1ST ANNUAL SDRC RESEARCH COLLOQUIUM

29TH - 30TH AUGUST 2024

REPORT FROM THE COLLOQUIUM RAPPORTEUR

Strathmore University
Dispute Resolution Centre

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RAPPORTEUR REPORT

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ACKNOWLEDGEMENTS

Strathmore Dispute Resolution Center held its inaugural ADR Research Colloquium from the 28th to 30th August 2024 at Strathmore University's Microsoft Auditorium.

This event was a success courtesy of the partnerships with **Strathmore Law School, Mohammed Muigai LLP, KM Associates, CIArb-Kenya Branch, The DR Hub, Amani Communities Africa, Maina & Onsare Partners Advocates LLP.** For this reason, SDRC's Colloquium Organising Committee appreciation to all these partners for their support.

SDRC also acknowledges and thanks all the participants who dedicated themselves to write and present their insightful papers at the Colloquium. Their commitment to sharing knowledge and engaging in meaningful discourse was instrumental in enriching the event's overall experience.

The audience's invaluable contribution did not go unnoticed by the center. For without their active participation and engagement, the colloquium would not have achieved its intended success.

Finally, SDRC acknowledges and commends the dedicated team that planned and steered the colloquium to success.

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A. EXECUTIVE SUMMARY

a) Strathmore Dispute Resolution Center is a premier Alternative Dispute Resolution research and training center dedicated to advance the scholarship and practice of ADR in Kenya and Beyond. Living up to its mandate, the center convened its Inaugural Research Colloquium. The event took place at Strathmore Law. This event was hybrid, accommodating both the in-person and virtual participants.

b) Approximately 100 people (one hundred people)attended the event, including more than 20 speakers who presented their papers.

c) The Colloquium structure included 5 panel sessions that delved into the themes of:

   i. Alternative Dispute Resolution and Access to Justice
   ii. Emerging Trends in ADR
   iii. ADR and the Built Environment
   iv. Mediation and AJS
   v. ADR, AI and Technology

d) **The Programme also included a** *Public Lecture on ADR In the Context of Emerging Challenges Such as Climate Change, Cyber Security and Globalization***.** *Additionally, the programme included a debate on the Role of The Bar, Bench, Academia & Private Sector in Shaping the Future Of ADR.*

B. COLLOQUIUM PROCEEDINGS

Opening and Welcome Remarks

Dr. Francis Kariuki - *Director, SDRC*

In his opening remarks, the director of the Strathmore Dispute Resolution Centre (SDRC) warmly welcomed participants to the 1st Annual Research Colloquium, highlighting the Centre's recent flurry of activities. The Colloquium paved way for a simultaneously concurrent moot court competition and training of trainers' assessment for mediators all within the week.

Dr. Kariuki gave a brief overview of SDRC's history. He noted that for 12 years, SDRC has played a key role in offering ADR services, including mediation, arbitration, and conducting ADR trainings. This Colloquium, he explained, served as a platform for discussions that contribute to the development and growth of ADR research in Kenya and beyond.

The director then recounted the Center's first successfully conducted banking mediation pilot in Kenya, and its playing of a critical role in shaping the Judiciary's Court-Annexed Mediation program. Further, he mentioned that the SDRC has hosted annual summits which have fostered high-level discussions on diverse ADR topics, such as banking mediation and labour dispute mediation. The Director noted that this year's colloquium provides an opportunity for vibrant intellectual discussions on ADR, its role in promoting access to justice, and how it can address systemic inequalities.

He also highlighted the emerging trends in ADR, particularly the impact of artificial intelligence, climate change, and the integration of environmental, social, and governance (ESG) principles in dispute resolution.

The director acknowledged the support of various partners, including the Judiciary, law firms, and other institutions, in the success of the colloquium. He expressed that the papers presented during the event would lead to academic output, emphasizing the importance of publishing these works to benefit practitioners, academics, and consumers of intellectual discourse.

He also outlined upcoming SDRC initiatives, including a mediation training program in the month of September 2024, a module on International Commercial Arbitration in October 2024, and a mediation mentorship program for mediators which is still in the works. These initiatives, he explained, were designed to ensure continuous professional development in the ADR space.

In conclusion, the director shared details of the SDRC's annual summit scheduled for April 2025, which will focus on disputes related to the environment, land, and construction. He encouraged participants to remain engaged with the Centre's activities and take advantage of the training and professional development opportunities offered.

Welcome Remarks

Dr. Jane Wathuta - *Dean, Strathmore Law School*

In her welcoming remarks, the dean of the Law School extended a warm welcome to participants of the first annual SDRC Research Colloquium 2024. She noted the significance of the event being held just two days after the celebration of the 14th anniversary of Kenya's 2010 Constitution, which brought with it key ideals to the country's unique needs, including Alternative Dispute Resolution which was the basis for the colloquium.

The dean highlighted that the founding of the SDRC in 2012 was a direct response to this constitutional mandate, reflecting the growing demand for effective and efficient ADR mechanisms in both Kenya and the broader East African region. She emphasized that this year's theme is rooted in the constitutional provision of Article 159 (2) (c) and is part of SDRC's continued commitment to fulfilling its mandate. Over the past 14 years, ADR has become a key component of Kenya's judicial system, particularly through court-annexed mediation, which has proven to be a quick and cost-effective method of resolving disputes.

She stated that as ADR continues to evolve, practitioners must be mindful of changing social realities and developments in technology. These changes demand innovative approaches to dispute resolution, especially in response to new areas of practice and the rapid socio-economic shifts in Kenya and globally. She expressed confidence that ADR will continue to grow and adapt, with this year's colloquium offering a crucial platform for discussing these emerging trends.

The dean concluded by expressing her gratitude to the sponsors, participants, and all those involved in organizing the event and invited the keynote speaker, Hon. Lady Justice Jacqueline Kamau.

Keynote Speech

Hon. Lady Justice Jacqueline Kamau *- C.Arb, FCIArb, Judge of the High Court of Kenya*

The Role of ADR In Promoting Access to Justice and Addressing Systematic Inequalities

In her keynote address, the speaker began by emphasizing the constitutional basis for judicial power in Kenya. She cited Article 1(1), which asserts that sovereign power belongs to the people of Kenya and is exercised through designated representatives in various state organs, including the Judiciary. The Judiciary, in turn, derives its authority from the people, with a mandate to promote access to justice as outlined in Article 48 of the Constitution.

Access to justice, she explained, must consider factors such as cost, efficiency, and the speed with which disputes are resolved. The speaker further stressed that justice delayed is justice denied, highlighting the adverse effects of case delays, particularly the financial burdens that are borne by litigants. The speaker noted that the Judiciary has been taking active steps to address these delays, including hiring more judges and staff, establishing the Small Claims Court, and leveraging on technology to expedite hearings and decisions.

She elaborated on the different avenues available for dispute resolution in Kenya, differentiating between formal systems like courts and independent tribunals, and informal systems such as mediation, reconciliation, and arbitration, which fall under the umbrella of Alternative Dispute Resolution (ADR). She also acknowledged the role of traditional dispute resolution mechanisms, which, though more informal, are recognized in the Constitution under Article 159.

The speaker then turned to the issue of systemic inequalities in accessing justice, contextualizing the challenges the Judiciary continues to face. While the Judiciary is tasked with interpreting laws, it operates within a broader framework that includes the legislature, responsible for lawmaking, and the executive, which enforces laws. She underscored the importance of the separation of powers, a doctrine that ensures a balance between the three arms of government to prevent the concentration of power and the loss of liberty, as first outlined by political thinker Montesquieu. The doctrine has since been interpreted as one that justifies independence and interdependence of the arms of government. This balance of power is crucial to maintaining accountability and transparency within government structures.

Judicial independence was a key focus of the address. The speaker emphasized that the Judiciary must be impartial and autonomous, as outlined in Article 159 of the Constitution and supported by the Bangalore Principle- independence. This, she argued, is fundamental to upholding the rule of law and ensuring that no one, including the other arms of government, is above the law. The Judiciary must remain impartial and free from external influence to preserve justice, with all parties before the courts treated equally, regardless of their status.

She also highlighted the Judiciary's responsibility to promote access to justice and address systemic inequalities. ADR mechanisms, which offer a more cost-effective and efficient alternative to formal litigation, are essential tools in achieving these goals. By embracing ADR and ensuring judicial independence, the speaker argued, Kenya can continue to enhance its justice system and address the needs of all citizens.

The keynote speaker highlighted significant challenges to the independence of the Judiciary, which have undermined its ability to dispense justice effectively. Among these challenges are interference from other arms of government, disobedience of court orders, and unjustified reductions in budgetary allocations. She pointed out that, despite the Judiciary's constitutional independence, systemic issues such as these continue to obstruct its functions. Notably, in the 2023-2024 financial year, the Judiciary received only 22 billion Kenyan shillings, far below its 43 billion. While it is recommended that the Judiciary receive 3% of the national budget, it currently receives only 1%, a stark contrast to the executive's allocation of 97% and the legislature's 2%.

The speaker further explained how the reduced budget, particularly when factoring in inflation and the devaluation of the Kenyan shilling since 2021, has severely limited the Judiciary's ability to function. Although the Judiciary's expenditure grew by 8%, budgetary allocations continued to decrease, creating a disparity in resources compared to other government branches. One direct consequence of these budgetary constraints is the insufficient number of Judiciary staff. The Judiciary currently has 6,895 staff members, significantly lower than the recommended 10,110, leading to overworked personnel and delays in delivering justice. As a result, the backlog of cases persists, despite a 99% case clearance rate reported in 2022-2023, with 423,394 cases filed and 419,262 resolved. High Court judges, burdened with an average caseload of 585 cases, face delays that can extend up to 5.8 years to clear the backlog, further hindering access to justice, particularly for financially disadvantaged litigants.

The speaker underscored the broader systemic issues of high litigation costs and inadequate staffing, both of which exacerbate inequalities in access to justice. These factors create an imbalance between disputing parties, deterring many from pursuing legal remedies due to the prohibitive costs involved.

In response to these challenges, she stated that the Judiciary has actively promoted mediation as a viable alternative dispute resolution mechanism. By the end of the 2022-2023 financial year, 17 mediation registries had been launched, achieving a 51.19% annual settlement rate with an average case resolution time of 76 days.

Mediation offers a more cost-effective and timely solution compared to traditional litigation, thus improving access to justice for both individuals and corporations, particularly those with fewer resources.

In conclusion, the speaker called for greater government support, particularly through improved internet infrastructure to facilitate online mediation and further enhance the effectiveness of mediation in facilitating access to justice. Additionally, she advocated for rule changes that would penalize litigants who refuse to participate in mediation, as well as increased collaboration between the executive, legislature, and Judiciary to address systemic inefficiencies and reduce the backlog of cases. This approach she stated will lead to a full realization of Article 152(c) of the Constitution, which mandates the promotion of alternative dispute resolution methods, ensuring more efficient and timely delivery of justice for all.

QUESTION & ANSWER SESSION

Q: *Participant 1* sought clarification on the speaker's suggestion that 10 decisions should be made monthly to resolve the backlog over five years, and she inquired about the preference for mediation over arbitration, questioning whether the legal landscape is leaning more towards mediation than arbitration.

A: The speaker clarified that the target of 10 decisions per month is a performance goal for judges, but judges often exceed this number, delivering 30 or more decisions in some cases. She however noted that despite these efforts, the backlog persists.

Further, she clarified that while her presentation focused on mediation due to the prominence of court-annexed mediation. Arbitration remains a valuable tool in dispute resolution. The choice between mediation, arbitration, or other ADR methods like negotiation or conciliation depend on the specifics of the case.

Q: *Participant 2* asked how effective court-annexed mediation is in addressing disputes, considering that parties may go through mediation but still not settle their issues.

A: The speaker acknowledged that mediation success varies, with some mediators achieving a 100% settlement rate while others are less effective due to poor skills. If mediation fails, the case returns to court, causing further delays as it re-enters the queue. However, she indicated that 51.19% of cases have been resolved through mediation.

Q: *Participant 3* raised concerns about whether court-annexed mediation accommodates non-lawyer mediators, since mediation is not limited to lawyers, and there are many non-lawyer mediators who can assist with the backlog of cases.

A: The speaker confirmed that mediation is not restricted to lawyers and encouraged non- lawyers to apply for accreditation by the Mediation Accreditation Committee. She argued that lawyers, in fact, can sometimes be ineffective mediators because they are trained to fight for legal rights, whereas mediation focuses on the parties' interests. Non-lawyers can be just as, if not more, effective in resolving disputes.

Q: *Participant 3* further asked about the emerging issue of domestic service providers resisting the introduction of Star link in Kenya, despite its potential to improve internet connectivity and benefit the Judiciary and citizens. He questioned how the Judiciary balances the interests of domestic providers and such new innovations.

A: The speaker explained that the court does not seek out disputes but resolves them based on their merits. Issues like monopolies and unfair competition, which involve internet service providers, are dealt with in the Commercial Division of the High Court.

PANEL 1:
ALTERNATIVE DISPUTE RESOLUTION AN ACCESS TO JUSTICE

Moderator:
Mr Allan Mukuki - MCIArb, Doctoral Fellow, Director Partnerships, SLS

1st Panellist:

Hon. Justice (Rtd) Edward Torgbor, C.Arb, FCIArb
Former Judge of the Court of Appeal of Kenya

The Role of ADR In Promoting Access to Justice and the Future of ADR in Africa

Hon. Justice (Rtd) Torgbor in addressing the role of ADR in promoting access to justice in Africa and its future trajectory noted that '*ADR and the future'* is a recurring theme due to the issue of the future of ADR importance attached to development of African ADR systems and the recognition of their value vis-à-vis their societal neighborliness.

He noted that African ADR systems align with global ADR systems making it important for these systems to benefit from the global advancement to be recognized as valuable in the society.

He acknowledged the distinctive characteristics of traditional African dispute resolution methods such as community-based dispute resolution which is led by community elders and noted that the challenge that arises with these systems is that they use all manner of methods including rituals and other cultural methods which are required to be consistent with the constitution and other laws which sometimes is a difficult to achieve. He therefore emphasized the importance of integrating these systems without compromising constitutional principles.

He provided the skeleton of his paper which informed his presentation, and it was

as follows: clarification of the terminologies and doctrinal concepts encountered in ADR; access to justice and rule of law, challenges, future of ADR, proper opportunities and his reflections on the future of ADR in Africa.

He provided historical and contemporary perspectives on ADR processes, mentioning that ADR encompasses a spectrum of processes, including litigation, mediation, arbitration, negotiation, self-help and importantly he stated that ignoring a problem is also an option. He stated that in Africa, ADR processes like mediation have deep historical roots and continue to hold importance, despite the imposition of Western legal traditions during colonialism.

Addressing the future of ADR in Africa, the panellist remarked that while ADR is evolving, challenges remain, particularly regarding the perception of arbitration. He referred to a South African perspective where arbitration was viewed as privatized litigation to avoid the courts in 2001. He, however, noted that this is a perception that is slowly changing with increased judicial support for arbitration particularly by the South African Supreme Court of Appeal and Constitutional Courts and a very high degree of deference to arbitral awards.

He noted that while some academics, like Professor Owen Fiss, express reservations about parties being encouraged to settle their disputes rather than having them adjudicated, most ADR practitioners view these systems as more beneficial than traditional, adversarial legal proceedings.

The panellist also explained the two broad categories of Alternative Dispute Resolution (ADR), focusing on the ways disputes are resolved. The first category he explained is the adjudicative process, which he noted resembles litigation. In this process, a third-party neutral, such as an arbitrator, delivers a decision that is binding on the parties. This is more formal and results in a final decision based on legal principles.

The second category is the agreement-based process which is centred around consensual outcomes. Here, the third party, such as a mediator or an ombudsman, does not impose a decision but rather facilitates the process to help the disputing parties reach a mutually acceptable resolution. The key distinction is that adjudication ends in a binding decision, whereas the consensual process allows for the third party to guide discussions and offer recommendations.

The panellist unpacked the term dispute, clarifying that it can mean anything from a simple argument to a deeper conflict. He posed a question to the audience, asking whether they thought “conflict” was more serious than “dispute.” He highlighted that while many people might perceive conflict as more severe, the literal meanings can overlap. Disputes may involve disagreements or differences, while conflicts, although often more intense, do not always imply war or hostility.

The panellist then referred to insights from Professor Iwara of Nigeria, who categorized different forms of disputes and conflicts. He urged arbitration practitioners to pay close attention to arbitration clauses that specify whether they cover disputes or differences. This distinction is crucial when drafting or interpreting legal agreements, as it affects the scope and nature of the arbitration process.

In his presentation, he also explored the constitutional and legal basis of ADR in Kenya, emphasizing the country’s need to develop an efficient and cost-effective commercial dispute resolution system. This, he noted is crucial for achieving the objectives of Kenya’s Vision 2030 which seeks to improve economic growth by fostering an accessible and reliable justice system.

One of the key concepts he also discussed was access to justice, which refers to the

creation of a fair and equitable legal framework that protects human rights and delivers justice.

He pointed out that Kenya's Arbitration Act (Cap 49) does not include explicit provisions for reconciliation and mediation which are two important ADR methods. Moreover, traditional forms of dispute resolution, which are deeply rooted in Kenyan society, are not sufficiently integrated into the formal legal framework. This, therefore, leaves a gap in how ADR can fully serve the needs of communities, especially those relying on elder-based and culturally rooted conflict resolution systems.

In contrast, Hon. Torgbor highlighted ADR legislation in countries like Nigeria, Uganda, and Ghana. He noted that the Nigeria's Arbitration and Mediation Act and Uganda's Arbitration and Conciliation Act both include mediation and conciliation as formal ADR mechanisms, ensuring these methods are legally recognized and supported by the state.

Further, the Ghana's Arbitration and Mediation Act goes even further by incorporating customary arbitration, where traditional dispute resolution processes can be registered and enforced through the formal court system.

Offering the global ADR context, the panellist mentioned how not every jurisdiction views ADR the same way. He stated that the United States does not consider arbitration as an ADR process, as it is seen as too adversarial and akin to litigation. In the U.S. context, ADR generally refers to non-litigious methods like mediation or negotiation.

He emphasized the importance of customizing ADR systems to the unique cultural and legal needs of each country, ensuring that they promote access to justice while remaining consistent with the constitution and existing laws.

In addressing the future of ADR in Africa, the panellist highlighted its evolving nature, emphasizing that the discussion remains critical and relevant because the future of ADR continues to unfold in the present. He recalled an intriguing observation made at a London conference, where a speaker claimed that the future of arbitration in Africa lies in Europe. He said that this statement, while thought-provoking, it invites reflection on the colonial legacy that has deeply impacted African legal and dispute resolution systems. Colonialism brought with it western legal traditions, primarily Anglo-American jurisprudence, which were imposed on African societies. This imposition severely undermined traditional African norms, values, and beliefs that once provided the normative framework for conflict resolution. Despite this, there is still remarkable resilience in African justice systems, which continue to play a central role in dispute resolution across the continent, as demonstrated by their recognition in legal frameworks and national policies.

Some significant challenges that the panellist addressed include the Judiciary in many African nations being the weakest branch of government due to the lack of the financial resources necessary to maintain its independence.

Looking to the future, the speaker expressed optimism about the progress of ADR in Africa, which he believes has not only gained momentum but has also carved out clear pathways for continued advancement.

He concluded by discussing progress and advancements in ADR across Africa, emphasizing that the continent has made significant strides in this field. While acknowledging the challenges, he confidently states that ADR in Africa is on the move and has forged clear pathways into the future.

2nd Panellist:

Hon. Justice (Rtd) Joyce Aluoch, EBS, CBS, Former Judge & First Vice President of the International Criminal Court at the Hague, Netherlands, Accredited Mediator

The Role of the Court in Enhancing ADR: A Personal Experience on the Bench

Hon. Justice (Rtd) Joyce Aluoch began her contribution by stressing the benefits of ADR processes, noting that they tend to be more confidential, less formal, and generally less stressful than traditional court proceedings. She highlighted Kenya's constitutional framework that actively promotes and encourages the use of ADR, specifically referencing Article 159(2)(c) of the Kenyan Constitution. She stated that these constitutional provisions are particularly important when discussing other African contexts, such as South Sudan which she was going to refer to in her presentation.

The panellist specially focused on the court-annexed mediation in Kenya, which she stated has proven to be successful. As an active member of the court-annexed mediation program, she testified of the system's effectiveness, citing its wide adoption and impact.

She noted a critical development in the realm of mediation, that is, the amendment of Section 59D of the Civil Procedure Code which now allows the enforcement of private mediation agreements. She argued of this development's importance for individuals who prefer to resolve disputes directly through mediation, without the need to go through court proceedings. She further noted that under the amendment, private mediation agreements must be accompanied by sworn affidavits submitted by Judiciary-accredited mediators, reinforcing the requirement for mediators to be officially recognized by the Judiciary to ensure the integrity of the process.

She also noted that the role of the court in enhancing ADR is also visible in the Intergovernmental Relations ADR Regulations, 2021. These regulations aim to facilitate the amicable resolution of disputes between national and county governments, as well as among county governments. The goal is to resolve disputes in a cost-effective and timely manner, reducing the need to resort to judicial proceedings and promoting the prudent use of public funds. She highlighted that the dissemination of these regulations began in May 2024. The panellist also discussed the use of mediation by the Court of Appeal in Kenya, which is a new frontier in ADR, where mediation is used to handle appeals.

She also reflected on her experience of 35 years in the Kenya Judiciary, beginning in 1974 as a magistrate and culminating as a Court of Appeal judge until 2009. She noted that at that time, ADR had not yet been integrated into the Kenyan judicial system. The 1995 Arbitration Act was the only legislation addressing ADR, and most ADR- related cases at the High Court involved applications to set aside arbitration awards.

She also recognized that traditional dispute resolution mechanisms were in use. These systems had not yet been formally integrated into the legal framework until the introduction of the 2010 Constitution which formalized ADR processes in Article 159(2).

The panellist, having served as a judge at the International Criminal Court for 9 years, gave a brief background on the jurisdiction of the ICC which includes addressing matters on genocide, war crimes, crimes against humanity, and the crime of aggression and stated that these crimes require a high standard of proof—beyond a reasonable doubt.

The panellist raised a key issue of whether the ICC plays a role in enhancing ADR, given its focus on serious criminal offenses. The speaker explained that, although the ICC primarily operates within a retributive justice framework, there are elements of restorative justice incorporated into its proceedings. Specifically, Article 68(3) of the Rome Statute. This provision, she said, aims to provide the court with a clearer understanding of the victims' experiences and suffering, thereby enriching the trial process. However, she noted that while victims' voices are considered, they do not typically influence the final judgment.

She gave an example where in one of the cases she handled which had over 500 victims only 7 victims were invited to participate, and their views ultimately did not alter the outcome of the judgment. Hence, the ICC's proceedings remain largely retributive rather than restorative.

The panellist also shared her personal experience in judicial reform at the regional level in South Sudan, highlighting the significant role of the Judiciary in enhancing ADR. In 2022, she was appointed by Intergovernmental Authority on Development (IGAD) to the Judicial Reform Committee as part of the Revitalized Agreement on

the Resolution of Conflict in South Sudan. South Sudan, a country emerging from decades of war, has faced persistent internal conflicts even after its independence in 2011, with civil wars in 2013 and 2016.

The panellist noted the challenges within South Sudan's Judiciary, particularly the lack of resources and trained personnel. The courts, especially in remote areas, are ill- equipped to handle the demands of justice. Throughout their travels to almost all the states, the speaker observed that the judicial system was particularly lacking in justices and judges at various levels, including the Supreme Court, Court of Appeal, and High Courts.

She stated that one of the primary outcomes of the Judicial Reform Committee's work is a comprehensive report, which is awaiting presentation to the government. The report includes a recommendation to introduce court-annexed mediation in South Sudan, similar to practices in Kenya, to quickly, efficiently, and amicably resolve disputes. This she said would help restore personal and business relationships, especially as business activities between locals and international parties continue expanding in the country.

Hon. Lady Justice (Rtd) Aluoch also gave the status of dispute resolution in South Sudan noting that most disputes in South Sudan are handled at the local level by paramount chiefs and sultans. She further noted that these leaders, though respected within their communities, often lack formal legal training and rely on traditional methods of dispute resolution, particularly compensation, even in serious criminal matters such as murder and rape. The speaker recounted a conversation with some chiefs, who claimed that they could determine whether a person was guilty of murder based on intuition alone, which raises serious concerns about the accuracy and fairness of these judgments.

One particularly troubling aspect of traditional justice in South Sudan as the panellist noted is the practice of using young girls (aged 10 to 14) as compensation for crimes like murder and rape. These girls are essentially married off to older men without their consent, a clear violation of their human rights. This practice contravenes provisions of the South Sudan's Transitional Constitution, which guarantee the right to marry only with the free and full consent of both parties. She stated that this practice persists because traditional mechanisms for resolving disputes are still widely relied upon, and formal legal structures are not yet wide enough to enforce constitutional protections.

In contrast, she referred to the Constitution of Kenya's, Article 159(3), which allows for traditional dispute resolution but stipulates that it must not contravene the Bill of Rights. South Sudan's Transitional Constitution provides only one limitation on the use of traditional mechanisms under Article 123(5) mandating that voluntary reconciliation agreements between parties in both civil and criminal cases be recognized by the court, leaving significant room for traditional practices that violate human rights, such as forced marriages.

In conclusion, Hon. Lady Justice (Rtd) Aluoch stated that the judicial reform recommendations from their committee will address many of these concerns and advocate for reforms that align with international human rights standards and improve the judicial infrastructure.

3rd Panellist:

Hon. Yufnalis Okubo, FCIArb,
Former Registrar of the East African Court of Justice (EACJ)

The Abstract Role of ADR in promoting Access to Justice and Addressing Systemic Inequalities

Hon. Okubo in addressing the critical role of ADR in promoting access to justice and tackling systemic inequalities, especially for marginalized communities emphasized that while ADR is increasingly recognized as a primary choice for resolving disputes, the traditional court system often remains the last resort for many individuals. This shift highlights the effectiveness of ADR in making justice more accessible to disadvantaged populations.

The panellist stated that ADR serves as a key mechanism for ensuring justice, particularly for marginalized and disadvantaged communities. It facilitates social inclusion and promotes a functional democracy by providing an alternative to the often complex and intimidating court system.

He noted that traditionally, courts have been viewed as the primary means of dispute resolution. However, for many marginalized groups, courts can seem inaccessible due to their complexities, inefficiencies, and high costs. ADR, on the other hand, offers a more user-friendly and expedient process for resolving disputes without requiring intervention from the court system.

Further, he mentioned that the principles of self-determination and party autonomy in ADR empower individuals, particularly those from minority groups, to take charge of their disputes. This empowerment is crucial for addressing systemic inequalities and improving access to justice.

He also addressed the question on the affordability of certain forms of ADR, particularly arbitration, which can sometimes be more expensive than traditional court processes. However, he argued that ADR is generally accessible and provides a quicker route to resolution for individuals facing disputes. The panellist called for a reflection on whether the existing justice systems are truly fair, simple, and affordable.

He noted that currently there is a shift toward informal mechanisms due to the challenges faced by courts, such as inefficiency, high costs, and complex procedures hence many individuals are turning to informal mechanisms, including traditional dispute resolution and ADR, as easier alternatives for obtaining justice.

However, he highlighted some of the challenges faced in the access to justice especially for marginalized communities, including lack of infrastructure, high advocacy fees, low literacy levels, limited access to information, geographic distance from courts and lengthy court processes which can be tedious.

He also noted that legal education and its perceived exclusion of practitioners involved in traditional dispute resolution mechanisms. Several participants expressed concerns that legal education, as currently structured, may inadvertently lock out or discriminate against those who have historically engaged in informal dispute resolution processes. These practitioners, who often operate at the grassroots level, play a critical role in dispensing justice within their communities but frequently lack awareness of the formal legal framework available to them.

He raised a concern with the existing legal aid framework, noting that while state- provided legal aid is minimal, the application processes for assistance often impose additional financial burdens. The paradox of requiring fees for applications intended to provide support raises questions about the accessibility of formal justice mechanisms for marginalized individuals.

In contrast to formal legal systems, he stated that ADR mechanisms offer significantly lower financial barriers to entry. Many ADR processes, such as mediation and negotiation, require little to no filing fees and do not necessitate formal representation. This accessibility makes ADR a preferred avenue for resolving disputes among individuals who might otherwise be deterred by the complexities and costs associated with formal litigation. Moreover, he stated that ADR processes tend to be more adaptable and responsive to individual needs, allowing for more personalized justice outcomes.

Further, he acknowledged that ADR also has its challenges. The potential for power imbalances to exacerbate existing inequities is a valid concern, particularly when larger corporate entities engage in ADR without adequate representation for individual claim holders.

Despite such challenges, he was positive that ADR processes can indeed facilitate access to justice by offering new pathways to remedies that may not be available through the traditional legal system. However, for ADR to avoid generating its own forms of injustice, he stated that it is imperative that these processes continue to innovate and adapt in response to the evolving social and legal landscape.

Legal frameworks in many jurisdictions promote ADR and traditional dispute resolution mechanisms; however, the lack of clarity regarding jurisdiction and

subordination to formal laws complicates the achievement of intended goals. To address these issues, policies and legislative frameworks need to be established to guide and promote the use of alternative dispute resolution mechanisms, enhancing access to justice for most Kenyans. These measures can support the already overburdened formal system, which struggles to reach all segments of society.

The discussion highlighted that dispute related to marriage, divorce, child custody, and succession often benefit from initial resolution through traditional dispute resolution mechanisms, where community understanding is paramount. It was suggested that the Judiciary should engage with community systems before taking on such cases formally.

A significant challenge identified in the ADR process is the lack of sufficient information available to parties engaged in alternative dispute resolution. While self- determination and autonomy in decision-making are often emphasized, it is essential that these decisions are made based on informed consent. Without adequate understanding of the context and consequences of their choices, parties may struggle to reflect their values accurately in the outcomes.

One potential solution he gave to this information gap is the proactive involvement of lawyers in educating their clients about ADR options prior to court proceedings. However, resistance from some legal practitioners who view ADR as a threat to their livelihood complicates this landscape. For instance, a system implemented in North Carolina requires parties to affirm that they have been informed about ADR options by their attorneys, ensuring both parties and lawyers acknowledge the availability of ADR processes.

Further, the concept of procedural justice is essential in enhancing access to justice and reducing systemic inequalities within marginalized communities. Parties should feel that they have been treated fairly, had the opportunity to share their narratives, and that the decision-making process was neutral. Furthermore, if a third party is involved in resolving the dispute, that individual must be perceived as trustworthy, sincere, and transparent.

In conclusion, he called for the adoption and effective implementation of ADR mechanisms which will play a crucial role in addressing conflicts and ensuring access to justice. This, he said, will not only promotes individual rights but also contributes to the development of stable economic states where all citizens have a voice and can pursue economic opportunities.

4th Panellist:

Ms. Kananu Mutea, FCIArb,
Founder and Partner, Course Correct Consulting in Collaboration with KM Associates

The Role of ADR in Promoting Access to Justice and Addressing Systemic Inequalities

Ms. Kananu explored various aspects of ADR, including the reasons behind the tendency of people to rush to court despite the availability of ADR mechanisms, highlighting structural, cultural, and societal factors that contribute to the underutilization of these processes.

She raised a significant issue around escalation clauses in contracts, where parties are required to negotiate, then mediate, and finally arbitrate before turning to court. Despite these clauses being present in contracts, many individuals, including legal practitioners, often bypass them due to unfamiliarity with the procedural steps.

The panellists reflected on several barriers to the adoption of ADR mechanisms, highlighting key challenges that limit its widespread use. One of the main obstacles is the lack of awareness among parties, including lawyers, who may not fully understand how ADR processes work or the benefits they offer. Additionally, there is a trust deficit in the ADR system, with concerns about corruption, inefficiency, and the enforceability of ADR outcomes, leading to reluctance in its adoption. Cultural resistance also plays a role, as in some societies, there is a tendency to defy legal directives or judicial orders, which undermines the effectiveness of ADR

processes. Furthermore, financial concerns, particularly among lawyers and other stakeholders, contribute to resistance, as ADR is perceived to potentially reduce income from court cases.

She also discussed the effectiveness of ADR in practice by sharing examples of successful implementation in specific contexts. One notable instance involved the *Boda Boda* (motorcycle) community, where disputes are resolved quickly and efficiently without the need for court involvement. This example highlighted the value of community-driven ADR systems, which deliver swift, enforceable, and trusted outcomes. Additionally, court-annexed mediation was presented as a positive development, supported by impressive statistics demonstrating its success in resolving disputes. However, some criticisms were raised, particularly regarding the lack of party autonomy in selecting mediators, which occasionally leads to dissatisfaction with the outcomes.

She raised concerns about the misuse of ADR in certain sectors, such as landlord-tenant disputes, where arbitration may not be appropriate, and court orders for eviction are preferred. Similarly, in employer-employee disputes, the speaker highlighted that arbitration can disproportionately benefit the party with deeper financial pockets, particularly in redundancy or unfair termination cases.

One of her key recommendations was the need for specialized ADR practitioners. The *jack of all trades* approach was criticized, with the panellist emphasizing that ADR practitioners should possess expertise in the relevant field of the dispute (e.g., family law, commercial disputes, technology-related cases) to build trust and credibility in the process.

She emphasized the importance of making ADR processes more inclusive, especially for marginalized and differently-abled individuals. Inclusivity should extend beyond gender, age, and technology aptitudes, ensuring that ADR mechanisms are accessible and user-friendly for all segments of society.

In her presentation, she also praised for improving access to justice through mechanisms like the Small Claims Court, which offers quick, low-cost resolutions. She suggested that ADR processes, while effective, should be seen as part of a broader toolkit alongside court systems, rather than competing with them.

In conclusion, she stated that ADR is a valuable tool for promoting access to justice and addressing systemic inequalities, but there is a need for increased awareness, specialized expertise, trust-building, and inclusivity in the process. The panellist called for broader societal engagement and better integration of ADR with traditional legal systems to ensure effective and equitable dispute resolution.

5th Panellist:

Ms. Kharyan Noor, MCIArb,
Advocate of the High Court of Kenya,
Founding Director of Sports Legal.
&

6th Panellist:

Ms. Sandra Anya, Dentons Hamilton Harrison and Mathews

Levelling the Playing Field: The Role of Sports ADR in Promoting Access to Justice and Addressing Systemic Inequalities

Ms. Noor stated that ADR mechanisms, such as arbitration and mediation, offer a faster, more specialized, and less adversarial alternative to traditional litigation. In sports, ADR is frequently employed to resolve issues related to contractual agreements, disciplinary actions, and doping allegations.

The Court of Arbitration for Sport (CAS), a global forum for resolving sports disputes, was recognized as a leading institution in this space. However, despite its efficiency, CAS and other international ADR mechanisms face challenges in promoting fairness for athletes from Africa and other marginalized regions.

She also discussed the challenges for African athletes which include significant financial constraints and limit their access to quality legal representation and compromise their ability to adequately defend themselves. Additionally, language barriers and a lack of familiarity with the complexities of international sports law further exacerbate these difficulties. The case of Semenya was highlighted as a prominent example, illustrating how systemic inequalities in sports can intersect with factors such as gender, race, and economic status, ultimately creating an uneven playing field for African athletes.

The 1st panellist emphasized the need for localized legal frameworks that addresses the unique challenges faced by African athletes. While international frameworks provide a foundation, regional approaches, such as establishing an African Court of Arbitration, could offer culturally relevant, linguistically inclusive, and economically accessible solutions. This proposal, however, raised concerns regarding the management of sports in African countries and whether regional bodies would have the expertise and capacity to operate fairly and effectively.

She also discussed the role of technology in ADR which they highlighted is also a potential equalizer, with tools like video conferencing expanding access. However, the panellist cautioned that in many parts of Africa, limited access to stable internet, digital literacy, and electricity could widen the inequality gap if these solutions are not carefully implemented.

Finally, the 1st panellist made a call to action for collaboration between stakeholders, including governing bodies, legal experts, athletes, and advocates. They stated that policy changes alone will not address systemic inequalities; a fundamental shift in how justice and fairness are perceived and enacted in sports is necessary. The overarching goal is to ensure that every athlete, regardless of background, has an equal opportunity to succeed, with talent and hard work as the only determinants of success—not systemic biases.

The second panellist delved into the workings of the Court of CAS and its governing body, the International Council of Arbitration for Sport (ICAS), emphasizing the role of ADR in promoting access to justice in sports. She did a statistical analysis highlighting that CAS handled 942 cases in 2023, a significant increase from 830 handled in 2022, showing a growing demand for ADR in sports disputes. However, the panellist raised key concerns about accessibility, particularly for athletes from marginalized backgrounds and African countries.

She discussed how the governance of the CAS raises concerns about systemic inequalities, particularly in its application to African athletes. CAS operates under Swiss law, and its awards are recognized and enforced globally through the New York Convention and the European Convention. While this ensures enforceability, the use of Swiss law in African disputes calls into question the relevance and fairness of decisions in an African context. Additionally, the ICAS which governs CAS, is composed of 20 members, many of whom are selected by sports governing bodies like the International Olympic Committee and FIFA. This selection process creates a power imbalance, as the same bodies that regulate sports also choose the arbitrators, potentially disadvantaging athletes in disputes involving these organizations.

Further, she explored how financial barriers further limit access to CAS for African athletes. To submit a dispute, athletes are required to pay $1,200, a substantial amount for those from economically disadvantaged regions. Although legal aid guidelines were introduced in 2023, they primarily apply to disputes related to football and the Olympic Games, excluding many athletes from receiving

financial assistance. Moreover, the centralization of CAS in Switzerland increases costs, making it difficult for African athletes to access the system and leading to inequalities in representation.

The panellist also addressed instances of racial and biological discrimination within sports regulations, particularly in cases involving the International Association of Athletics Federations rules on differences in sexual development. She also reffered to the case of Caster Semenya, a South African athlete, was highlighted as an example where regulations on naturally high testosterone levels disproportionately impacted African athletes. CAS upheld these regulations, reinforcing systemic inequalities. Similarly, Kenyan sprinter Imali voiced frustration over the IAAF regulations that require athletes to take medication to regulate natural hormone levels, a policy that disproportionately affects African athletes.

In response to these challenges, the speaker proposed several reforms to protect athletes. Jurisdictional reforms were suggested, including enacting laws in countries like Switzerland to prevent discriminatory practices in sports. The speaker also called for greater transparency and honesty in ADR proceedings and proposed initiatives to subsidize costs for athletes while providing specialized legal support. Furthermore, the speaker recommended education and awareness programs to improve the understanding of sports law among African athletes and lawyers, which would promote better representation in international sports disputes.

She also concluded with a call to action for creating ADR systems more relevant to the African context, advocating for localized solutions to address the current systemic inequalities in sports arbitration.

PANEL 2:
EMERGING TRENDS IN ADR

Moderator:

Ms. Joy Impano, MCIArb, Senior Associate,
Gikera & Vadgama Advocates

1st Panellist:

Prof. Kariuki Muigua, OGW, C.Arb, FCIArb, Professor of Law at the University of Nairobi School of Law

Building Capacity for Lawyers on Environmental Law, Climate Change and Mediation

Prof. Muigua started by doing a reflection on the role of law and lawyers. He questioned the definition of the word ''law'' and stated that law encompasses everything and varies depending on philosophical interpretations. He the looked at the different schools of thought, such as positivists who believe that law is strictly what is written and codified, and naturalists who focus on how law ought to be rather than its current state.

He then explored how different lawyers interpret and apply the law. Critical legal theorists challenge the idea of democracy and other legal constructs by asking "who says?". Feminists, on the other hand, argue that law often embodies male perspectives, whereas sociological legal thinkers regard law as a tool for social engineering, shaping behaviours and society.

The panellist highlighted the role of lawyers in Kenya's development of mediation laws and policy. Before mediation was formally included in the Constitution, legal practitioners had to justify its use through references to international law, such as referring to Article 33 of the UN Charter. This signified the complex relationship between local and international legal frameworks, often leaving lawyers to navigate uncharted territories.

Further, Prof. Kariuki emphasized the role of lawyers in sustainable development. He stated that lawyers can challenge environmental, social, and economic injustices and influence government policy. Hence, they are instrumental in holding governments accountable, shaping laws, and driving reforms. He highlighted the recent work on Kenya's ADR policy as an example where lawyers played a critical role in crafting effective policies.

In addressing the role of lawyers in developing environmental law and access to justice, he noted that lawyers have been crucial to the development of environmental law, including at the National Environment Tribunal. Their influence extends to enhancing access to environmental justice ensuring that both the process and outcome are fair and just. Public participation and principles like subsidiarity which dictates that decisions should be made by those most affected—are key elements in environmental governance, and lawyers help ensure these are upheld.

He also discussed the role of lawyers in the negotiation of natural resource agreements, particularly in the context of improving Kenya's involvement in international treaties, such as the ongoing negotiations for the Plastics Treaty. This process, which now involves more systematic legal participation, contrasts with earlier days when agreements were often signed without thorough consideration.

When it comes to the role of lawyers and climate change, the panellist stated that lawyers are increasingly involved in climate change litigation. They are instrumental in advocating for stronger environmental regulations, holding polluters accountable, and engaging in climate litigation. The concept of ecocide, or environmental destruction as a potential international crime, is gaining traction, and Kenyan lawyers are part of this global dialogue.

In his last part of presentation, he addressed mediation as a tool for resolving environmental and natural resource conflicts. He presented mediation as a non-coercive process where parties agree on resolutions without litigation.In discussing this, he pointed out the potential for mediation to resolve environmental and natural resource conflicts and advocated for including mediation and negotiation in lawyers' remuneration structures. He stated that lawyers can play a key role in encouraging clients to pursue mediation, preserving relationships and facilitating sustainable dispute resolution.

In conclusion, he invited the colloquium participants especially legal practioners to build capacity within the legal profession, particularly around environmental law and dismissed the notion that environmental law is a weak discipline, stressing the increasing demand for legal professionals in areas such as climate litigation and international ADR.

2nd Panellist:

Ms. Mueni Kalola, Commissioner, the Advocates Complaints Commission

The Future of Alternative Dispute Resolution in the Advocated Disciplinary Process -An ACC Perspective

Ms. Mueni began by briefly introducing the commission, which she mentioned was established in 1989 under the Office of the Attorney General to handle complaints of professional misconduct against advocates. She stated that ADR is very important within this regulatory framework, noting that ADR, particularly mediation, has become an integral part of the disciplinary process at the ACC.

She stated that the ACC's mandate is limited to dealing with complaints against advocates related to professional misconduct. This includes unethical behaviour, such as misappropriating clients' funds, delaying client payments, and failing to meet professional obligations with the more common cases involving running down insurance claims. Importantly, she mentioned that the ACC does not handle cases involving unqualified individuals pretending to be lawyers or judicial officers, as these matters fall outside its jurisdiction.

Ms. Mueni highlighted the value of ADR, particularly mediation, in resolving disputes quickly and efficiently compared to traditional prosecution methods. She stated that lawyers often express willingness to participate in mediation, especially when faced with disciplinary proceedings, despite general resistance to mediation in other professional contexts. This, she said is a very ironical stance but clearly indicates the practical benefits of ADR.

She stated that the ACC has successfully incorporated mediation as a primary tool in its disciplinary process, offering a faster alternative to the more drawn-out disciplinary tribunal processes, which can take years to resolve.

Doing a statistical review of mediation and its impact, she noted that between July 2023 and June 2024, the ACC handled 408 complaints, with 131 resolved through mediation. Additionally, she highlighted that the ACC recovered KES 43.1 million on behalf of complainants in the same period. She further staed that the ACC has also been proactive in taking justice closer to the people by organizing ADR circuits across various counties, allowing for face-to-face mediations outside Nairobi.

Despite these successes, she acknowledged some challenges this system faces, including logistical issues related to virtual ADR sessions due to inconsistent internet access and difficulties in gauging emotions during online mediations. However, she stated that the ACC has continued to explore technology as a tool for broadening access to justice.

In conclusion, she stated that the ACC has made significant strides in incorporating ADR into its disciplinary processes. With 80% of cases before the Disciplinary Tribunal prosecuted by the ACC, the integration of mediation has helped reduce backlog, promote faster resolutions, and restore the reputation of the legal profession. The ACC's efforts in the use of ADR reflect its commitment to delivering justice efficiently while maintaining the integrity of the legal profession. She ended by emphasizing that ADR is not only beneficial but necessary for enhancing access to justice within the advocate's disciplinary process.

3rd Panellist:

Ms Getrude Nguku, Commissioner and Vice Chairperson National Land Commission

National Land Commission: Emerging Opportunities for Land Dispute Transformation

The panellist addressed the transformative role of the National Land Commission (NLC) in land dispute management in Kenya. Her presentation centred around the complex, protracted history of land administration, particularly the colonial legacy that distorted traditional land ownership and management systems.

She highlighted how colonial doctrines like the radicle title disrupted indigenous land management practices, replacing them with systems that prioritize title ownership over communal land stewardship. Traditionally, land in Kenya was managed by elders for the benefit of the community, a system undermined by colonial rule.

Ms Getrude explained the mandate of the NLC under the Kenyan Constitution which is to manage public land and address historical land injustices. However, she noted challenges stemming from unclear distinctions between public and private land management, referencing a case in Taita Taveta where a large tract of land

reverted to public ownership after a lease expired, yet the NLC lacked the records to manage it effectively.

Drawing on examples from Singapore, the Netherlands, the USA, and the UK, the panellist compared Kenya's land administration practices with global approaches. Notably, she discussed Singapore's model of public participation, which involves citizens at the micro-level, unlike Kenya's macro-level focus. The UK's use of independent, fraud-detection teams to address land-related crimes was also highlighted as a potential model for Kenya to consider.

The presentation emphasized the need for better integration of the NLC's mandate with emerging land management issues. She referenced Article 249 of the Kenyan Constitution, which delegates authority to national and county governments, and discussed how land management requires clear frameworks to handle disputes, community participation, and resource management.

A key recommendation she made in her presentation is the need to prioritize public participation and mediation over lengthy litigation processes. She cited a San Diego case where stakeholders resolved land use disputes by considering the needs of developers, environmentalists, and the community, resulting in a win-win solution. Such collaborative approaches, it was argued, should be adopted in Kenya to avoid costly legal battles and ensure community involvement in decision-making.

She referenced the wind power project in Marsabit, where a court ruling forced the community into land acquisition processes without adequate consultation. The lack of public participation in decisions regarding community land was criticized as an infringement on the rights of the local population. The speaker argued that proper procedures should have been followed under the Trusts Act and the community should have been asked whether the project was necessary.

The panellist concluded by advocating for transformative approaches to land dispute resolution, using ADR mechanisms like mediation. she underscored the need for an inclusive, people-centred approach that places landowners and communities at the forefront of land management decisions. She also recommended that Kenya adopt a more independent, technology-driven land administration system, like the UK's fraud team, to curb land-related crimes.

She called for a re-evaluation of how land disputes are managed in Kenya, emphasizing community involvement, adherence to constitutional mandates, and learning from global best practices to create a more equitable land administration system.

4th Panellist:

Mr David Onsare, FCIArb, Arbitrator; Partner & Head of Dispute Resolution at Maina & Onsare Partners Advocates LLP

Integrating ESG Principles into Arbitration Challenges and Best Practices

Mr. Onsare began by unpacking the concept of ESG, which covers environmental impact such as degradation, climate change impact, social factors like labour practices and human rights, and governance issues such as diversity in the boards and corporate transparency. He mentioned that the relationship between ESG and arbitration is gaining prominence in business disputes, as arbitration is increasingly being relied on to address conflicts related to these principles.

The panellist addressed some of the key challenges that might be experienced in integrating ESG into arbitration, these include:

i. Lack of standardized ESG metrics and reporting frameworks

Due to the absence of uniform criteria for measuring compliance and impacts, assessing ESG performance across different cases becomes inconsistent. This lack of a standardized approach leads to varying interpretations and assessments by parties, which complicates dispute resolution and may result in differing arbitration outcomes.

ii. Tension between transparency and confidentiality

He noted that arbitration is traditionally confidential, but ESG disputes often

involve a wide range of stakeholders, such as communities, non-governmental organizations (NGOs), and governments, who call for greater transparency. Balancing the need for confidentiality with the demand for public accountability and openness remains a significant issue, particularly when sensitive ESG-related matters are involved.

iii. Expertise gap in ESG arbitration

Given the complexity and scientific nature of many ESG disputes especially those related to climate change and human rights violations there is a noticeable lack of expertise among arbitrators and legal professionals. This gap in knowledge and experience can adversely affect the quality and accuracy of arbitration outcomes in such cases.

iv. Maintaining efficiency while ensuring due process

Noting that ESG typically involve large amounts of data and multiple stakeholders, which can significantly slow down arbitration processes. However, maintaining the efficiency for which arbitration is known while ensuring thorough examination of evidence and due process for all involved remains a delicate balance that must be carefully managed.

The panellist further proposed solutions to these challenges. He stated that these solutions include:

i. Development of Specialized ESG Arbitration Rules

The panellist advocated for creating distinct arbitration rules and procedures tailored to ESG disputes. This includes developing a specialized register of arbitrators with expertise in ESG matters.

ii. ESG Accreditation and Training

Training and accrediting arbitrators in ESG-specific issues are essential to ensure that arbitrators possess the necessary skills and have expertise to handle complex disputes. Continuous education in areas such as environmental law, corporate governance, and human rights standards.

iii. Enhancing Transparency in ESG related Arbitration

To address the transparency issue, the panellist suggested publishing redacted arbitration awards and creating mechanisms for broader stakeholder participation. This would help build a body of ESG jurisprudence while maintaining the confidentiality necessary for arbitration.

iv. Leveraging Technology

He encouraged the use of artificial intelligence and other technologies to manage the large data sets often involved in ESG disputes. He argued that the proper use of these tools, within ethical guidelines, could improve the efficiency and accuracy of arbitration processes.

Finally, the panellist took the audience through some of the benefits of ESG Integration in arbitration, which he stated outweigh the challenges. They include:

i. Enhancing the Legitimacy of the process

Incorporating ESG principles strengthens the legitimacy of arbitration as a dispute resolution mechanism, particularly in addressing complex global challenges.

ii. Contribution to Sustainable Development

Redacted awards and ESG arbitration decisions can support global Sustainable Development Goals (SDGs) by promoting corporate accountability and responsible business practices.

iii. Promotes responsible business conduct and corporate accountability

ESG arbitration frameworks create incentives for companies to take their environmental, social, and governance responsibilities seriously, fostering a culture of corporate accountability.

In conclusion, Mr. Onsare presented a comprehensive roadmap for integrating ESG principles into arbitration, dividing it into three key phases: short-term, medium-term, and long-term goals. In the short term, he stated that the focus is on raising awareness and building consensus within the arbitration community about the importance of incorporating ESG principles. The medium-term goal involves developing and implementing tailored ESG arbitration frameworks and rules to address the unique challenges posed by these disputes. Ultimately, the long-term goal is to mainstream ESG considerations across all aspects of arbitration, positioning it as a central forum for resolving increasingly prominent ESG-related disputes.

He concluded by stating that integrating ESG principles into arbitration is no longer optional but mandatory.

PANEL 3:
ADR AND THE BUILT ENVIRONMENT

Moderator:

Dr. Kenneth Mutuma, C.Arb, FCIArb,
Vice Chairman, CIArb (Kenya Branch)

1st Panellist:

Eng. Aluoch Fredrick, CE, MIEK, FCIArb,
Civil Engineer/Arbitrator/Adjudicator/Mediator/
Expert Witness

Construction Adjudication: Development Practice and the Future; The Challenges for the Construction Industry Practitioners in Africa

Eng., Aluoch started by pointing out the nature of the construction industry, which involves several stakeholders ranging from highly educated professionals such as architects and engineers, to individuals with minimal formal education, such as casual labourers. He stated that this diversity creates conflicts of interest, with different players motivated by different objectives. He gave the example that while architects may prioritize the successful completion of a project, labourers and other stakeholders may be more focused on financial gain. These conflicting interests contribute to a high potential for disputes within the industry.

He stated that there is need to resolve the arising disputes quickly, as delays not only increase costs but also impede the flow of cash necessary to drive construction projects. He, like previous panellist emphasized that traditional litigation in courts is often too slow and inefficient for the fast-paced nature of construction. Hence, adjudication has emerged as a more suitable alternative for resolving disputes in the industry. He defined adjudication as a process in which a neutral third party is

called upon to resolve disagreements between parties. It is particularly well-suited to construction because it helps release '*trapped cash*' ensuring that projects continue without financial hindrance.

The panellist also looked at the legal framework, pointing out that Kenya has made progress in adopting ADR mechanisms, including adjudication, as part of its legal system. He cited Article 152(2)(c) of the Constitution of Kenya, and Kenya's recent ADR legislation development, including the Construction and Adjudication Bill and the Dispute Resolution Bill.

The panellist then provided a historical context for construction adjudication, tracing its origins to the United States in the 1970s, though it did not initially gain widespread statutory support. He stated that the United Kingdom is a key player in the global development of construction adjudication, with Sir Michael Latham's 1994 report leading to the enactment of the Housing Grants, Construction, and Regeneration Act of 1996, which became a cornerstone for construction adjudication practices worldwide.

He further discussed other global models, such as Malaysia's Construction Industry Payment and Adjudication Act of 2014, which he described as the most progressive in the field of adjudication practice globally. He stated that the Act integrates elements from similar laws in Australia and Singapore and provides a grounded framework for adjudication and encouraged that Kenya be inspired by the Act's provisions as far as development of a legal framework around construction adjudication is concerned.

The panellist examined the state of construction adjudication in Africa and lamented that no African country, aside from Kenya, has enacted a Construction Adjudication Act. South Africa was noted for its contractual adjudication, which is tied to the construction contracts in use, such as JBCC and FIDIC. In contrast, Nigeria's legal framework references adjudication only in a limited sense within its constitution, and there is no specific legislation governing construction adjudication.

Eng. Aluoch further discussed the challenges in the construction industry in Africa, particularly in relation to the practice of adjudication. He pointed out that while Zambia has followed the path of South Africa by adopting contractual adjudication, there is still no statutory adjudication framework across the entire continent. In Kenya, the only significant progress made has been the approval of the National Dispute Resolution Policy in March 2023. Despite this, the country has yet to implement a statutory adjudication system, and the panellist expressed hope that the proposals in Session Paper No. 4 of 2024 would eventually be realized.

One of the central challenges he also identified is the absence of a legal framework for statutory adjudication in Kenya. He explained that, currently, adjudication in the country particularly in the engineering sector is guided by international standards such as the FIDIC contracts, which apply the International Chamber of Commerce (ICC) rules. However, he noted that these contracts do not provide for statutory adjudication specific to Kenya, leaving a significant gap in the country's legal infrastructure for dispute resolution in the construction industry.

The panellist also mentioned that the rapid advancement of technology as another challenge facing the construction industry. Technological developments are transforming the ADR landscape globally, yet Kenya's lack of a statutory adjudication framework makes it difficult to effectively incorporate these innovations.

Another challenge the panellist discussed was the intrusion of legal professionals into the construction adjudication process. He argued that construction disputes

often require input from industry experts, such as engineers or architects, rather than legal experts. However, the involvement of lawyers as he argued complicates the process, as it becomes necessary to bring in expert witnesses to explain technical issues. This, according to him hinders efficient adjudication, since legal professionals may lack the necessary technical expertise to resolve construction disputes effectively.

The lack of trained and competent adjudicators in Africa was also one of the challenges he mentioned. He explained that in countries like South Africa and Zambia, finding qualified adjudicators is difficult, either because they are too expensive or insufficiently trained.

In addressing these challenges, the panellist proposed several solutions. He emphasized the need for Africa to institutionalize alternative forms of ADR, such as negotiation and mediation. He noted that while these practices are common in African culture often seen in traditional forums like councils of elders they are not formally institutionalized in the legal framework. Institutionalizing these forms of ADR could serve as a stepping stone toward establishing a more comprehensive statutory adjudication system in the future.

Furthermore, the panellist called for a harmonization of construction contracts to reflect African conditions and governance structures. He critiqued the widespread use of FIDIC contracts in Kenya, which originate from Geneva and do not account for the unique cultural and operational realities of African construction projects. He argued that it is crucial for practitioners to incorporate African cultural perspectives into the creation of construction adjudication frameworks.

In conclusion, the panellist emphasized that statutory adjudication has the potential to significantly improve dispute resolution in the construction industry across Africa. He argued that an adjudication system tailored to the African context would accelerate development on the continent.

2nd Panellist:

Simon Saili Malonza, C.Arb, FCIArb, Q.S,
Accredited Court Annexed Mediator, Advocate

Technology & Innovation in Construction Adjudication

Mr. Malonza began by emphasizing the importance of the construction industry to the economy, noting that it contributes between 10-12% of a sector valued at around 160 billion dollars. This highlights the considerable resources and investments funnelled into major infrastructure projects such as railways, ports, roads, and housing. Hence, with such large-scale developments, he stated that disputes are unavoidable, making adjudication a key mechanism for resolving conflicts quickly and maintaining cash flow for contractors.

He reiterated that adjudication was originally designed to provide temporary, binding decisions that unlock cash flow for contractors as was mentioned by the previous panellist. However, he expressed concern that the process is often misunderstood, particularly by lawyers, who may treat adjudication as a form of *mini arbitration*. The essence of adjudication, he argued, is to provide a swift resolution to disputes, which is undermined when parties misunderstand its function.

The panellist clarified that adjudication is intended as an interim dispute resolution mechanism under construction contracts, but the lack of a statutory framework in Kenya has led many parties to view it as a mere procedural step before pursuing litigation or arbitration. This uncertainty regarding the binding nature of adjudication decisions discourages parties from fully embracing it. He stressed the

need for Kenya to establish a legal framework that gives adjudication decisions the necessary authority and certainty to ensure they are respected and enforced.

Despite this legal gap, he highlighted that there have been recent attempts to introduce a more structured approach to dispute resolution in the construction sector. For example, the Joint Building Council has sought to amend its Green Book contract to include dispute resolution mechanisms that would bring adjudication to the forefront. Although this proposal was recently withdrawn, the panellist expressed hope that it would be revisited and eventually implemented. Further, he talked about the proposed Construction Adjudication Bill which seeks to embed adjudication within Kenyan law and provide clearer guidance on the enforcement of decisions.

The panellist also discussed the work of the National Steering Committee, which was appointed in January 2020 to formulate an ADR policy for Kenya. This led to the creation of Session Paper No. 4, which outlines a unified approach to ADR practices in the country. One of the key recommendations from the committee was to address the perception that adjudication is solely for the construction industry. The committee advocated for a legal framework that distinguishes between court-mandated adjudication and non-court adjudication, as well as strengthening the construction adjudication process by giving it its own legal foundation.

He also highlighted the significant differences between the construction adjudication systems in the UK and Australia compared to those in other regions, particularly in Kenya. He pointed out that early regulation in these countries has led to a grounded adjudication framework, enabling the swift resolution of disputes often within 28 to 42 days.

The panellist also noted that one of the key challenges in adjudication arises from the limited number of judicial precedents in Kenya, which leads practitioners to rely heavily on foreign jurisdictions, especially the UK. He explained that in the UK, there is a clear understanding that adjudication is a temporary mechanism designed to facilitate ongoing project cash flows. However, this has created issues regarding enforcement, particularly when parties wish to challenge decisions based on the existence of a dispute.

The panellist further discussed the principles of natural justice that underpin the adjudication process, emphasizing the rights of parties to a fair hearing and an impartial tribunal. He acknowledged that many parties challenge adjudicator decisions on the grounds of not being afforded proper notice or the opportunity to present their case. However, he indicated that courts prioritize the need for timely decisions over absolute accuracy. If the adjudicator addresses the claims presented, the courts generally do not delve into the minutiae of the decision-making process. This practical approach is crucial, especially as discussions around establishing a statutory framework for adjudication continue.

In reference to the role of technology in adjudication, he stated that construction projects generate an overwhelming amount of data, which can complicate the adjudication process. The integration of technology, particularly in document management and electronic discovery, is becoming essential for expediting the resolution of disputes. He stated that modern construction projects rely on various forms of documentation, including electronic files, BIM models, and online project management tools, all of which must be navigated by adjudicators within tight timelines.

The panellist emphasized the importance of agreement between parties on various issues when using electronic documents in the adjudication process. Discrepancies over the authenticity or existence of documents can lead to significant challenges, such as disputes over certification or allegations regarding deleted materials. Therefore, it is crucial for parties to clarify whether copies of discoverable electronic documents should be provided, whether electronic versions can substitute for physical inspections, and whether forensic inspections of electronic media are necessary.

He noted that the rise of virtual and hybrid hearings, catalysed by the COVID-19 pandemic, has transformed the adjudication landscape, particularly in construction disputes where parties may be geographically disconnected. He, however, stated that there lacked appropriate legal framework around the appropriate manner in conducting of virtual and hybrid hearings.

He also discussed the space of artificial intelligence(AI) in adjudication where he stated that AI has emerged as a powerful tool in adjudication, particularly in handling vast amounts of electronic data. Given the tight timelines for adjudicators to reach decisions, he stated that AI can assist in managing and evaluating this information efficiently. The panellist highlighted that while AI has the potential to streamline the decision-making process, it should not replace the adjudicator's role as it would then flip the decision-making process from human to automated, raising potential questions around the lawfulness of such delegation,. Instead, AI should be viewed as an aid, allowing adjudicators to make informed decisions based on the data presented.

The panellist raised critical questions regarding the legal implications of integrating AI into adjudication. Concerns about lawful delegation of decision-making authority to machines were paramount, as adjudicators derive their authority from statutes and the parties involved. The potential for AI to influence decisions raises questions about procedural fairness and the necessity for human oversight in the decision-making process. He noted that there are currently no established legal frameworks in Kenya to safeguard against these issues, which could result in decisions being made with insufficient transparency.

The panellist opined that while technology offers valuable tools for improving adjudication, it is imperative to maintain human oversight and ensure that adjudicators retain their authority in the decision-making process.

He concluded by emphasizing the importance of establishing regulatory frameworks to govern the use of technology in adjudication. He noted that while technology can significantly enhance the adjudication process, a lack of proper oversight could lead to chaos.

3rd Panellist:

Alex Kamau, FCIArb, Director at Obra International Limited

Permanent Impermanence: The Legal Fiction that is 'Final and Binding' Construction Adjudication Decisions

Mr Kamau began by agreeing with the Q.S Malonza assertion that construction adjudication is often misunderstood but also expressed his disagreement pointing out that construction adjudication operates within various regimes, including statutory, contractual, and ad hoc jurisdictions. He argued that the duration of disputes, which can extend beyond eight months, often stems from contractual obligations between parties. In contractual adjudication, parties have the autonomy to define their processes, which can lead to different outcomes based on their specific agreements.

He also noted another critical distinction explaining that while adjudication serves as a dispute resolution mechanism, it is inherently temporary and does not aim to provide a final resolution. Instead, it allows aggrieved parties the option to pursue further steps for a definitive judgment.

The panellist opted to approach the discussion with a devil's advocate perspective, urging careful consideration of the implications of formalizing adjudication within a legal framework. He stated that in his paper he has considered a comparative analysis of eight jurisdictions which reveal marked differences in how construction adjudication is approached, hence the need for a Kenyan Construction Education Act that accommodates local contexts and requirements.

Further, referring to previous panellist he emphasized the importance of recognizing that construction adjudication was originally designed to address cash flow issues, which are critical to the industry's sustainability. With fierce competition in construction markets, delayed payments can jeopardize contractors' financial stability. He raised key questions about the current state of cash flows within the Kenyan construction industry and whether the legislative focus should remain on construction adjudication or consider alternative dispute resolution mechanisms.

He also highlighted inherent inconsistencies in adjudication practices, particularly the ***pay now, argue later*** principle, which can conflict with parties seeking just resolutions.

Further, he noted significant concerns in the use of construction adjudication. Regarding the adherence to natural justice principles within this framework he pointed out that, especially in jurisdictions like the UK, the emphasis is often not on ensuring that all procedural justice rules are strictly followed. Instead, the primary focus of adjudication is to facilitate the flow of money and enable project completion. The aggrieved party is expected to seek final resolution through litigation or arbitration after the temporary measures of adjudication have been applied. Highlighting ***Balfour Beatty Construction Limited v The Mayor & Burgesses of the London Borough of Lambeth,*** he noted that this is done on a case by case basis, as courts can sometimes overrule a decision reachedby construction adjudicators on the basis of materiality.

Referring to the UK, he noted that adjudicators are typically required to render decisions within a 28-day timeframe. However, the speaker noted that the draft bill under consideration proposes a significantly shorter timeline of just 14 days for adjudicators to reach a decision. While this expedited process may be appealing for efficiency, it poses challenges. Given the complexities and volume of data inherent in the construction industry, the question arises whether adjudicators can deliver just decisions within such limited timeframes. It is essential to recognize that the parties entering adjudication often do so under contentious circumstances, which could complicate any mutual agreement on extending deadlines.

He also highlighted the uniqueness of construction adjudication, particularly through the lens of the *unreviewable error doctrine* which posits that as long as the outcome is deemed correct, the reasoning behind it may not be scrutinized. As a result, he argued that adjudicators' decisions can be enforced even in cases of significant errors.

Additionally, the conversation touched upon the recent revisions to commonly used contracts in Kenya, such as the Joint Building Council (JBC)contract, which now stipulates adjudication as the primary dispute resolution mechanism. This, as he stated is one interesting yet concerning provision within this contract that allows dissatisfied parties a mere five days to issue a notice of dissatisfaction regarding the adjudicator's decision. Such a brief window raises concerns about the fairness of the process and the capacity of parties to adequately respond, especially in complex cases where significant sums are at stake.

The concerns he raised regarding the proposed construction adjudication regime emphasize significant implications for natural justice and the fair resolution of disputes within the construction industry. He highlighted the precarious position parties may find themselves in, particularly due to the stringent five-day period for issuing a notice of dissatisfaction with an adjudicator's decision. This short timeframe is especially troubling for parties who may lack adequate legal representation or expertise to thoroughly review the decision and consider their options.

Another concern raised is the potential floodgate of claims that could emerge if this proposed adjudication process is implemented without sufficient safeguards. He stated that the system could overwhelm the courts with challenges if adjudication decisions are seen as unfair or as breaching natural justice. This risk mirrors existing issues in arbitration, a well-established dispute resolution mechanism that still faces scrutiny in terms of access to justice and equitable outcomes. Given that construction adjudication allows for deviations from strict legal norms, the concern is that the courts may become burdened with numerous challenges from parties seeking to rectify perceived injustices.

In conclusion, the speaker advocated for a cautious approach in drafting the provisions of the proposed Construction Adjudication Bill as the risks associated with allowing adjudication decisions to become final and binding without proper protections for the parties involved are substantial. He suggested that, rather than creating a completely new adjudication regime, it may be more effective to enhance the existing arbitration framework to address the specific needs of the construction industry. For instance, fast-track arbitration could be introduced as a way to resolve construction disputes more quickly, without the risks posed by a separate adjudication process.

4th Panellist:

Martin Mbugua, MCIArb, Partner, Quanycosts Consultants

Re-designing Construction Adjudication in Kenya: A Human Centred Approach in Technology and innovation

Mr. Mbugua explored emerging technologies such as online dispute resolution (ODR), artificial intelligence (AI), blockchain, and conversational AI, which could significantly enhance the efficiency and fairness of construction dispute resolution processes. He, like Q.S Malonza emphasized that technology should act as an enabler in dispute resolution, complementing the human aspect rather than replacing it entirely.

The panellist identified several major challenges in Kenya's construction industry, particularly the prevalence of disputes related to construction cost claims. He referred to a study by the National Construction Authority (NCA), which indicates that 50% of disputes in the industry involve issues surrounding valuations and payments. Additionally, unforeseen logistical issues and ground conditions, as illustrated by the Standard Gauge Railway (SGR) project, often result in cost escalations and project delays. The SGR, for instance, saw its original budget rise by 30%, alongside a two- year delay. Such unexpected events are common in the industry, further complicating project execution.

Another challenge discussed was the differing priorities of the parties involved in construction projects, particularly between contractors and developers. Contractors, as business people, aim to maximize profits, while developers or employers seek the best possible return on their investment.

The panellist also discussed the concept of Dispute Adjudication and Avoidance Boards (DAABs) stating that these boards are incorporated into FIDIC contracts to oversee construction projects and anticipate potential disputes before they escalate. Each party in a construction contract nominates a member to the Board, with a third umpire being jointly appointed. The role of these boards is to prevent conflicts from stalling projects and to resolve disputes quickly through ADR methods, such as expert determination, mediation, and adjudication.

Further, he discussed the integration of technology into ADR within the construction industry, emphasizing the potential for significant benefits. Studies show that AI- driven dispute resolution can reduce both the costs, and the time needed for dispute resolution by 30% and 25%, respectively.

He examined Online Dispute Resolution (ODR), an evolution of virtual dispute resolution that became prominent during the COVID-19 pandemic. He stated that ODR enhances traditional ADR by incorporating centralized databases and communication hubs, making it easier for parties to engage in the process. Platforms like IBRAM, based in Hong Kong, run by the American Arbitration Association, exemplify how ODR is being implemented. These platforms can be further strengthened by integrating Distributed Ledger Technologies (DLTs) like blockchain.

The panellist then turned to AI and its applications in ADR, particularly AI-driven chatbots. These conversational AI tools, such as ChatGPT, utilize natural language processing to interact with users, simulating human communication. He noted that Chatbots have the potential to reduce the time needed for claims processing by up to 30%. AI chatbots, in particular, could assist Dispute Adjudication Boards (DABs) by enabling them to sift through vast amounts of information quickly and deliver decisions that meet the tight timelines stipulated in FIDIC contracts. He acknowledged that while the adoption of AI in construction adjudication may seem futuristic, such technology is already in use.

Despite the potential, the speaker acknowledged significant challenges. For instance, many practitioners lack familiarity with blockchain, cryptocurrencies, and online dispute resolution systems. Further, the high costs of acquiring and maintaining the necessary hardware and software may pose further obstacles to widespread adoption of these systems.

He also highlighted several regulatory and legal barriers to integrating technology into ADR in Kenya. A key challenge is that the current legal frameworks are outdated, limiting how much technological innovations can be accommodated. For example, the Judiciary has yet to embrace cases involving blockchain-encoded smart contracts, which presents a gap in the regulatory landscape. Another major issue is cybersecurity, data privacy, and security concerns. Although Kenya enacted the Data Protection Act in 2019, technologies like generative AI may pose risks by compromising user data, either through machine learning or malicious access.

The panellist also noted that while technological advancements can improve efficiency, they risk overlooking human understanding, empathy, and nuances crucial to fair adjudication. There is also the danger of algorithm bias in AI systems,

which may lead to unfair rulings if dispute resolvers become too dependent on these tools. He stated that cultural resistance may also arise, especially in a society like Kenya's, where face-to-face meetings and human interaction are highly valued.

To address these concerns, the panellist recommended that regular training for ADR stakeholders is essential to enable them to leverage technological applications effectively. Second, he emphasized the importance of establishing a clear regulatory framework to govern the use of technology in ADR.

Finally, the panellist stated that human involvement and oversight remain essential in dispute resolution. While technology can act as an enabler, it cannot replace the role of human dispute resolvers.

PANEL 4:
MEDIATION AND AJS

Moderator:

Gloria Munyiva, Accredited Mediator, Associate at KM Associates in collaboration with Course Correct Consulting

1st Panellist:

Dr Kenneth Wyne Mutuma, C.Arb, FCIArb, Vice Chairman, CIArb(Kenya Branch)

Assessment of the Impact of Court Procedural Rules in Implementation of Court Annexed Mediation Programme (Camp) in Kenya

He began by referencing the 2016 pilot program designed to explore whether court- annexed mediation could help alleviate the growing case backlog. Using primary research tools, the pilot involved respondents including judicial officers, practitioners, and users of the court system. One of the key findings was that mediation, unlike adjudication and arbitration, is a more informal process and is distinct in nature. Although there were signs of a reduction in the caseload due to mediation, the overall impact of the pilot was modest when compared to the sheer volume of cases pending in the courts.

A key tension identified during the pilot was the balance between procedural structure and flexibility. While there was an effort to introduce regulatory features to guide the mediation process, these procedures began to resemble the formal systems that mediation was meant to offer an alternative to. This issue sparked discussions with the Mediation Accreditation Committee about the need to avoid overburdening mediation with formal requirements, as people turned to mediation for its flexibility compared to the formal court process.

The panellist also discussed concerns about the training and qualifications required for mediators. After the pilot, there was an insistence on mediators undergoing specific, formalized training, leading to the question of where to draw the line between formal and informal mediation. He highlighted the organic nature of AJS, and the need to avoid transforming mediation into a process that mirrors the commercial- centric nature of arbitration or litigation. He referenced how mediation is used to resolve disputes across various contexts, such as family and community disputes, and how flexibility in training should account for these diverse settings.

Sustainability emerged as another critical issue in the implementation of court- annexed mediation. Mediation, being emotionally and mentally demanding, requires highly skilled mediators, yet the compensation provided is often inadequate. Mediators, especially those with significant experience, face

opportunity costs when participating in mediation due to the low pay. This results in experienced practitioners being replaced by less experienced mediators, which ultimately affects the quality of the mediation process. This trade-off between budget constraints and the need for skilled mediators presents a significant challenge to the sustainability of the mediation system.

The panellist further discussed the funding dilemma, noting that mediation requires resources, yet the public sector budget for this program is limited. This funding challenge is compounded by the emotional and relational complexities that mediators must manage. As a result, the retention of experienced mediators becomes difficult, affecting the quality and outcome of the mediation process.

On a comparative aspect, the panellist highlighted that Kenya is ahead of several other jurisdictions, particularly South Africa, in the formal implementation of court- annexed mediation. While South Africa incorporates traditional elements into its mediation process, Kenya has demonstrated leadership in the formalization and structuring of court-annexed mediation. He shared an anecdote about how elements of traditional African dispute resolution systems, once studied and incorporated into the Ontario mediation rules, were then reintroduced to Africa during the development of Kenya's own court-annexed mediation process.

In conclusion, the panellist stated that it is important to balance procedural guidelines with the need for flexibility in mediation. The formalization of mediation should not replicate the rigidity of court procedures, and the sustainability of the program relies on adequate funding and the retention of experienced mediators. He stated that Kenya's leadership in formalizing mediation is commendable, but challenges remain in ensuring the process remains people-centred and accessible while maintaining high standards of mediator expertise.

2nd Panellist:

Dr. Christina Kinyua, Accredited Mediator, Founder & Executive Director, Jesilo Consultancy

Peer Mediation in Educational Institutions

Dr. Kinyua particularly focus on this topic was on universities and students in general. Drawing from her extensive experience of over 30 years working in educational institutions, she reflected on how dispute resolution mechanisms exist within the education sector but are often traditional and limited in scope. She posed a question to the audience, asking whether anyone had experienced disputes during their own time in school or through their children or relatives, to demonstrate the ubiquity of conflict in educational environments.

The panellist shared how, after becoming a mediator, she considered introducing mediation into the education system. She envisioned peer mediation as a program of empowerment for student leaders and other stakeholders, enabling them to manage disputes that naturally arise in schools and universities. Her vision was to equip students with conflict resolution skills from a young age, such that by the time they reached higher levels of education, they would be better equipped to resolve disputes constructively. This, in turn, could mitigate destructive behaviors often witnessed in schools and universities, such as strikes and violence.

She emphasized that peer mediation is not intended to replace existing dispute resolution methods, but rather to strengthen them. Through workshops and training, students would be empowered to help each other resolve conflicts, while also acquiring the confidence to approach school administrators. This system, she argued, would reduce the physical and emotional outbursts that often accompany student dissatisfaction and unrest. Peer mediation would create a more peaceful, constructive environment by addressing conflicts at their root.

The panellist highlighted the diverse nature of disputes in educational institutions, which range from student-to-student conflicts to tensions between students and administrators, or even between schools and the community. Traditional methods of discipline—such as corporal punishment and detention—have been used in the past but are often ineffective or damaging. Peer mediation, in contrast, completes the circle of dispute resolution by introducing a more contemporary, empathetic approach. The involvement of student leaders and higher education leadership teams is crucial for the sustainability of peer mediation programs, as they must be equipped with the necessary skills to support and oversee these initiatives.

She discussed the potential benefits of peer mediation, summarizing them as generational, economic, emotional, spiritual, social and academic (GEESSA). Peer mediation, she suggested, would help address generational conflicts by empowering students to resolve disputes within their own peer groups. Economically, it could prevent the financial and reputational losses caused by escalating conflicts, while emotionally, it would allow students to release negative energy and foster a more harmonious school environment. The program would also enhance students' social skills and relationships, which could have long-term benefits both during their education and in their post-education lives.

In terms of implementation, the panellist outlined five key steps: detecting and clarifying disputes, mitigating them when necessary, managing escalated conflicts, reviewing the outcomes of peer mediation, and adopting these practices into institutional policies. By following these steps, educational institutions would be able to create safe and trusting environments conducive to learning. She concluded by noting the possible resistance to this new approach from those invested in traditional methods but emphasized that policy reviews, further research, and the inclusion of all stakeholders, including those with disabilities, would be essential for the success of peer mediation.

Finally, the panellist expressed optimism that peer mediation, if implemented effectively from primary schools through universities, could help develop conflict-competent students and leadership teams. This, she argued, would ultimately reduce the burden on the country's dispute resolution systems and contribute to a more peaceful society.

3rd Panellist:

Mr. David Njoroge, FCIArb, Advocate of the High Court of Kenya & Head of Dispute Resolution at Njuguna & Njuguna Co. Advocates

Mainstreaming Alternative Justice Systems: Towards an Efficient People Centred Justice in Kenya

He started by emphasizing the inspiration for his area of discussion, which he stated stemmed from the Chief Justice's vision of social transformation through access to justice. The essence of this vision is to ensure that justice serves the people and is not confined to the formal institutions of the courts or legal professionals.

The panellist questioned the ownership of justice, asking, whose justice, is it? Or rather who justice belongs to? especially in the context of both criminal and civil disputes. This people-centred perspective, he noted, is at the heart of AJS and has already been integrated into the justice system in Kenya.

He referred to the notable case of *Republic V Mohamed Abdow Mohamed* involving a murder trial in Garissa, where the *Masla* process, an informal justice mechanism within the Muslim community, was used to resolve the dispute. In this case, the perpetrator confessed and went through a rigorous process of reintegration into the community, which included reparations to the victim's family. The community accepted the resolution, which was endorsed by the court, demonstrating the successful integration of traditional justice mechanisms into the formal system. This case, he explained, serves as a model for how AJS can complement formal legal procedures, particularly in achieving reparative justice and reintegration.

The panellist highlighted the significance of the AJS policy, launched in 2020, and the challenges associated with its implementation. He noted that while there is substantial progress in mainstreaming AJS, public awareness remains low, and there are limited resources available to fully support its widespread adoption. Despite these challenges, he praised the efforts of former Chief Justice Willy Mutunga, whose transformative leadership spearheaded many reforms in the Kenyan Judiciary, including initiatives to address the overwhelming backlog of cases and the launch of court-annexed mediation in 2016. He pointed out that surveys had revealed that 79% of disputes in Kenya are resolved outside formal court systems, with only 21% going through the courts. This figure, he stated shows the importance of strengthening AJS mechanisms, as they reflect the reality of how most Kenyans seek justice.

The panellist outlined three models of AJS currently being practised in Kenya. The first, autonomous AJS, refers to systems that exist organically within communities, functioning without state or third-party intervention. These systems are widely accepted by the communities they serve, making them the more common form of AJS. The second model involves third-party AJS, where the state or non-state actors, such as chiefs or civil society organizations, facilitate the resolution of disputes. The third model is court-annexed AJS, where a court refers certain cases to community-based mechanisms for resolution, and the outcomes are later endorsed by the court. He explained that this referral system works both ways, with some community-based systems referring cases they cannot handle to the courts.

In advocating for the mainstreaming of AJS, the panellist emphasized that resolving

disputes should not be the exclusive preserve of the courts. He referenced the Universal Declaration of Human Rights, which enshrines the principle that judicial intervention should be the last resort in dispute resolution. Mediation, negotiation, and arbitration should be prioritized before turning to the courts. By intertwining these methods, the justice system becomes more responsive to the needs of the people, aligning with the vision of people-centred justice.

In conclusion, the panellist encouraged participants to become ambassadors of AJS, spreading the word about the importance of alternative justice mechanisms. He stressed that AJS, alongside other forms of Alternative Dispute Resolution (ADR), is essential in creating a justice system that is truly accessible and reflective of the needs of the people. He called on all stakeholders to support the expansion and integration of these systems, ultimately contributing to a more efficient and inclusive justice landscape in Kenya.

QUESTION AND ANSWER SESSION

Q: *Participant 1* asked whether there are ADR mechanisms with the National Land Commission that allow for mediation of land disputes involving registrars who have been involved in corrupt dealings.

A: The speaker stated that there are various provisions in the National Land Registration Act that outline criminal offences which are meant to guide the Commission's workforce. She however stated that Section 16 of the Act that mandates the Parliament to come up with legislation that gives the Commission powers to adjudicate land disputes, has yet to be implemented. This, she stated, has largely contributed to slowed down adoption of ADR in the Commission.

Q: *Participant 2 asked how peer mediation mechanisms in universities would enable disputes such as examination cheating be solved.*

A: The speaker stated that the peer mediation would help involved parties as well as administrative bodies in the universities understand underlying causes of disputes such as cheating. This would eventually help administrative bodies come up with a concrete method of tackling such conflict.

Q: *Participant 3* asked on the panellists on whether they believe in the doctrine of adverse possession and the ADR mechanisms that may be used to resolve arising conflicts as a result of the adoption of the doctrine.

A. The speaker contended that many have used the doctrine for personal gain. This has been done through various ways such as obtaining permanent injunctions that are meant to hinder initial owners of the land from accessing the land. She however stated that ADR can come in, such that initial and those deemed to be current ‘‘owners ’’would reach peaceful resolve in a way that caters to each parties' interests.

DAY 2

PANEL 5:
ADR, AI & TECHNOLOGY

Moderator:

Ms. Wambui G. Muigai, FCIArb, Associate, Mohammed Muigai LLP, Accredited Mediator

1st Panellist:

Prof. Zachary Calo, S.C, Professor of Law, Hamad bin Khalifa University College of Law: Senior Counsel, McNair International of Counsel Sports Law, Schelstraete Equine Law, International Mediator.

Impact of Artificial Intelligence on Alternative Dispute Resolution

The panellist in his presentation drew from experiences in the Middle East, where he is based and especially because similar conversations are taking place there. He began by stating that while challenges exist, there is significant momentum towards transforming ADR processes with AI. The discussion focused on the ethical implications and professional responsibilities AI introduces into mediation practices, noting that while arbitration may have integrated AI more rapidly, the ethical challenges posed to mediation are equally critical.

He highlighted that AI will not only change how mediation is conducted but could potentially alter the fundamental nature of mediation itself. Although technology in dispute resolution is not new, with early developments in online commerce platforms like eBay in the 1990s, AI presents more profound challenges. He acknowledged that while the shift to ODR during the pandemic changed some logistical aspects of mediation, such as confidentiality and interface issues, it did not transform the core practice. AI, however, has the potential to bring more significant changes to the structure and nature of mediation.

He raised concerns about how AI is outpacing ethical and regulatory frameworks in mediation. Despite efforts by organizations such as the International Bar Association and the Silicon Valley Arbitration and Mediation Centre to issue guidelines on AI and ethics in ADR, these initiatives are still in their early stages. The speaker's own involvement in drafting guidelines on ethics in AI mediation further underscored the nascency of the conversation, urging the need for proactive thought and regulation in this space.

The speaker emphasized that while AI's intersection with mediation is still being explored, there is a pressing need to identify how the technology will influence both the methodology and substance of mediation. The conversation on AI in ADR is still in its infancy, but it will likely become more central as the technology advances and continues to reshape the dispute resolution landscape.

The speaker pointed out how AI can assist mediators in tasks like organizing documents, summarizing key arguments, and identifying key timelines or facts. AI could also help mediators generate neutral, unbiased questions for parties involved in mediation, or analyse emotional tones based on language patterns as well as, assessing the positions of parties that could assist in reality testing. While this may enhance efficiency, there are ethical concerns, particularly around AI profiling parties based on publicly available information, which may introduce bias or violate privacy.

Further, he stated that AI's ability to predict legal outcomes based on data analysis could be presented as an objective judgment, helping mediators push parties to a resolution without seeming biased. This could extend to using AI for option generation and mediator proposals, leveraging precedential cases to suggest resolutions.

However, the panellist emphasized that the role of AI in reshaping mediation will challenge mediators to adapt their approaches as mediators will need new skills to navigate this AI-enhanced landscape.

Ethically, the panellist suggested that existing codes of mediation ethics could provide a sufficient framework to manage these challenges for now, without needing entirely new guidelines. Mediators should continue to follow principles such as neutrality, confidentiality, and informed consent, and apply these to the use of AI in practice. He referenced various ethical guidelines from international and national organizations, such as the International Bar Association, American Bar Association, and the International Mediation Institute.

As AI becomes increasingly integrated into mediation, the panellist urged consideration of how it affects these long-standing principles. For example, party self- determination, a cornerstone of ADR, could be compromised if AI-generated solutions leave parties feeling disempowered or lacking control over the process. Similarly, the principle of impartiality might be at risk due to biases potentially embedded in AI software or its misuse by mediators who may unintentionally skew the process.

In conclusion, the speaker emphasized the importance of transparency in the use of AI in mediation. He stated that parties should be fully informed that AI is being employed and must understand how it influences the mediation process. This is closely linked to the principles of voluntariness and consent, ensuring that parties retain control over their decisions. He concluded by stating the need for further dialogue on how AI can be harmonized with ethical mediation practices while respecting the foundational principles that guide ADR.

2nd Panellist:

Mr. Khaseke M. Georgiadis, FCIArb, Arbitrator, Deputy Head of Dispute Resolution Group Mohammed Muigai LLP

Resolution of Tax Disputes in Kenya through Technology and ADR: Hits and Misses

This part of the presentation covered five key areas, beginning with an introduction that laid out the assumptions underpinning the discussion. The first assumption was that participants were already familiar with the various types of ADR, and therefore the panellist did not give a detailed explanation of these mechanisms.

The panellist clarified that there are three main categories of tax disputes. The first category of tax disputes concerns the constitutionality of tax measures, whether they are proposed or already implemented. Several recent cases exemplify this type, such as the challenge to the constitutionality of Kenya's minimum tax law and the affordable housing levy, both of which were declared unconstitutional by the courts. There is also an ongoing constitutional challenge involving the Finance Act of 2023 that is pending before the Supreme Court.

The second category deals with the conduct of tax authorities, particularly where actions are ultra vires, or beyond their legal authority, or where guidelines lack statutory basis. These disputes often involve judicial review and may now be addressed through constitutional means as well, following recent jurisprudence that supports such an approach under Article 22 of the Constitution. The third category involves technical tax disputes, such as the interpretation of tax statutes and the determination of tax liability, including the amount a taxpayer owes.

The panellist noted that while ADR can be a useful tool in resolving tax disputes, there has been controversy surrounding its application in this area. Some legal perspectives, including those voiced by the keynote speaker suggest that tax disputes, like intellectual property or climate change disputes, may be better left to the courts. Despite this viewpoint, the speaker emphasized the successes and challenges experienced with ADR in tax dispute resolution and concluded with recommendations based on the existing legal framework and identified challenges.

In the discussionof ADR in the context of tax disputes, particularly in Kenya, the panellist stated that there's a growing movement advocating for ADR in resolving tax disputes, particularly mediation, even though the legal framework may not explicitly mandate it. Taxation, he said, is viewed as part of public law, raises unique challenges regarding its arbitrability. The argument is that since tax laws are statutory, there's less room for private negotiation compared to disputes in private law, such as contract law.

He cited Article 159(2)(c)) of the Constitution of Kenya 2010 stating that it provides a legal basis for ADR, even in tax disputes, and this is supported by various laws, including the Tax Appeals Tribunal Act and the Tax Procedures Act.

He also did a statistical analysis indicating that there is a sharp increase in the use of ADR for tax disputes in Kenya particularly employed by the Kenya Revenue Authority (KRA). In 2019, 174 cases were resolved, unlocking 10.4 billion Kenya shillings, while in 2021, 393 cases resulted in 21 billion being collected.

The panellist also discussed some of the challenges facing the ADR framework for resolving tax disputes in Kenya revolve primarily around autonomy, legislative gaps, and cost imbalances. One significant issue is the need for the ADR process to be more autonomous from the Kenya Revenue Authority (KRA), which currently plays a substantial role in the proceedings, potentially compromising the independence of the process. Additionally, while the existing regulations mark progress, concerns remain about the requirement for consent from both parties before entering ADR, as well as the possibility that facilitators may be KRA officers, raising questions about impartiality. Furthermore, a cost imbalance exists, as taxpayers who opt for an independent facilitator are required to bear the associated costs, creating financial disparities between the parties involved.

In conclusion, the panellist gave a comparative analysis, stating that Kenya's ADR framework is seen as more advanced than those in the UK and South Africa, particularly with respect to its provisions for autonomy. He recommended that to enhance the process' independence Kenya needs to adopt a court-mandated mediation model, like what exists in other legal frameworks.

3rd Panellist:

Mr. Samuel Kyalo, Adjunct Lecturer at Riara Law School, Member, EALS Rule of Law Committee

Injustice Outside Courts? A Natural Justice Account Against 'Criminal AJS'

The panellist acknowledged that while his paper took a different turn from the previous conversation, he still believes that AJS is integral to both ADR and the overall justice framework. The presentation referred to different models of AJS, including autonomous AJS institutions, third-party AJS institutions, and quota-based institutions. It was noted that while AJS is deeply rooted in cultural practices, it must align with evolving principles of justice to avoid undermining established legal norms.

He clarified that their paper was not critical of AJS but sought to explore its use while ensuring it respects key legal principles. He started by acknowledging the historic significance of AJS, noting its presence before the colonial era and its formal recognition under Kenya's 2010 Constitution, particularly under Article 159. AJS policies, operationalized in 2020, have been applied in both civil and criminal cases, adopting a non-distinction approach, which has helped settle previous scholarly debates on whether traditional dispute resolution is appropriate for criminal matters.

However, in the presentation he raised concerns about whether AJS, particularly in criminal cases, truly upholds justice and constitutional principles. While AJS is beneficial in some respects, it may undermine the rights of accused individuals, especially in cases involving serious offenses. He cited the case of *Republic vs. Mohammed Abdow*, which sparked controversy by applying traditional dispute resolution in a capital offense matter.

Further, he highlighted potential shortcomings of AJS in terms of natural justice principles, particularly the lack of uniformity across different AJS models and practices. This variability raises concerns about whether participants in AJS processes are guaranteed a fair hearing or unbiased decision-making, which are core elements of natural justice. While some AJS models, such as those based on mediation and consent, do not raise natural justice concerns, others—such as those involving autonomous authorities like elders or chiefs—may pose significant risks to fairness.

He identified key issues where AJS could fall short of ensuring natural justice. First, there is no guarantee of fair decision-making due to the diverse AJS models. Second, the autonomy of certain AJS institutions, such as those involving chiefs, might lead to biased outcomes, especially when decision-making is informal or based on negotiation rather than adjudication.

The panellist also delved into the challenges of AJS, particularly focusing on the balance between community-accepted forms of punishment and the protection of individual rights as enshrined in constitutional law. The discussion emphasized that while some community-driven resolutions, such as the traditional payment of

10 cows as compensation for an offense, may be perceived as socially acceptable, they can also be viewed as punitive. This raises critical questions about the nature of consent in these arrangements, especially when individuals may feel compelled to comply due to societal expectations or the fear of formal judicial consequences.

He highlighted concerns about the constitutionality of various forms of punishment meted out by community elders, including physical penalties like corporal punishment. Such actions must be scrutinized within the framework of constitutional protections against unusual punishments.

He also reiterated the principle of natural justice, which asserts that every accused person is entitled to due process and the least severe form of punishment. This leads to a broader inquiry into how community-based justice can align with the standards of formal judicial systems without compromising individual rights.

Moreover, the panellist addressed the ambiguity surrounding the review standards of AJS decisions. The discussion referenced four potential standards that courts could apply when reviewing cases originating from these systems, including deferential, recognition and enforcement, facilitative interactive, and monist approaches.

In concluding remarks, the panellist acknowledged the risks of potential violations of natural justice rights within community-based resolutions but asserted that these systems remain important and worthy of preservation. Rather than abolishing AJS, he recommended a structured approach where AJS processes could be supervised by courts to ensure compliance with constitutional rights. This would allow for the benefits of community justice while safeguarding individual liberties hence, advocating for a model that respects both traditional practices and legal protections.

4th Panellist:

Ms. Justine Ferland, Associate Legal Officer, Information and External Relations Section, WIPO Arbitration and Mediation Centre.

The Intersections Between Intellectual Property Rights & Alternative Dispute Resolution

Ms. Justine Ferland joined the colloquium virtually. She started by expressing a firm belief that ADR is well-suited for resolving most IP-related issues. She acknowledged a prevailing sentiment in earlier discussions advocating for litigation as the preferred method for resolving IP disputes. She respectfully disagreed, arguing that while some IP disputes, particularly those involving the registration of rights, may require formal judicial intervention, many others can effectively utilize ADR methods, which offer distinct advantages.

She highlighted the role of the World Intellectual Property Organization (WIPO) and its Arbitration and Mediation Centre, which has been operational for nearly 30 years. WIPO serves as a global forum for IP services and aims to foster innovation and creativity. Among its offerings, the centre provides various dispute resolution services that help parties navigate conflicts involving IP and technology without

resorting to traditional court litigation. This is particularly beneficial as it often results in faster and less costly resolutions. She noted that WIPO's mediation services have gained popularity, with a notable increase in their caseload in recent years. This trend underscores a growing awareness of the advantages of ADR over conventional litigation.

Ms. Ferland explained that the centre administers a broad spectrum of disputes, primarily focused on IP issues such as patents, trademarks, and copyrights, but also includes broader commercial disputes. While historically, most cases have originated from Europe, North America, and Asia, Ferland observed a significant increase in participation from African countries, indicating a rising interest in ADR in the region. She emphasized that WIPO's services are not limited to international disputes; they also accommodate purely national cases, allowing parties in jurisdictions like Kenya to resolve disputes locally without the need to travel to Geneva.

Further, she elaborated on the flexibility and efficiency of ADR processes, particularly mediation noting that approximately 70% of mediation cases settle successfully, with the expedited nature of these procedures allowing resolutions within a few months or even weeks, contrasting sharply with the lengthy timelines often associated with litigation. Furthermore, the ability to choose mediators or arbitrators with specific expertise relevant to the technology or industry in question enhances the effectiveness of ADR, as parties do not need to explain technical details to judges who may lack specialized knowledge.

Another key advantage Ferland highlighted is the preservation of long-term relationships through mediation. In many IP collaborations, parties are involved in ongoing partnerships, and mediation facilitates solutions that benefit both sides, fostering cooperation rather than adversarial outcomes typical of court decisions. She concluded her presentation by reiterating the strong case for using ADR in IP disputes.

PUBLIC LECTURE

Moderator:

Ms. Kananu Mutea, FCIArb, Founder and Partner, Course Correct Consulting in Collaboration with KM Associates

The discussion began with Ms. Kananu acknowledging how commonplace the discussions around cybersecurity and climate change was in today's culture. As a result, she stated that these discussions are crucial to have in ADR forums since they are inherently related to the kinds of disputes that will more likely be subjected to dispute resolution processes including ADR. Therefore, one of the most important aspects of the conversation about ADR's future is how well it works to give access to justice in these related fields.

Regarding climate change, she referred to the Paris Agreement, which she said that has gone on to recognise the disparity in the impact of climate change as well as the capability of countries to take action on the same. Countries have since then moved to ensure its actualisation through legislative laws and progressive

jurisprudence. The environmental conversation has influenced other spheres including international trade. A Brazilian court, for example, became the first to recognise the Paris Agreement, ordering its government to reactivate its climate fund in line with the treaty. A Dutch court, on the other hand, required an oil and gas company, Shell, to comply with the treaty by reducing its emissions by forty five percent. These were some of the few examples outlined by the moderator, that show global efforts towards achieving environmental sustainability, as well as potential opportunities for ADR to be used as an effective method of ensuring equitable environmental governance.

Similarly, the moderator also pointed out that cybersecurity is a pressing issue in today's society. In the digital age, data breaches and digital privacy rights have emerged as critical aspects of human rights discussions. Ms. Kananu drew parallels between and the increase in data breaches due to the wase of access to information use which is often exploited for social engineering tactics.

In conclusion, Ms. Kananu stated that ADR practitioners ought not to ignore this discourse and propose solutions of how to use dispute resolution solutions to cater to these arising challenges before ceding the floor to the next speaker, for the public lecture.

Speaker:

Prof Kariuki Muigua, OGW, C.Arb, FCIArb, Professor of Law at the University of Nairobi School of Law

ADR in the Context of Emerging Challenges such as Climate Change Cyber Security & Globalization

The speaker highlighted the *necessity* of reevaluating what ADR encompasses, noting that its interpretation and implementation can differ significantly across regions. There were discussions regarding practical applications of ADR, including mediation and its historical introduction into legal frameworks, such as the Constitution of Kenya.

The speaker highlighted the profound impact of climate change as a defining issue of our time, prompting a discussion on how ADR mechanisms can be effectively employed to address the myriad disputes arising in this context. The complexity of the topic, which intertwines various global challenges, particularly the growing importance of environmental, social, and governance (ESG) considerations in ADR frameworks.

He noted that ADR is becoming increasingly relevant in disputes related to climate change and natural resources. With the proliferation of ESG clauses in contracts—mandating *the* protection of the environment and ensuring social responsibility there is a pressing need for arbitration and other ADR methods to handle these

disputes effectively. The speaker emphasized that negotiations, mediations, and traditional justice systems are often the first avenues pursued before disputes escalate to arbitration.

Prof. Kariuki stated that one of the selling points for arbitration is its ability to navigate transnational disputes, which are prevalent in environmental issues. The New York Convention allows arbitration to be recognized across approximately 150 jurisdictions, enhancing its utility in international contexts. The speaker contrasted this with the emerging Singapore Convention, which aims to provide a similar framework for mediation, although participation is still growing.

Further, the role of ADR in facilitating environmental diplomacy was noted, with methods such as negotiation and mediation serving as instrumental tools for fostering dialogue between countries. He asserted that negotiation serves as a foundational element *of* mediation, where parties engage in discussions to reconcile their interests. However, when negotiations reach a stalemate, it becomes necessary to involve a third party to facilitate mediation.

However, he criticized the current state of mediation, arguing that it often occurs prematurely, bypassing essential negotiation steps. Judges tend to refer parties to mediators without first encouraging them to negotiate, which can lead to inefficiencies. He called for redefining mediation to include negotiation as a critical component, suggesting that effective mediation should begin with collaborative discussions among parties.

He also differentiated between coercive and non-coercive ADR mechanisms. Coercive methods like arbitration and litigation tend to create adversarial relationships, often resulting in a clear winner and loser. Non-coercive approaches such as negotiation and mediation allow for more flexibility, efficiency, and the opportunity to incorporate expertise, ultimately fostering collaborative resolutions.

The lecture also raised critical reflections on traditional litigation practices in various regions, including Africa and East Asia. It challenged the Eurocentric notions of property and land ownership that dominate legal discourse, particularly the concept of *radical* title, which asserts that the government owns all land. This perspective often overlooks the cultural significance of land within communities, particularly where ancestral connections are deeply rooted. The speaker suggested a re-evaluation of these legal concepts to better align with the realities and values of the communities they affect, suggesting that a shift in perspective is necessary to address historical injustices effectively.

A significant focus was also placed on the importance of local communities and their connection to land and resources. In countries like Australia and New Zealand, there is a resistance against the imposition of external concepts that overlook indigenous rights and heritage. The speaker emphasized the need for acknowledgment of local ownership and the generational ties to the land, recommending that any significant developments, such as airport constructions, should not proceed without recognizing the prior claims of local populations.

The speaker also discussed the challenge of public participation within the framework of ADR. The speaker stated that true public participation involves ensuring that local communities understand the issues at stake and that their interests are genuinely considered in decision-making processes. The Ramsar Convention, which aims to conserve wetlands, was cited as an example where local populations often suffer displacement in the name of environmental protection, illustrating the disconnect between policy objectives and the lived realities of these communities.

Looking toward the future, the lecture reflected on the evolving landscape of technology and its relationship with ADR. The rising prominence of artificial intelligence and the Internet was acknowledged, alongside a call to adapt educational methodologies to incorporate these advancements.

The lecture further provided an insightful commentary on the challenges and developments in ADR, particularly in the context of emerging technologies and cybersecurity concerns. The speaker began by reflecting on the academic landscape, highlighting a troubling tendency to prioritize references from established, often Western sources over indigenous knowledge and practices.

Particularly on the implications of AI and cybersecurity. The speaker noted the increasing reliance on technology within ADR processes. The urgency of adapting to these technological advancements was emphasized, as the speaker warned of the cybersecurity risks associated with the digitalization of ADR. The potential for data breaches and unauthorized access to sensitive information poses significant challenges, particularly in arbitration settings where confidentiality is paramount.

The lecture also touched upon the evolving landscape of cryptocurrency and its implications for financial institutions, particularly in the face of regulatory resistance from central banks. Drawing parallels to previous technological disruptions, such as the introduction of mobile payment systems like M-Pesa, the speaker asserted that adaptation and relevance in a rapidly changing environment are essential. The advent of AI was presented as a transformative force, altering daily routines and interactions.

Furthermore, the lecture brought attention to cultural considerations in the deployment of AI, particularly in African contexts. The speaker raised concerns about AI's potential failure to account for communal values such as Ubuntu, which emphasizes collective well-being.

The speaker also discussed the relationship between ADR and traditional judicial processes, arguing that neither should be viewed in isolation. He stated that ADR should be the first port of call in conflict resolution, although this does not exclude the use of more forceful means, such as court orders supported by police, when necessary. However, the speaker advocated for peaceful mechanisms over violent ones, suggesting that understanding the appropriate contexts for different approaches is crucial.

In conclusion the lecture revealed the necessity for adaptive and innovative legal frameworks that can effectively address these emerging challenges. The speaker called for a shift towards integrative dispute resolution approaches that involve various stakeholders, including marginalized communities, to ensure equitable and sustainable outcomes. He recommended efforts to enhance legal literacy, build institutional capacity, and promote interdisciplinary collaboration in integrating the use of ADR in addressing emerging challenges.

QUESTION & ANSWER SESSION

Q: *Participant 2* asked the speaker how best to balance the right to a clean and healthy environment and the right to property.

A: The speaker began by demonstrating the difference between ecocentric and anthropocentric approaches to environmental conservation. While he did not have a definite answer to the question, he stated that the different philosophical stances may lead to opposing conclusions. As such, those that take an ecocentric approach, believe in environmental conservation for its own sake, hence would lean more towards the right to a clean and healthy environment as an overriding interest. He highlighted the importance of scientific research on the impact of industrial developments on biodiversity, which was an underpinning of Environmental Impact Assessments as part of the requirements to be submitted by developers before building a project. He faulted Kenyan legislations that rely on developers to carry out these assessments which may cast doubt on their legitimacy.

Q: *Participant 1* asked the speaker how ADR can be used to address historical land injustices, and whether Traditional Dispute Resolution Mechanisms in particular, are best suited for the same.

A: The speaker stated that he advocated for environmental democracy, that is, a citizen's right to choose the method of dispute resolution that best addressed the violation of rights or interests. As such, while some conflicts may best be solved through ADR, others may require court intervention through instruments such as injunctions. Other conflicts, in his opinion, due to their gravity require radical protection of human rights hence warranting state intervention. The affected communities had the right to choose how best to access justice in pursuance to Article 159(2) of the Constitution of Kenya.

THE GREAT DEBATE

Moderator:

Mr. Geoffrey Imende, FCIArb, Managing Partner, Mohammed Muigai LLP

The debate began by *Hon Lady Justice (Rtd) Mary Ang'awa* explaining the Judiciary's role in shaping ADR, noting that it is a key institution that cannot be sidelined. She emphasized the importance of education for judicial officers, asserting that they must be well-versed in ADR processes to effectively handle cases that involve such mechanisms. In her view, awareness and education are key to implementing ADR successfully and ensuring that both parties understand its workings.

Mr. Ohaga John, SC supported the Judiciary's evolving role. He observed a significant shift in how judges now facilitate ADR, particularly given the practical pressures they face, such as performance contracts and the need to reduce case backlogs. He noted that many judges now actively embrace and promote ADR, which is a change driven by both necessity and an increasing appreciation of its benefits.

Mr Georgiadis Khaseke pointed out that practitioners and court systems sometimes contribute to delays when ADR matters get entangled in prolonged litigation. While courts may act as facilitators, when ADR matters reach the courts, the procedural delays can undermine the efficiency ADR aims to provide. He emphasized that it is essential for courts to recognize when cases should be expedited, particularly when ADR has already been initiated.

Ms. Kananu Mutea, gave the private sector's perspective, expressing concerns about the prolonged timelines of ADR cases, noting the 17-year duration of some judicial processes. She argued that while ADR is meant to be more efficient, the lack of clear procedures for arbitration filings and the ease with which parties can invoke technicalities often frustrate the process. She suggested that greater engagement between the Judiciary and the legal community, particularly through the Kenya Judicial Academy, could help address these issues by ensuring that judges are better informed about the nuances of ADR.

Ms. Jacqueline Oyuyo offered an institutional perspective, highlighting the need for genuine commitment from all parties involved in ADR. Without authentic participation, the process risks being delayed or stifled, undermining the very efficiency ADR aims to achieve. She stated that it is important for arbitrators and mediators having the tools to maintain momentum in the process, ensuring that the benefits of ADR can be fully realized.

Prof. Kariuki Muigua provided insights from the academic sphere, arguing that academia has a critcal role in shaping the future of ADR. He called for honesty in teaching students about the realities of ADR, as this creates a foundation of their knowledge in ADR. He also pointed out the need for ADR to be taught in the context of access to justice and development, urging that timelines and public accountability be integrated into the teaching and practice of ADR to ensure its effectiveness in promoting justice.

On the question of when and how ADR should be introduced to students, and whether it should be taught solely to law students or extended to other professions. He stated that ADR should not be limited to legal professionals. For example, at the University of Nairobi, ADR is taught across different departments, such as the built environment.

Hon. Lady Justice (Rtd) Ang'awa further stated that Kenya lacks a specialized curriculum for training judges and judicial officers compared to France and U.S that have a proper judicial training programme to be a judicial officer. She suggested that training should begin earlier, allowing aspiring judges and magistrates to be specifically prepared for their roles from the outset, rather than having lawyers transition into these roles without additional targeted training. This approach would then ensure that judicial officers are better equipped to handle ADR-related matters.

Mr. Khaseke critiqued the curriculum for law students was also for being overly adversarial in nature, focusing on training professionals to make decisions rather than solve problems. The introduction of ADR into the curriculum was noted to come much later in legal education, often after students have already been steeped in adversarial procedures like civil litigation and evidence. This creates a mindset that may hinder the adoption of ADR, as lawyers often continue to argue cases as if they were in court, even during ADR processes.

The debate also delved into a discussion on ethics in ADR, particularly corruption. ***Mr. Ohaga, SC*** gave an experience he has had in his practice illustrating the challenges of maintaining ethical standards in ADR, especially given the confidential nature of these processes, which could shield unethical behaviour from scrutiny.

In the private sector, ***Ms. Kananu*** regarding reluctance of some parties to include ADR clauses in contracts, she stated that it is because they believe the process may be influenced by vested interests, especially where the party offering arbitration has a deeper financial stake. She elaborated the parallels between the corruption observed in ADR and other professional fields such as medicine and construction.

Hon. Lady Justice (Rtd) Mary Ang'awa shared an anecdote about how corruption has become deeply ingrained in Kenyan society, likening it to a fish that rots from the head. She expressed disappointment at the Judiciary's role in perpetuating corruption, referencing past campaigns that failed to address the root causes effectively.

Prof. Kariuki Muigua reinforced the prevalence of corruption in ADR on an international scale, referencing *guerrilla tactics* used in investor-state arbitration.

Ms. Oyuyo further stated that it is important to label corruption for what it truly is: theft, fraud, and bribery. She noted that by minimizing or sugarcoating the language around corruption, society becomes more tolerant of unethical behaviour. She emphasized the need to understand the long-term economic and social impacts of corruption and how it continues to undermine fair dispute resolution, particularly as African countries engage in more transnational commerce through agreements like the AfCFTA.

Another significant issue raised was the management of time within the ADR process, ***Ms. Oyuyo*** emphasized the need for greater efficiency and questioned whether ADR was truly delivering on its promise of being an expedited alternative to traditional litigation. She noted that bottlenecks often arise from delays caused by parties who request postponements, which ultimately undermines the goal of efficient dispute resolution.

Another point discussed during the debate was on transparency and disclosure in the appointment of arbitrators. ***Ms. Oyuyo*** stated the that potential conflicts of interest must always be disclosed to ensure fairness in the process. She referenced the Nairobi Centre for International Arbitration code of conduct, which outlines the responsibilities of arbitrators, including the need to disclose any potential conflicts, whether they seem minor or significant. She also acknowledged that although institutional rules are in place, much of the responsibility falls on the third-party neutral to self-manage and uphold these ethical standards.

Mr Khaseke noted that some arbitrators face undue influence, which compromises the integrity of the process. A lack of significant consequences for unethical behaviour was identified as a major issue. While reputational damage can occur, he suggested that more serious sanctions are necessary to deter arbitrators from unethical conduct. Such as prosecuting arbitrators who engage in corrupt activities, classifying such behaviour as fraud or theft, and imposing criminal penalties.

Further, a broader ethical question was also raised concerning the technical competence of arbitrators. *Ms. Kananu* stated that institutions like the Chartered Institute and others must ensure that appointed arbitrators possess the necessary expertise, especially in emerging and specialized sectors like technology or telecommunications. In the selection of arbitrators and mediators, as well as the competence and qualifications of individuals in these roles. She emphasized the importance of lawyers in selecting arbitrators, stressing the need to understand the competencies of players in the ADR field. She clarified that the point was not to disqualify some mediators, but they might be better suited to different forms of mediation.

Prof. Kariuki on the question on transparency in the appointment of arbitrators, stated that while confidentiality is often cited as a reason for not disclosing awards, the international peer-review mechanisms of institutions like the ICC and LCIA are good models to adopt in preventing negative perceptions about corruption in African ADR proceedings.

Another area that was discussed during the debate was access to justice, particularly the high costs associated with ADR processes. Citing a 2017 Judiciary survey, it was noted that only 10% of Kenyans with legal needs used formal justice systems due to cost barriers. The debate touched on whether arbitrators' fees were too high, especially in the context of commercial disputes. There was agreement that while arbitrators should be compensated fairly, particularly for their expertise, the costs should not be prohibitively high, as one of the core advantages of ADR is its promise of affordability.

Prof. Kariuki noted the primary selling point of arbitration is not necessarily low costs, but its transnational nature and the value of the services provided by arbitrators, which should reflect their expertise and the complexity of the cases they handle.

Lastly, the debaters touched on the ethical responsibilities of arbitrators, particularly in cases where they may have misconducted themselves. It was debated whether arbitrators should be required to refund their fees in such instances. *Mr. Ohaga, SC* stated that there is contractual relationship arbitrators have with the parties involved and the potential for arbitrators to face legal actions, such as being ordered to refund money if they have engaged in misconduct.

Following this, attention was drawn to the issue of escalating costs in arbitration. It was noted that institutions like the Nairobi Centre uses an ad valorem fee system based on the quantum in dispute, ensuring a more scientific and predictable calculation of costs. While this system is intended to keep costs manageable, the example of disproportionate awards illustrates the need for vigilant cost management to prevent undue financial burdens on parties involved in arbitration.

In a shift to the future of ADR, the debate also touched on the role of technology. ***Mr. Khaseke*** referenced how the pandemic accelerated the adoption of online dispute resolution mechanisms, such as those used by Kenya Revenue Authority. This, he highlighted reduced travel and logistical costs and allows for easier exchange of documents. Technology also aids in handling large, complex cases where digital documents can be easily searched and analysed. However, he raised concerns about the integrity and security of technology in the ADR process were acknowledged, indicating that while technology brings clear advantages, it also introduces new risks that must be carefully managed.

Particularly on AI, ***Ms. Mutea*** raised some concerns regarding the potential for manipulation during cross-examinations, particularly when witnesses appear remotely and may be influenced by unseen individuals. Instances were shared where technical failures, such as a witness disappearing during cross-examination, raised questions about the integrity of the process.

In addition, ***Mr. Ohaga*** acknowledged the criticisms surrounding technology, emphasizing that while challenges exist, they are surmountable. The conversation pointed to the advantages of embracing technological advancements, particularly in improving efficiency and reducing costs for parties involved in disputes. The ability to conduct meetings remotely was cited as a significant benefit, allowing legal practitioners to engage in proceedings without the logistical burdens of travel.

Ms. Oyuyo further clarified to the audience that AI is not a new concept in Africa; rather, it has been integrated into everyday life through smartphones and other technologies. This understanding frames AI not as an external force but as an evolving tool that can enhance ADR practices.

Overall, the debate highlighted the imperative for collaboration among the bar, bench, and academia to build an environment that not only embraces technological advancements but also ensures they are grounded in the realities and needs of the African legal landscape.

C. CONCLUSION

SDRC Mediation Competition:

Final Rounds of the 2nd Edition of the Strathmore Dispute Resolution Centre Annual Mediation Moot Court Competition.

The colloquium was concluded with exciting mediation moot competition, where participants showcased their skills in ADR particularly mediation. Two teams made it to the final rounds comprising of law students

The two teams were presented with a fact pattern depicting an ideal conflict between two parties, which served as the foundation for their simulated mediation session. This scenario challenged participants to navigate the hard points of the dispute, requiring them to apply their theoretical knowledge of mediation techniques and conflict resolution strategies in a practical setting.

Each team assumed the roles and had a mediator present, working collaboratively to identify underlying interests, explore solutions, and facilitate effective communication between the conflicting parties.

The competition was adjudicated by a distinguished bench of five judges, with the Presiding Judge being *Hon. Lady Justice (Rtd) Mary Ang'awa, FCIArb, a former Judge of the High Court of Kenya*. The judges adopted a facilitative role rather than an evaluative one, allowing participants to lead the discussions. They tested the participants' conceptual understanding of the law and principles of ADR, focusing on how effectively these concepts could be applied to the present conflict scenario.

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