Institutionalization of Alternative Dispute Resolution in Kenya: A Democratization Imperative

By: *Henry K Murigi**

Abstract

Constitutionalism is one of the pillars of democratization that entails ensuring that Constitutions work as intended. In any democracy, the proper functioning ADR as institutions of governance, is indeed a clear indicator of constitutionalism. Conflicts existed before institutions, modernity, development and progress and even democracy has not been able to eliminate them. It is therefore critical for democratization processes to adopt ADR as an imperative erstwhile the States become fragile notwithstanding efforts to democratize. Institutionalizing ADR is critical to the concept of democratization. In this paper we argue that there are converging points between democracy and ADR. In particular, this paper is premised on the notion that ADR should not be viewed merely as alternative to judicial process instead it should be regarded as an alternate to violence and useful within any democratic culture. To this end, this paper contends that a one sided view of access to justice is a narrow conceptualization of democratization. The paper instead suggest a more progressive approach to justice as an imperative for democracy..

1.0 Introduction

To fully understand institutions of governance one has to consider the ontological as well as the epistemological foundation for the ideas giving rise to their existence. This requires an understanding of the institutional theory which explains transitions through rational myths, isomorphism and the legitimacy of democratization structures[1]. Institutionalization of democracy in Africa is an ongoing debate and can be explained through the institutional

---

PhD International Relations Student at USIU-A, MA Peace and Conflict Management, Post-Graduate Dip in Law from Kenya School of Law, LLB, Advocate of the High Court of Kenya.

[1] Scott, W. R. 1994. Institutions and Organisations; Toward a Theoretical Synthesis. California: Sage Publishers.

theory. The institutions of democracy are both formal and informal the former attracting debate from scholars. These institutions include the three arms of government as well as the mechanisms around them. The judicial arm of governance is critical for any democracy and if flows from the broader idea of justice which is central to democratization. ADR is one of the mechanism that support access to justice. In this paper we suggest that justice should be viewed from multiple perspectives. In so doing this paper seeks to postulate four major themes. First, the paper traces the conceptual origins of ADR and democracy suggesting that it is a shared history. Second, this paper situates democracy and ADR in Africa by locating some of the similarities. Third, the paper suggests that a deeper consideration of Dahl doctrine will reveal that ADR is an imperative of democratization. Finally, this paper reacts to some of the arguments put forward by opponents of institutionalization of ADR as a democratization imperative.

2.0 Democratization Defined

Defining democracy, though necessary, is convoluted by a number of issues including the many philosophical components that have informed its growth over time[2]. Although there is no unanimity in defining democratization, there are many methods of describing consensus as deliberated below. Lipset opines that democratization is a process which is an unceasing course[3]. Such a process seeks to establish certain social pre-requisites like supporting institutions and values as democratic imperatives. Democratization is certainly not a static concept. It is an unsolidified, extremely questioned, a milieu-specific involvement which suggests that it is observed as both a contextual variable and deontological concept[4]. To this end, democratization cannot be defined by a fixed timeless objective criterion. Thus, it is a transitional ideology with innumerable stages characterized by disintegration, reintegration, and cataclysmic social change[5]. Theoretically democracy is premised on the prism

---

[2]   Schmitter, Phillipe, C. 1994. "What Democracy is and is Not." Journal of Democracy 75-88.
[3]   Lipset, Seymour, Martin. 1959. "Some Social Requisites of Democracy: Economic Development and Political Legitimacy." The American Political Science Review 53 (1): 69-105.
[4]   Whitehead, Lawrence. 2002. Democratization; Theory and Experience. Oxford: Oxford University Press.
[5]   Conteh-Morgan, Earl. 1997. Democratization in Africa: The Theory and Dynamics of Political Transitions. London: Praeger Publishers.

of consensus to govern based on a social contract as suggested by classical thinkers such as Plato 1943[6], Thomas Hobbes 1588-1679[7] and John Locke 1690[8] among others. This thread of idea springs forth to the modern day constitutionalism. Democratization is often gauged by adherence to the principles of rule of law and constitutionalism[9].

3.0 Comparative Origins of ADR and Democracy

The arrival of political authority in the form of the state is not largely contested by African scholars in terms of its origin[10]. However, some trace the origin of democracy in the class struggle in Europe, America and China[11]. Others trace it to the arguments by Socrates, Plato and Aristotle. Plato envisioned how a state would operate within the existing structural arrangement. Since then States create and operationalize formal institutions to resolve disputes. These have taken diverse formats such as litigation, arbitration, mediation, and adjudication. There are several examples that can explain this point. First, in China an important ideology of legal formalism and strong state power existed before the third century BC[12]. This thinking (legalism) was as a response to the Confucian ideology that insisted on harmony, moral leadership, education and self-sacrifice. The emergence of legalism and Confucian ideologies have continued to harmoniously cohabit and arguably become institutionalized with modern day modifications. The entrenched ideology has consistently been utilized by ordinary people adopting self-administered justice (ADR) as opposed to formalist institutions (litigation).

---

[6]   Plato. 1943. Plato's The Republic. New York: Books Inc.
[7]   Hobbes, Thomas. 1588-1679. Leviathan. Baltimore: Penguin Books.
[8]   Locke, John. 1690. Two Treaties of Government. Indianapolis: Hackett Publishing Company.
[9]   Fredrich, C. J. 1968. "Constitutions and Constitutionalism." International Encyclopedia of the Social Science 16-18. And Lijpart, Arendt. 1991. "Constitutional Choice for New Democracies." Journal of Democracy 72-84.
[10] Randall, V., and L. Svåsand. 2002. "Political Parties and Democratic Consolidation in Africa." Democratization 9 (2): 30-52. Doi:10.1080/714000266.
[11] Moore, Barrington. 1958. Social Origins of Dictatorship and Democracy: Lord Peasant and the Making of the Modern World. New York: Beacon Press.
[12] Robert, S., & Palmer, M. 2005. "Cultures of Decision-Making: Precursors to the Emergence of ADRs." In Dispute Process: ADR in the Primary Forms of Decision Making, by S. Robert, 9=44. Cambridge: Cambridge University Press.

Second, in Rome although there seems to be no clear documentation of formal justice institution, there is abundant evidence that settling disputes was by way of both formal and informal mechanisms[13]. It is argued that initially Rome dealt with justice through judicial council which adjudicated both private and public claims[14]. Rome transitioned from a Monarchy to a Republic and later an Empire which influenced how disputes were resolved globally[15]. The Roman Community was ideally orderly and resolving disputes was part of the function of ensuring social order which include democracy[16].

The agrarian society in Africa was more adept to resolving dispute resolutions. In most African States, patterns of pluralist social legal ordering emerged after colonialism. This pluralist legal order was utilized greatly in Europe and exported effectively to Asia and Africa[17]. This introduced a preference for western style democratic values in the African States. Traditional dispute resolution mechanisms were declared repugnant. According to Kariuki Muigua there are several approaches to the institutionalization of traditional dispute resolution mechanisms[18]. He contends that the repugnancy test is crucial in determining the type of traditional dispute resolution mechanisms. The test is envisioned in Article 159(3) of the Constitution. The traditional-based dispute resolution processes emphasized approaches akin to negotiation and mediation. In the period after colonialism, efforts to reinstate pre-colonial law and institutions have variously been put in place not only to support in the removal of foreign laws and aspects presented by the colonial leaders, but more lately also attempt to deal with aspects arising out of the downfall of political authority.

---

[13]   Oakley, S. P. 1997. "The Beginning of Rome; Italy and Rome from the Bronze Age to Punic Wars." The Classical Review 358 - 361.
[14]   Cornell, T. J. 1995. The Beginning of Rome: Italy nd Rome from the Bronze Age to the Punic Wars. London: Cambridge University Press.
[15]   Gibbon, Edward. 1946. The History of the Decline and Fall of the Roman Empire Vol 1 . New York: Fred de Fau and Company Publishers.
[16]   Lipset, S. Martin. 1960. Political Man: The Social Basis of Politics. New York: Anchor Books.
[17]   Gazal-Ayal, O., & Perry, R. 2014. "Imbalance of Power in ADR: The Impact of Representation and Dispute Resolution Method on Case Outcome." Law & Society 791=823.
[18]   Muigua, Kariuki. 2017. "Institutionalizing Traditional Dispute Resolution Mechanisms and other Community Justice Systems." Alternative Dispute Resolution 1-80.

In addition, the theory and practice of democracy and ADR cohabit a similar conceptual origin. The main idea is located in what Socrates envisioned of society being able to dialogue. Indeed Aristotle is credited for having praised arbitration over the court dispute resolutions system. He argued that an arbitrator is guided mainly by the fairness of a dispute and a judge is guided primarily by the law. Therefore, Aristotle suggests that arbitration and indeed other dispute resolution mechanisms were invented with the direct purpose of fortifying power for fairness and equity[19]. John Rawls explains that in the original position (before democracy), the individual (state) is allowed to aspire to the highest standard of life based on their areas of strength. In the same way, States before and during democratization should come up with ideals of justice that are suitable for their contexts[20].

4.0 Conceptualising Institutional Theory

The institutional theory is concerned with the behavior of individuals, organizations and states engaged in a quest for legitimacy. The theory is used to understand the processes by which institutions are formed and how they attain legitimacy. One can consider how they are formed by spreading the new practices and ideas as new norms.

The ideas underpinning this theory can be classified into several isomorphic categories. (Isomorphism seeks to explain why states follow the same strategies or adopt the same practices). The first isomorphic category is the coercive process which involves norms and regulation including non-governmental self- regulation. When a new law is adopted organizations are expected to dutifully to follow it. This should be fascinating for legal scholars. Second, the concept of mimetic refers to the tendency to deal with uncertainty by imitating the behavior of other organizations that have responded to the same situation. Here, states adopt a similar policy by simply copying as is. The third isomorphic category is normative which stems from a process of professionalization of the institutions. This process goes hand in hand with the dictates of democratization.

---

[19] Lintott, Andrew. 1992. "Aristotle and Democracy." The Classical Quarterly, 114-128.
[20] Rawls, B. John. 1971. Theory of Justice. Cambridge: University of Harvard Press.

In this paper we argue that ADR in Kenya has been constitutionalized but not adequately institutionalized since it has not attained adequate attention past coercive process. To attain normative status there is a clear need to include a deeper view of justice in society as being more that what the Judiciary promises.

Jowett made several compelling arguments on Aristotle's thoughts on ADR and Democracy[21]. Firstly, as Aristotle's argued, equality beyond everything else is the aim of human interactions. This is because mankind quickly becomes captivated by socialistic theories especially when they are intermingled with assaults on standing institutions. These institutions include religion, philosophies and political institutions which although different share a common concern in human nature. Secondly, since Aristotle wrote in the context of Sparta and Carthaginians disputes, he was able to locate that judicial institutions were part of a democracy. Thirdly, Jowett argued that judicial institutions of a country reflect the political institutions even though there is a difference in their functions. Aristotle insisted that there is also an analogy that can be drawn between the political and judicial institutions. In a free state the law must be supreme, and the courts of law must exercise an independent authority; they must be open and public, and they must include popular element[22]. From the forgoing it is clear that institutions exist as a product of social relations.

5.0 Philosophy of ADR and Democracy under the Institutional Theory.

The main idea of the institutional theory can be traced in what Socrates envisioned of society being able to dialogue Plato. There is plenty of evidence that ADR existed as early as 1800 BCE to 300 BCE starting with Akhenaton all through to Woodrow Wilson[23]. Both ADR and democracy can also be located in Aristotle's main idea on politics. To this end, the ontology of democracy and ADR is that they both exist to facilitate human interactions that are fair and just. The constructivist theories are the epistemological

---

[21]   Jowett, B. M.A. 1885. The Politics of Aristotle. London: The Clarendon University Press.

[22]   Ibid

[23]   Barret, T. Joseph & Barret P. Jerome. 2004. A History of Alternative Dispute Resolution: The Story of a Political, Cultural and Social Movement. The Association for Conflict Resolution. Doi: ISBN: 978-0-787-96796-3.

foundation of both ADR and democracy as institutions. This means they are social constructions. These institutions are ideally premised on the thinking located in the social contract theory as advanced by Hobbes and Locke who argued that people come together and decide to donate their authority to a sovereign.

The epistemological basis for the institution theory can also be located in the idea of justice that comes about from the sovereign allowing distribution of resources as the basis for equality as suggested by John Rawls. Constructivism requires both quantitative and qualitative research methodology. We argue that in conducting such a study one must consider that social institutions are implanted in a social structure and institutionalization is the process by which ideas such as ADR becomes embedded in a social structure[24]. Institutionalization therefore is the process by which social institutions develop from a founding idea or ideas and set of unorganized acts into an organized set of behaviors with a social stricter, role and function. To this end, a study under this theme would require both qualitative and quantitative research.

ADR and democracy cohabit the same ontological foundation which is that human interactions bring people together in pursuit for equality which is exercised in the arena of an institution. This occurs when someone has an idea and other people see the idea and begin to take action in accordance with that idea. These actions can appear in an amorphous blob which in time both the actor and observant create boundaries with parts of the actions eliminated because of inaccuracy or inappropriateness. These actions are based on values, norms and rules of the actions. With time, a division of labor develops for specific actions developing social roles. When new rules are put in place, they are primarily seeking to encourage formation of institutions[25].

6.0 Situating Institutionalisation in Africa

Most political activities and actions of tangible consequence happen in institutions. As such, it is critical to understand how institutions act and how

---

[24]   Goodin, Robert E. 1996. The Theory of Institutional Design. New York: Cambridge University Press.

[25]   Scott, W. R. 1995. Institutions and Organizations. California: Sage Publishers.

they influence the behavior of individuals working within them[26]. According to Rustow, democracy is instituted in phases [27]. These phases in the African context were predetermined by the systems that were put in place during the colonial era. Almond and Verba suggest that there are several ways of considering the political posture of a state in terms of political culture[28]. This can explain how institutionalisation and democracy are located in Africa. When presented in Africa, democracy produced several attitudes which revealed the political culture in Africa as democracy was being assimilated[29]. There are three attitudes that can be used to explain the political culture[30]. These include: the parochial attitude, subjective attitude and participants' attitude. The first attitude was hinged on citizens being remotely aware of the presence and function of the central government. The second projects an individual who is aware of what is going on but not a willing participant. The third is pegged on citizens orientation as a whole, to both the political and administrative structures. All these attitudes should be considered in the process of democratization because they determine its longevity all the while taking into consideration that democracy in Africa was instituted as a foreign ideology. We now turn to some of the perspectives to institutionalization of democracy and ADR in Africa

a) Perspectives for Democracy and ADR in Africa

There are several perspectives for situating democracy and ADR in Africa. It is important to note that for ADR and Democracy in Africa, history, politics and internal affairs of a state are in sharp focus. Here we suggest that there are three approaches that converge to show how the type of politics within a state

---

[26]   Peters, B Guy. 2001. Institutional Theory in Political Science; The New Institutionalism. London: Continuum.

[27]   Rustow, Dankwart, A. 1970. "Transitions to Democracy: Toward a Dynamic Model." Comparative Politics 2 (3): 337-363.

[28]   Almond, Gabriel, A., and Verba Sidney. 1963. The Civic Culture: Political Attitudes and Democracy in Five Nations. Princeton, N. J.: Princeton University Press.

[29]   Robert, S., & Palmer, M. 2005. "Cultures of Decision-Making: Precursors to the Emergence of ADRs." In Dispute Process: ADR in the Primary Forms of Decision Making, by S. Robert, 9=44. Cambridge: Cambridge University Press.

[30]   Dalton, Russell, J., and Christian, Welzel. 2014. Political Culture and Value Change' in the Civic Culture Transformed From Allegiant to Assertive Citizens. New York: Cambridge University Press.

will affect democratization. Firstly, the triadic approach to dispute settlement affects democratization within a state[31]. Here the argument is that the rules used to resolve disputes take into account three aspects (1) autonomy of the umpire, (2) availability of the dispute resolution mechanism to all disputants and (3) how well democracy is entrenched within the society. Secondly, when institutions of governance are consolidated, the distinction between law and politics vanishes. Here practices such as triadic dispute resolution become embedded as normative values that shape future relations[32]. Thirdly, to understand democratic decision makers, it is necessary to consider the trust levels within states. The contention here is that the input of the universal populace in non-democratic States is insignificant[33]. Therefore stronger democratic dyads emerge to influence the approach of ADR within a state[34]. To this end, the institutionalization of democracy and ADR has both inner and exterior posture on democratization.

One of the realities in Africa is that States have been in transition for a long period. In any event, democratization operates ideally within states that are in transition. It is important to contextualize transitions in Africa which can be understood by considering four explanations to democratization suggested by Bratton et al[35]. First, they suggest the structural and contingent explanations which are based on Marxism. They adopt the thinking as advanced by Weber, a social scientist evolutionary who argued that capitalism introduced democracy[36]. Here the argument is that capitalism influences the type of

---

[31] Keohane, O. Robert et al. 2006. "Legalized Dispute Resolution: Interstate and Transnational." In International Law and International Relations, by A. Beth and Steinberg, H. Richard Simmons, 331-374. London: Cambridge University Press.

[32] Sandholtz, Wayne and Sweet A. Alee. 2004. "Law, Politics and International Governance." In The Politics of International Law, by Christian Reus, 238-271. New York: Cambridge University Press.

[33] Amatrya, Sen,. 1999. "Democracy as a Universal Value." Journal of Democracy 3-17.

[34] Florian, Justwan. 2017. "Trusting Publics: Generalized Social Trust and the Decision to Pursue Conflict Binding Conflict Managements." Journal of Conflict Resoluton 61 (3): 590-614. Doi: 10.1177/0022002715590879.

[35] Bratton, Michael, and Nicholas Van de Walle. 1997. Democratic Experience in Africa: Regime Transition in Comparative Perspective. England: Cambridge University Press.

[36] Weber, Max. 1958. The Protestant Ethics and the Spirit of Capitalism. New York: Dover Publications, Inc.

institutions that emerge[37]. Second, the view is that African states are susceptible to international domination and manipulation and therefore ripe for the exportation of Westernized ideologies, which are predetermined by international forces[38]. Because of the push and pull for independence in Africa and the continued exploitation of its natural resources, institutions in Africa are sometimes not effective. Third is the participatory approach which is supported by Plato's model of philosopher-king where we have experts making crucial decisions on matters within their expertise. There is an abundance of African thinkers who can marshal expertise in different directions for the growth of Africa. The fourth approach is that the national states have elites who are the custodians of power and use their roles to form, shape and determine the course of democracy. All of these approaches help to expand and explain the systems that are used to govern and maintain powerful institutions in modern day Africa.

b) Deliberative and Actual Democracy

Deliberative democracy is another approach that can be used to show the link between ADR and democracy in Africa. In deliberative democracy, it is clear that human agency is critical. Human skills therefore come into question. The tactful management of conflict is one of the highest human skill which relates to both democracy and ADR[39]. Dominance and compromise (human skills) are useful tactics necessary to produce both justice and democracy. This is because the ideals of justice transcend just institutions[40]. In this regard, it is important to understand the process of formulating institutions that are perceived to produce justice. A one sided view of institutions does not reflect the reality of both deliberative democracy and justice. Similarly, justice is not a one sided affair. It comes from viewing all sides of the argument and as such is part of deliberative democracy. As Eleanor Roosevelt once said, justice and

---

[37] Durkheim, E. 1986. Durkheim on Politics and the State. Ed by Giddens. Cambridge: Polity Publishers.

[38] Whitehead, Lawrence. 2002. Democratization; Theory and Experience. Oxford: Oxford University Press.

[39] Barret, T. Joseph & Barret P. Jerome. 2004. A History of Alternative Dispute Resolution: The Story of a Political, Cultural and Social Movement. The Association for Conflict Resolution. Doi: ISBN: 978-0-787-96796-3.

[40] Rawls, B. John. 1971. Theory of Justice. Cambridge: University of Harvard Press.

peace considers all sides of the arguments. It is not about winning but arriving at decisions that solve problems with the rights process.

Actual democracy on the other hand is concerned with two questions[41]. The first is what political institutions are required to do for large scale democracy and the second responds to the requirements for government to govern democratically. Here the argument is that institutions emerge from practices that are part of deliberate measures. These are based on habitual practices and well settled values. To this end, we argue that all institutions both formal and informal are the arena for the practice of democracy. We argue that ADR should be institutionalized as a democratic imperative due to its contribution to access to justice as well as democratic governance.

7.0 Democratization Imperatives – Dahl Doctrine

One of the main proponents for the concept of democracy is Dahl Roberts. In his seminal works on democracy, he places a high premium on political systems that encourage opposition, political rivalry and competition between government and its opposition, without which, democratization cannot be complete[42]. For democratization to exist, citizens must have unimpaired opportunities to three key things (1) formulate preferences (2) signify preferences to their fellow citizens and governments (3) to have their preferences given equal weight by government without discrimination. Under these three, several other requirements occur and re-occur for the process of democratization to be valid, some of which are (1) freedom to form and join organizations (2) freedom of expression (3) right to vote (4) alternative source of information (5) right of political leaders to compete for support. The contention here is that the standards of predilection should to be domiciled in the Citizens.

The other framework under this doctrine is that no one group dominates politics and organized groups compete with each other to influence policy by using sources of influence such as legal authority, money, prestige, skill, knowledge, charisma, legitimacy, free time, and experience[43]. Pluralists

---

[41] Dahl, A Roberts. 1998. On Democracy. Connecticut: Yale University Press.
[42] Ibid
[43] Ibid

believe that (1) resources and potential power are widely scattered throughout society; (2) as a bare minimum certain assets are accessible to almost everybody; and (3) at any period the amount of potential power exceeds the amount of actual power. (4) No one is all-powerful unless proven so through empirical observation.

The question then is who governs? The Dahl doctrine insists that it is erroneous to assume that any group in fact does. Dahl attempts to answer this question in his study of New Haven and posits that a few people usually those who are rich and well-read, sway political result or decision making. The Elite and pluralists agree with classical pluralists that there is plurality of power but this plurality is not pure as some people and groups have more power than others. Basically, this doctrine claims that in democracies people participate by electing the elite who then play a major role in decision making, representation and creation of laws.

8.0 Democracy and ADR

Certainly, democratization is a broad subject covering several phenomena. It goes beyond the idea of voting, electoral justice and proportional representation, to showing how individuals interact in a democratic society. The premise of this paper is that democratic states are ideally peaceful[44]. Also, democracies are known to produce favorable cultures for peaceful resolution of disputes and general restraints towards war and thirst for blood money[45]. This view promotes a perception by people in a democracy that reveals that they are autonomous and self-governing since they share norms and values that are not aggressive towards each other[46]. Here we argue that in post conflict transitions it is a democratic imperative that dispute resolutions systems must be institutionalized.

---

[44] Boulding, Kenneth. 1979. Stable Peace . Austin : University of Texas Press.
[45] Schumpeter, Joseph, A. 1942. Capitalism, Socialism, and Democracy. New York: Harper & Row. And Munene, Macharia. 2009. "Generic Peace and The Peace: A discource ." Journal of Language Technology and Entrepreneurship in Africa 218-229.
[46] Russett, Bruce. 1993. Grasping the Democratic Peace: Principles for a Post-Cold War World. Princeton, New Jersey: Princeton University Press.

New approaches to deal with internal conflicts have developed over time and ought to be considered as part of democratization. The model of a Truth and Reconciliation Commission have been used in several countries, in connection with their respective transitions to democracy. In addition, private property and individual rights are essential elements of the liberal democratic state which must be protected by adequate dispute resolution mechanisms[47].

There is an elaborate and symbiotic relationship between judicial and political processes. Their converging point is the pursuit for democratic ideals contained in the constitution. This may occur in the tension between Court decisions and political maneuvers which tension could be healthy as it produces growth for both institutions. In a constitutional democracy, independent institutions ought to operate without interference. Such independent institutions allow citizens to find several avenues for resolving their disagreements. ADR processes are attached to the concept of access to justice.

Little debate can be entertained on the question whether the rule of law is one of the vital elements of governance in a democratic regime. Central to rule of law are ideals such as access to justice which hinge on the need for procedural fairness as well as independence, neutrality and equal treatment in proceedings. Civic culture and social capital are far more effective than positive law, political institutions, and economic factors in generating effective democracy[48]. Successful regional governments, are marked by a civic culture that broadly encourages cooperation and reciprocation among its citizenry at all levels of national life, from social to political to economic and beyond[49]. Failure to regard the idea of dispute resolution as an integral part of a functioning democracy is fatal to democratization. The net effect of this failure is that the very law that citizens have agreed will govern their lives

---

[47] Sullivan. Daniel S. 1993. "Effective International Dispute Settlement Mechanism and Necessary Condition for Liberal Democracy." Georgetown Law Journal 2369- 2412.

[48] Putnam, Robert D. 1993. Making Democracy Work: Civic Traditions in Modern Italy. Princeton, New Jersey: Princeton University Press.

[49] Reuben, Richard C. 2000. "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Service Justice." UCLA LAW REVIEW 949- 1104. Elazar, Daniel. 1966. American Federalism: A View from the States. New York: Crowell.

under the social contract, ultimately has little bearing on how their disputes are resolved. To avoid a diminution of democracy itself, ADR should continue to expand and become more institutionalized, which effectively makes individualized injustices more practical and critical.

Conflict is inevitable in a democratic society[50]. The orderly adjudication of disputes is a crucial function of public court as contained in Article 165 and 159 of the Constitution of Kenya. It must be remembered that under Article 1 of the Constitution of Kenya, institutions of governance including the Judiciary and independent tribunals exercise delegated (indirect) democratic power. To this end, ADR forms part of the democratic practices in Kenya as part of the judicial function as is envisioned in Article 159 of the Constitution. This essential function - the orderly and enforceable resolution of disputes - is important to democratic governance in the same way the legislative and executive functions are. Indeed, it helps define civilized society, preventing routine disputes from escalating into violence and social chaos. Equally, like the executive and legislative branches, the judiciary best serves democratic governance when it acts in a manner that is consistent with and reinforces the basic values of democracy.

9.0 Converging Principles of Democracy and ADR
Once it is acknowledged that dispute resolution has an essential role in democratic governance, the question then is how to appreciate, assess, and beneficially cultivate the democratic character of a dispute resolution system, procedure, or structure. The core standards of democracy are generally agreed upon which can be clustered into political, legal, social capital values and cultural[51]. These are premised on participation, accountability and transparency and rationality. Similarly, these same values are espoused in most dispute resolution mechanisms. Let us consider these four aspects and how they converge.

First, participation as a democratic value is promoted in ADR albeit with difficulty. The idea here is that parties are allowed to participate in the

---

[50]   Mwagiru, Makumi. 2006. *Conflict in Africa: Theory Processes and Institutions of Management*. Nairobi: CCR Publication.
[51]   Dahl, Robert A. 1964. *Who Governs? Democracy and Power in an American City*. New Haven: Yale University Press.

decisional process, even when it is unilaterally imposed. This occurs in all dispute resolution mechanisms and in any event it is one of the democratic imperatives for democratization. In ADR, some rules of evidence and procedure may be relaxed to allow parties tell their version of events without technical legal obstacles. However, one may challenge this view by arguing the public does not participate in all arbitral matters more so in International Arbitration[52]. This goes to the question of legitimacy of participants and willingness to involve others who are affected when it is a matter of public policy.

The second and third aspects are transparency and accountability. Accountability is gleaned from the constitution making moments. In the Constitution of Kenya 2010, aware of the reality of alternative dispute resolution mechanism, Article 159 was crafted to provide for the avenue for practice of ADR and entrench principles of transparency and accountability. Fourth, rationality is mainly found in arbitration and other dispute resolution mechanism. Most arbitration decisions are usually accepted as being very sensible. Rationality in ADR goes beyond what is strictly prescribed in law. While it is expected that the law will be strictly observed at all times, parties may clothe the arbiters with discretion to determine cases on grounds beyond those that may be required by a rule of law, grounds that may appear arbitrary or capricious to observers who are unfamiliar with the customs or practices within a particular relationship, entity, or industry[53]. Rationality is a strength of the arbitration process because it permits disputes to be resolved according to the unique facts and circumstances that may be most relevant to the parties, rather than according to a more remote general rule of law.

The idea of ADR as a movement in the context of democracy presents two main areas of tension[54]. This includes the discourse between formal law and justice. Here the argument is that while formal justice mechanisms are part of

---

[52]   Reuben, Richard C. 2000. "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Service Justice." UCLA LAW REVIEW 949- 1104. Elazar, Daniel. 1966. American Federalism: A View from the States. New York: Crowell.

[53]   Ibid

[54]   Gazal-Ayal, O., & Perry, R. 2014. "Imbalance of Power in ADR: The Impact of Representation and Dispute Resolution Method on Case Outcome." Law & Society 791=823.

a democratic society, it remains clear that the mere existence of formal institutions does not amount to justice. The second area is the need for the institution to respond to societies ideals. The Hobbesian argument here is the sovereign should promote order, harmony, equality, all of which are expected for justice and communal identity.

10.0 Debates on ADR Institutionalization Efforts in Kenya

There have been several attempts to institutionalise ADR in Kenya[55]. These is seen in the emphasis no ADR under Article 159 of the Constitution of Kenya. Promoting use of ADR is a guiding principle to all Courts and tribunals who exercise judicial authority. The Article is couched in mandatory terms therefore obligating courts and tribunals to encourage and promote ADR. However the rider to this is all ADR mechanism must pass the repugnancy test as elaborated by Kariuki Muigua[56]. Also and most importantly, all the ADR forms must be conducted in accordance with the Constitution and written laws. This makes it an imperative for enactment, implementation and enforcement of laws guiding application of this principle. The laws and institutions currently governing ADR are the Arbitration Act, Nairobi Centre for International Arbitration and the rules thereunder. What is missing is a legal framework, in terms of Acts of parliament, to deal specifically with reconciliation, mediation and traditional dispute resolution mechanisms.

Institutionalisation takes the form of legal frameworks, policy formulations, and implementation of the measures to ensure that for instance ADR is the normative practice. Applause must be given to Kenyan Parliament which seeks to house all ADR initiatives in the Alternative Dispute Resolution Act, 2019. The Attorney General also gazetted a taskforce to validate the ADR policy framework. The idea of a taskforce can be explained by deliberative democracy. One may effectively argue that the composition of the taskforce clearly demonstrates the decision makers for ADR as argued under the Dahl

---

[55] Adar, Korwa. G. and Vivekananda, Franklin. 2000. "The Interface between Political Conditionality and Democratization: The Case of Kenya." Scandinavian Journal of Development Alternatives and Areas of Studies 71 -97.

[56] Muigua, Kariuki. 2017. "Institutionalizing Traditional Dispute Resolution Mechanisms and other Community Justice Systems." Alternative Dispute Resolution 1-80.

doctrine[57]. The taskforce must allow participation of the people so that there is adherence to democratization principles. However, there is a little mention of reconciliation as an ADR mechanism which is at the heart of Justice. This is a gap that should be explored either by Parliament or in the taskforce.

The multiple-door principle should make ADR mandatory for specific cases in specific areas where it might thrive. Some scholars argue that making ADR mandatory or obligatory goes against the principle of democracy and ADR. Making ADR mandatory means insistence of power belonging to the people to determine as argued by Plato. The view would be that parties should be compelled to attempt ADR as an effort to resolve disputes and as a democratization imperative. When ADR is made mandatory it does not mean that there has to be a resolution by force. Each ADR mechanism has inbuilt principles that allow parties to control what matters most in an attempt to resolve the dispute. Such principles include consent, confidentiality, and autonomy of parties among others. These principles make an attempt at ADR a worthwhile democratic value.

11.0 Responding to Critics of Institutionalization of ADR

Although there are many advantages and converging points between democracy and ADR, this paper admits that there are voices that criticize both Democracy and ADR[58]. Some do not agree that settlement of disputes should become be institutionalized to form generic practice. Others argue that ADR creates an imbalance especially the indigent who are not capable of accessing it. There are several weaknesses for institutionalizing ADR which include absence of data on certainty of outcomes of attempts to resolve disputes through courts or war[59]. There are also certain vulnerable parties who may agree to settle disputes as a result of pressure from the superior parties. The parties without economic might are likely to be persuaded to agree to a settlement not because it is their ideal sense of justice but that it is a less expensive alternative.

---

[57] Dahl, Robert A. 1964. Who Governs? Democracy and Power in an American City. New Haven: Yale University Press.
[58] Fiss, Owen M. 1984. "Against Settlement." Yale Law Journal 1073-1090.
[59] Ibid

Some argue that privatizing public civil dispute resolution systems amounts to interfering with a large part of how democracy is realized[60]. Farrow makes three central criticisms to challenge the effect of the growth of ADR as privatized justice. Firstly, he suggests that ADR undercuts the expansion of common law by taking away the idea of judicial precedent. Secondly, ADR denies disputants the procedural shield of the court process and thirdly, and most interestingly, ADR reveals a real threat to the Western democratic institutions. The argument here is that ideally ADR reduces the chances for the existence of a fair, predictable, accessible, just and relatively common regulatory system for all.

Those who find ADR as a weaker substitute to justice seem to suffer from litigation romanticism based on unverified notion that Courts tend to offer better justice[61]. What the critics miss is that their focus on the structure of the institution and not the democratic values that are espoused in ADR. To this end ADR can be vindicated on its own ethical grounds now that there are significant values, consistent with the important values of any legal and political system backing the legitimacy of settlements disputes[62].

12.0 Conclusion

Democracy and ADR appear to cohabit a conceptual origin. There is clamor for democratization to the extent that it can be viewed from the minimalist framework. ADR on the other hand is seen as an appendage of democratic institutions in particular the judiciary as the third arm of governance. Access to justice perception dominate most scholarly debates and arguments in the ADR field. This mostly takes a one sided view of both democracy and justice. This paper has argued that ADR and democracy appear to be inseparable and the institutional school confirms this. It has been demonstrated that from their origin, democracy and ADR must be institutionalized as democratization imperatives. Institutionalization of traditional justice mechanisms seems to respond affirmatively to those who argue that democracy is not relevant in

---

[60]   Farrow, T. 2008. "Public Justice, Private Dispute Resolution and Democracy." CLPE Research Papers 4 (4): pp 59-70.

[61]   Menkel-Meadow, Carrie. 1990. "Durkheiman Epiphanies: The Importance of Engaged Social Science in Legal Studies." The Georgetown Law Journal (The Georgetown Law Journal) 91.

[62]   Ibid

Africa. It has been argued that ADR generally and traditional justice mechanisms specifically promote both culture and social interactions thus once institutionalized they become part and parcel of the idea of justice. There may be hurdles along the way such as normative practices on access to justice which stand in the way of ADR. To overcome these challenges, it is critical to ensure that ADR is considered as a democratization value. While it is acknowledged that norms are difficult to establish, we however argue that in Africa in general and in Kenya specifically, there are sufficient safeguards to respond to these concerns. This therefore calls for a new perspective to the idea of democracy in Africa which invites relearning, retooling and recasting ADR as a social and legal institution.

Bibliography

Adar, Korwa. G. and Vivekananda, Franklin. 2000. "The Interface between Political Condititionality and Democratization: The Case of Kenya." *Scandinavian Journal of Development Altarnatives and Areas of Studies* 71 -97.

Almond, Gabriel,A., and Verba Sidney. 1963. *The Civic Culture: Political Attitudes and Democracy in Five Nations.* Princeton, N. J.: Princeton University Press.

Amatrya, Sen,. 1999. "Democracy as a Universal Value ." *Journal of Democracy* 3-17.

Aristotle. 1888. *A Treaties on Government.* New York: George Routledge and Sons .

Barret, T. Joseph & Barret P. Jerome. 2004. *A History of Alternative Dispute Resolution: The Story of a Political, Cultural and Social Movement.* The Association For Conflict Resolution. doi:ISBN: 978-0-787-96796-3.

Boulding, Kenneth. 1979. *Stable Peace .* Austin : University of Texas Press .

Bratton, Michael, and Nicholas Van de Walle. 1997. *DemocraticExperience in Africa: Regime Transition in Comparative Perspective.* England : Cambridge University Press.

Conteh-Morgan, Earl. 1997. *Democratization in Africa: The Theory and Dynamics of Political Transitions.* London: Praeger Publishers.

Cornell, T. J. 1995. *The Begining of Rome: Italy nd Rome from the Bronze Age to the Punic Wars .* London : Cambridge University Press .

Dahl, A Robert. 1989. *Democracy and its Critics.* New Haven: Yae University Press.

Dahl, A Roberts. 1998. *On Democracy .* Conneticut : Yale University Press .

Dahl, Robert A. 1964. *Who Governs? Democracy and Power in an American City.* New Haven: Yale University Press.

Dalton, Russell, J., and Christian, Welzel. 2014. *Political Culture and Value Change' inthe Civic Culture Transformed FromAllegiant to Assertive Citizens.* New York : Cambridge University Press.

Dankwart, Rustow. 1970. "Transitions to Democracy: Toward a Dynamic Model." *Comparative Politics* 337 - 363.

Durkheim, E. 1986. *Durkheim on Politics and the State. Ed by Giddens .* Cambridge : Polity Publishers .

Elazar, Daniel. 1966. *American Federalism: A View from the States.* New York: Crowell .

Farrow, T. 2008. "Public Justice, Private Dispute Resolution and Democracy." *CLPE Research Papers* 4 (4): pp 59-70.

Fiss, Owen M. 1984. "Against Settlement ." *Yale Law Journal* 1073-1090.

Florian, Justwan. 2017. "Trusting Publics: Generalized Social Trust and the Decision to Pursue Conflict Binding Conflict Managment." *Journal of Conflict Resoluton* 61 (3): 590-614. doi:10.1177/0022002715590879.

Fredrich, C. J. 1968. "Constitutions and Constitutionalism ." *International Encyclopedia of the Social Science* 16-18.

Gazal-Ayal, O., & Perry, R. 2014. "Imbalance of Power in ADR: The Impact of Representation and Dispute Resolution Method on Case Outcome ." *Law & Society* 791=823.

Gibbon, Edward. 1946. *The History of the Decline and Fall of the Roman Empire Vol 1 .* New York : Fred de Fau and Company Publishers .

Goodin, Robert E. 1996. *The Theory of Institutional Design .* New York : Cambridge University Press .

Hobbes, Thomas. 1588-1679. *Leviathian* . Baltimore : Penguin Books .

Jowett, B. M.A. 1885. *The Politics of Aristotle* . London : The Clarendon University Press.

Keohane, O. Robert et al. 2006. "Legalised Dispute Resolution: Intersate and Transnational ." In *International Law and International Relations* , by A. Beth and Steinberg, H. Richard Simmons, 331-374. London: Cambridge University Press.

Lijpart, Arend. 1991. "Constitutional Choice for New Democracies ." *Journal of Democracy* 72-84.

Lintott, Andrew. 1992. "Aristotle and Democracy." *The Classical Quarterly,* 114-128.

Lipset, S. Martin. 1960. *Political Man : The Social Basis of Politics* . New York : Anchor Books .

Lipset, Seymour, Martin. 1959. "Some Social Requisites of Democracy: Economic Development and Political Legitimacy." *The American Political Science Review* 53 (1): 69-105.

Locke, John. 1690. *Two Treaties of Government* . Indianapolis : Hackett Publishing Company.

Menkel-Meadow, Carrie. 1990. "Durkheiman Epiphanies: The Importance of Engaged Social Science in Legal Studies." *The Georgetown Law Journal* (The Georgetown Law Journal) 91 .

Moore, Barrington. 1958. *Social Origins of Dictatorship and Democracy : Lord Peasant and the Making of the Modern World.* New York : Beacon Press .

Muigua, Kariuki. 2017 . "Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems." *Alternative Dispute Resolution* 1-80.

Munene, Macharia. 2009. "Generic Peace and The Peace: A discource ." *Journal of Language Technology and Entrepreneurship in Africa* 218-229.

Mwagiru, Makumi. 2006. *Conflict in Africa: Theory Processes and Institutions of Management* . Nairobi: CCR Publication.

Oakley, S. P. 1997. "The Begining of Rome; Italy and Rome from the Bronze Age to Punic Wars ." *The Classical Review* 358 - 361.

Peters, B Guy. 2001. *Institutional Theory in Political Science; The New Institutionalism.* London : Continuum .

Plato. 1943. *Plato's The Republic.* New York : Books Inc.

Putnam, Robert D. 1993 . *Making Democracy Work: Civic Traditions in Modern Italy* . Princeton, New Jersey : Princeton University Press .

Randall, V., and L. Svåsand. 2002. "Political Parties and Democratic Consolidation in Africa." *Democratization* 9 (2): 30-52. doi:10.1080/714000266.

Rawls, B. John. 1971. *Theory of Justice.* Cambridge: University of Harvard Press.

Reuben, C. Richard. 2004. "Democracy and Dispute Resolution : The Problem of Arbitration." *Law and Contemporary Problems* 279 - 320.

Reuben, Richard C. 2000. "Constitutional Gravity: A Unitary Theory of Alternative DIspute Resolution and Public Service Justice." *UCLA LAW REVIEW* 949-1104 .

Robert, S., & Palmer, M. 2005. "Cultures of Decision-Making: Precursors to the Emergence of ADRs." In *Dispute Process: ADR in the Primary Forms of Decision Making* , by S. Robert, 9=44. Cambridge : Cambrigde University Pres .

Russett, Bruce. 1993. *Grasping the Democratice Peace : Principles for a Post-Cold War World.* Princeton, New Jersey : Princeton University Press .

Rustow, Dankwart, A. 1970. "Transitions to Democracy: Toward a Dynamic Model." *Comparative Politics* 2 (3): 337-363.

Sandholtz, Wayne and Sweet A. Alee. 2004. "Law, Politics and International Governance ." In *The Politics of International Law* , by Christian Reus, 238-271. New York : Cambridge University Press.

Schmitter, Phillipe, C. 1994. "What Democracy is and is Not." *Journal of Democracy* 75-88.

Schumpeter, Joseph, A. 1942. *Capitalism, Socialism, and Democracy.* New York: Harper & Row.

Scott, W. R. 1994. *Institutions and Organisations; Toward a Theoretical Sythesis.* Califonia: Sage Publishers.

Scott, W. R. 1995. *institutions and Organisations.* California: Sage Publishers.

Sullivan., Daniel S. 1993. "Effective International Dispute Settlement Mechanims and Necessary Condition for Liberal Democracy." *Georgetown Law Journal* 2369- 2412.

Weber, Max. 1958. *The Protestant Ethics and the Spirit of Capitalism* . New York : Dover Publications, Inc.

Whitehead, Lawrence. 2002. *Democratization; Theory and Experience.* Oxford: Oxford University Press.