THE USE OF RECONCILIATION BY THE EAST AFRICAN COURT OF JUSTICE (EACJ) IN DISPUTE RESOLUTION BY MEMBER STATES

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DECLARATION

I do declare that this research project is my original work and has not been submitted to any other university for any kind of an academic award**.**

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This research project has been submitted for examination with my approval as the official university supervisor.

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DEDICATION

I dedicate this work to my husband David Nduva Soi and my children Ellen Mutile Nduva and Lesley Kimilu Nduva who have encouraged and motivated me throughout my study period.

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May God Bless you all

LIST OF ABBREVIATIONS

AG	Attorney General
CJEU	Court of Justice of the European Union
EAC	East African Community
EACA	East African Court of Appeal
EACJ	East African Court of Justice
ADR	Alternative Dispute Resolutions
EU	European Union
ID	Identity Card
UK	United Kingdom
US	United States
ULS	Uganda Law Society
DPP	Directorate of Public Prosecutions
DRC	Democratic Republic of Congo
ICJ	International Criminal Court
JSC	Judicial Service Commission
LSK	Law Society of Kenya
TLS	Tanzanian Law Society
TDR	Traditional Dispute Resolution Mechanism
CSO	Community Society Organization
CRS	Community Relation Service
EALA	East African Legislative Assembly
TJRC	Truth Justice and Reconciliation Commission
NCAJ	National Council on Administration of Justice

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ABSTRACT

The study sought to establish the use of reconciliation by the East African Court of Justice (EACJ) in dispute resolution by member states. The study's main objective was to determine the extent to which the EACJ effectively utilized reconciliation as an ADR mechanism. This study was guided by the theory of Liberal institutionalism which argued that the only way which the use of reconciliation and the ADR mechanisms can be successfully adopted in the EACJ and the justice systems of the EAC member states is through strengthening of the regional institutions such as the EACJ so that they can cause spillover effects to the justice systems of EAC member states. This theoretical framework was also backed up by a conceptual framework which highlighted the independent variable, the dependent variables and the intervening variables. The study sought to test two hypotheses, first that, the existing mechanisms in EACJ justice systems does not adequately support the use of reconciliation as an ADR mechanism in the day to day affairs of EACJ. Secondly, that there exists serious legal, administrative and policy loopholes which do not support the adoption of reconciliation as an ADR mechanism in the justice system of the EACJ. The study established that both hypothesis one and two are true and correct. Secondly, that the EACJ is facing serious financial, administrative, human resource incapacity and legitimacy challenges which make it unable to adequately adopt the use of reconciliation as an ADR mechanism. Consequently, that most EAC member states are not willing to fully embrace the use of reconciliation as an ADR mechanisms in the justice systems of both the EACJ and their national justice systems. The study recommended that, the EAC needs to learn from the EU experience on the strategies they undertook to factor in the use of reconciliation and other ADR mechanisms in their justice systems, that there is need for a total legal, policy and administrative overhaul of the EACJ so as to streamline its activities including a creation of a new directorate of ADR mechanisms where reconciliation will be factored in. That; there is need for the EAC to look for alternative sources of finance rather than wait for the subscriptions from the member states, this will enable it to have enough finances to facilitate the use of reconciliation. Finally, that, a serious sensitization campaign should be undertaken to conscientize the EAC citizens on the existence of ADR mechanisms within the EAC justice system.

CHAPTER ONE: INTRODUCTION

1.0 Background of the Study

In the Aftermath of the second World War, states realized that the only way of ensuring that there is global peace and security in the international system was by ensuring that justice is accorded to all, whether an individual person or to a state or non-state actors (Haas, 1968). This line of thinking made democracies all over the world at that time to enhance their justice systems by incorporating reconciliation as an Alternative Dispute Resolution mechanism within their jurisdiction. This led to spillover effects whereby most states in Europe embraced reconciliation among the disputing parties as an alternative dispute resolution mechanism. This practice of reconciliation was also adopted by the European Union in the late 1950s as a strategy of settling any emerging interstate disputes between member states. All these practices according to Lederach, (1997) have ensured that justice can be accessed by all.

The United Kingdom according to Bloomfield, (2003) has also been noted as the key European Country which has embraced ADR as a strategy of ensuring access to Justice. This has been done so through the adoption of appropriate policy measures, statutory as well as administrative measures that will see to it that ADR mechanisms succeed. This practice of embracing reconciliation as part of the ADR has been widely embraced in the European Union Court of Justice whereby some disputes that involves states have been settled out of courts through reconciliation. Not only has the court of the European Union managed to ease its burden, but it has also succeeded in ensuring that cases are dispensed with expeditiously. As a result of these, the practice of reconciliation as part of the ADR has been embraced in the entire EU by the member states through spill-over effects. Therefore, the sum-total of all these, is that the Justice systems of these developed countries has been strengthened through the utilization of Reconciliation as part of the ADR mechanisms.

In the African continent, the practice of reconciliation as a part of the ADR mechanism was used in Rwanda in the aftermath of the 1994 genocide (Risagara 2008). This is whereby the Gacaca courts were set up to deal with perpetrators of the genocide against the victim. Through the Gacaca courts, a lot of cases were dispensed with and harmony in society was ensured. The other benefit that the use of reconciliation had on Rwandese Justice System is that it boosted the levels

of confidence that the Rwandese had on their courts. To date there are adequate mechanisms that have been put in place in Rwandese Justice System to make it embrace reconciliation as part of the ADR mechanisms.

The use of reconciliation as an alternative dispute resolution was applied in the DRC Vs Uganda case at the International Court of Justice. The DRC had sued Uganda over unjustified invasion and illegal extraction of its mineral as well as natural resources. The ICJ fined the Republic of Uganda with heavy fines and penalties that was to be paid to the DRC. The Republic of Uganda in response had to plead with the ICJ to allow it have an out of court settlement with the DRC through reconciling, a prayer which was granted. As a result of the continuous reconciliation, the two countries have continued to maintain a close diplomatic relations and its levels of co-operation and inter-state trade has been enhanced (Rwigamba, 2005).

In the East African Region, there have been quite a number of interstates dispute, these disputes have been as a result of states pursuing their national interests which in most cases are contradictory to those of the neighboring states. As a result of these conflicts, the East African region has experienced serious interstate conflicts over boundaries, trade disputes, the question of immigration as well as the issue of cross border security just to mention but a few. These states have found it difficult to meaningfully engage in regional integration because of the existence of too much suspicion and interstate disputes. This situation informed the framers of the EAC treaty to adopt the use of reconciliation as an Alternative dispute resolution mechanism within the East African states. The East African Court of Justice also has allowed the use of pacific means of dispute resolution among member states. Migingo Island was once brought before the EACJ and subjected through arbitration. However, despite the use of pacific settlements of disputes within the EAC, there is no clear impact on what reconciliation has delivered in terms of conflict resolution in the East African region since there is escalation of the number of conflicts as time goes by to an extend where some member states are threatening to go to war with each other.

It is due to the above reasons that this study intended to determine the application of reconciliation as an Alternative Dispute Resolution by the EACJ in Dispute Resolution among the member states.

1.1 Problem Statement

Maintenance of international peace and security is the hall mark of the various regional integration initiatives across the world. Among the many things that regional bodies do is to provide for an avenue of which states belonging to the same regional body can resolve their differences amicably without going to war or degenerating into inter states conflicts. Therefore, accessing justice is one of the fundamental rights that a state enjoys in the international system. States and governments within regional organizations or within global institutions must therefore do all that is within their means to ensure that there is an enabling legal as well as policy framework which ensures that every state can easily access justice (Mutua, 2008). This is for the reason that most of the regional organizations in the world are states based and they are controlled by the member states unlike in the European Union where the organs of the various regional bodies have been given more powers to have a total jurisdiction over member states. The International Court of Justice has provisions which allow the use of reconciliation as an Alternative Dispute Resolution mechanism between any disputing states. However, despite the existence of this provision, states are still engaging in conflicts which makes them appear to be at war with each other, for instance the economic crisis in Greece saw other European countries to be in conflict with Greece as a result of massive migration of the people of Greece into other European states. The United Kingdom was unable to settle the disputes it had with other EU member states which resulted into the BREXIT vote which saw UK moving out of the European Union altogether.

The same case applies to the East African Community, whereby there exists the East African Court of Justice. Under the treaty of the EAC, the EACJ has been allowed to make use of the Alternative Dispute Resolution Mechanisms in resolving inter states disputes, therefore the EACJ for instance embraces the use of pacific means of settlement of disputes. However, despite all these provisions by the EAC treaty, the practice of reconciliation as part of the ADR mechanism has not been backed up by sufficient pieces of legislation and the necessary policy

framework which will ensure a smooth operationalization of reconciliation as part of the Alternative conflict resolution mechanism across the board in the East African region. This makes the EAC member states not to pursue this line of action because they feel they will not get justice (Mutua, 2008). Again since the revival of the new EAC which adopted the EACJ that embraces reconciliation, there has been an increase of the interstate conflicts which begs the question WHY? Are the ADR mechanisms really being used to address these cases? for instance, Kenya and Uganda over Migingo Island, Kenya and the Republic of South Sudan over the Ilemi Triangle, Uganda and Rwanda over the Border disputes, Rwanda and Burundi over cross border conflicts just to mention but a few. This study therefore asks why this is the case?

A number of studies have been done on this area of reconciliation however there is no single study which has looked at the use of reconciliation in the East African Court of Justice hence a study gap. Among the existing studies that have been done in this particular area includes; Masika, (2014) who did a study on "The role of reconciliation in divided societies, a case study of the Kenyan Truth Justice and Reconciliation commission. Rwigamba (2005) who did a study on "Justice and reconciliation as instruments of political stability in post Genocide situations: A case study of Rwanda. Affrifah, (2015) who did a study on "Alternative Dispute Resolution as a tool for conflict Resolution in Africa, case study of Ghana and Wafula, (2014) did a study on the Role of the church in promoting reconciliation during the post-election violence in Kenya (2008-2013). Despite the fact that these studies focused on the role of reconciliation in various jurisdictions, these studies came up with mixed findings on the actual role that reconciliation plays in conflict resolution. Also as it can be seen from the existing studies, none of them has focused on the role of reconciliation as an Alternative Conflict Resolution mechanism in the East African Region or within the regional organization hence the existence of a knowledge gap which this study aims at filling. The overall gap which this study sought to fill were the strategies which needed to be adopted in order to fully embrace reconciliation in the justice systems of the East African states.

For that reason, study purposed to examine the role of reconciliation as an alternative Conflict resolution in the East African region. The East African Court of justice was adopted as a case study.

1.2 Research Questions

This study was guided by the following research questions.

i. To what extent does the East African Court of justice effectively utilize reconciliation as an alternative dispute resolution (ADR) mechanism?
ii. What are the existing legal and policy loopholes which hinders the use of Reconciliation in the East African Court of Justice?

1.3 Objectives of the Study

The study was guided by the following objectives.

i. To determine the extent to which the East African Court of justice effectively utilize reconciliation as an alternative dispute resolution (ADR) Mechanism.
ii. To determine the challenges that the East African Court of Justice experiences while trying to use Reconciliation in resolving disputes among member states.

1.4 Justification of the Study

This study had two justifications; academic justification and policy justification.

Academically, this study established that a number of studies that have been done have focused on the roles of the truth, justice and reconciliation commissions, the church and the community as the agents of reconciliation in society. These studies ignored the fact that there are no adequate legal as well as policy provisions that enables the practice of reconciliation to be anchored in the justice systems of the East African states and by extension, the East African Court of Justice. The study therefore contributed to the expansion of knowledge in as far as the East African Court of Justice is concerned. The findings and the recommendations made by this study was useful to the law students, students of conflict, political science and international relations and those students of international studies, not only did it create a platform for academic discussions and but it also formed a basis for further research.

In terms of policy Justification, this study identified a number of gaps in the existing policies and legal frameworks in as far as the practice of reconciliation in the East African Court of Justice is concerned. As a result of this, it was established that member states within the East African Community were unable to settle their disputes through reconciliation. Secondly, the ripple effects of these administrative, legal as well as the policy gaps have made it difficult for the

regional organizations all over the world to prosper and stay in harmony. This to a greater extent infringed on the rights of a number of states across the East African states. Through filling in of these policy as well as the legal gaps, the study was useful in strengthening the EAC treaty and the justice systems of the member states as it informed future legal and administrative reviews. Similarly, the findings and the recommendations made by this study to some extent informed the art of policy making and created a basis for comparative analysis between the justice systems of other regional bodies in other jurisdictions.

1.5 Scope and Limitations of the Study

This study critically analyzed the use of reconciliation as an alternative dispute resolution mechanism by the EACJ. The study focused on the role of reconciliation in the justice system of the East African Court of Justice between the periods of 1999 and 2019. This was necessary in that was the period when the new East African Community was revived and the new Treaty establishing the EAC embraced reconciliation as part of the ADR mechanisms were operational. The study focused on the East African Court of Justice and all its organs. This was because these organs mentioned were critical parts of the justice systems in East African states that in one way or another assist in the dispensation of justice to all the citizens of East Africa.

Among the limitations of this study was the problem of accessing information from the EACJ since it only allows states to go before it and not individual person. The other challenge is that of confidentiality and anonymity of the respondents. This study noted that the provision of the EACJ is a judicial body that mostly settles inter-state disputes therefore some officers may not be willing to share sensitive information with the researcher because of fear of victimization, being quoted as well as fear of contradicting their bosses.

Secondly, the researcher has noted that most of the judicial officers from the EACJ member states were always busy and getting an appointment with them for an interview was hectic since their diaries were always full. The third challenge was that some of the respondents in this study were lawmakers in the East African Legislative Assembly for the reason they were in charge of policy making. The lawmakers were ideologically indifferent hence fail to offer objectivity in this study since it was noted by several scholars that the law makers from the East African states

were part of the elites that were the stumbling blocks in ensuring that the judicial arm of their respective governments properly functions and dispenses justice to all.

However, despite all the above limitations, the researcher explained everything to the respondents and got their consent prior to interviewing them. Secondly the researcher sent the interview guide to the respondents prior to the interview. The respondents were at liberty to ignore the items on the interview guide which they were uncomfortable in discussing. Finally, in order to avoid bureaucratic challenges, the researcher had in possession of a valid passport, The University of Nairobi's introduction letter and the researcher's national identity card. These documents were relevant to the researcher as they assisted in identifying to her respondents.

1.6 Definition and Operationalization of Key Terms

Justice: According Lederach (1997), justice refers to "the virtue which renders to each his own." For the purposes of this study, justice refers to the rights that are given to individuals through reconciliation as an alternative dispute resolution mechanism. It will also mean all those legal and policy frameworks which have been put in place to support the use of reconciliation as an Alternative Dispute Resolution in the Justice Systems of the East African Court of Justice.

Reconciliation: According to Bar-tal (2002) reconciliation refers to "a psychological process for the formation of lasting peace". For the purposes of this study, reconciliation meant the transformation of identities and values regarding interactions, altitudes, behaviors and interactions that parties in a conflict have towards each other with a view of fostering co-operation and diffusing tensions. It also meant the practice of states settling their disputes out of court through forgiveness and embracing one another.

Alternative Dispute Resolution Mechanisms (ADR)

According to Kauffman, (2001) it refers to the extra-legal measures such as arbitration, reconciliation, mediation, conciliation, use of good offices that have been adopted and accepted as ways of resolving disputes in society. For the purposes of this study, Alternative Dispute Resolution mechanisms meant the use of reconciliation that has been accepted by the East African Community treaty.

1.7 Literature Review

This section dealt with the question of the conceptualization of the concepts of justice, and reconciliation. Secondly the section focused on the subjects of the legal framework alluding to reconciliation as one of the ADR mechanisms in other jurisdictions and in Kenya as well, the concept reconciliation and the implications it had on the justice systems of various countries. Finally, the remaining sections focused on the challenges that reconciliation as one of the ADR mechanism face in developing countries. The section gave a conclusion at the end of it all and the ideas of the scholars on this particular issue were cited, compared, contrasted, critiqued and concurred with. It is at that point that a knowledge or literature gap was established.

1.7.1 Conceptualization of the Concepts of Justice and Reconciliation

Justice according to Lederach, (1997) refers to "the virtue which renders to each his own." According to Mutua, (2008), there exist two types of justice systems, namely; Retributive justice system and the restorative justice system. He acknowledges that most countries especially in the third world states promote retributive form of justice whereby the offenders must be punished through court fines, sentences, as well as jail terms as a way of serving justice to the offended. Restorative justice on the other hand according to Bloomfield, (2003) refers to that kind of justice where the focus is not just punishing the offender but to restore social relationships between the offender and the offended in an out of court settlement of disputes with a view of establishing or re-establishing social equality in relationships.

The major challenge that the justice systems of many developing countries encounters according to Mutua, (2008) is that they have been overwhelmed by the number of cases that are brought before the law courts. He argues that almost all the courts of law beginning from the lowest courts to the highest courts in the land have huge backlog of cases. This situation leads to situations where there are a lot of delays in serving justice to both the offender and the offended. Secondly, Kagwanja and Southall, (2009) argues that many states in the developing world continues to be haunted by the crisis of state formation hence a lot of societal divisions starting from the family level, community level and societal level all the way to the national level. In such kind of scenarios according to the authors, it is very hard for individuals and communities to trust one another, therefore there is a major belief in developing countries that, every dispute

however minor it is must be settled before the courts of law and true justice cannot be achieved through reconciliation hence the idea of frequent filling of cases before the law courts despite high backlog of cases and the lack of enough capacity of the judicial arm of government.

Affrifar, (2015) observes that most states in the developing world have started embracing the idea of reconciliation in their justice systems through restorative justice as advanced by Boutros, (1992). This according to the author was because the judicial arm of governments realized that unless they embrace alternative dispute resolution mechanism (ADR), there is no day that they will be able to lessen the burden of clearing the huge backlog of cases that are before them.
This study has therefore noted that there exists a literature gap as well as policy gaps in anchoring the practice of reconciliation in the justice systems of most of the developing countries especially in the sub-Saharan region. This is because a lot of the existing studies have dealt with the subject of reconciliation either from a religious angle, from a political angle and from a security angle, but none of these studies has attempted to look at the issue of reconciliation from an angle of the justice system with a view of anchoring the practice of reconciliation in the justice system. Although the Kenyan Constitution (2010) allowed reconciliation in the Kenyan justice system, there are no sufficient number of studies and research that have been done with regards to its performance, successes and failures hence the rationale for this study.

Reconciliation according to Bar-Tal, (2002) refers to a "psychological process for the formation of lasting peace". The author further notes that in the process of reconciliation, past rivals come to mutual recognition and acceptance, in other words they change the types of attitudes, behavior as well as perceptions that they have towards each other. Melvin, (1999) defines the concept of reconciliation as "all initiatives which brings people together with a view of transforming their identities and values in as far as their style of interactions, attitudes and behavior towards co-operation rather than antagonism. He further argues that the most important features of reconciliation are justice, truth, healing as well as security. While the social level of reconciliation includes the national level, community level as well as the individual level. He further concludes that the aspects of reconciliation are a salient feature in the process of building lasting peace. Long and Brecke (2003), looked at reconciliation as a process of mutually conciliatory accommodation between former antagonists and forgiveness is the driving factor.

They further observe that maintenance of social relations in the times of aggression or war is key for human survival. They therefore view reconciliation as a strategy of solving problems which is part and parcel of the human beings lives.

Bloomfield, (2003) noted that the concept of reconciliation involves a process through which a society moves from a divided past to a shared future. This according to the scholar can only be realized in an environment where democratic principles are embraced. This is because a lot of conflicts are caused by perennial injustices that are structural in nature. He concludes that democracy forms a good platform where reconciliation can take place, this will ensure that individuals lives peacefully, learn to trust one another and empathize with each other thereby ensuring that peace is sustained.

Lederach, (1997) views reconciliation to mean both "a focus and a locus". He argues that focus of reconciliation should be forging of new and stronger relations between former enemies. This is because according to him, social relations are the cause as well as part of the solutions to all kind of conflicts. The locus of reconciliation refers to the space, place as well as the location where warring parties meet. This place should formulate the past challenges as well as the aspirations for the future. In places where the ideas of truth, forgiveness or peace exist, justice will naturally emerge.

Although all the above definitions of the terms reconciliation differ from one another, they have all focused on the dimensions of eventuality, prevention, forgiveness, change of attitudes and beliefs and restoration of former relationships. This means that warring parties should change their destructive perceptions and behaviors towards each other and begin to have constructive behaviors towards one another. All these authors do not mention anything about the idea of anchoring the reconciliation process in the justice system of a country hence a conceptualization gap.

The other issue is that most of these scholars have anchored the concept of reconciliation from a religious discourse where the notions of forgiveness and mercy are required, however the issue of reconciliation in the modern world has transcended to other disciplines such as law and

politics. For instance, in politics, those countries that have experienced wars, violence as well as ethnic divisions must embrace reconciliation in order to ensure that there is state survival. This is because in the realm of reconciliation, the said states would have managed to ensure there is national healing as well as the re-occurrence of such conflicts is prevented at all costs.

1.7.2 The Legal Framework Alluding to Reconciliation as part of the ADR Mechanism

The idea of embracing the reconciliation as an ADR mechanism has existed since time immemorial. For instance, in the Bible as well as in the Quran, there are so many cases where the prevailing disputes were sorted out using intermediaries or third parties. In addition to these, many Archaeologists have established evidential instances when reconciliation was used in the Ancient civilizations in Egypt, Mesopotamia, Greek as well as Assyria. These archaeologists have noted that the modern court system itself was once on ADR process where the art of reconciliation was emphasized, in the sense that it replaced the ancient processes of dispute resolution such as trial by battle and trial by ordeal (Bar-Tal, 2002)

The earliest mediation and reconciliation processes took place 4,000 years ago in ancient Mesopotamia where a Sumerian ruler prevented an emerging war through developing an accord over on existing land dispute. In Europe, the rise and development of reconciliation and other ADR mechanisms is traced from the Ancient Greece who created a post of public arbitrator in 400BC after establishing that the Greek courts of law were overcrowded. India and China have practiced reconciliation processes for a long time; this has been encouraged by the Buddhist religion and in particular the Dhalai Lamah (Brecke 2003).

At the Global level, the practice of reconciliation as part of ADR mechanism enjoys a lot of support. It has also been embraced at the regional level as well as at the local level. Globally, the UN through its General Assembly provided guiding principles upon which crimes can be prevented and criminal justice in the context of a New International Economic Order. These principles are enshrined in the UN Charter Article 33 whereby pacific ways of settling disputes such as the use of reconciliation, arbitration, mediation, conciliation, commissions of inquiry, use of good offices among others have been encouraged. As a result of these, the goal of maintaining the international peace and security has been ensured.

In the United States of America, the concept of reconciliation as part of the ADR mechanism was popularized as the best way of dealing with the emerging inter-racial disputes which had come up with the advent of the civil rights movements in the 1960s and the loss of faith in the ability of the American Justice system to deal with a huge backlog of cases that was before it. Since the Civil Rights Act was promulgated in 1964, it led to the creation of the Community Relations Services (CRS). Thus the body embraced the pacific ways of setting disputes such as mediation, negotiation and reconciliation as a way of preventing the emergence of the inter-racial wars. It also played a key role in resolving emerging disputes in the institutions of learning, police service, prisons as well as other government departments in the 1960s (Afriffar, 2015). Today not only has the civil rights programs grown very popular among the American people, but it has now been institutionalized as well as been legalized. In fact, a number of legal scholars have argued that it has lost its "alternative tag" since it has been embraced as an integral part of the American Justice System. The same case has also been embraced in Europe, Asia as well as in the Caribbean region.

In the continent of Africa, the idea of reconciliation as part of ADR became popular in the 1990s whereby there was a lot of emphasis in the judicial reforms and in particular the issue of improving the capacity of the citizens to access justice. This influenced African states to embrace reconciliation as part of the ADR in ensuring that the poor and vulnerable citizens have an access to justice. For instance, the multi-door approach in Nigeria was introduced in 2002. In this kind of an approach, the disputing parties are offered a choice between the formal court litigation and court-connected ADR mechanisms such as reconciliation. According to the judicial report of Nigeria (2015), the practice of reconciliation as an ADR mechanism that is court connected resolved an average of 200 cases daily with a settlement rate of between 60-85%. This has drastically reduced the case load in the Nigeria formal court systems whereby judges admit a minimum of 50 cases daily (Afrifar, 2015).

Afrifah, (2015) observes that, the major aim of reconciliation is to obtain a better form of justice through putting much focus on peaceful settlement of disputes in a bid to ensure there is a mutual agreed form of settlement instead of a binding adjudication by a state authority. He suggests that mediators from the state as well as non-state actors can offer ADR. What makes these ADR

processes different from the formal court processes is the procedure, an informal search for an agreed and just solution as opposed to deciding who has won or lost.

1.7.3 Characteristics of Reconciliation as an ADR approach

Although all the listed forms of ADR shares one thing in common, that is the alternative tag or alternative measures of resolving disputes besides the formal court processes. Muigua, (2015) observes that they share some common features that make them different from the formal court processes. It is these common features that have made them to enhance the justice systems of many states in a bid to faster development, national cohesion and integration.

Informality

To a greater extent, reconciliation processes has been much informal than the court processes, the rules of engagement are always flexible. There are no formal pleadings. There is the absence of extensive written documentation and rules relating to evidence. This kind of being informal is very much appealing to the poor and vulnerable citizens and those citizens who are not interests in spending too much time in court. This process also makes it impossible for people to intimidate there. It has a benefit of cost reduction, absence of formal representation and its fast (Muigua, 2015).

The Principle of Equity

These reconciliation processes focus so much in applying equity to each party as opposed to the adherence of the rule of law. The decisions made in these cases either emanates from the third party or between the disputing parties themselves. They therefore do not create any form of precedence's or amendments of any law (Muigua, 2015).

Direct Participation of Disputing Parties

This means that all the disputing parties are allowed to have a chance in designing the rules of engagement, venues, methods of communication and form part of the solutions. This helps to increase the levels of confidentiality, respect for one another, less direct pacer of enforcement as well as flexibility in creation of solutions (Muigua, 2015).

1.7.4 The Legal and Policy Framework on Reconciliation as Part of ADR Mechanism in Kenya

In Kenya it was not until the promulgation of the 2010 Constitution that the expansions of the mechanisms for accessing justice were done. This is because the 2010 Constitution allowed for the utilization of both the formal as well as the informal justice systems. Articles 159 of the 2010 Constitution recognized the use of ADR and TDR mechanism as back-up to the formal court processes. Articles 159(2) of the 2010 Constitution gives the principles upon which the exercise of the judicial authority in Kenya which include promotion of reconciliation as part of the ADR and TDR mechanisms. However, there is no institutionalization of these mechanisms in terms of legal framework, policy framework that will help to guide as well as to promote the use of these mechanisms.

The following frameworks that are both legal and policy make reference to the ADR and TDR mechanisms in selling the disputes. They advocate for the use of the said ADR and TDR mechanisms in resolving disputes in Kenya. These frameworks include;

The 2010 Constitution

This document promotes reconciliation and other ADR and TDR mechanisms in promoting Justice to all Kenyans through Articles 159 (1) and (2). The major reason as to why a customary rule is subjected to the repugnancy test is because it was argued that some traditional practices do not adhere to the human rights standards. This therefore made the courts to have a formed opinion about customary laws hence undermining the contribution of ADR mechanisms. There is also the misconception of justice and morality. Majority of the Kenyan people have got their own way of looking at morality. It is therefore difficult to improve the western moral codes. Therefore, if the repugnancy clause can be redefined it will greatly assist the courts to change their attitude towards reconciliation and other ADR and TDR mechanisms.

Civil Procedure Act and Rules

Under this framework the court in its own wisdom and determination has the powers to embrace reconciliation in order to ensure there is a just, expeditious, proportionate as well as the affordable resolution of civil disputes. The major idea of the court doing this is to ensure that

there is efficient utilization of judicial resources, reduction of backlog of cases and getting all the facts right. Most cases that have been handled through this process are marriage, divorce and division of matrimonial property as well as succession cases. Among the popular ADR mechanisms that are employed are arbitration, reconciliation, mediation and fact finding.

Land Act (2012)

This Act is the supreme law that deals with matters of land. It harmonizes all land regimes that are usually scattered in many pieces of legislation. It lays down the guiding principles as far as the management of land, and its administration is concerned. The Act specifically ensures that there is no gender discrimination, in matters of customs and practices in relation to land property right encouraging local communities to employ pacific ways of settling land disputes and promoting the use of reconciliation in resolving land disputes especially community land.

This study wishes to argue out that reconciliation can also be relied on to resolve cases with a goal of promoting some constitutional principles of public participation, inclusiveness, and protection of the marginalized communities, non-discrimination, equity and social justice among others.

Commission on Administrative Justice Act (2011)

Section 3 of the Act establishes the commission and confers it with the mandate under Section 8 to perform functions such as promoting the use of reconciliation, in resolving complaints which are brought before it. This makes the commission to be in a position to get to the bottom of the disputes at hand and explore the best solutions. This commission has been a key factor in resolving the disputes between state and constitutional organizations.

National Land Commission Act (2012)

Section 3 of this Act empowers the commission to manage and administrate land matters in Kenya in accordance with the principles of national land policy and the Kenyan Constitution. In Section 6 of the Act, the commission is empowered to use reconciliation in resolving land conflicts. Section 2 (f) of the Act empowers the commission to use reconciliation in resolving land disputes. Section 6 of the Act empowers the commission not to rely so much on strict rules

of evidence. However, Section 17 of the Act does not empower the commission to seek the assistance of traditional and community leaders and clan elders in deciding cases. In other words, there is no actual or meaningful engagements with these clan elders hence on the measures are counter-productive. For instance, in the ongoing war between the NLC and the ministry of land, it has been very difficult for the community elders to be engaged in ADR processes.

Environmental and Land Court Act 2011

Section 3 of this Act empowers this court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act. The same section calls for the parties to a case to assist the court in dispensing justice. Section 20 of this Act allows the court to embrace reconciliation and other ADR mechanisms in resolving environmental and land disputes. The sections give specific mechanisms such as reconciliation, mediation, conciliation and other TDR mechanisms in accordance with Article 159 (1) of the 2010 Constitution. However, in cases where ADR mechanisms is precedent to the Constitution, the Act claims that court processes stay until such conditions are fulfilled. The most ambiguous thing is what or who determines a matter where the use of ADR and TDR mechanisms is a condition precedent to any proceedings in courts the discretion of the court and lack of clarity in this provision may render the spirit behind Article 159 as redundant.

1.7.5 The Legal and Policy Framework on Reconciliation as Part of ADR Mechanism in Uganda

In Uganda, the practice of Reconciliation is guided by the following legal and policy framework

Constitution of the Republic of Uganda, 1995

Article 126 (d) provides for exercise of judicial power which is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people. The Constitution promotes reconciliation between parties.

The Civil Procedure Act (Cap. 71) and the Civil Procedure Rules S.I

The Civil Procedure Rules provides for "Scheduling conference and Alternative Dispute Resolution". Rule 1 provides that "The Court shall hold a scheduling Conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any form of settlement. Rule 12 (2) provides for ADR before a member of the bar or bench

The Judicature Act, Cap. 13

This Act provides for Alternative Dispute Resolution under Court's direction. The Judicature (Mediation) Rules of 2013 Provides for mandatory mediation in all civil matters including land, family and other civil claims.

The Arbitration & Conciliation Act of Uganda (Cap 4)

This Act regulates the operation of arbitration and conciliation procedures, as well as the behavior of the arbitrator or conciliator in the conduct of such procedure. The Act also provides for arbitration and conciliation and how they are conducted as well as for the enforcement of the New York Convention awards and ICSID Awards. The institution created by this Act is Centre for Arbitration and Dispute Resolution (CARDRE).

1.7.6 The Legal and Policy Framework on Reconciliation as Part of ADR Mechanism in Tanzania

The use of Reconciliation and other ADR mechanisms in Tanzania is founded on the following legal and Policy frameworks;

The Constitution of the United Republic of Tanzania

Article 107A.-(1) talks about the dispensation of justice in the United Republic. It establishes the High Court of the United Republic, the Judicial Service Commission for mainland Tanzania, the High Court of Zanzibar, the Court of Appeal of the United Republic and Special Constitutional Court of the United Republic. It vests **t**he Judiciary with the authority with final decision in dispensation of justice in the United Republic of Tanzania. Part (d) states that in delivering decisions in matters of civil and criminal matters in accordance with the laws, the court shall

observe the following principles, that is to say to promote and enhance dispute resolution among persons involved in the disputes.

The Civil Procedure Code –Cap 33 RE 2002

Orders VIIIA, VIII B, VIII C, Orders VIIIA,

Rule 3 provides for the use of negotiation, mediation, conciliation and arbitration or such other procedure not involving a trial. I have noted only mediation is practiced in Tanzania courts under the Civil Procedure Code as amended by the Government Notice No.422 of 1994.

The Land Act NO.4/1999 Section 18

This Act provides for the use of Alternative Dispute Resolution mechanisms in resettling land related cases with the direct control of the courts of law.

The East Africa Community Mediation Agreement Act [Cap 232 R.E 2002] Enacted in 1984

This agreement allowed the East African member states to resettle their disputes through the use of mediation and arbitration. It aimed at promoting peaceful coexistence of the three EAC states and avoid a repeat of the bitter fallout of EAC member states in 1977.

1.7.7 Challenges of Reconciliation as an ADR Mechanism in the East African States

The practice of reconciliation in Kenya and in other developing countries has also experienced a number of challenges during the implementation process for instance, a number of scholars such as Nyongesa (2014) and Suto (2014) have argued that the problems of funding, training and infrastructure. Their arguments are explained below.

The Problem of Funding

The issue of funding reconciliation processes as an ADR mechanism has been a major problem in developing countries. This is because they have a big cost implication to the countries budgets. A number of NGOs and international organizations had stepped in to support these initiatives; however, they have pulled out as time goes by since they find it unsustainable. The funding that the judicial arm of government gets is very small hence a big problem in recruiting

mediators, conciliator and arbitrators. It is a big challenge in as far as the practice of adopting ADR mechanisms is concerned. Without enough funding, expanding these ADR mechanisms to all the magistrates' courts all over the country remains a pipe dream.

The Problem of Training

Most of the court practitioners in East Africa have inadequate training in as far as the issues of reconciliation and ADR mechanisms are concerned. This means that they are not well capacitated in promoting issues such as reconciliation since they ignore the principle of neutrality. This means that in order for the success of the adoption of reconciliation and other ADR mechanisms, proper training of court officers should adhere to the global accepted stands. This will promote efficiency, effectiveness in practicing the ADR mechanisms.

The Problems of Infrastructure

Successful implementation of reconciliation as an ADR mechanism requires that there exists an alternative structure that is flexible enough in reaching out to all the East Africans at the grassroots. So as to ensure that justice is served to everyone lack of enough funding makes it hard for the judicial arms of these EAC member states to put in place the required infrastructure to ensure that the practice of reconciliation is adequately institutionalized. This means that mediators, conciliators, para-legal officers among other officers must be recruited, given proper officers, equipment as well as supported financially so that they are able to be sent to every magistrate's court to implement reconciliation as an ADR mechanism.

The Challenge of Resistance

Successful implementation of reconciliation as an ADR mechanism is always resisted by a number of interest groups who have vested interests, for instance, lawyers view reconciliation as an ADR mechanism as a threat to their legal career while judges may also resist reconciliation as an ADR mechanism because they fear losing control over non-litigation processes of the out of court settlements. Some government officers may resist reconciliation as an ADR mechanism because it will spur the additional of skills to the employers. Besides these, an enabling legal framework would be operational which may be a threat to their corrupt activities

1.7.8 Conclusion

As it can be seen in the above literature review and from the above legal and policy frameworks of the three EAC member states. It is apparent that reconciliation has been left out as an alternative dispute resolution although the Constitutions of the three member states of the EAC factored in the practice of reconciliation as an ADR mechanism in their justice systems. There is no elaborate legal and policy framework which will ensure that there exists a comprehensive guideline in merging the ADR process with court processes. It is upon this background that this study seeks to critically analyze the role of reconciliation as an ADR mechanism in the justice systems of the East African states.

1.8 Theoretical Framework

This study will be anchored on the Liberal institutionalism theory of international relations. The theory argues that it is difficult to control the behavior of states with the absence of a higher authority to regulate the behavior of these states (Haas, 1968). This is because all states assume their own sovereignty which makes them believe that they are the ultimate authority within their jurisdictions. Therefore, in order to deal with this challenge, the theory proposes that those states which have voluntarily accept to enter into any form of regional integration arrangements must also agree to create some supra-national institutions which will police the behavior of states on certain issues of common interest (Haas, 1968). For instance, in order to ensure that the justice systems of the East African states embrace the concept of reconciliation as part of their justice systems', the theory argues that supra national institutions such as the EACJ should be strengthened and given full powers to enforce these kinds of practices in the justice systems all the respective member states.

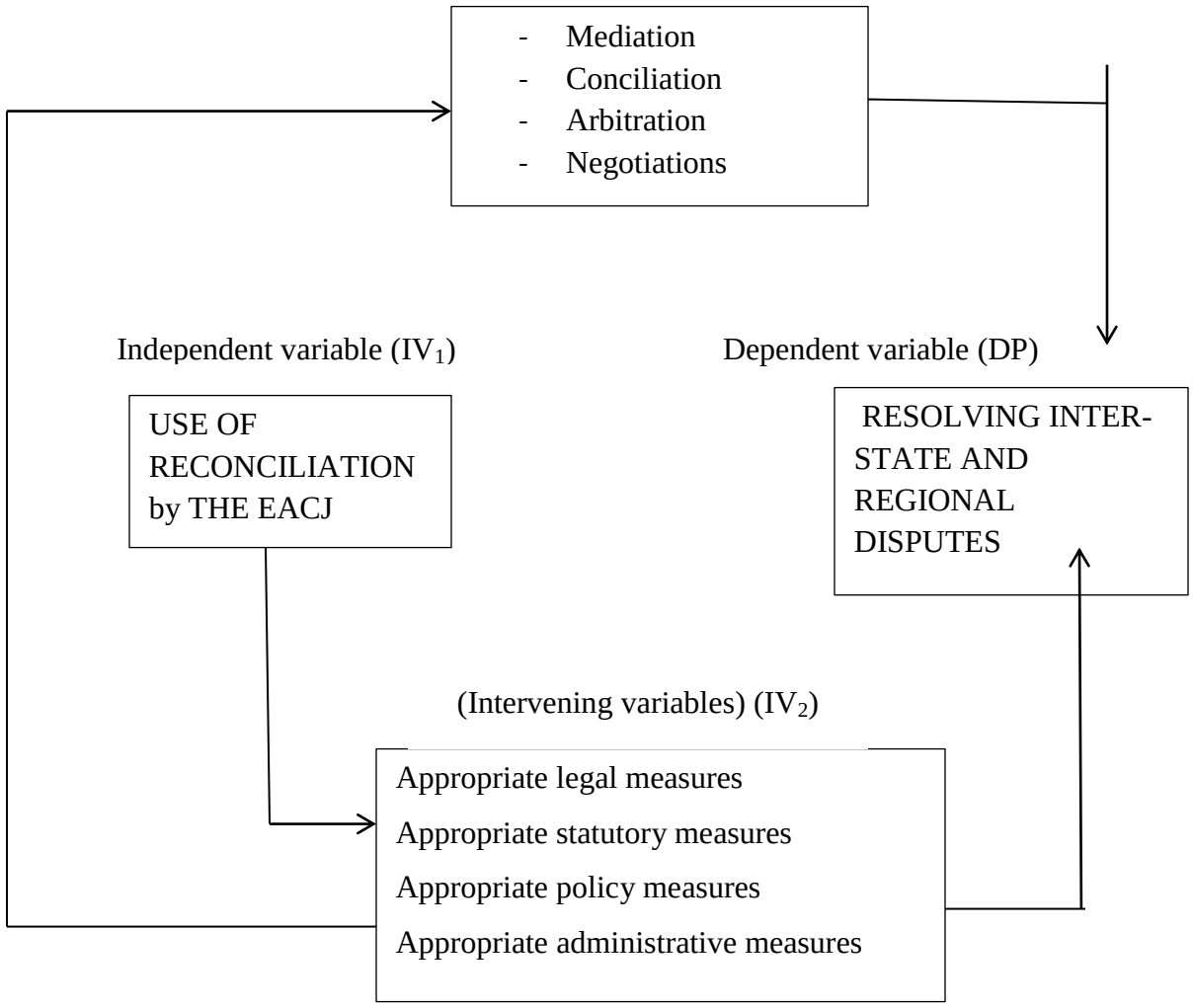
These institutions according to Rosamond, (2000) will also have the benefit of ensuring that all states adhere to the laws which guides and governs matters of reconciliation. The institutions will also be very key in causing spill-over effects to all the citizens of East Africa in that it will create a culture of embracing the practice of reconciliation as Alternative Dispute Resolution mechanisms by all the states in the East African. The institutions will succeed in achieving this as a result of proper sensitization of the general public about matters of reconciliation as part of the ADR mechanisms. Once the state has embraced the culture and practice of reconciliation, the

theory argue that this can also cause spillback effects to the leadership of the respective member states to embrace what the general public in the East African region want (Rosamond, 2000). Therefore, it is only through liberal institutionalism theory that both the spill-over effects and the spill-back effects can be caused thereby resulting to the massive support and adoption of reconciliation as part of the ADR mechanisms in the justice systems of the East African states.

However, this theory is also not running short of weaknesses. First and foremost, these higher institutions face the danger of being captured by the respective member states since in the East Africa community, membership is states-based. It is these states that will second leaders or managers in these EAC institutions and are likely not to have independent minds other than what their respective states prevails upon them to execute. This theory also assumes that states may surrender part of their sovereignty to these institutions willingly. It is a very difficult decision which most states may find it hard to try and surrender art of their sovereignty.

1.9 Conceptual Framework

This study was guided by the following conceptual framework that is summarized in the diagram below.



Source (author 2020)

From the above diagram, it can be noted that the independent variable which is use of reconciliation by the EACJ can only manage to satisfactorily resolve inter states disputes and other regional disputes which is the dependent variable through the existence of the intervening variables. These intervening variables are those variables that help to accelerate or to speed up the influence that reconciliation as an alternative dispute resolution mechanism can effectively enhance the capacity of the Justice systems in East African states in discharging on their mandate. These intervening variables include these measures that are meant to support Constitution of these states. These measures include both the legal measures and the supportive

pieces of legislation through Acts of parliament, policy measures, Administrative measures as well as the appropriate statutory measures. All these variables are very critical enabling factors that are meant to ensure that the strategy of reconciliation is properly and adequately utilized as alternative dispute resolution mechanisms.

The same intervening variables will also be useful in enhancing other strategies of Alternative Dispute Resolution mechanisms (ADR) such as mediation, conciliation, arbitration, negotiations and the use of good offices. This is because just like reconciliation, the said intervening variables will act as enabling factors for the other strategies other than reconciliation to be effectively utilized in the Kenyan Justice system.

1.10 Research Hypotheses

This study sought to test the following hypotheses.

i. The existing legal and policy framework in the East African court of justice does not adequately support the utilization of reconciliation as an ADR mechanism?
ii. There exist legal and policy loopholes which hinders the utilization of Reconciliation in the East African Court of Justice.

1.11 Methodology

1.11.1 Research Design

The study used the descriptive survey design as well as the case study method, in accordance with Kerlingers views (1973). This type of design was useful in this study because it enabled the researcher to acquire accurate information for a large number of people using a small sample and to explore the relationship between the variables. It enabled her to paint a picture of what she observes through interviews as described and allowed generalization across the population. Secondly the descriptive design described the present status of a phenomenon, determining the nature of the prevailing conditions, practices, attitudes and seeking adequate descriptions.

1.11.2 Methods of Data Collection

This study adopted two sources of data collection, namely; primary sources and secondary sources. The primary sources include the use of the interview guide for collection of information from the respondents, while secondary sources will rely on books, academic journals, articles, publications, speeches as well as documentaries.

1.11.3 Target Population

The target population for this study was 35 officers working for the EACJ, 26 Academicians from the Schools of Law in Kenya, Uganda and Tanzania. 20 members of the civil society groups which have their presence in the three states that deals with matters to do with the administrative Justice, 54 EALA members, 9 EACJ judges, 6 members of the defunct TJRC in Kenya and the members of the Law society of Kenya. The researcher conducted interviews with representatives from each category. In-depth interviews were done from these respondents with a view of getting their deeper reflections on the variables under study. The target population of this study was estimated to be 150 respondents.

1.11.4 Sample Size

The research had a sample size of 30 respondents which constituted 20% of the target population. The justification of this figure was drawn from Mugenda & Mugenda's ideas (1999) on a descriptive survey design whereby a large population can be studied using a very small sample that will cut across all the categories of the respondents and it will be representative of the special features of the target population. The study interviewed all the 30 respondents. 7 officers working for the EACJ, 5 academicians from the Schools of Law in Kenya, Uganda and Tanzania. 4 members of the civil society groups which have their presence in the three states that deals with matters to do with the administrative Justice, 11 EALA members, 2 EACJ judges, 1 member of the defunct TJRC in Kenya and the members of the Law society of Kenya. Out of the sample size of 30 respondents, at least 10 respondents were of either gender, this was critical in ensuring gender balance and the representativeness of the sample. These members were strategically important in giving critical information as far as policy making and policy implementation is concerned.

1.11.5 Sampling Design

For convenience and economy, purposive sampling was used for the purposes of obtaining primary data. Purposive sampling technique identifies sub groups within a population and their proportions according to the researchers own judgment. In each sub group a sample was picked which represents the typical characteristics of the population. The purpose of employing this technique was to group a population into homogeneous subsets that share similar characteristics. This is also to ensure that there is equitable representation of the population in the sample and determining who is of relevance to this study and who is not. The respondents in this study included all the officers from the relevant administrative offices that are tasked with the duties of policy making, implementation as well as policy evaluation from the mentioned categories. The researcher distributed the Interview Guide or the guiding questions to all the respondents prior to the interviews.

1.11.6 Data Analysis

Validity

In order to boost the validity of the research instruments, the researcher adopted the split half method as prescribed by Coolican, (2006) and handed over the research instruments to different experts like the supervisor and course colleagues in research to ascertain their content and construct validity, their suggestions were included in the research instruments so as to improve on them.

Methods of Data Analysis

Since this study is qualitative in nature, content analysis was used to analyze qualitative data. In content analysis, sources of data were books, law journals, public records and statistics, historical documents, magazines and newspapers. Data analysis was after raw data collected from the field through taking of notes in organized and explained in a systematic form. Further the data collected was analyzed through script narration as well as the use of logical interpretations and thematic analysis.

Ethical Considerations

The major ethical problem in this study was the confidentiality of the respondent's. In an ideal set up, the study should have been able to freely engage with all the officers in relevant directorates within the EACJ and EALA which are the key policy making. However, this was impossible because most of these officers are not comfortable in discussing Judicial and inter-state matters with the members of the public for fear of losing their jobs and being quoted as well as being victimized.

Secondly in this era where there are the supremacy battles between the three East African states, Judicial officers from the EACJ are usually suspicious of the researchers. The study could be seen in one way or another as a method of spying the members of the EACJ by the member states or in protecting their respective states sovereignty. Third, the study went to an extent of accessing specific information from judicial officials in the judicial, legal, prosecutorial and the investigative agencies. This means an infringement on people's privacy too and confidentiality of respondents they swore to the government and their respective agencies will be breached. This was the only surest way to acquire accurate and reliable information as well as generating a representative sample. However, the respondents were at liberty to ignore items on the Interview guide which they were not be comfortable in responding to. The respondents who wished to remain anonymous their wish was respected. Another ethical consideration the researcher adhered to was the issue of getting consent from the respondents before interviewing them by discussing everything about the study.

Finally, the researcher had her national identity card, passport, student ID card, and a letter of introduction from University of Nairobi for the purposes of identification.

CHAPTER TWO: THE EAST AFRICAN COURT OF JUSTICE, HISTORY, FUNCTIONS, CHALLENGES AND OPPORTUNITIES AND LESSONS EACJ CAN DRAW FROM THE EUROPEAN UNION (EU)

2.0 Introduction

This chapter among other things looked at the East African Court of Justice which is a key organ of the East African Community. The history of this organ, its key functions, its challenges and opportunities were looked at in detail. The type of cases which the court has managed to resolve so far and whether reconciliation and to a larger extent the application of the ADR mechanisms was also looked at in great detail. This chapter will help this study by shading more light on the documented facts about this organization so far.

2.1 The East African Court of Justice

The EAC is one of the main organs of the EAC which has been created under Article of the EAC treaty. This organization is the judicial arm of the EAC. The core mandate of this organ has been explained in details in the chapter 8 of the EAC Treaty. (Articles 23 – 47).

2.1.1 The History of the EACJ

The EACJ according to Mukaindo (2014) succeeded the East African Court of Appeal in November 30 1999. This treaty was enforced on 7th July 2000. The former East African Court of Appeal made a determination of the National Court decisions from the three member states with an exception of the constitutional issues from all the three member states and treason matters from the United Republic of Tanzania.

2.1.2 The Main Functions of the EACJ

The major function of this court is to make sure that all the member states, all the organs of the EAC and every individual adheres to the provision of the 1999 EAC Treaty. This is more of a global court. The jurisdiction of the court according to the 1999 EAC Treaty can be explained as follows:

Interpretation of the EAC Treaty

Every individual member states, the national courts from each member state, on every organ within the EAC has got a right to petition the EACJ to make a pronouncement on the interpretation of the treaty. The EACJ will rule on an issue with a finality (EAC treaty 1999).

Solving Disputes between EAC Organs and Its Employees

The EAC has got a jurisdiction to hear and determine cases that have been brought before it by the employees. These disputes are mostly in relation to the terms and conditions of their jobs, the implementation of the various rights and regulations of the community with regards to work and the job culture (EAC Treaty 1999).

Resolving Inter-State Disputes

The partner states who may have any disputes amongst themselves concerning any issue such as boarder related disputes/ socio-economic disputes, political disputes or commercial disputes may approach the community for hearing and determination. The dispute may also be regarding the treaty itself or to any signed agreements between the two states (EAC treaty 1999).

Hear and Determine Arbitration Cases

This means that any complainant against his home state or any of the EAC organ, or the EAC itself has got a right to petition the EACJ to hear and become an arbiter in the case. This function has mostly continued to be applied in the commercial contracts / agreements which recognizes the EACJ as the arbiter (EAC treaty 1999).

Hearing and Determination of Human Rights Cases

For instance, when an individual or a group of individuals have felt aggrieved by their home state, or any member state within the East African region. They have got a right to petition the court so that they can get a legal redress in order for them to be compensated or their rights to be protected and upheld (EAC Treaty 1999).

2.2 The Composition of the EACJ

The court is divided into two major divisions, there is the appellate division and the first instance division. Once the case has been brought before the EACJ, it is first taken to the first instance division, which hears the case and determines whether it has got a jurisdiction over it or not, then hears and determines it. They have got the right to file an appeal at the higher division. Both the appellate division and the first instance divisions are composed of one judge from each of the member states respectively. The high courts in each of the member states will act as the official sub-registries of the EACJ (EAC treaty 1999).

2.3 The Opportunities of the EACJ

The EACJ according to Mukaindo (2014) stands a better chance of promoting the EAC agenda which is to promote a harmonious existence between the states in the region and ensuring that peace and stability of the East African region has been guaranteed although. However, the major goal of the EAC besides all these is to ensure that the community has become a federation.

2.3.1 Promotion of Human Rights

The EACJ was inaugurated in 2001, however due to logistical challenges it did not receive cases until the year 2005 from that time till now, so many cases with regards to human rights vibrations in the EAC region has been filed in the court. These human rights violations have emanated from issues such as arbitrary arrests and detention, cruel and inhumane treatment, property rights, freedom of movement and protection of the environment. Therefore, between 2005 and 2017 the court from its records had issued 62 judgements, 50 rulings, 20 taxation ruling and 2 advisory opinions. All these is good for the development of human rights (EACJ Website 2019).

2.3.2 Promotion of Trade and Industry

The only way that the EAC can rely to make economic progress is through trade and industrialization. This is because it is through these two ventures that jobs are created for the jobless, economies of scale are earned, highest revenues are collected, there is value addition for the raw materials and it is through all these that a bigger cake is baked and distributed to

everybody. However, there is no trade and industrialization that can take place if traders and industrialists are taking or spending too much times in the corridors of justice. Hence the rationale for the East African Court Justice to dispense the cases brought before it at a faster rate (Gathege, 2012).

2.3.3 Promotion of Constitutionalism

One challenge that the African continent experiences is the spirit of constitutionalism, whereby both the government and state leaders and the citizens at large are willing to live by within the tenets of the law. Therefore, the EACJ has got a very huge task of promoting constitutionalism in all the six member states. This is by way of ensuring that everybody is adhering to the rule of law and the tenets of the treaty. This is a big milestone for the democratization in the continent and a yard stick for economic prosperity and meaningful development (Gathege 2012).

2.3.4 Boosting the Investor Confidence

One of the reasons as to why investors have chosen to invest in some regions and not others is because of the existence of a good business environment. Faster dispensation of justice and fair arbitration is a good yard stick for boosting the investor confidence. This will make a good attraction to thousands of both local and international investors. The EACJ has got this moment to achieve this goal (Mukaindo, 2014).

2.3.5 Promotion of the Pan-Africanism Ideals

For a very long period of time, the African continent has been referred to as a dark continent. This is because all manner of malpractices and bad things which are archaic and backward have been associated with the African people. However, with the emergence and the existence of the regional courts such as the East African Court of Justice (EACJ), the African continent has got another wonderful chance to reclaim itself (Gathege, 2012).

2.4 The Challenges Associated with the EACJ

Despite the fact that the EACJ has got many opportunities to take the EAC and the East African people to greater heights it has been riddled by a number of set-backs or draw backs according to Gathege (2012), Mukaindo (2014,) and Muigua (2015) which includes;

2.4.1 Budgetary Constraints

This has been occasioned by three factors which includes some of the EAC partner states failure to pay up their annual subscriptions, leaving the EAC to be financially constrained. Secondly, most of the EAC member states have been classified as part of the LDCs. This means that they have weaker economies which makes them unable to meet up their own domestic budgets. Thirdly, failure by the donors to honor their support on time. Therefore, the EAC has times without number found itself in such a situation whereby, it is unable to meet all the needs. This means that the little available resources are used sparingly on essential activities. This makes the EACJ not to deliver on its services on timely manner and in an efficient way (Gathege, 2012).

2.4.2 Establishment by the Partner States of Parallel Quasi – Judicial Bodies

Some states within the EAC region are fond of sabotaging the East in such a way that they set up parallel quasi-judicial bodies with the same mandate the EACJ. This makes it difficult for this court to enforce the EAC treaty in all the member states and it been beats logic as to why the EACJ was established in the first place (Muigua, 2015).

2.4.3 The Question of Sovereignty

Some of the EAC member states have deliberately refused to accept the place of the EACJ in the East African community dispensation. They have done this through constantly challenging its jurisdictions within their territories. The question of states having too much nationalistic ideas in their mindsets has strongly threatened the functioning of the EACJ so as to deliver on its mandate. If the litigation process of the East can be challenged this much, how can the use of the ADR mechanisms such as reconciliations be promoted in all the member states (Mukaindo, 2014).

2.4.4 The Politicization of the EACJ Decisions

There have been quite a number of cases whereby the partner states or parties to a dispute have approached the EACJ to hear and determine several cases once the EACJ has pronounced itself on an issue. Some parties to the case have gone ahead and started as a mere campaign against the EACJ, and discrediting it on its legitimacy (Mukaindo, 2014). This habit has consistently

weakened the EACJ. It has also served to threaten the independence of the court which is not good for the development of the community.

2.4.5 Slow Extension of the Appellate and Human Rights Jurisdiction

The failure of the EAC to extend the mandate of the appellate court to hear and determine large scope of cases has also served to weaken the EACJ. This is because the EACJ is faced with a lot of backlog of cases and there is insufficient human resource capacity to hear and determine these cases. The EACJ has so many pending human rights cases and these cases unnecessary delays that may be equated to the denial of justice (Gathege, 2012).

2.5 Lessons from The EU

According to Jalloh, (2015), the European Union is regarded as the most successful regional body across the world. This is because not only was it the first regional organization to be established in the aftermath of the world War II, but it is the regional body that has scaled up the ladder of the integration stages. The EU has attained the states of an Economic Union whereby there is division of economies of all the member states in Europe, meaning there is some increased commercial activities between the member states and most activities whether sports, security, education, fiscal policy, monetary policy, agricultural policy or geographical policies are formulated, implemented and evaluated in a joint manner. For this reason, there is an increase of the number of disputes which are brought about before the European Court of Dispute for determination. With an increased number of cases, the European Union through its court of Justice has devised ways and means in which disputes are resettled within the EU member states (Steffek, 2012).

2.5.1 The Court of Justice of the European Union (CJEU)

This court was established in 1952, and its major objective is to ensure that the EU law is interpreted and applied the same way in every EU member state, it also ensures that both the EU member states and the various organs of the EU are abiding by the EU laws. This court is divided into two major divisions, namely; the Court of Justice which consists of judge from each member states and II Attorneys. The second division is that of a General Court which is composed of 2 judges from each of the EU member states. This court is located in Luxemburg.

Under a number of circumstances, the individual persons, companies or business organizations can also approach this court when they have a feeling that one or two of the EU organs has infringed on their rights (Jalloh, 2015).

2.5.2 Functions of the CJEU

The two divisions of this court have been tasked to perform the following roles. These duties according to the EU commission Directorate General for Justice report (2012) includes;

To Interpret the Law

Sometimes different member states can have a different interpretations of the EU law which may be contradictory. Therefore, in order to resettle these contradictions with finality the EU member states through their national courts can approach the CJEU for a clarification of the law as to whether the law in question is in consonance with the EU interpretation (EU Commission Report 2012).

Enforcement of the Law

At times, some member states can deliberately refuse to implement or embrace a certain law, the CJEU in such circumstances usually comes in to force these countries to comply with the same law. These countries are either warned, fined suspended or expelled. All these is meant to make them comply with this law (EU report 2012).

Annulment of the EU Legal Acts

The EU treaty states categorically that only law which is consistent with the EU law is null and void to the extent of its inconsistency. Therefore, the CJEU usually is keen to annul any law that contravenes EU law once and for all and its decisions are final. The same CJEU can also annul and organ of EU that formulates an inconsistent law the EU (EU report 2012).

Taking Action to EU Organs for Failure to Act

The EU law mandates each organ of the EU and each member states to act under certain conditions for instance member subscriptions, voting, giving a response, honoring the summons among others. Therefore, if these member states or the EU organs fails to act, the CJEU can take a legal action against them (EU report 2012).

Sanctioning of EU institution

Once there is a failure of any EU organ or member states against an individual or a business organization of a group of people, the affected individuals can approach the EU Court of Justice for litigation and court sanctioning of the state in question (EU report 2012)

2.5.3 The Application of the ADR by the CJEU

Jalloh (2015) argues that almost each of the EU member states have adopted the use of the ADR mechanism in resolving different kinds of disputes. All these strategies from all the EU member states are somehow contradicting each other and therefore the EU finds it difficult to harmonize all these contradicting mechanisms. Despite these scenarios, the EU has tried its best to put in place a number of legal and policy framework which guides the process of ADR in court proceedings.

For instance, the Directive 2008/52 clearly sets out the framework under which the use of mediation in cross border disputes civil and commercial matters are done. The second measure to be undertaken towards the promotion of the ADR mechanisms is the European Commission's recommendation number 98/257 and 2001/310, which dealt with an out of court dispute settlements and consensual dispute mechanisms. These meant that mechanisms such as reconciliation, arbitration mediation and negotiations were promoted by these recommendations. These recommendations were further strengthened by the subsequent adoption of the directive and the regulation of the use of these ADR mechanisms by the EU legislature and the EU canal in 2013. This therefore means that the uses of the ADR mechanisms have been greatly promoted by the EU (Romualdi 2018).

2.6 Circumstances under which the Reconciliation has been used by the EU

The European Union according to Romuladi, (2018) has times without number adopted the use of reconciliation in solving interstate disputes and some intra-states disputes with any of the European Union organs.

2.6.1 Cross-border Trade Disputes

The EU for instance has experienced a number of disputes between states on cross-border trade disputes. These cases such as the one between Italy and Spain, UK and France, France and Greece just to mention but a few. The parties to these cases have all been brought to the table and reconciled many times under the guidance and close supervision of the CJEU (Romuladi 2018).

2.6.2 Immigration Disputes

The question of cross border access to social benefits or what is popularly known as the "welfare tourism' has brought about a number of disputes between the EU member states. This is because some EU member states have felt that this free migration of the EU citizens is over burdening the national welfare systems. The new immigrants have always wanted to enjoy the same rights as the local citizens, in fact the UK was the biggest complainant in the issue. Therefore, the CJEU was forced to summon the UK and all other aggrieved parties on a round table and this issue was discussed and resolved. It was however agreed that no immigrant should enjoy all the welfare rights in a new state when he/she has visited, however, only the vulnerable groups such as the students, the unemployed, people with disabilities, the refugees and the Asylum seekers were spared and allowed to enjoy these rights (Romualdi, 2018).

2.6.3 Labor Disputes

Third division of the CJEU is the civil service tribunal has also settled a number of labor disputes between the employers includes the various organs of the EU and the employees are the civil servants working in that union who are drawn from each member states (Romualdi, 2018).

2.6.4 Intra-State Disputes

Finally, before the Scotland referendum whereby the Scottish people were deciding whether to continue being part of the larger United Kingdom or not. There were so many cases of discrimination, marginalization and unfair application of the law and resource distribution to the Scottish people by the UK government. These cases were brought before the ICJ which tried to resolve these cases through reconciliation. Some scholars have argued that it is through these reconciliation measures by the CJEU that the referendum actually failed and hence the Scottish people opted to remain in as citizens of the larger EU (Romualdi, 2018).

2.6.5 Transitional Justice

Most EU member states have historical experiences which were characterized by war, violence authoritarianism and long periods of conflict for instance the world War II experiences, the civil war in Spain, the prolonged periods of conflicts in Northern Ireland or the movement from a dictatorship into a democracy in Spain, Greece, Eastern Europe, Central Europe and Portugal. Since one of the reasons as to why the EU was established in 1952 was to prevent against the rise of the future wars and conflicts within the continent. The CJEU has times without number succeeded in helping these countries to heal from these previous experiences. This has been done through the use of reconciliation of the waiting factions. This has continuously played a key role in crisis management, peace building, as well as the acts which are geared towards the promotion of human rights (Romualdi, 2018).

2.7 The Successes of the use of ADR mechanisms in the European Union

According to the EU report of (2012) the following are the number of benefits when were derived from the use of ADR mechanisms. They included:

2.7.1 Time Saving

Most inter-party disputes were resolved within a short period of time for instance, most labor related disputes, immigration disputes and historical disputes were resolved in a very fast and speedy way and it enabled the EU citizens to access justice easily and widely for instance the Dutch insurance cases (EU report 2012).

2.7.2 Saving on Costs

Savings on commercial costs or individual costs which are incurred in the litigation process is good for the thriving of the business organizations, for instance. During reconciliation there were no court fees or legal fees, these made individuals and businesses to prosper (EU report 2012).

2.7.3 Capital Unblocking

For example, some cases in the construction and the investment sectors have been resolved very fast through the use of ADR mechanisms such as reconciliation. This has enabled the cash flow

to be fast and it has reduced significantly the amount of time which capital was stopped (EU report 2012)

2.7.4 Preservation of Business Relations

The report acknowledged that as a result of the use of reconciliation in resettling commercial disputes, businesses great benefit to business organizations (EU report 2012).

2.7.5 Granted Conflict Partners Control over Dispute Resolution Outcome

This unlike other cases which have opted to follow the litigation rate, reconciliation and other ADR mechanisms gives the disputing parties a chance to take control over the case and thus leads to a win-win situation. For instance, the Bulgarian business managers case and the Dutch insurance industry cases were sorted out through reconciliation and mediation (EU report 2012).

2.7.6 Implementation of the Decision Taken

The parties in the European Union who may have resolved their cases through reconciliation have confessed that it is easier to implement the decisions which the disputing parties have agreed upon than implementing a decision which has been imposed to them by a court of law (EU report 2012).

2.8 Challenges of the Application of the ADR Mechanisms in the European Union

The use of the ADR mechanisms in the European Union has also faced a number of challenges according to the EU report (2017). These challenges include:

2.8.1 Lack of awareness of reconciliation as a suitable means for solving disputes

This report pointed out that most EU citizens and those that bring cases before CJEU have no idea of the existence of these ADR mechanisms. This shows the element of cheaper societal roots in the cultures of different communities (EU report 2017).

2.8.2 Most of the Template contracts do not contain ADR Clause

The report pointed out that most commercial deals or legal deals do not have any clauses touching on reconciliation or the ADR mechanisms in case any disputes arise. This means that it

is very difficult for the CJEU to use ADR because they were not part of the signed contracts (EU report 2017).

2.8.3 Conservative Attitude of Lawyers

The report pointed out that almost every disputing party usually see the services of a lawyer, most of these lawyers are allergic to ADR mechanisms in favor of the litigation process, this is because most of them are more familiar with litigation and they are more profitable than ADR mechanisms (EU report 2017)

2.8.4 Limited Training on ADR

The report pointed out that many lawyers are ignorant of ADR mechanisms such as reconciliation, mediation, arbitration and negotiations. It is not part of the legal curriculum in the law school. This problem cuts across in all the states in Europe. It makes it difficult for these practice to thrive (EU report 2017).

2.8.5 Corporate Culture

The report pointed out that big organizations have a different culture and behavior than smaller organizations when it comes to matter of conflict resolution for instance the report cited that big organizations are mostly sober more rational and objective in resolving their disputes because they are very careful to protect their brand image and their business relations than smaller organizations who are mostly emotional and prefer squaring out their differences head on (EU report 2017).

2.9 Conclusion

This chapter has managed to look at the practice of reconciliation and the application of the ADR mechanisms in the East African Community and in the European Union. The chapter has also looked the legal and policy framework, challenges and the opportunities that have been experienced in the process of implementing the ADR mechanism in the two jurisdictions.

CHAPTER THREE: DATA PRESENTATION, DATA ANALYSIS AND DISCUSIION OF THE STUDY FINDINGS

3.0 Introduction

This chapter presented the data which was collected from the field, analyzed and interpretations made which enabled the research to draw out the study findings. This chapter highlighted the researcher's experiences from the field, the contacts she made to her respondents and the information which she managed to derive from her field work. The first dealt with the data presentation which included the demographics of the respondents. The second part dealt with data analysis which respondent to the items or questions that were in the interview guide and the final part drew out the findings of the study from the first two sections of data presentation and data analysis.

3.1 Data Presentation

The researcher started by getting in touch with her contact persons in Arusha, Kampala and Dar es Salaam who were well versed with the functioning of the East African Court of Justice. These contact persons were drawn from various civil society organizations, academicians, EALA members; EACJ members of staff, the researcher also targeted the Law Society of Kenya Senior officials, the Ugandan Law Society senior officials and the Tanzanian Law Society senior officials as well as the members of the defunct TJRC in Kenya. The purpose of making these contacts to this said officer was to collect information with regards to how reconciliation as an alternative dispute resolution mechanism was embraced and practiced by the East African Court of Justice. It was assumed by the researcher that this target population which had a sample size of 30 respondents was able to give the necessary information to the researcher which was useful for her study.

3.1.1 The Response Rate

The study wanted to interview at least 30 respondents, however due to the tight schedule of most of the respondents and the difficulties in getting in touch with these respondents. The researcher succeeded in reaching 18 respondents. This amounted to 60% of the sample size. Although the data of response was a bit lower than what was expected. Mugenda and Mugenda's ideas (2003) would suggest that the above response rate was fair and it can be admissible for data analysis.

3.1.2 The Gender Response

Out of the 18 respondents whom the researcher managed to contact, 11 respondents were of male gender type, while the remaining 7 were of female gender type. This translated to 61% for the male gender type while 39% for the female gender type. At least was an element of fair representation of the gender respondents although the researcher had aimed at getting 5% of each gender type.

3.1.3 The Nationality of the Respondents

The EACJ and the entire target population of the researcher was spread across the six nationalities of the EAC member states. This was because the respondents came from different countries from the 18 respondents, 8 of the respondents were Kenyans, 5 of the respondents were Tanzanians, 3 were Ugandans, one (1) came from Burundi and there was 1 from South Sudan. Although majority of the respondents were Kenyans and Tanzanians which stood at 72%, however there was an element of representation from the other four countries with 3 from Uganda, 1 from Burundi. There was no representative from Rwanda.

3.1.4 Categories of the Respondents

This study wanted to interview at least 7 of the EACJ staff, 5 academicians who were well versed with functioning of the EACJ and matters of reconciliation in the justice systems of the East African Court. 4 CSO members, 11 EALA members, 2 EACJ courts, 1 at the Appellate division and 1 from the first instance division as well as 1 member from the defunct Kenyan Truth, Justice and Reconciliation Commission. These would have made it to a total of 30 respondents. However, the study managed to get 18 respondents and they were distributed as follows: 7 staff members from the EACJ, 5 academicians who were well versed with the operations of the EACJ and matters of reconciliation, 4 members from the civil society organizations which deals with EAC integration matters 1, EACA members and 1 Judge of the EACJ first instance division.

3.2 Data Analysis

The respondents were asked to respond to the questions which appeared on the interview guide. There were varying opinions from each respondent in response to each item which had been

asked in the interview guide. In analyzing this data, the researcher will combine all their views which she was noting down during their discussions in form of short notes.

These short notes were later on cleaned, corded and organized in such a way that proper interpretation could be made. The researcher went on to compare the ideas of each respondent on every item that has been asked. The points of convergence of the respondents were singled out and the points of divergence were also pointed out. The analysis of the respondent's points of convergence and divergence was analyzed in relation to each question, each objective and each hypothesis.

3.2.1 Objective 1: To determine the extent to which the East African Court of justice effectively utilize reconciliation as an alternative dispute resolution (ADR) Mechanism.

The respondents were asked to respond to several issues under this objective. The respondents gave varying opinions with regards to the issues raised. However, in analyzing this data, the study relied so much on the points of divergence as well as the points of convergence to draw out here analysis.

The respondents were asked to give their views concerning how the EACJ conceptualizes the concept of reconciliation. Most of the respondents actually got the understanding of reconciliation as an alternative dispute resolution mechanism, and they supported the use of it as a radical measure of clearing the huge backlog of cases which are still pending in the EACJ. However, the respondents were quick to point out the fact that despite their understanding of the concept, the practical aspect of it was missing in that they did not see any mechanism which was put in place to promote reconciliation as an alternative dispute resolution mechanism.

3.2.2 The Extent to which the existing EACJ Embrace Reconciliation as an ADR Mechanism

The respondents were asked to state the extent to which the existing EACJ as a judicial arm of the East African Community embraces reconciliation as an Alternative Dispute Resolution mechanism. 15 out of the contacted respondents felt that to a larger extent the current EACJ does not in any way embrace reconciliation, in fact one of the respondents from the civil society organization asked.

"If truly the EACJ justice system embraced reconciliation, then why did the Kenyan case against Uganda over on Migingo Island taken to the ICJ.

Another respondent from the academics from the University of Nairobi said
"May be it exists, but to the extent of my knowledge is that I have not seen any mechanism put in place with regards to that, am a PhD candidate and to the extent of my readings and research on various issues to do with the EAC I have never come across such.

There were three other respondents who worked for EACJ who supported the idea that the existing EAC mechanisms allow reconciliation to be used. Some of their responses included
"True, EACJ supports the conflicting parties to reconcile with each other, that is only if they themselves wants to, the court does not stop them."

The other EACJ member of staff pointed out that,
"The fact that there was no express provision in the law of statutes that promotes reconciliation as an ADR mechanisms does not mean that the court does not practice it, however, to reconcile or not is the presence of the existing parties again, most of the reconciliation activities take place at the Diplomatic level which is outside the jurisdiction of this court".

Therefore, as it can be seen from the above responses, it is clear that the existing EACJ justice system does not adequately embrace the practice of reconciliation as part of the ADR mechanism. This therefore means that even if reconciliation is used or adopted, it is at the discretion of the judges to allow it, but there is no express law or statute or any act that promotes the use of reconciliation as an ADR mechanism.

3.2.3 Whether EAC Member States are ready to embrace Reconciliation as an ADR Mechanism

Since the EACJ is a product of the justice systems of the EAC member states, and it borrows heavily and relies heavily on the support from the national courts of the EAC member states. The respondents were asked to give their views on what they thought about the EAC member states being ready to embrace the reconciliation as an ADR mechanisms.

The responses were almost unanimous, in that all the respondents agree that the respective member states were in dire need of accepting reconciliation and other ADR mechanism as the surest measures of dealing with the huge backlog of cases that exists in the national courts. Other respondents argued that, whereas the sovereignty of the EAC member states is highly respected but they supported the idea of having a uniform justice system which embraces reconciliation as an ADR mechanism. Coming back to the gist of the question, as to whether the EAC member states were ready to embrace reconciliation in the EACJ. The respondents agreed that on paper yes, there was that intention of most member states wanting to adopt reconciliation and to larger extent ADR mechanisms. However, nobody was willing to walk the talk. It remains an intention like any other, but on the implementation side, there was lack of good will for instance one respondent argued;

If the states are promoting the culture of impunity in their territories, they disobey court orders, and the same individuals feel that they are larger than the state, then how do you expect such people to allow the use of reconciliation and the ADR mechanism to take root in their countries.

Another respondent from Kenya who has written extensively on Kenya's justice system reckoned.

"Kenya is a country of double standards, whereas the new Constitution expressly accepted to adopt the use of ADR mechanisms in its justice systems, there is no single Act of parliament, or single policy which has been enacted to operationalize this practice, it still remains a pipe dream."

3.3 Challenges experienced by the EACJ that makes it unable to use Reconciliation effectively

The respondents were asked to state their opinions about what they thought were the biggest obstacle facing the EACJ which made it unable to embrace reconciliation as an ADR mechanism. The said respondents gave varying opinions with regards to this issue, however, the most recurring views included but were to limited to; lack of adequate finances, absence of political will, lack of enough personnel, the hard headedness of the disputing parties. The amount of suspicion that exists between the disputing parties, lack of proper sensitization of the EAC

citizens with regards to the use of reconciliation as an ADR mechanism. Those are some of the reasons/challenges which were listed by the respondents which incapacitates the EACJ from adequately embracing the reconciliation practice. One of the EALA members who wished not to be named for fear of antagonizing her political bosses reckoned.

"If I as an EALA member of parliament can spend 4 months without being paid my monthly dues, what do you think happens to the EACJ junior staff?

Another respondent argued that
"If it is only one or two countries that promptly pays its annual subscription fees to the EAC secretariat, then how do you expect this organ of the EAC to function smoothly?

As it can be seen from the above response, it can therefore be argued that so many challenges which the EAC as a regional body faces cannot allow it to fully adopt reconciliation as an ADR mechanism

3.3.1 Hypothesis I: The existing legal and policy framework in the East African court of justice does not adequately support the utilization of reconciliation as an ADR mechanism

Through the various questions which the respondents were asked, hypothesis I was subjected into test, whereby the study wanted to confirm or disconfirm whether hypothesis I was true or not true. There were a number of questions which were asked in these regard. They included;

In your view state instances or articles of any law or supportive legislation in the EAC treaty that embraces reconciliation as an ADR mechanism

From all the respondents whom the researcher managed to contact, they all pointed out to chapter eight of the Treaty which expressly talks about the East African Court of Justice. Surprisingly all the respondents failed to point out any specific Article which promoted the use of the ADR mechanisms such as reconciliation in the process of the EACJ dispensing with justice. They just stated Chapter 8 of the Treaty and the rest of their responses were based on generalities. However, the researcher critically went and scrutinized chapter eight of the Treaty and evaluated each Article under it, the researcher did not point out any article that expressly talked about

reconciliation. The researcher also never stopped there, during her visit to the Arusha based court, she was allowed to access a number of judicial and policy guidelines by the EACJ members of staff, she was not able to see any policy guideline which was meant to promote the use of reconciliation and by larger extension, ADR mechanism as a strategy of promoting access to justice for all.

In your view, which institutions are responsible for initiating the supporting legislation, policies and statutory mechanisms that will entrench the utilization of reconciliation as an ADR mechanism in the EACJ

The respondents were asked to give their ideas on who exactly was responsible in ensuring that the practice of reconciliation as an ADR mechanism is used and promoted by the EACJ. The views of the respondents differed greatly, however the most pointed out organs were the East African Legislative Assembly (EALA), the EAC secretariat and the Summit. However, the members of staff working for the Arusha based court insisted that, whether those provisions are enacted or not, the most important thing to ask is whether the EAC member states are willing to go the whole hog in embracing reconciliation as an ADR against one of the respondents narrated.

"It is not that we are opposed to the enactment of this law (promoting the use of the ADR) but the member states themselves are the problem, they have refused to embrace reconciliation fully in their respective justice systems at home, what makes you think they may embrace it here?

Another officer working for the Arusha based court narrated that;

"In as far as the EACJ is concerned, the use of ADR mechanism is welcomed, however, there must be enough political will from the enactors i.e. EALA, the secretariat, and the summit, the problem exists there".

3.3.2 Confirmation / Disconfirmation of the Hypothesis

Therefore, after the interrogation of views from various respondents, this analysis has confirmed hypothesis I to be true and correct in that, the existing legal and policy framework in the EACJ does not adequately support the utilization of reconciliation as an ADR mechanism.

3.4 Objective 2: To determine the challenges that the East African Court of Justice experiences while trying to use Reconciliation in resolving disputes among member states.

The study wanted to determine whether there were any loopholes in the existing legal or policy framework that hinders the effective adoption of reconciliation as an alternative dispute resolution mechanism. This study found that apart from Chapter eight of the Treaty Articles 23 – 47 which talks in details about the EACJ its functions, judges, appointment of judges/ functions of the court/ points of hesitance among others. There was nowhere in the treaty whereby the use of the ADR mechanisms was mentioned in addition to this, the researcher from her three days stay in the Arusha based court which included visiting the courts chambers, the registry, the courts library as well as the courts boardroom. She never came across any Acts, Statutes or piece of supportive legislation that aimed at promoting the use of the ADR mechanisms and to a larger extension reconciliation on within the EACJ.

Similarly, the study aimed at establishing the various policy loopholes which existed in the EAC that made it impossible for the EACJ to adopt the ADR mechanisms as part of its justice system. The study found out that policy loopholes

3.4.1 Budgetary Allocation

From the responses that the researcher received from her various respondents, most respondents argued that the EACJ is greatly underfunded which made it impossible for it to adopt the ADR mechanisms such as reconciliation as part of its justice system. This is because for any meaningful reconciliation to take place, there must be a closer supervision and direct control of the EACJ.

3.4.2 Administrative Challenges

The respondents pointed out that one of the challenges that the EACJ was experiencing was the issue of lack of enough human resource personnel. The court does not have sub –branches in each of the six partner states hence making it hard for everyone to access justice. The researcher also established that there was the problem of space to accommodate all the staff of the Arusha

based court. This therefore meant that the court was seriously incapacitated to meet its present needs therefore impossible to achieve its objectives.

3.4.3 Legitimacy Challenges

From the interactions by the various respondents who were drawn from almost all the member states, it was established that some member states have kept on disobeying the orders of this court since there is no regional police or Leviathan to police the behavior of these country. It has greatly hampered and affected the legitimacy of this court. Again, there has been no sufficient sensitization of the EAC citizens about the existence of this court, therefore the court is not unduly known. Therefore, under these circumstances it becomes very hard for reconciliation or to a larger extension the ADR mechanisms to respond to these challenges.

3.5 Hypothesis 2: There exists legal and policy loopholes which hinders the utilization of reconciliation in the East African Court of Justice

This study wanted to confirm or disconfirm the assumption that there were a lot of legal and policy loopholes within the EAC that prevented the use of reconciliation as an ADR mechanism. From the intention with the respondents, they all agree that in principle the EAC need to have a supplementary measure which will go a long way in reducing the number of backlog of cases in the EACJ. However, they also agreed that nothing was done beyond that point to put in place supporting legal and policy mechanism to accelerate the use of ADR mechanisms in the EAC justice systems.

The respondents also kept on pointing out the experiences of the European Union (EU) as the best example which the EAC needs to borrow from. This according to them was because it had put in place adequate support pieces of legislation and policy mechanisms to support the use of reconciliation as an ADR mechanism. Therefore, to them, the EU was their Gold standards.

The respondents also warned the researcher not to rely so much on reconciliation or ADR mechanisms in resolving regional conducts. This is because some of the atrocities or wrongs that countries member states have committed to each other, or on EAC institution has committed against a state or what individual persons have experienced in the hands of other people requires much more than reconciliation. They insisted that in such cases people must be punished through

heavy fines, compensations, surcharges, expulsion from regional organizations so that it becomes as alternative in people committing the same mistakes in future. Therefore, to some respondents, when it came to the justice system, reconciliation was not a big deal after all.

Finally, the respondents also felt that in the process of the EAC trying to deepen the use of reconciliation as part of the ADR mechanism, the EACJ is likely to experience a number of challenges such as financial challenges, opposition from a number of member states, human resource incapacities, and the biggest challenge will be lack of political goodwill from the EAC member states through EACA, the secretariat and the summit.

3.6 Confirmation or Disconfirmation of Hypothesis

From the responses received from the various study contacts. This study hereby do confirms that hypothesis 2 is true and correct that, actually there exists legal and policy loopholes which has continuously hindered the effective utilization of reconciliation as an ADR mechanism in the EACJ. As a result of all these loopholes, justice has either been delayed through a huge backlog of cases or it has been totally denied for the long periods of time it has taken to resolve some of these cases.

3.7 Findings of the Study

From the above data presentation and analysis. This study has established the existence of these conditions in as far as the use of reconciliation as an alternative dispute resolution mechanism within the EAC is concerned. They include;

That, majority of the respondents understood that the concept of reconciliation as an ADR mechanism was all about, even the EACJ itself and its officers knew that reconciliation as an ADR mechanism was all about. However, there was little efforts that was done to actualize its use. Reconciliation as an ADR mechanism within the EACJ existed on paper but there was nothing beyond that.

That, to a bigger extent the existing justice system of the EACJ does not properly embrace the practice of reconciliation as an ADR mechanism. This confirms hypothesis one of the study to be

true and correct and it responds positively to objective I and adequately answers question 1 of this study.

That, although the EAC member states have got the will to embrace reconciliation as an ADR mechanism within the jurisdiction, they have not done any effort beyond that to actualize this will.

That, the major reason as to why the EACJ is finding it hard to adopt and implement reconciliation as an ADR mechanism is that it is financially incapacitated, it does not have adequate support from the member states, it does not have enough office space of its staff members, and a crisis of legitimacy which has been brought about by some member states discrediting it.

That, there exists legal and policy loopholes which has consistently hindered the utilization of reconciliation as an ADR mechanism within the EACJ. This finding confirms hypothesis two of this study to be true and correct. The finding also responds positively to objective 2 of this study. It also answers question 2 of this study.

That, the best yardstick, Gold standards or comparison which the EAC needs to learn from was the European Union. This was because not only has the EU put in place sufficient mechanisms for promoting the use of ADR mechanisms in their jurisdictions, it has also walked the talk in supporting their institutions morally, materially, legally and administratively to adopt the use of reconciliation as an ADR mechanism. Besides this, the EU has gone to an extent of sensitizing its citizens of the existence of the ADR mechanisms in resolving their disputes within their jurisdiction. This therefore meant that the EU was not just a speaker, but it was a doerer.

Finally, that, reconciliation may not resolve all the cases, and it may not serve correct justice to states or serve justice in equal measure to the aggrieved state, or at times it may grant an aggrieved party a raw deal. However, this study also points out that the benefits of using reconciliation as an ADR mechanism in the justice system of the EACJ is that it reduces the backlog of cases, fastens the process of dispensing justice, maintains good relations between

states and the aggrieved parties, reconciliation also saves time and costs. The benefits of the use of reconciliation in the justice system of the EAC outweighs the costs.

3.8 Conclusion

This chapter has dealt with the data presentation and data analysis. The chapter has also managed to draw out the findings from the above data which was collected from the field, presented and analyzed. This therefore paved way for the final chapter.

CHAPTER FOUR: SUMMARY OF THE STUDY, CONCLUSION AND RECOMMENDATIONS OF THE STUDY

4.0 The Introduction

This chapter gave the summary of the entire study, dealt with the conclusions which were drawn from the study findings and finally the chapter gave the recommendations which centered along legal, policy and administrative recommendations.

4.1 Summary of the Study

This study had purposed to look at the role of reconciliation as an alternative dispute resolution mechanism (ADR) in the justice systems of the developing countries. The East African Court Of Justice was taken as the case study. The EACJ was looked at from the periods between 1999 and 2019. This is the period when this organ the EAC has been in existence. It is also the period when the EACJ has received a lot of cases from the states, individual persons, companies, non-state actors just to mention but a few. This has resulted into a huge backlog of cases. The scenario has also been replicated in the EAC member states whereby the practice of the use of reconciliation as an ADR mechanism has seemingly been embraced spirit rally and morally, but the practical aspect of it is still missing in most countries.

This study wanted to ask, to what extent does the EACJ effectively utilize reconciliation as an ADR mechanism? The specific questions were; what legal and policy framework exists in the EACJ in supporting reconciliation as an ADR mechanism? What are the existing legal and policy loopholes which hinders the use of reconciliation in the EACJ? The main objective of this study was; to establish the existing legal and policy framework in the EACJ which support the utilization of reconciliation as an ADR mechanism, and to establish the existing legal and policy loopholes which hinders the effective use of reconciliation in the EACJ. Among the research hypothesis of this study were; the existing legal and policy framework in the EACJ does not adequately support the utilization of reconciliation as an ADR mechanism and there exists legal and policy loopholes which hinders the utilization of reconciliation in the EACJ.

This study was purely qualitative and it managed to interview 18 respondents who were well versed with the matters of reconciliation and the day to day affairs of the EACJ which is the

judicial arm of EAC. These respondents were drawn from the members of staff of the EACJ, academicians, members of the CSO's which had spread its wings in most of the EAC partner states, EACA members, the EACJ judges, and the members of the defunct JRC in Kenya.

This study was anchored on liberal institutionalism theory which argues that the only way to promote the use of reconciliation in the EAC partner states by way of creating and strengthening regional institutions such as the EACJ. These include regional institutions such as the EACJ. These institutions once they have fully embraced the use of reconciliation and to an extension factored in the use of ADR mechanism in their justice systems, it will automatically have ripple effects in the justice systems of the individual member states.

This study found out that majority of the respondents understood correctly the conceptualization of the concept of reconciliation in as far as the ADR mechanism was concerned. This proper conceptualization was also extended to the officers working for the EACJ, the Arusha based court, however the study established that there was very little that was done to actualize this dream or the conceptualization.

This study also established that the existing justice system at the Arusha based court to a larger extent does not embrace the practice of reconciliation as an ADR mechanism. The study also revealed that EAC member states are not willing to embrace fully the use of reconciliation as an ADR mechanism. The study has also managed to find at that the EACJ is faced with a number of challenges such as financial challenges, human resource challenges, challenges of space, strong opposition from some member states, the challenges of illegitimacy as well as the challenges of absence of support from EACA, secretariat and the summit.

The study has further established that there exist so many loopholes both legal, administrative and policy that make it difficult for the use of the reconciliation as an ADR mechanism in the justice system of the EACJ. Also the study has established that at times reconciliation may not deliver the correct justice to the victims, but it is good for the harmonious existence between states and the warring parties which is good for regional stability and regional progress.

Finally, this study has established that the European Union (EU) is the right organization or the correct regional body which the EAC is supposed to learn from. This was so because EU had reached the fourth stage of regional integration which is the Economic Union stage, but in as far as the use of reconciliation as an ADR mechanism in the justice systems of the European Union, the EU has put in place sufficient legal and policy framework which supports the use of reconciliation. As a result of this development, many cases have been resolved and the backlog of cases that existed before has been significantly reduced.

4.2 The Conclusion

From the findings of this study which was derived from data presentation and analysis that came in as a result of the field work research that was conducted by the researcher. This study makes these conclusions. They are as follows:

That, there is a proper conceptualization of reconciliation by most of the respondents, this includes all those employees or staff members of the EACJ, therefore the problem is walking the talk, little has been done or is being done by the relevant stakeholders to actualize the use of reconciliation as an ADR mechanism within the ICJ.

That, the existing legal and policy framework that covers the daily operations of the EACJ does not support the use of reconciliation as an ADR mechanism. This means that the framework both legal, administrative and policy are very weak and it has no place where ADR mechanisms SMS such as reconciliation can be factored in

That, there exists very serious legal, policy and administrative loopholes that makes it impossible for the adoption of reconciliation as an ADR mechanism in the justice systems of the EACJ. This therefore means that even if the EACJ wants to implement the use of reconciliation as an ADR mechanism in its day to day activities, it lacks the legal, policy and administrative backing.

That, the EACJ as it is currently has serious challenges that makes it unable to adopt reconciliation and other ADR mechanism in their day to day activities. This challenges include financial challenges, legitimacy challenges, human resource deficit, administrative challenges,

lack of structures, the grassroots just to mention but a few. It therefore makes it hard for the organization to achieve its objectives which includes the adoption of reconciliation as an ADR mechanism.

That, the EAC member states are not ready and willing to adopt the use of reconciliation and other ADR mechanisms in their justice systems. This is because most of these states have Constitutions that recognizes the importance of reconciliation and other ADR mechanisms in reducing the existing backing of cases. However, these same states have not done anything including putting in place sufficient legal and policy framework to guide the operationalization of these activities. They are therefore not willing.

That the EACJ is likely to experience a number of challenges if it ever tries to implement or adopt the use of reconciliation as an ADR mechanism. These challenges include; stiff opposition from some member states, absence of sensitization of the EAC citizens of the existence of ADR mechanisms such as reconciliation within the EACJ, monetary challenges, human resource challenges, absence of support from other EAC organs such as EALA, the secretariat and the summit.

That, the issue of adopting reconciliation in the justice systems of the EACJ may not always serve the correct justice to states or offer correct justice which is commensurate to an aggrieved state or an aggrieved party. Some victims in a case may feel that they have gotten a raw deal however for the sake of regional stability, a harmonious existence between the warring parties and continuity of inter-state relations, the use of reconciliation and other ADR mechanisms is very key.

Finally, that, the European Union should be taken as a gold standard by the EACJ. This is because for the case of the EU which is the most successful regional organization in the world. It has gone ahead and put in place sufficient pieces of legislation and policy framework which aims at supporting the use of reconciliation and other ADR mechanisms in their justice systems. As a result of this measures, there has been a significant drop in the backlog of cases in the European

Court of Justice. This has a serious implication to society because the scope of access to justice by all the EU citizens has been widened and there has been a faster dispensation of justice.

4.3 Recommendation

From the field work conducted by the researcher which resulted into the data which was presented and analyzed by this study the above findings and conclusions were able to be generated. The study makes the following recommendations.

That; a serious campaign for public sensitization be carried out in all the six EAC member states on the existing ADR mechanisms such as reconciliation. This will not only raise the public awareness of these mechanisms in the EACJ, but it will also inspire the general public to demand for the same in the justice systems of their individual states.

That; there is need to carry out a major reform in the EACJ as an organ of the EAC. This means that new departments and directorates that needs to be created such as the ADR mechanisms departments. This is where all the cases that require reconciliation within the EACJ will be referred to. This reforms will also ensure that the EACJ has a serious legal, administrative and policy backing that will enable it to adopt the use of reconciliation as an ADR mechanism.

That; the partner states should consider taking seriously the idea of factoring in the use of reconciliation and other ADR mechanisms in their justice systems. This will not only fasten the speed at which the dispensation of justice happens but it will also be a serious intervention measure that arms at reducing the existing huge backlog of cases. The civil society organizations that involve themselves in EAC matters and they have spread their wings across all the East African partner states should consider helping the region with this exercise by putting pressure on all the EAC member states to adopt the use of reconciliation as an ADR mechanism.

That; the EAC as an organ should consider looking for alternative sources of funding with a bid of financing on its core activities. This includes getting more reliable donors asking the EU to consider supporting its activities. Further approaching other international organizations such as the ICJ, ICC and the United Nations to finance on its activities. This will ensure that EACJ is

completely autonomous from the member states and other organs of the EAC. This means that once the EACJ has become that independent, it will be very easy for it to implement some of these activities without any form of interference from any quarters.

That; the relevant institutions in the EAC should consider formulating good policies that will enable EACJ to adopt and implement the use of the reconciliation and other ADR mechanisms in its justice systems. These institutions include; EALA for setting up the necessary pieces of legislation and legal framework that will empower the EACJ to adopt these ADR mechanisms, the Summit for giving in policy directions and the Secretariat for the prompt implementation of these administrative and budgetary policies. This will do a lot of justice to the struggling EACJ.

Finally; this study recommends that the EACJ should consider learning from the experience of the EU, with regards to the implementation of these ADR mechanisms. By doing so, the EACJ will acquire the right skills; adopt the right strategies that will enable it to successfully implement the use of reconciliation as an ADR mechanism. It is through learning from the EU that the EACJ will be able to avoid the mistakes the EU made while implementing the use of reconciliation as an ADR mechanism in its justice system.

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APPENDIX 1: THE INTERVIEW GUIDE SECTION A: THE INTRODUCTION

Dear Respondent,

You are kindly requested with all humility to assist the researcher in her endeavors to carry out a research entitled "***The use of reconciliation by the East African Court of Justice (EACJ) in dispute resolution by member states"*** This is in partial fulfillment of the requirements for the award of the degree of masters of Arts in International relations at the department of political science and public administration of the University of Nairobi.

SECTION B: INTERVIEW QUESTIONS

i. In your view what can you say about the concept of reconciliation as far as the East African Court of Justice is concerned?

ii. To what extent does the existing justice system in the East African Court of Justice embrace the practice of reconciliation as an alternative dispute resolution mechanism?

iii. Do you think the East African member states are ready to embrace reconciliation as an alternative dispute resolution mechanism?

iv. What challenges in your view does the East African Court of justice system experience in their current form that makes it hard for them to embrace the concept of reconciliation as an alternative dispute resolution mechanism?

v. In your view, state instances or articles of any law or supportive legislation in the EAC treaty that embraces reconciliation as an alternative dispute resolution mechanism?

vi. What are the benefits or advantages of reconciliation as an alternative dispute resolution mechanism?

vii. In your view, which institutions are responsible for initiating the supporting legislation, policies as well as statutory mechanisms that will ensure the concept of reconciliation is adequately utilized in a bid to enhance the justice systems of the East African states?

viii. From your experience, what are the likely challenges that the East African Court of justice are likely to face or experience in the process of deepening the role of reconciliation as an alternative dispute resolution mechanism?

ix. In your view, do you think that the concept of reconciliation will serve correct justice to states or justice in equal measure to the aggrieved state? Or will the victim states get a raw deal?

x. Globally is there any success story you know of where reconciliation as an alternative dispute resolution mechanism has enhanced the justice systems of the said countries?

xi. Suggest measures that need to be taken in order to enhance the role of reconciliation as an alternative dispute resolution mechanism in the East African Court of Justice, give suggestions along these lines?

i. Legal measures
ii. Administrative measures
iii. Policy framework measures
iv. Statutory measures
v. Political measures
vi. Socio cultural measures
vii. Economic measurers
viii. Judicial measures

THANK YOU FOR YOUR PARTICIPATION!