areas such as family sector among others.

2.4.3 Challenges in Negotiation

Negotiation is the most widely used method of dispute resolution in everyday life and also within other mechanisms of ADR. 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. There is also no institution championing development of negotiation in the country.

2.4.4 Challenges in 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. It is widely used for instance in family disputes but there is little professional expertise developed within that sector for conciliation. There are also no training programmes for the mechanism in the country. It is also often confused with mediation yet there are major distinctions in their practice. Conciliation is recommendatory while mediation is facilitatory.

2.4.5 Challenges in 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 Courts Act creates a court-practiced ADR by bringing adjudication into the formal practice of the courts albeit maintaining its less stringent procedural approach. Court-practiced adjudication needs to be distinguished from non-court practiced adjudication in the Act so as not to undermine non-court adjudication in the eyes of the public by making adjudication appear like a purely court process, administered by lawyers and one that is restricted to the pecuniary jurisdiction of two hundred thousand shillings. There also lacks training programmes and institutional forms championing adjudication as an ADR mechanism.

2.4.6 Challenges with Ombudsman

This mechanism is little exploited in Kenya. Even though it is mostly visible through 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 utilised 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. In Kenya, the CAJ adopts the Ombudsman model, and has promoted this in all government agencies through complaint mechanisms in each agency. This needs to be supported further and extended to the private sector. The mechanism is under-developed and under-utilised in Kenya.

2.4.7 Challenges with Traditional Dispute Resolution Mechanisms (TDRM)

Key challenges in TDRMs include lack of: clarity of the scope of their jurisdiction; uniformity of procedures; a framework law governing TDRM practice; an oversight institution to manage governance and set and enforce standards in the practice area; a code of conduct for practitioners; sufficient capacity building for practitioners in order to adhere to the principles of justice and of the constitution; sufficient enforcement mechanisms and guidance as to acceptable and constitutional

awards and enforcement mechanisms; inadequate linkages with the formal justice systems and other ADR practice mechanisms; and a remuneration framework of practitioners which affects the availability of the service and creates opportunity for abuse.

2.5 Linkage and coordination challenges

The relationship, linkage and interface between the formal justice system and ADR mechanisms is critical for various reasons including enforcement of ADR settlements and the fact that the judiciary is major referral for matters to ADR. Similarly, ADR is beneficial to the formal justice system as it de-clogs the courts, hence increasing their efficiency. The two systems cannot therefore be completed severed. Furthermore, under constitutional logic, the ADR mechanisms are executing the mandate of the judiciary through their informal methods. The current mostly de-linked status of the two creates a bifurcated justice system, of parallel apparatus with a lot of lost potential and opportunity in collaboration and mutual support. While caution should be taken not to co-opt ADR within the formal justice systems, there is a need to forge strategic linkages that are mutually beneficial to both.

Coordination within the ADR sector itself is weak as evidenced in the disparate development of standards, fragmented institutionalisation, and vacuum in sector governance infrastructure.

2.6 Enforcement Challenges

For most non-adjudicative mechanisms such as mediation and conciliation for which court adoption of settlements is not a requirement of the process, there is no established mechanism at the courts for recognition or registration of such settlements for parties who by consent would wish to have their agreement adopted by a court. Mechanisms such as TDRMs, often have some enforcement mechanisms, but some of these are unconstitutional. For those mechanisms that require court adoption by law such as arbitration, the quality of timeliness and confidentiality may be compromised due to delays in the court process, and its public nature. These delays are sometimes caused by unnecessary application of civil procedure rules on the arbitration awards and mediation settlements in adoption processes. There is a need for custom made linkage between courts and ADR mechanisms such as for instance special express registries for these settlements and a system of coding of names and details to preserve confidentiality.

2.8 Technological gaps

ICT has the potential to disrupt working models within ADR as in any other sector. It is therefore imperative that there is in-tandem development of ICT capacity in the sector. ADR is already 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.

2.9 Gaps in sector regulation and governance

Some areas of practice have developed standards of practice especially mediation and arbitration. These are however not standardised or uniform and this creates confusion and also challenges quality control. There are no standards in some areas such as TDRMS, provincial administration and faith-based provides. There is furthermore no framework of principles guiding development of standards nationally and no regulatory institutions to manage disciplinary processes and enforce standards for practitioners and institutions.

3. POLICY STRATEGIC FRAMEWORK

3.1 The Rationale for the policy

The logic for the development of this policy is based on the following facts and realities:

a) Access to justice is an important right that enables the realisation of other rights and of the rule of law, and ultimately development. Realisation of this right to majority of Kenyans is a catalyst to the realisation of the government's development goals;

b) The justice resources within the formal court system only provide access to justice to 4-10% of Kenyans. 90-96% of Kenyans access justice through alternative dispute resolution mechanisms. It is therefore imperative that these mechanisms are supported and developed further;

c) ADR, through its non-adversarial and reconciliatory nature of most of its processes is a useful tool for the promotion of peace and social cohesion, which are fundamental prerequisites for development;

d) ADR has been proven to assist in de-clogging the courts as evidenced by the CAM which has had a success rate of 67% hence relieving the courts of many cases that would have unnecessarily taken up time and resources. De-clogging the courts leaves them free to focus on important matters that really need judicial adjudication, and to improve their efficiency which is a key element of justice.

e) The need for promotion of ADR is anchored in the constitution under Article 59(2), national legislation, and international and regional human rights instruments. It is also provided for in development framework at all levels including in SDG 16.3; Vision 2030; and the Judiciary's Sustaining Judicial Transformation Framework.

f) 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 and to increase its effectiveness, availability and accessibility to the public.

3.2 Policy Vision

The vision of the policy is that of:

'An efficient sector, offering quality, accessible and available ADR services that are the preferred mode of access to justice.'

3.3 Policy Mission

The mission of the policy is:

'To promote the development of an efficient ADR sector that will offer quality, easily accessible and available ADR services.'

3.4 Policy Objectives

The objectives of the policy are:

a) To provide definitions for key ADR terms, and to outline the scope of ADR.

b) To strengthen the legal and institutional frameworks supporting the ADR sector

c) 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

d) To strengthen sector governance, regulation and capacity building in order to enhance the quality, availability and accessibility of ADR services

e) To strengthen different mechanisms of ADR for provision of best quality, available and accessible ADR services

f) To strengthen the ADR sector through research, knowledge development, community of practice and leveraging of ICT in order to enhance quality and innovation

g) To Strengthen the practice of ADR in all sectors and to inculcate the culture of ADR in Kenya, and to make it the preferred mode of dispute resolution

h) 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, government institutions such as the judiciary should restrict their hegemony and undertake only those initiatives which exceed the capacity of individuals or private groups/sectors (such as the ADR sector) acting independently. Government should support the smaller community (ADR sector) and help where needed in the coordination of its activities in the rest of society for the sake of common good.

3.6 Policy Approach

3.6.2 Human Rights 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 implementation of policies. 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. 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.

3.7 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 is mandated to develop a gender and equality strategy for the ADR sector, including the strategy of gender and equality mainstreaming in all elements and activities of the sector such as training; appointment of third parties; and representation in the council, practice area committees and other entities, forums and opportunities in 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) Technological 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

f) Corruption

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

4. POLICY STATEMENTS

4.1 Definitions

4.1.1 Meanings and definitions of key ADR terms

a) The policy adopts the following meanings for key ADR terms:

''*Alternative Dispute Resolution*'' 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'' is used inclusively to refer to an unresolved complaint, grievance or disagreement. It is used inclusively to include: situations where parties or stakeholders consider that there is a conflict (of whatever magnitude); situations where no dispute exists but where there is a 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 institutions and is holding a current practicing certificate. In regard to TDRMs, an ADR Practitioner must in addition be a person who is by traditional custom of his/her community recognised as possessing the skills, wisdom and social standing required to offer that service.

The definition of ADR practitioner in this policy is exclusive to persons offering ADR services *to the public*. The policy recognises that ADR services are also widely offered in informal set-ups on an *ad hoc* basis by persons not trained in ADR and not purporting to offer their service to the public but to persons within close proximity such as family and neighbours. These are important actors in the continuum of ADR who play an important role in those private spaces. However, where a person holds themselves out as offering such a service to the public, they will be required to get training and register as ADR practitioners for the service that they offer.

b) The oversight body for the sector, in collaboration with stakeholders will develop a glossary of all other important and emerging ADR terms which will be reviewed periodically.

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 matters

iii) criminal matters considering the different types of ADR mechanisms in criminal justice practiced in comparable jurisdictions.

iv) all the practice mechanisms and sectors of application covered by the policy

v) matters that could be considered justiciable and those not justiciable,

iv) private and public disputes,

v) 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) new and innovative forms of ADR.

4.3 Strengthening the Institutional Framework for ADR

4.3.1 The Oversight ADR Body and Practice Area Committees

a) Nairobi Centre for International Arbitration (NCIA) as the ADR Oversight Body

The Nairobi Centre for International Arbitration (NCIA) will under Section 5(f) of its constituting Act
be the oversight body for the ADR sector.

b) Practice Area Committees (PACs)

The NCIA in collaboration with stakeholders will establish six practice area committees for ADR
practice areas of: Arbitration; mediation; TDRMs; provincial administration; faith-based bodies; and
an omnibus PAC (for Ombudsman, conciliation, DRBs, tribunals among other mechanisms).

c) The NCIA will oversee the implementation of this policy and its functions in this regard will be among others to:

i) promote public understanding of ADR as an apparatus of justice, including the understanding of ADR terminologies scope and processes;

ii) promote further development of the legal and institutional frameworks supporting the ADR sector;

iii) enhance and strengthen coordination, collaboration and linkage within the sector, and between the ADR sector and the formal justice system in order to increase harmony and efficiency;

iv) strengthen sector governance and regulation in order to enhance the quality, availability and accessibility of ADR services,

v) promote and engage in capacity building for the sector;

vi) strengthen different mechanisms and the practice of ADR in all sectors of the country.

vii) promote and inculcate the culture of ADR in Kenya and to increase public confidence and adoption of ADR as the preferred mode of dispute resolution in the country

viii) strengthen the ADR sector through research, knowledge development, community of practice and leveraging of ICT.

ix) provide oversight over the Practice Area committees and over all mechanisms for ADR established by law within other state and SAGAs

d) The functions of the PACs will be to:

i) enhance the quality of ADR services in their area of practice, through the development and enforcement of tools of regulation and governance including codes of conduct; standard operating procedures; remuneration schedules; training curriculums and certification and accreditation mechanisms; and Continuous Professional Development (CPD) programs among other things:

i) promote public awareness of the ADR practice and service;

ii) participate through representation on NCIA board and to support it in its endeavours;

iii) promote coordination and collaboration with other practice areas and with the formal justice system;

iv) promote policy and legislative development in their areas of practice in order to create alignment with the policy, and the proposed Alternative Dispute Resolution Act, and to strengthen the practice.

v) promote knowledge development and the growth of a community of practice of the ADR area of practice;

f) The NCIA will have oversight authority over the PACs and over all mechanisms for ADR established by law within other state and SAGA agencies.

a) The NCIA will in collaboration with the line ministry for provincial administration, establish ADR centers at the chiefs camps in every location. The functions of the centers will be to:

i)provide information on all forms of ADR mechanisms and processes to members of the public

ii) provide members of the public with a list of certified ADR practitioners nearest to them

iii) to offer a sitting facility for ADR sessions for members of the public

4.3.2 Judiciary ADR Centre & special ADR registries

a)The judiciary is encouraged to establish an ADR centre which will:

i) house and expand the CAM and promote other court- connected ADR

ii) promote ADR by building capacity of judicial officers,

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

a) There shall be enacted an Alternative Dispute Resolution Act, which will be the framework legislation for ADR in the country.

b) The Nairobi Centre for International Arbitration Act will be amended as shall be necessary to align it with this policy.

c) The NCIA in collaboration with stakeholders will promote the full implementation of existing laws that promote ADR, and advocate for similar legal provisions in other needy sectors.

d) All new legislation enacted in the country at both levels of government shall incorporate ADR provisions, and all amendment legislation shall introduce ADR provisions where none existed in the amended law.

e) All PACs will promote legal and policy development in their areas of practice, in furtherance of the goals of this policy.

f) All laws with definitions of ADR shall be amended to align them to the policy.

4. 5 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 promote autonomous operation and growth of the ADR sector.

b) The linkage between the formal justice system and non-court ADR mechanisms will be in areas of mutual benefit such as enforcement and referral.

d) All service providers in ADR are encouraged as good practice to collaborate with each other towards the ends of dispute resolution.

4.5.1 Regulation and governance

a) The NCIA will provide global oversight of the sector and develop guiding principles and models of standards of training and practice.

b) PACs will provide oversight of their areas of practice and, guided by the standards and guiding principles developed by NCIA, develop codes of ethics, training curriculums, and establish certification mechanisms for practitioners in their areas of practice.

c) PACs will provide disciplinary oversight of practitioners in their areas and will towards these ends establish the appropriate mechanisms.

d) PACs will report to the NCIA on governance and regulation in their practice areas.

4.5.2 Quality and Standards of Practice in ADR

a)Training.

i) Each ADR practitioner will be trained in their area of practice with curriculum custom made by
NCIA in collaboration with the respective PACs. The NCIA will provide certification to ADR institutions for training purposes, and also to appropriate academic institutions with the capacity to
offer training services using the NCIA curriculum.

ii) In conducting training programmes, the certified training institutions will tailor the training to
special needs in specific communities based on the typology of disputes prevalent in those areas. For
instance in coast county land issues are generally at the centre of most disputes, and in Kwale and
Kilifi counties, cases of incest and SGBV are uniquely prevalent there and are frequently presented to
elders and other ADR mechanisms.

b) *Accreditation*.

There will be a two-tier accreditation model for the sector as follows:

i) *generalist accreditation* which will be given by the institutions which will be certified by NCIA as

accrediting institutions for specific areas of practice.

ii) *specialist accreditation* will be given by institutions certified by NCIA as accrediting institutions for
specialised areas of practice. This will be further accreditation intended for practitioners who wish
to practice under institutions such as Mediation Accreditation Committee of the Cout Annexed
Mediation which requires their practitioners to undergo further specialist training and accreditation.

iii) The accreditation rules will be developed by NCIA in collaboration with PACs and the specialist
accrediting bodies.

c) *Continuous Professional Development (CPD)*.

NCIA in collaboration with PACs will organise CPD programs for practitioners, attendance of which shall be a prerequisite for annual practicing certificates.

d) Institutional ADR providers.

All institutional providers of ADR services will be required to register with the NCIA, and to obtain a certificate of registration as an institutional ADR service provider. NCIA will develop the criteria and preconditions for the certification.

e*) Standard Operating Procedures*

PACs in collaboration with NCIA will develop and integrate in training curricula, Standard Operating Procedures (SOPs) for special, sensitive and unique cases including:

i) cases involving children

ii) GBV and SGBV cases

iii) cases involving Persons Living with Disability (PLWD)

f) Timeframes for ADR processes

PACs, in developing standards and internal rules of process will provide guidance as to acceptable time frames for ADR matters in their areas of practice,

h) Limited Liability for practitioners

The proposed ADR Act will provide for the protection and limitation of liability for practitioners in providing their professional services.

4.5.3 Enforcement of ADR decisions

a) Judiciary is encouraged to develop a special ADR registry for expeditious adoption and enforcement of ADR awards and settlements.

b) The NCIA and the respective PACs will establish a working committee to develop a framework for efficient recognition, adoption and enforcement of ADR decisions and settlement arrived at through from the unique ADR practices such as TDRMs, and those provided by faith-based, and provincial administration providers.

4.5.4 Capacity Building

a) Additional training and mentoring of new practioners

Over and above professional training, the NCIA, in liaison with PACs will:

i) organise other trainings for practitioners on relevant matters;

ii) organise benchmarking and peer learning events in comparable jurisdictions;

iii) organise trainings for Training of Trainers;

iv) collaborate with NLAS, CSOs and institutional ADR providers to establish mentoring programmes for newly trained practitioners

b) Training for relevant government officers and agencies

NCIA will collaborate with the relevant state agencies to develop capacity building programmes for officers and agencies who are already carrying out ADR services or who are otherwise strategically situated to offer these to members of the public in the course of their normal work including: the police; Court Users Committees; judges and magistrates; probation officers; children's officers, chambers of commerce and peace committees among others.

c) Leveraging already existing infrastructure for ADR

NCIA will take stock of state and SAGA infrastructure that can be used for ADR and take action to collaborate with the respective agencies to build leverage the infrastructure for ADR. For instance, the complaints departments in government offices established through CAJ initiative can be strengthened to also offer ADR services.

4.5.5 ICT

The NCIA in collaboration with area PACs will promote the use of ICT in ADR and towards this end, commission a study on the same, and develop and review periodically an ICT strategy for the ADR sector.

4.6 Increasing Availability, Accessibility and Uptake of ADR services

4.6.1 Availability

a) The proposed ADR centers and the training of additional practitioners, among other initiatives proposed in this policy will increase physical availability of the service to majority of Kenyans

b)The PACs on TDRMs and faith-based mechanisms, in collaboration with the NCIA will work to remove barriers to the use of these mechanism for certain groups such as women, youth, and children, and any other elements that may make the mechanisms unavailable constitutionally.

a) The NCIA in collaboration with the PACs will establish a working committee which will develop harmonised remuneration scales for practitioners for each practice area. In so doing, the committees shall be guided by the principle of affordability as a key pillar of ADR, and that of market forces.

b) The NCIA and PACs in collaboration with the National Council for PLWD, will develop a strategy for promoting accessibility of ADR services to PLWD, and especially enhancing their abilities for direct self-representation in ADR processes, and for serving as ADR practitioners.

4.6.3 Uptake

a) *ADR Clauses in contracts*.

The NCIA, PACs and stakeholders such will popularise, as a good practice, the inclusion of ADR clauses in written contracts and agreements.

b) *Compulsory pre-court ADR for some matters*.

The NCIA in collaboration stakeholders will establish a schedule of civil and criminal matters for which court adjudication will not be available at the first instance, and which must be first submitted to ADR.

c)*Compulsory Pre-court ADR information sessions*.

For all matters that will not fall within the proposed schedule for pre-court ADR, the judiciary is encouraged, as a good practice, to require all parties filing matters in court to attend an ADR information session at the judiciary unit responsible for ADR, or with their lawyers and, having done so, file in court a statement of reasons why ADR is not pursued in their matter.

d) *ADR in education and training curricula*.

ADR will be integrated into the national school curriculum at all levels as a core subject, and also in specialist training curriculum such as that of the disciplined forces, and local administration officers among others.

e) *ADR policies and ombudsman for all government agencies*.

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

f) *ADR policy for NGO and private entities*.

All non-governmental and private entities operating in the country are encouraged as a good practice to develop ADR policies, and where possible establish ombudsman offices within their establishments.

g) *ADR policies and ombudsman for industry associations*.

Industry associations in the country are encouraged as a good practice to develop an ADR policy, to encourage their members to embrace ADR, and to establish an ombudsman for their industry.

h) *ADR policy and capacity for the private sector*

The private sector is encouraged to promote ADR among its members, and to encourage them to develop ADR policies for their entities.

i) *Public awareness*.

The NCIA in liaison with the PACs will organise public awareness programmes on ADR, in collaboration with county governments, provincial administration and various agents of social change including: the media, religious organisations; schools' system and CSOs.

i) *County governments' role*.

County governments are encouraged to support ADR centres and TDRMs in their regions, and to promote public awareness on ADR.

j) *Promoting Innovation in ADR.*

The NCIA together with stakeholders will; promote innovation, learning and integration of other types of ADR not yet adopted in Kenya as shall be appropriate

l) *Role of tribunals*.

Tribunals are encouraged where applicable, to establish a mandatory ADR door through which all disputants must pass before submitting their disputes to tribunals, with the exception of those seeking urgent injunctive relief. This door will be within the tribunal or through linkage with ADR providers including CAM. The NCIA will collaborate with the registrar to develop a programme to build capacity of tribunals for ADR. Tribunals are encouraged to play the role of a referral agent to ADR of matters coming before them to ADR.

4.6.4 Research

a) The NCIA and PACs will initiate research programmes and collaborate with academia and stakeholders on various areas of ADR with a view to generate information that will inform growth and development of the sector.

b) The NCIA and PACs will develop a strategy for knowledge management within practice areas and in the ADR sector generally. To this end they will 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 among all stakeholders;

iii) establish, manage and monitor a sectoral knowledge platform and innovative approaches in practice areas, and stakeholder institutions.

4.6.6 Community of practice

a) The NCIA and PACs will jointly and separately organise forums for sharing ADR knowledge and building cohesion, and community of practice in the ADR sector and respective practice areas.

5. POLICY IMPLEMENTATION ARRANGEMENTS

5.1 National Action Plan

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

5.2 Resourcing

a) The Government will allocate funding for the implementation of this policy.

b) Funding will 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. NCIA will lobby the private sector to contribute to the strengthening of ADR mechanisms.

ii) *Development Partners*

NCADR will collaborate with development partners for technical and financial support towards the implementation of this policy.

iii)*Voluntary Organizations*

NCADR will leverage the resources of voluntary organizations including NGOs, CBOs, FBOs, foundations to strengthen and support ADR.

vi) *Sector Development Fund*

An ADR Development Fund will be established by the proposed ADR Act. This fund will be managed by NCIA and will be funded by the revenue collected by from various services NCIA will offer to stakeholders. The NCIA will also establish a levy to members for support to the fund. The fund resources will go towards supporting un-funded 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. NCIA 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 periodically and at least once in each NAP period.