

**Access to Civil Justice in Kenya:
An Appraisal of the Policy and Legal
Frameworks**

Kibaya Imaana Laibuta

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Requirements of the Degree of Doctor of
Philosophy, School of Law,
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DECLARATION

I CERTIFY that this thesis is my original work and has not been presented for the award of a degree or any other award in any other university.

Name: **KIBAYA IMAANA LAIBUTA** **Reg. No.G80/80001/2010**

Signature: _____

Date: _____

SUPERVISORS

The thesis has been submitted for examination with our approval as University supervisors.

Signed:

Date:

Hon. Justice (Prof) J. B. Ojwang

School of Law, University of Nairobi

Signed:

Date:

Prof. Paul Musili Wambua

School of Law, University of Nairobi

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DEDICATION

Dedicated to my father, Mzee Imaana Laibuta, whose unreserved commitment to community-based ADR in the adjudication of land and other civil disputes, resolution of claims under Meru customary law over the decades has been a rich source of inspiration for me.

ABSTRACT

A diverse range of international human rights instruments prescribe minimum standards and essential elements of equal access to civil justice. Those ratified by Kenya form part of the municipal law by virtue of Article 2(6) of the Constitution of Kenya (2010). The Constitution guarantees the right of access to justice and establishes a hierarchy of national tribunals that exercise judicial authority in the adjudication of competing claims. It forms the foundation for the extant policy, legal and organisational frameworks for the administration of civil justice.

The threefold purpose of this study is: (a) to conduct an appraisal of the policy and legal frameworks in Kenya; (b) to evaluate the level of consumer satisfaction in the civil justice system with particular reference to the principles of proportionality, party autonomy, expedition, fairness of process, extent and equality of opportunity to access; and (c) to recommend appropriate policy and legislative reform strategies for expeditious claim adjudication and the augmentation of equal access to civil justice.

The study establishes that the current Kenya's policy and legal frameworks are not well suited to guarantee the effective delivery of, and equal access to, civil justice, and that the system of procedural justice is not well suited to deliver quality outcomes and effective remedies. In response to these inadequacies, the study addresses pertinent conceptual issues and recommends various reform measures founded on what it considers as the conceptual imperatives for the efficient delivery of civil justice. The proposed reform strategies draw from beneficial examples of international best practices and from strategic interventions undertaken in other jurisdictions.

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ACHPR	African (Banjul) Charter on Human and Peoples' Rights, 1981
ADR	Alternative Dispute Resolution
FIDA	Federation of Women Lawyers in Kenya
GJLOS	Governance, Justice, Law and Order Sector
ICCPR	International Covenant on Civil and Political Rights, 1966
UDHR	Universal Declaration of Human Rights, 1948

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CHAPTER ONE

INTRODUCTION

1.1. Background

The right of access to law and civil justice is founded on what may be viewed as a form of “social contract”. The notion of social contract presupposes that we or our predecessors “agreed” to establish a particular political structure complete with its policy, legal and organisational frameworks to which we submit and owe obedience by virtue of its legitimacy.¹ What this means is that we submit to political power which draws its legitimacy from the consent theory; a traditional notion of social contract which presupposes that no man can be subjected to the political power and authority of another without his consent. Obedience to authority is thus legitimised by voluntary submission to those who exercise authority.²

The creation in 1920 of Kenya as a British colonial state led to the establishment of a system of governance, law and order previously unknown to the indigenous subjects of the new colonial administration. They nonetheless submitted to the will of the Sovereign and to the institutions of the colonial government which was by no means democratic. Whether or not submission to the sovereign authority was in reality voluntary as posited by early modern political philosophers and proponents of the natural law theory of social contract, such as Thomas Hobbes (1588-

1 MDA Freeman *Introduction to Jurisprudence* (8th edn Sweet and Maxwell London 2008) p.106.

2 *ibid.*

1679); John Locke (1632-1704) and Jean Jacques Rousseau (1712-1778),³ is another matter which this study does not address. Suffice it to say that the colonial administration was characterised by structural injustices and social inequalities which prompted diminished public confidence and civil disobedience. This culminated in decades of struggle for political independence in pursuit of basic rights and freedoms. The ultimate withholding of voluntary submission to the colonial rule led to the breakdown in its political and social order. Failure by the colonial authority to satisfy the quest for justice had far-reaching consequences. The sovereign authority gradually lost legitimacy and became incapable of maintaining social order, and of exercising effective political power over its indigenous subjects thereby giving way to revolutionary change in political administration.

Subsequently, at independence in 1963, Kenya inherited a social, economic and political system complete with legal and organisational frameworks that had been purposely designed to serve and perpetuate the colonial state. The emergent state inherited policies, laws, governance and judicial structures, practices and jurisprudence that had supported and justified the colonial system⁴ for nearly five decades. Accordingly, the existing system of civil justice owes its origin to the antecedent legal system and colonial institutions, whose introduction in the local arena was plausibly responsible for the demise or gradual attrition of previously existing traditional systems of dispute resolution.

3 R Nobles and D Schiff, “The Evolution of Natural Law,” in A Barron and others *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (Oxford University Press New York 2005) ch 2.

4 S Ouma and J Ambani ‘Taking These Rights Seriously: Civil Society Organisations’ in Eastern Africa Coalition on Economic, Social and Cultural Rights (EACOR) and Kenya National Commission on Human Rights (KNCHR) *Parallel Report to the Initial State Report of the Republic of Kenya on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (Report) (October 2008) paras 2.1-2.2.

The governance model established by the British colonial administration was backed by legislation and a court system designed to advance its imperial policy and meet the needs of the settler community in disregard of the pre-existing indigenous legal orders. This legal system was retained at independence with minimal modifications. It was gradually reformed merely to reflect the realities of political independence that inspired the principle of equality of all races before the law, and to accommodate changing circumstances,⁵ culminating in today's policy, legal and organisational frameworks founded on English common law.

The compelling need to modify English law to suit local circumstances and meet contemporary challenges in Kenya was underscored by Lord Denning in *Nyali Ltd v Attorney-General* where he had this to say:

Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It would flourish indeed, but it needs careful tending.... In these far-off lands the people must have a law which they understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications.⁶

The concept of legal justice as understood in the context of sociological jurisprudence of the day was locally adapted and applied to suit the colonial agenda and satisfy the demands of the emerging agrarian economy. The ensuing rapid growth in the private- sector- driven commerce

5 Government of the Republic of Kenya *Report of the Committee on the Administration of Justice (Kwach Report)* (Government Printers Nairobi 1998) p.6.

6 *Nyali Ltd v Attorney-General* [1956] 1 QB 1 (CA) pp.16-17.

and industry in the urban centres coupled with the complexity of the ever-changing social-economic environment began to make pressing demands for effective legal framework for the management and resolution of increasing conflicts.⁷ The ensuing complexity of social-economic and race relations was characterized by competition and friction, generating new demands, claims and wants⁸ thereby overwhelming the conventional judicial systems, which are largely seen as outdated and incapable of expeditious resolution of disputes.⁹

Since independence, the demand for use of the legal system continues to expand with the widening scope of legal rights and democratic space. This is also attributable to increasing awareness of such rights and the continued expansion of the general body of laws and regulations into every area of social and economic activity. As this study demonstrates, the national tribunals have over the years failed to effectively satisfy these demands and meet the contemporary challenges faced in pursuit of effective remedies due to an inapt legal framework. Instead, they have proved to be, among other things, costly to access, overly officious (thereby grinding down the quality of procedures), unduly formal, and in many cases inaccessible to ordinary members of public.¹⁰ The high costs of claim adjudication, inordinate delay in the administration of justice, diminished party autonomy and the erosion of the quality of procedures invariably diminishing the quality of outcomes, making it ever more difficult for the ordinary citizen to access civil justice on an equal basis.

7 This historical development in Kenya compares with the situation described by R Pound 'A Theory of Social Interests' (1921) 15 Proceedings American Sociological Society p.1.

8 *ibid.*

9 Government of the Republic of Kenya *Report of the Committee on the Administration of Justice (Kwach Report)* op. cit. note 5 p.47 observes that there is "an increased growth of the Kenyan population and its urbanisation" (among other factors) resulting in delay and backlog of cases that bedevil the administration of justice.

10 International Commission of Jurists (Kenya Chapter) *Strengthening Judicial Reforms: Performance Indicator* (Report) (2003).

To overcome these challenges, the judiciary has only recently undergone comprehensive reforms leading to the re-establishment of the judicial authority and the underpinning legal system as discussed in the third chapter. The restructured organisational framework established under Chapter Ten of the Constitution of Kenya, which was promulgated on 27th August 2010, comprises a system of superior and subordinate courts. The superior courts established under article 162 are the Supreme Court, the Court of Appeal and the High Court, and include courts with the status of the High Court to hear and determine disputes relating to employment and labour relations, and the environment and the use and occupation of, and title to, land. The subordinate courts established under article 169 include Magistrates' courts and Kadhi's courts.

In addition, there is a range of special quasi-judicial tribunals established by statute with jurisdiction to deal with particular types of civil disputes, whose details this study does not explore. Suffice it to say that under the Constitution of Kenya, 2010 “[j]udicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under [the] Constitution”.¹¹

These organisational reforms are backed by entrenchment in the Constitution of Kenya, 2010 of the overriding principles designed to ensure expeditious judicial services and equality of opportunity to access civil justice. The overriding principles, which are prescribed in Article 159(2) of the 2010 Constitution, guide the courts and tribunals in exercise of their judicial authority. Article 159(2) of the Constitution provides that in exercising judicial authority, the

11 The Constitution of Kenya, 2010 art 159(1).

courts and tribunals shall be guided by the following principles, namely: (a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted; and (d) justice shall be administered without undue regard to procedural technicalities.

Even though the declaration of these principles provides a firm foundation for reforms in policy, legislation and administrative procedures to improve the delivery of civil justice, the intended reforms are yet to be realised. This argument is developed in chapter three, which discusses the status of the civil justice system in Kenya and demonstrates the wide gap between the declaratory constitutional guarantees of access to justice as contemplated, *inter alia*, by Article 48 and the reality on the ground. While Article 48 of the Constitution of Kenya 2010 imposes an obligation on the State to ensure access to justice for all at an affordable cost, the means by which this is attainable is left to legislation yet to be enacted.

The only significant legislative step taken so far toward improvement of access to civil justice is the recent amendment in 2009 of the Civil Procedure Act (Cap. 21 Laws of Kenya). Section 1A(1) of Cap. 21 sets out the overriding objective of the Act and the rules made there under, namely: to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Section 1B of Cap. 21 imposes a duty on the court to conduct judicial proceedings in an expeditious and cost-effective manner. Similarly, section 3A(1) of the Appellate Jurisdiction Act (Cap. 9 Laws of Kenya) sets out the overriding objectives of the Act and the rules made thereunder, namely: "... to facilitate the just, expeditious, proportionate and affordable resolution

of appeals ...”. Section 3B of the Act imposes a duty on the court to ensure expedition and cost-effectiveness in the determination of appeals. However, no legislative reforms have been undertaken to breathe life to these overriding objectives and eliminate the complexity of procedural rules reported in chapters three and four.

The study argues that, despite the recent institutional and legislative reforms, the embryonic judicial system in Kenya is in its present form ill equipped to guarantee access to civil justice on an equal basis due to insubstantial policy and legal frameworks that do little to minimise the cost of claim adjudication and increase the quality of procedures and outcomes. This hypothesis is backed by research findings generated mainly through qualitative, purposive and expert sampling strategies. On the basis of findings discussed in chapters three, four and five, the study proposes strategic reforms in policy and legislation.

1.2. Problem Statement

A well functioning judicial system is a central feature of civil society¹² in view of the fact that it is the main adjudicator over competing interests in the political, social and economic spheres. Yet the judiciary in Kenya suffers from administrative irregularities, high cost of litigation, backlogs and delays in the adjudication of disputes. These irregularities are mainly attributable to inept policy and legislation, which do not guarantee quality procedures and outcomes in pursuit of civil justice or recognise the complementary role of non-state legal orders comprised of both alternative dispute resolution (ADR) and traditional dispute resolution (TDR) mechanisms.

12 N Tobi ‘Delay in the Administration of Justice’ in C Nweze *Essays in Honour of Honourable Justice Eugene Ubaezona* (1997) p.21.

Elaborate rules of procedure suit the adversarial system, which encourages litigants to wage legal battles rather than seek effective redress of their just grievances. The system becomes an unduly expensive battlefield of technicalities, which is difficult to access without representation by legal counsel. On the other hand, engagement of legal counsel invariably diminishes party autonomy and escalates the cost of access. The very fact of hiring costly legal minds is tantamount to buying justice. It is no wonder that litigation has been described as “a gamble or luxury that only the affluent can afford”.¹³ This view is shared by Hon. Justice (Dr.) Smokin Wanjala who concludes that “[a]ccess to justice for the poor has been elusive in many respects” and has become what the learned judge of the Supreme Court describes as “... an extremely rare commodity for the majority of the people”.¹⁴

As this study demonstrates, the national tribunals have for the most part failed to effectively satisfy increasing demands for fair procedures and effective remedies, in pursuit of civil justice. The overbearing and bureaucratic nature of the judicial process, the high cost of access, the markedly formal nature of civil proceedings, and in many cases outright inaccessibility by ordinary members of public¹⁵ makes the civil justice system incapable of delivering quality outcomes. In addition to high costs, hard professionalism in the Bar (which diminishes party autonomy and participatory justice) coupled with undue regard to technicalities has impaired the efficacy of the judicial process. Yet the extant policy and legislation have done little to support alternative dispute resolution strategies of non-state legal orders despite: (a) the constitutional guarantee in

13 Dr. Justice TN Singh ‘Constitutional Values and Judicial Process’ available at: <http://www.cili.in/articles/download/1493/1084> (last accessed on 8 October 2009).

14 S Wanjala (ed) *Law and Access to Justice in East Africa* (Claripress Ltd Nairobi 2004).

15 International Commission of Jurists (Kenya Chapter) *op. cit.* note 10 p.3.

Article 48 of the Constitution of Kenya, 2010, of the right of access to justice; and (b) the progressive principles of judicial authority set out in Article 159(2) of the Constitution. These principles are yet to be realised by the formulation of appropriate policy, legislation and administrative procedures to complement the ongoing transformation of the organizational framework of the judiciary.

1.3. Research Objectives

This study explores the concept of civil justice and evaluates the effectiveness of the policy and legal frameworks within which national tribunals exercise their judicial functions. The inquiry addresses pertinent issues relating to policy and practice, and examines the relationship between the legal framework and the main factors that impede access to civil justice in Kenya.

The main aim of the inquiry was to conduct an appraisal of the policy and legal frameworks in Kenya, to evaluate the level of consumer satisfaction in the civil justice system with particular reference to the principles of proportionality, party autonomy, fairness of process, expedition, extent and equality of opportunity to access, and to recommend appropriate policy and legislative reform strategies for the enhancement of equal access to civil justice. The specific objectives were:

- (1) To examine and enhance general understanding of the concept of civil justice in the theoretical orientation of sociological jurisprudence, identifying the primary indicators of access to civil justice in an ideal judicial system.

- (2) To examine the historical development and analyse the status of the policy and legal frameworks and mechanisms employed in dispute resolution in Kenya with a view to –
- (a) establishing the degree of access to civil justice, identifying the major impediments thereto; and
 - (b) providing suggestions for strategic reforms necessary to guarantee full and equal access to civil justice.
- (3) To make substantial and original scholarly contribution to knowledge in the area of civil justice, and to translate the results of this research into guidelines and recommendations with the aim of-
- (a) motivating policy, law and judicial reforms in Kenya to ensure full and equal access to civil justice; and
 - (b) motivating change in approach to dispute resolution towards affordability, quality procedures and effective remedies.

1.4. Research Questions

While addressing the broad issues under inquiry, this study answers the following pertinent research questions:

- (a) What is the current status of the policy and legal frameworks for access to civil justice in Kenya; and are such frameworks suitable for guaranteeing and facilitating full and equal access to civil justice?

- (b) What international best practices exist in developed common law and other jurisdictions that would be suitable for adoption by Kenya to guarantee full and equal access to civil justice?
- (c) What policy and legal reforms are necessary to ensure full and equal access to civil justice in Kenya?

1.5. Rationale and Justification

Access to civil justice is a fundamental right to which all are entitled. Yet, economic disparities among the indigent and the inadequacies of the existing judicial and quasi-judicial systems, and the underpinning policy and legal frameworks, impede full and equal access to civil justice. This justifies the need to critically analyse the status of the Kenyan policy and legal frameworks with a view of identifying the major impediments to full and equal access. The study recommends appropriate means of mitigation and ultimate riddance of inaccess by undertaking comprehensive policy and legislative reforms suitably designed to close the justice gap between aspirations and achievements.

While there has been substantial scholarly contribution in the area of access to civil justice, most studies focus on developed jurisdictions, such as the United Kingdom, certain European states, the United States of America and Canada, just to mention a few. A quick look at the literature reviewed in this study discloses that little is said in relation to the need for corresponding reforms in Kenya. It becomes necessary, therefore, to undertake an appraisal of the Kenyan policy and

legal frameworks with a view of drawing on the comparative experiences of developed common law jurisdictions and establishing what reforms (if any) are necessary to facilitate full and equal access so as to achieve the minimum standards and international best practices enjoyed in the developed jurisdictions.

The study was also intended to generate a reservoir of knowledge and provide strategic recommendations for reform and establishment of ideal multifaceted models of access to civil justice, including alternative methods of dispute resolution and informal community-based institutions. The findings and recommendations will be shared with policy makers, legal practitioners and development partners so as to encourage change in attitude, policy and practice, and to promote the establishment of similarly reformed policies, laws and institutions in other common law jurisdictions.

In summary, the research was intended to generate the following outcomes by which it is justified:

- (a) guidelines for reform of the civil justice system, policy and practice in Kenya;
- (b) recommendations for adoption of best practices and strategies for removal or limitation of inhibitions of equal access to civil justice;
- (c) recommendations that motivate change in policy and practice towards the adoption of market mechanisms and appropriate methods of dispute resolution;

- (d) recommendations which, if adopted, would aid in the reform and establishment of an expeditious and user-friendly civil justice system in Kenya and other developing common law jurisdictions;
- (e) guidelines for a simplified, proportionate, expeditious, party-driven and cost-effective process of litigation and reduced cost of civil claim adjudication;
- (f) recommendations that would contribute to existing knowledge about the ways and means of improving access to civil justice; and
- (g) a valuable tool for advocacy and action towards reduced injustice and inordinately high costs of business investments attributable to needlessly drawn-out and costly judicial processes of civil claim adjudication.

1.6. Hypothesis

This study is based on the following hypothesis:

The current Kenya's policy and legal frameworks for the administration of civil justice are not well suited to guarantee the effective delivery of, or equal access to, civil justice.

The hypothesis was developed around the main research questions. It was generated from the following suppositions or proposed explanations made on the basis of limited preliminary evidence as a starting point for further investigation:

- (a) Delivery of effective civil remedies depends mainly on an accessible and effective system of procedural justice; and effective and efficient policy and legal frameworks are essential (*sine qua non*) for full and effective access to civil justice.
- (b) Institutional inadequacies, complexity in procedure in national tribunals, high cost of claim adjudication, lack of legal representation in the majority of cases, inappropriate policy and legal frameworks, and undue solemnity of civil courts (among other factors) hinder equal access to civil justice and render the conventional judicial system in Kenya incapable of effective management and expedient resolution of civil disputes.
- (c) Civil justice is attainable in both developed and developing jurisdictions, and the concept of civil justice is not the preserve of developed jurisdictions.
- (d) Effective enforcement of rights and delivery of effective remedies depend on an accessible and effective system of civil litigation¹⁶ and on other appropriate means of dispute resolution; and delay in determination of disputes results in denial of justice.
- (e) The principles of equality, economy, proportionality and expedition are fundamental to an effective system of justice, and a system of accessible civil justice is essential to the maintenance of a civilized society.¹⁷

1.7. Conceptual Framework

This section explores the meaning and essence of key concepts as generally understood in the context in which they are used. It explains the coverage and meaning of the concepts of “justice”,

16 O Nwankwo and W Odhiambo ‘Country Governance Profile (CGP)’ (consultant’s report to the African Development Fund on Kenya November 2004) p.19.

17 Lord Woolf ‘Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales’ (HMSO 1995) ch 1 in Lord Woolf *The Pursuit of Justice* (Oxford University Press New York 2008) p.311.

the derivative concepts of “civil justice”, “access to civil justice” and “fair trial” and avoids the erroneous tendency to conflate the concepts of procedural and substantive justice.

1.7.1 The Concept of Justice

The concept of justice has drawn considerable interest among scholars and jurists alike. The words “just” and “unjust” are terms most frequently used by lawyers in the praise or condemnation of law or of its administration.¹⁸ Their use appears to suggest that justice and morality are coextensive. Indeed, justice has a prominent place in the criticism of legal arrangements and is a distinct segment of morality with reference to which the laws and the administration of laws may have or lack excellencies of different kinds.¹⁹ As Hart observes, “the general principle... in... (the) diverse application of the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality”.²⁰ According to him, justice is “... to be respected in the vicissitudes of social life when the burdens or benefits fall to be distributed; it is also something to be restored when it is disturbed”.²¹ Hence justice is traditionally thought of as maintaining or restoring a balance or proportion.

While clarifying the meaning of the concept of justice, a clear distinction should be drawn between “procedural” and “substantive” rudiments of justice. However, the concept of justice

18 HLA Hart *The Concept of Law* (2nd edn Oxford University Press New York 1994) p.157.

19 *ibid.*

20 *ibid* p.159.

21 *ibid* p.157.

cannot be summed up in a single set of principles. It cannot be universal or absolute, but is embedded in specific “spheres” of activity with their own criteria of evaluation.²²

Schmidtz attempts to explain what justice is. According to him, “questions of justice are questions about what people are due.” However, what that means in practice depends on the context in which the question is raised.²³ Depending on the context, the formal question of what people are due is answered by principles of desert, reciprocity, equality, or need. He concludes that the notion of justice is “a constellation of elements that exhibit a degree of integration and unity. Nonetheless, the integrity of justice is limited, in a way that is akin to the integrity of a neighbourhood rather than that of a building. A theory of justice offers individuals a map of that neighbourhood within which they can explore just what elements amount to justice.”²⁴

Schmidtz’s “neighbourhood of justice” enjoys the support of other theorists who view justice in the broad sense of a “continuum of principles”. As rightly observed by Connie Ngondi-Houghton, the notion of “justice” should be viewed as a continuum of principles and values rather than an end in itself.²⁵ This study shares her perception of “justice” as engendered and compounded in a range of widely acknowledged principles, verifiable values and factual situations, a few of which may be briefly outlined as-

22 M Walzer *Spheres of Justice: A Defence of Pluralism and Equality* (Oxford Blackwell 1985).

23 D Schmidtz *The Elements of Justice* (Cambridge University Press New York 2006). According to Schmidtz, justice concerns what people are due even though what people are really due cannot be settled entirely by conceptual analysis.

24 *ibid* preface.

25 C Ngondi-Houghton *Access to Justice and the Rule of Law in Kenya* (paper developed for the Commission for the Empowerment of the Poor) (November 2006) p.4.

- (a) the endowment and recognition of an individual's rights at law, and the determination of a proper balance between competing claims;
- (b) the right to seek protection and vindication of those rights by full and equal access to law;
- (c) the provision of equal protection by law of the rights of all without making any arbitrary distinctions between persons in the assigning of basic rights and duties;
- (d) the right to corrective and restorative redress for violation of one's rights and guaranteed security of effective remedies;
- (e) the full and equal access to all judicial mechanisms for the protection of such rights, and the respectful, fair, impartial and expeditious adjudication of claims by national tribunals; and
- (f) the right to equal and humane treatment of all individuals in the enforcement of law.²⁶

1.7.2 Substantive and Procedural Justice

Justice is a broad concept which cannot be understood merely by an attempt at its lexical definition. It manifests itself in two main facets on which this study focuses, namely, the distributive concepts of procedural and substantive justice. Substantive justice generally refers to merits of entitlements.²⁷ On the other hand, procedural justice denotes fairness (in the sense of fair equality of opportunity) in the processes of dispute resolution, allocation of resources, distribution of rights and benefits and advantages of social life, and in the apportionment of burdens. Procedural justice “or procedural fairness) is closely connected to what is commonly

26 *ibid.*

27 R Reiner ‘Justice’ in Barron and others *op. cit.* note 3 p.754.

referred to as “due process” or “rule of law”.²⁸ But the notion of procedural justice is not confined to judicial processes. It may be applied to non-legal contexts in which certain other processes are employed to resolve conflicts, to distribute benefits or to apportion burdens.

Procedural justice essentially refers to the means of acquisition, fairness and transparency of the processes by which decisions are made, including judicial decisions. Some theories of procedural justice hold that fair procedure leads to equitable outcomes, even if the other requirements of distributive or corrective justice are not met.²⁹ Procedural justice may be contrasted with substantive justice (or merits of entitlement) in the sense of fairness in the distribution of rights or resources.

Substantive justice refers to fair equality of opportunity and the merits of entitlement in the distribution of goods and services while procedural justice refers to fair means of acquisition. Perfect procedural justice has two characteristics, namely: (a) an independent criterion for what constitutes a fair or just outcome of the procedure; and (b) procedure that guarantees achievement of fair outcomes.³⁰

Pure procedural justice describes situations in which there is no criterion for what constitutes a just outcome other than the procedure itself. On the other hand, imperfect procedural justice shares the first characteristic of perfect procedural justice (in that there is an independent criterion for a fair outcome), but with no method that guarantees that the fair outcome will be

28 ibid p.719.

29 M Maiese ‘Procedural Justice’ in G Burgess and H Burgess *Beyond Intractability* (Conflict Research Consortium, University of Colorado Boulder January 2004) available at: <http://www.beyondintractability.org/essay/procedural_justice> (last accessed on 12 March 2010).

30 JA Rawls *A Theory of Justice* (Oxford University Press Oxford 1999) ch II (at s 14).

achieved.³¹ The concept of procedural justice is controversial, with a variety of views about what makes a procedure fair. These views fall into three main categories, which may be referred to as the outcomes model, the balancing model, and the participation model.³²

The idea of the outcomes model of procedural justice with which this study is not concerned, is that the fairness of process depends on the procedure producing correct outcomes. For example, if the procedure were a legislative process, then the procedure would be fair to the extent that it produced good legislation and unfair to the extent that it produced bad legislation. This model has many limitations. Principally, if two procedures produced equivalent outcomes, then they are equally just according to this model.³³ However, there are other features about a procedure that make it just or unjust. For example, many would argue that a benevolent dictatorship is not (as) just as a democratic state (even if they have similar outcomes).

The idea of the balancing model denotes proportionality with which this study is concerned. It holds that a fair procedure is one which reflects a fair balance between the costs of the procedure and the benefits that it produces.³⁴ Thus, the balancing approach to procedural fairness might in some circumstances be prepared to tolerate or accept erroneous verdicts in order to avoid unwanted costs associated with the administration of the judicial process.

The idea of the participation model, which underpins this study, is that a fair procedure is one that affords those who are affected party autonomy in the choice of procedures and the

31 ibid.
32 Maiese op. cit. note 29.
33 ibid.
34 ibid.

opportunity to actively participate in the making of the decision. In the context of a trial, for example, the participation model would require that the defendant be afforded an opportunity to be present at the trial, to put on evidence and cross-examine witnesses. All in all, due process (as procedural justice is often referred to) becomes an imperative constituent of the means of access to civil justice.

Procedural justice requires that rules or procedures be consistently followed and impartially applied. Fair treatment is often identified with those procedures that generate relevant, unbiased, accurate, consistent, reliable, and valid information. Procedural justice engenders the notion that fair procedures are the best guarantee for fair and acceptable outcomes. It is concerned with making and implementing decisions according to fair processes. People feel affirmed if the procedures that are adopted ensure their active participation, treat them with respect and dignity, making it easier to accept even outcomes they do not like.³⁵

But what makes procedures fair? First, there is an emphasis on consistency. Fair procedures should guarantee that like cases are treated alike. Any distinctions “should reflect genuine aspects of personal identity rather than extraneous features of the differentiating mechanism itself”.³⁶ Secondly, those carrying out the procedures must be impartial and neutral. Unbiased decision-makers must carry out fair procedures to reach a fair and accurate conclusion. Those involved should believe that the intentions of third-party authorities are benevolent in the sense

35 M Deutsch ‘Justice and Conflict’ in M Deutsch and PT Coleman *The Handbook of Conflict Resolution: Theory and Practice* (Jossey-Bass Inc. Publishers San Francisco 2000) p.45.

36 RT Buttram and others ‘Equity, Equality and Need: Three Faces of Social Justice’ in BB Bunker and M Deutsch *Conflict, Cooperation, and Justice: Essays Inspired by the Work of Morton Deutsch* (Jossey-Bass Inc Publishers San Francisco 1995) p.272.

that they want to treat people fairly and take into account the viewpoint and needs of the interested parties.³⁷ If people trust the third party, they are more likely to view the decision-making process as fair. Thirdly, those directly affected by the decisions should have a voice and representation in the process. Having fair equality of opportunity to competent representation affirms the status of group members and inspires trust in the decision-making system. This is especially important for weaker parties whose voices often go unheard or otherwise muffled by undue technicalities of procedure. Finally, the processes that are implemented should be transparent and decisions should be reached through open procedures without secrecy or deception.³⁸ The decision-making process should also be fully accessible on an equal basis by those least well-off in the society.

But others believe that procedural justice is not sufficient (as the only means) to guarantee equal access to effective remedies. To the consequentialists, for instance, reaching fair outcomes is far more important than implementing fair processes. Other theorists maintain that fair procedures are of central importance in so far only as they are likely to translate into fair outcomes.³⁹

Whatever the case, fair procedures tend to inspire feelings of loyalty to one's group, legitimize the authority of leaders, and help to ensure voluntary submission to, and compliance with, the

37 ibid p.273.

38 ibid.

39 W Nelson 'The Very Idea of Pure Procedural Justice' (July 1980) 90(4) Ethics p.506.

rules⁴⁰ and outcomes. In effect, fair procedures substantially guarantee fair equality of opportunity to access civil justice and effective remedies.

1.7.3 Civil Justice

In the context of this inquiry, the term “civil justice” (as opposed to criminal justice) is a derivative of the wider notion of justice. Civil justice refers to both “fairness of process” in the adjudication of civil claims and “fairness of outcomes”, which denote the effectiveness of remedies, in addressing justiciable issues.⁴¹ Justiciable issues may be described as those problems for which there is a potential legal remedy within a civil and/or criminal framework⁴² and in relation to which effective remedies are only attainable where the parties have full and equal access to the civil justice system. However, many factors impose barriers and affect the justness and efficacy of the legal process in pursuit of effective remedies. Mason and others identify these factors as including:

- (a) ignorance of the law or lack of awareness of justiciable problems;
- (b) lack of awareness of the source and availability of advice;
- (c) inadequate or total inaccess to legal assistance or competent legal representation;
- (d) the nature of legal rights and remedies sought;
- (e) the institutional and legal structure of the judicial processes;

40 TR Tyler and MA Belliveau ‘Tradeoffs in Justice Principles: Definitions of Fairness’ in BB Bunker and M Deutsch *Conflict, Cooperation, and Justice: Essays Inspired by the Work of Morton Deutsch* (Jossey-Bass Inc Publishers San Francisco 1995) p.297.

41 P Mason and others *Access to Justice: A Review of Existing Evidence of the Experiences of Minority Groups based on Ethnicity, Identity and Sexuality* (Report) (Department for Constitutional Affairs (now Ministry of Justice) May 2009) p.14 available at: <<http://www.justice.gov.uk/publications/research.htm>> (last accessed on 4 November 2009).

42 *ibid.*

- (f) the attitudes of judges and court personnel; and
- (g) the resources, expertise and incentives of the parties.⁴³

The legal structure of the civil justice system is of particular interest to this study. It must be acknowledged, though, that not all barriers to justice are in the judicial system; some are part of a larger problem of economic disadvantage.⁴⁴ Likewise, the mere provision by national tribunals of judicial services should not be treated as an end in itself in the quest for access to civil justice.

1.7.4 Access to Justice

The notion of “access to justice” may be broadly interpreted as embracing yet another range of interrelated principles with which this study is concerned, namely-

- (a) the ability to realize the right to full and equal access to protection of one’s entitlements by the law enforcement agencies without undue delay, expense or technicalities. This presupposes the existence of a legal aid scheme to guarantee access to law by the poor even though questions may arise as to who, how much and in what kind of cases litigants merit legal aid);
- (b) ease of entry into the justice system and the availability of physical judicial institutions with appropriate alternatives to conventional dispute resolution mechanisms;
- (c) less resource-intensive pre-trial protocols and civil process of claim adjudication;

43 ibid p.16.

44 Massachusetts Access to Justice Commission *Barriers to Access to Justice in Massachusetts: A Report with Recommendations to the Supreme Judicial Court* (Report) (June 2007) p.3.

- (d) affordability of competent legal representation in the adjudication process;
 - (e) the principle of equity and efficiency;
 - (f) cultural appropriateness and conducive environment within the judicial system; and
 - (g) expeditious processing of claims and timely enforcement of judicial decisions,⁴⁵
- which are dependent on the underpinning legal framework.

1.7.5 Fair Trial

One of the basic components of access to civil justice is fair trial, which is guaranteed by Article 50(1) read together with Article 25(c) of the Constitution of Kenya 2010. Article 50(1) provides: “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”. Article 25 (c) lists the right to a fair hearing in the category of those fundamental rights that shall not be limited despite any other provision in the Constitution.

The term “fair trial” in the context of this study necessarily implies, *inter alia*: (a) the availability of affordable competent legal representation (which guarantees equal participation in the proceedings); (b) expedition in dispute resolution; and (c) the cost-effectiveness of the process.⁴⁶

For instance, in the absence of expedition, the remedies sought would be of no beneficial effect

45 Ngondi-Houghton op. cit. note 25 pp.4-5.

46 These basic elements of fair trial are prescribed in the Constitution of Kenya, 2010 art 50 (which guarantees fair hearing by providing for the securing of the protection of law more substantively in criminal trials) and in the International Covenant on Civil and Political Rights (adopted 16th December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14 (which extends the principle of fair trial to civil proceedings by demanding equal treatment of “All persons before the courts and tribunals... in the determination of... his rights and obligations in a suit at law”).

where they come too late in the day. Accordingly, the concept of fair trial denotes expedition, proportionality and fairness of process among other conceptual imperatives advanced in this study.

It is the obligation of every state to make available to its subjects effective means of access to justice for the attainment of effective remedies in the enforcement of their legal rights and obligations, and in pursuit of their dignity, social and economic aspirations. This study argues that the ability of any state to effectively discharge this obligation depends upon the establishment and maintenance of apposite policy, legal and organisational frameworks founded on the conceptual imperatives discussed in the third, fourth, fifth and sixth chapters.

1.8. Theoretical Framework

This study is premised on the jurisprudence of natural law and the constituent notion of social contract. It is founded on the theoretical framework of justice as validated by the egalitarian principles of distributive justice and more specifically focused on the tenet of procedural justice. The right of access to law and civil justice is derived from what may be viewed as a form of “social contract”. The notion of social contract is a natural law theory of justice as expounded in Hobbes’ book entitled *Leviathan*, with reference to which Freeman and others⁴⁷ explain that the notion of social contract presupposes that we or our predecessors “agreed” to establish a particular political structure complete with its policy, legal and organisational frameworks to which we submit and owe obedience by virtue of its legitimacy. What this political theory holds

⁴⁷ *ibid.*

is that we submit to political power which draws its legitimacy from the presumption of consent; a traditional notion of social contract which presupposes that no man can be subjected to the political power and authority of another without his consent.⁴⁸ Obedience to authority is thus legitimated by voluntary submission to those who exercise authority.⁴⁹

The theory of natural law holds that “there was a kind of perfect justice given to man by nature and that man’s laws should conform to this as closely as possible”.⁵⁰ This suggests that there are certain normative rules of conduct which any social organisation must contain if it is to be viable.⁵¹ The modern theory of natural law presupposes that there are universally recognised principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims.⁵² These principles may be considered the minimum content of natural law. According to Hart, “...without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other. In the absence of this content, men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of cooperation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible”.⁵³

Hart’s suggestion that human beings associate and cooperate by voluntary submission to the normative proposition of natural law and to the prescriptive contents of positive law merely for

48 T Hobbes ‘The Leviathan’ pt 2 ch 21 in Freeman op. cit. note 1 p.106.

49 ibid.

50 EA Martin (ed) *A Dictionary of Law* (4th edn Oxford University Press New York 1997).

51 Hart op. cit. note 18 p.193.

52 ibid.

53 ibid.

the purpose of survival is rather one-dimensional. There is more to it, i.e., the need to discharge the reciprocal political obligation by submission to authority in order to safeguard basic human entitlements to life, liberty and property, which (in the context of this study) require, *inter alia*, the establishment by the sovereign power of a legitimate system of government with appropriate legal and organisational frameworks for the resolution of disputes and realisation of competing claims and interests.

As Hart observes, “without voluntary cooperation, thus creating authority, the coercive power of law and government cannot be established”⁵⁴ or maintained. He further states that “if the system is fair (in the sense of treating people equally; just or appropriate in the circumstances)⁵⁵ and caters generally to the vital interests of all those from whom it demands obedience, it may gain and retain the allegiance of most for most of the time, and will accordingly be stable”.⁵⁶ On the other hand, a narrow, exclusive and repressive system running the interests of the dominant group in the strata of social inequalities stands the threat of instability, disorder and ultimate collapse, as did the colonial administration in Kenya.

While law and government may be viewed as necessary means of promoting social order and personal security, allegiance and obedience to the law and political power are, as this study argues, motivated by the attainment and maintenance of critical standards and values which subjects of the state treasure and hold as fundamental pillars of good and legitimate governance. It is in this sense that natural law may be viewed not merely as limited to survival but as a means

54 ibid p.202.

55 J Pearsall (ed) *The Concise Oxford Dictionary* (10th edn Oxford University Press New York 1999) p.510.

56 Hart op. cit note 18 p.202.

of “conservation of life”.⁵⁷ The motivation to obedience may be summed up in the words of Hobbes, according to whom we should infer the characteristics of political obligation from “the intention of him that submitteth himself to his power, which is to be understood by the end for which he so submitteth”.⁵⁸ His theory of political obligation is derived from a consideration of “the end of the institution of sovereignty, namely, the peace of the subjects within themselves, and their defence against a common enemy.”⁵⁹ Undeniably, there can be no “peace of the subjects within themselves” in the absence of an effective system of delivering justice as may be inferred from the guarantee of personal security, and from the protection of liberty and property, which are the subject of competing claims to which civil justice is largely devoted.

On the other hand, English philosopher John Locke held an alternative conception of natural law and the derivative social contract. According to Locke, “man renounced his otherwise idyllic natural condition and by contract gave up part of his liberty to a sovereign” for the purpose of government, which was in turn obligated to protect his basic human entitlements to life, liberty and property. He argued that the consent on which the social contract is grounded is principally tacit.⁶⁰ According to Locke, “man tacitly consents to obey the law by their mere presence within the territorial confines of a society, since to be within a society means taking advantage of the benefits derived from the actions of a political sovereign”.⁶¹ In other words, tacit consent is a useful construct for demanding obedience to the law by those present in a society. As this study suggests, obedience to sovereign authority is possible only if there were in existence such

57 AP D’Entreves ‘Essay C, A Call of Good Sense: Reflections of Hart’s Theory of Natural Law’ (1970) in Barron and others op. cit. note 3 p.89.

58 T Hobbes ‘The Leviathan’ pt 2 ch 21 in Freeman op. cit. note 1 p.106.

59 *ibid.*

60 J Locke ‘Second Treatise on Government’ in Freeman op.cit. note 1 p.108.

61 *ibid.*

legislative and organisational frameworks as would guarantee the protection of those basic human entitlements that would ordinarily be the focus of any system of civil justice. Moreover, rulers had the right to rule and to use their political power only for the public good.⁶² Otherwise, they lacked legitimacy, and were therefore incapable of inspiring obedience and voluntary submission to their authority. The social contract is therefore the concept that human beings have made an agreement with their government, whereby the government and the people have distinct reciprocal roles and responsibilities. The theory is based on the idea that humans abandoned a natural (free and ungoverned) condition in favour of a society that provides them with order, structure, and the protection of life, liberty and property.

Through the ages, many philosophers have considered the role of both government and the citizenry within the context of the social contract. According to Locke, the social contract is directly tied to natural law; the theory that some laws are fundamental to human nature. Locke argued that people first lived in a state of nature, where they had no restrictions on their freedom. Realizing that conflict arose as each individual defended his or her own rights and interests, people finally “agreed”, albeit tacitly, to live under a political sovereign, which presupposes the existence of a legal system or other social framework through which competing interests were realised and the pervasive conflicts effectively contained in the best interest of all. Indeed, our society has been described as one in which “actors with different amounts of wealth and power

62 Freeman op. cit. note 1.

are in constantly competitive or partially cooperative relationships in which they have opposing interests.”⁶³

It may be concluded, therefore, that the stability of any political system and social order depends upon the maintenance of equilibrium between the reciprocal duties of state (which has the responsibility to ensure good governance and to protect life, liberty and property) and its subjects (who are in return obligated to submit to the political sovereign). This study argues that full and equal access to civil justice and effective remedies in a democratic state facilitates the enjoyment by everyone of their entitlements and the advantages of social life, and is therefore a requisite component of those basic standards and values on which social order and good governance are founded. The attenuation of those basic standards of access to justice for the realisation and protection of basic human entitlements erodes basic rights of the individual. This prompts action towards institutional and legislative reforms without which the society stands the risk of diminished public confidence, civil disobedience and weakened public institutions. Consequently, the subjects might withhold voluntary submission to the justice system resulting in complete breakdown of the political and social orders.

According to David Hume, the need for rules of justice is dependent on the size of the society.⁶⁴

He argues that in very small societies where the members are more of an extended family, there may be no need for rules of justice because there is no need for regulating property (liberty and

63 M Galanter ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1994) in *Law for Life: the Foundation for Public Legal Education* p.2 available at: <http://www.lawforlife.org.uk/data/files/whythehavescomeoutahead-33.pdf> (last accessed on 7th June 2012).

64 WE Morris ‘David Hume’ in *Stanford Encyclopedia of Philosophy* (2009) available at: <http://plato.stanford.edu/entries/hume> (last accessed on 30 March 2010).

personal security); no need, indeed, for our notion of property at all. In his view, only when society becomes extensive enough that it is impossible for everyone in it to be part of one's "narrow circle" does the need for rules of justice arise.⁶⁵ Hume argues that the rules of justice in a given society are "...the product of artifice and contrivance" (i.e., scheme or ploy and machination) and are constructed by the society to solve the problem of how to regulate property (in the sense of a wider range of basic human entitlements and competing interests) even though other rules might do just as well. According to him, the real need is for some set of "general inflexible rules adopted as best to serve public utility".⁶⁶ It is in the interest of everyone in the society that there are rules regulating property and other competing interests, and the benefits for each individual result from the whole scheme or system being in place. For this reason, societies approve of the system of rules and voluntarily submit to the authority of government even where individual self-interest is not at stake.

From the perspective of this study, the consent or tacit approval which the social contract theory is grounded is central to the notion of justice, whose basic tenets include fairness, equality and satisfaction of legitimate expectations in the realisation of competing interests. The concept of justice has been conceptualized in a diverse range of philosophical and theoretical frameworks. The study recognises the theoretical exposition of distributive justice as elucidated by both early and contemporary philosophers in their attempt to explain the framework for examining different conceptions of justice, which are discussed in chapter two.

65 ibid.

66 LA Selby-Bigge (ed) *Enquiry concerning the Principles of Morals* (3rd edn Clarendon Press Oxford 1975) p.305.

1.9. Literature Review

The initial scoping of accessible literature to establish the extent (if any) to which any of the aspects of this inquiry has been previously undertaken indicated a paucity of research. Although there was a wide range of literature that had the potential to inform the study with respect to the conceptual, legal and theoretical frameworks on which this study is grounded, little has been accomplished in the specific area of access to civil justice in Kenya. Indeed, searches that focused on the specific research questions returned very few sources, which limits the capacity to undertake systematic review of each research question. It is for this reason that the study takes an exploratory and investigative review of literature supplemented by insights from broader knowledge whose context is not specific to the topic under inquiry. Accordingly, this study constitutes a valuable contribution to research initiatives and a much-needed building block in the key theme of access to civil justice in Kenya and the conceptual imperatives on which civil justice is more determinedly constructed.

The broad subject of access to justice has been popular among published theorists and jurists alike. But fewer have devoted their time and scholarship to the specific subject and constituent elements of access to civil justice, and even fewer (if any) to the narrower subject of access to civil justice in Kenya in relation to which little scholarly contribution has been made, and hence the value of this research initiative. But as pertains to judicial reforms towards access to justice, England and Wales present the most influential comparative experience for Kenya and other developing common law jurisdictions. A review of relevant literature demonstrates why.

In his book entitled *Justice, Legal Systems, and Social Structure*, Hartzler develops the theory of the relationship between the nature of justice, legal systems and social structure-or justice, law and order as postulated by Lasswell H D (1948, 1950); Smelser N J (1963); Pound R (1917, 1921, 1922, 1924, 1923, 1938, 1942, 1959); Llewellyn K (1940, 1941, 1951, 1960); Hoebel A (1941, 1954); Weber M (154); Dahl R A (1953); Lindblom C E and Dahl R A (1953).⁶⁷ His book surveys the subject of law and order and explores the nature, functions and limitations of legal systems and purports to introduce a relationship between justice, legal systems and social structure. Although his work constitutes a general proposition of sociological jurisprudence, Hartzler does not focus on any particular legal system or territorial jurisdiction, or go beyond explaining the social inevitability of supporting legal systems that are the backdrop of this study. However, this study focuses on the policy and legal frameworks and the appurtenant conceptual imperatives for equal access to civil justice in Kenya.

In his Interim Report to Lord Chancellor on the Civil Justice System in England and Wales, Lord Woolf addresses the issue of access to civil justice specifically in the context of the English judicial system but pays no attention to developing common law jurisdictions that could share in this comparative experience. In Part IV of his book entitled *The Pursuit of Justice*, he provides an overview of the access to justice in England and Wales. The report⁶⁸ extensively referred to in his book was “designed to meet the needs of the public in the 21st century by creating a comprehensive and coherent package for the reform of civil court proceedings. It aimed to

67 HR Hartzler *Justice, Legal Systems, and Social Structure* (Dunellen Publishing Company and Kennikat Press Corporation New York 1976).

68 Woolf op. cit. note 17 p.311.

improve access to justice and reduce the cost of litigation, reduce the complexity of the rules and modernize terminology, and remove unnecessary distinctions of practice and procedure”.⁶⁹ Lord Woolf identifies defects in the English system at the time of his 1995 interim report⁷⁰ and draws attention to a number of general principles which the civil justice system should meet in order to ensure access to justice. This study focuses on access to civil justice in Kenya with specific reference to the policy and legal frameworks and examines the extent to which the comparative experience in England and Wales would beneficially influence reforms in policy, legislation and the civil justice system in delivering effective remedies.

In their collection of essays edited by Dr. Smokin Wanjala, which are written within the context of the role of lawyers in constitutional development, Femi Falana, Issa G Shivji, Gibson Kamau Kuria and Frederick W Jjuuko address the broad subject of law and access to justice and the manner in which justice is dispensed in East Africa. The writers address important themes in the question of justice.⁷¹ The three country focus papers in East Africa analyse the concept of law and access to justice. The three essays describe the scenario of accessing justice in the East African region and emphasise the fact that the issue of access to justice should take the centre stage as the three countries continue to grapple with reforms to consolidate their recent democratic gains, as “there can be no democracy without justice”.⁷²

69 ibid.

70 ibid p.312.

71 Wanjala (ed) op. cit. note 14.

72 ibid preface.

The first paper by Femi Falana at pages 1-13 gives a general overview of the role of the lawyer in constitutional development. In his paper on the Tanzanian experience,⁷³ Issa Shivji uses real situation examples at pages 16-23 to demonstrate how poor people struggle for justice, which remains elusive to them. According to Shivji, the road to justice for the poor is riddled with systemic biases and non-systemic constraints.⁷⁴ He revisits the debate as to what constitutes the best approach in teaching the law so as to facilitate equal access of the impoverished people to more justice.⁷⁵

Frederick Jjuuko discusses issues of justice as they relate to Uganda, addressing conceptual and functional perspectives of justice. He also discusses traditional and new forms of dispute resolution in Uganda.⁷⁶ Jjuuko observes that although a lot has been done to make justice accessible to the poor, the legal system is still abysmally inadequate in the delivery of justice.⁷⁷ He underscores the necessity for more institutional and normative reforms in very general terms.

Kamau Kuria advocates for the right to legal aid in Kenya. He examines the relevant constitutional provisions relating to the issue of legal aid and demonstrates the difficulty in securing legal aid in a country where the system is neither constitutionally guaranteed nor well institutionalised or structured. He calls for the establishment of a national legal aid scheme.⁷⁸ Notably, though, the writers do not specifically address the policy and legal frameworks for

73 L Shivji 'Law and Access to Justice: The Rhetoric and the Reality' in S Wanjala (ed) note 14 pp.14-40.

74 *ibid* p.19.

75 *ibid* p.25.

76 F Jjuuko 'Law and Access to Justice and the Legal System in Contemporary Uganda' in S Wanjala (ed) *op.cit.* note 14 pp.76-103.

77 *ibid* p.103.

78 G K Kuria 'The Right to Legal Aid in Kenya' in S Wanjala (ed) *op.cit.* note 14 pp.41-75.

access to civil justice in Kenya or present a persuasive case for specific reforms, a gap which this study seeks to fill.

Connie Ngondi-Houghton explores the broad subject of access to justice and the rule of law. She identifies various challenges and factors that bar access to justice by the poor in Kenya. In her paper titled *Access to Justice and the Rule of Law in Kenya*, she seeks to illustrate that reforms or initiatives to empower the poor through the law must find their logic and feasibility within the social, economic and political projects going on in the country. According to the author, the main barrier to access lies in the economic disadvantages of the poor and suggests that these barriers may be removed by projects that are designed to move the goals of the state projects towards the interests of the poor. She considers economic recovery and wealth and employment creation strategy 2003 and the Kenyan Vision 2030 as relevant intervention policies.

Ngondi-Houghton observes that “the edifice of the legal system-the laws and the practice-is not designed to cater for the interests of the poor, women, children, workers, refugees and other vulnerable groups.”⁷⁹ She identifies gaps in the constitution and laws and substantive provisions of the rights of these groups. According to her, the process norms of the entire system are broadly insensitive and exclusionary, making it difficult for them to vindicate their rights in the system. However, her paper pays little attention to the notion of civil justice with which this study is concerned. Ngondi-Houghton attributes inaccess to justice largely to economic and social-cultural disadvantages, and to inadequacies of the legal framework, an explanation which this study considers inexhaustive. The study addresses this gap and goes beyond the legal

79 Ngondi-Houghton op.cit. note 25 p.2.

framework to critically examine the policy framework and the quality of procedures employed in pursuit of effective remedies.

In a paper titled ‘Access to Justice: Perspectives from the Poor and the Vulnerable,’ the Legal Resources Foundation Trust also addresses the issue of access to justice from the perspective of the poor and the vulnerable.⁸⁰ The paper attempts to explain the meaning of “justice” and “access to justice” and analyses the structure of the dispute resolution mechanisms in Kenya, including the formal justice system and the community justice and other ADR systems. It identifies various factors that impede access to justice, the impact of these barriers and measures to address those challenges. The paper then suggests that the establishment of Small Claims Courts and the Court of Petty Sessions in Kenya would simultaneously address both civil and criminal bottlenecks and enhance access to justice in the formal system.⁸¹ But, according to this study, the solution does not lie merely in the introduction of more institutions to the extant judicial system. The paper does not demonstrate how the inadequacies of the extant policy and legal frameworks are to be addressed even though the proposed courts may arguably be part of the solution.

This study addresses that gap and shares the opinion expressed by Jjuuko⁸², who was of the view that “the struggle for justice must necessarily remain a continuous one. It cannot be confined either to law and the institutions that administer it nor within the law can it be confined to the judicial process, or to the official arena. There is also the danger that the creation of so many

80 The Legal Resources Foundation Trust ‘Access to Justice: Perspectives from the Poor and the Vulnerable’ (paper presented on the occasion of the workshop to develop policy and legal framework for the small claims court Nairobi July 22 2005).

81 *ibid* p.8.

82 F Jjuuko ‘Law and Access to Justice and the Legal System in Contemporary Uganda’ in S Wanjala (ed) *op.cit.* note 14 p.103.

institutions may spread the effort too thin and [thereby] create new problems especially with regard to new tiers of bureaucracy and expenses. It is an important stage in this struggle to make an important appraisal of these diverse measures and efforts with a view to co-ordinate, synchronise and maximise the synergy buried in them”.⁸³

In his paper entitled *Constitutional Values and Judicial Process*, Dr Justice TN Singh addresses the fallacy of perceived equity and efficiency. With reference to civil suits, he demonstrates how conventional judicial systems often offend the spirit of participatory justice. When represented, parties appear in court merely as witnesses in the course of trial of their cause, and are wholly insulated against the judicial process in cases of appeal. On the other hand, the extant system sets the stage for counsel to “match their wits” and to expose their talents as what Justice Singh calls “legal wizards” while the judge plays a limited role of a legal umpire sanctioned by law and procedure.⁸⁴

While Justice Singh’s commentary constitutes valid critical analysis of judicial processes, which is generally true of adversarial systems of civil justice, his paper does not by any means offer ready solutions or address the specific circumstances of developing common law jurisdictions, such as Kenya, to which this study focuses. This study highlights the conceptual imperatives of equal access to civil justice and demonstrates that the extant judicial system and the legal culture which permeates the judicial process in Kenya are in their present form ill equipped to facilitate full and equal access to civil justice. It makes proposals for reform in policy and legislation to ensure quality procedures and outcomes.

83 ibid.

84 Singh op.cit. note 13.

Lawrence B. Solum builds a compelling case for procedural justice, focusing his attention on procedural fairness and participation. In his paper titled *Procedural Justice*,⁸⁵ Solum analyses the utilitarian and consequentialist theories of procedural justice. He argues that “procedural justice is concerned with the benefits of accuracy and the costs of adjudication” but not solely with “costs and benefits”.⁸⁶ He then explains the requisites of meaningful participation in the process of adjudication of civil disputes. He attempts to articulate the theory of procedural justice for a system of civil dispute resolution. His article responds to the challenges posed by hard questions of procedural justice, namely: (a) the meaning of procedure; (b) the distinction between substance and procedure; and (c) whether the search for a theory of procedural justice is a worthwhile enterprise.

Solum’s conceptual analysis of the notion of procedural justice and the underpinning theoretical framework are restricted to the Federal civil procedures in the United States of America and does not lay claim to any degree of universality. While the American experience in the context of which Solum’s paper is presented may be of comparative interest to this study, the decisions of the US Supreme Court to which he heavily relies are of no experiential effect to the Kenyan jurisdiction. Moreover, the Federal civil procedure in the United States of America, which he frequently uses as examples, is shaped by concerns for federalism that are not matters of procedural justice. This case study goes beyond the conceptual analysis and theoretical framework to which Solum’s study is confined. It addresses issues pertaining to the extent of

85 LB Solum *Procedural Justice* (2004) Public Law and Legal Theory Research Paper Series No. 04-02 available at: <<http://ssrn.com/abstract=508282>> (last accessed on 15th March 2011).

86 *ibid* p.2.

access to civil justice in the social-economic context of the Kenyan judicial system, which is shaped by an entirely different set of factors that influence the extant policy and legal frameworks.

In her article titled *Procedural Justice*, Dr. Praveena Sukhraj-Ely focuses on procedural justice with particular reference to the 1996 Constitution of the Republic of South Africa and the South African justice system. She discusses the object, scope and functionality of procedural justice with regard to its implementation and impact on just outcomes. While her analysis stimulates debate and dialogue in the widely written area of procedural justice, her focus narrows on the role and current state of procedural justice in South Africa. Viewing the ambit of justice as extending from substantive justice to questions of distributive, restorative and retributive justice, Dr. Sukhraj-Ely recognises procedural justice as the thread that holds the various aspects of justice together.⁸⁷

Although this study shares Dr. Sukhraj-Ely's general conception of justice as fairness in accord with John Rawls postulation of justice,⁸⁸ it goes beyond theory and deals with the specific issues and experiences that characterise the system of civil justice in Kenya. The study inquires into the conceptual and theoretical foundations, the status of the policy and legal frameworks that inform the degree of access to civil justice, and recommends means by which some of the impeding factors may be eliminated or mitigated. On the other hand, Dr. Sukhraj'Ely's narrow focus on the

87 Dr. P Sukhraj-Ely 'Procedural Justice: The Thread That Weaves the Fabric of Justice in Society' available at: <<http://www.hsf.org.za/resource-centre/focus-chapters/focus-55-chapters/procedural-justice>> (last accessed on 18th August 2010).

88 Rawls op. cit. note 30.

context of the South African Constitution does not by any means meet the objectives or address the research questions that this study sets out to answer.

In his study titled '*Procedural Justice, Institutional Legitimacy and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*,' Tom R. Tyler challenges the view that procedure has no influence on acceptance outcomes of judicial decisions. His article presents a report on research findings, which indicate that "... public views about the fairness of Supreme Court decision-making procedures have an indirect effect on acceptance through their influence on public views about the Court's legitimacy and support the suggestion of a number of studies that the legitimacy of both national and legal institutions, and the willingness to accept their decisions, are influenced by views about the fairness of their decision-making procedures".⁸⁹ His discussion of procedural justice as vindicated by fairness of process, which in turn engenders acceptance of outcomes, is in the context of the organisational framework of those judicial decisions. Tyler does not consider other components of civil justice with which this study is concerned, such as party autonomy, participation, accessibility in relation to costs and effective remedies, and which this study considers as critical to civil justice.

Other jurists have recommended ways and means of ensuring access to justice and effective remedies. Arthur Marriott recommends mandatory ADR as a pre-requisite for access to justice. He argues that "without the widespread use of ADR attached to formal adversarial processes, whether before courts or tribunals, no significant improvement in access to justice and its cost is

89 TR Tyler '*Procedural Justice, Institutional Legitimacy and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*' (1991) 25 (3) *Law and Society Review* p.621.

to be expected”.⁹⁰ He observes that “the demands of the public, the expectations which it has of its legal profession and the entrenched power of the lawyers, mean that there is little scope to reduce the cost of access to justice ...”⁹¹ in judicial and arbitral proceedings. According to Marriot, although the use of ADR (primarily adjudication and mediation) in litigation has been actively encouraged and promoted at senior levels (i.e. in the Court of Appeal and the High Court); county courts as a whole have been slower to accept that ADR has a useful role to play even though there was nothing to prevent the establishment of court-attached ADR.⁹² The author makes no mention of whether the complementary roles of litigation and ADR at all levels of the judicial system can be replicated to developing common law jurisdictions to guarantee expedition and effective remedies, a proposition with which this study is concerned.

This study shows that, contrary to the practice in England, the use of ADR in litigation is yet to be actively encouraged and effectively promoted in Kenya and that there are beneficial aspects of ADR that are capable of application in systems of civil justice in developing common law jurisdictions. The study suggests that in the absence of a comprehensive mandatory national scheme, there should be change in judicial policy to encourage and promote ADR in private initiatives as a market mechanism for dispute resolution and through ADR schemes attached to civil trial centres. However, the study concedes to Marriot’s view that while access to justice rests on a complexity of factors which admit of no simple or single solution, ADR is an essential element of any meaningful reforms.⁹³

90 A Marriot ‘Mandatory ADR and Access to Justice’ (November 2005) 71(4) The Journal of the Chartered Institute of Arbitrators p.308.

91 *ibid.*

92 *ibid.*

93 *ibid.*

Wood discusses the trend in the growth and adaptability of mediation and its increasing application in almost all civil dispute in the European jurisdictions.⁹⁴ This study draws from this comparative experience and recommends the introduction and promotion of various aspects of ADR, including mediation, early neutral evaluation, expert determination and adjudication in a wide range of civil disputes in Kenya.

Marinari M identifies the court's primary and traditional role to provide a forum for adjudication of civil disputes. He envisions change in this role towards a possible combination of a wider and more flexible range of duties and to what is today commonly known as a multi-door courthouse, which more vividly describes the changing role of the courts in providing forums for dispute resolution. His vision and status of ADR is one of "appropriate dispute resolution" rather than the traditional "alternative dispute resolution".⁹⁵ He discusses in general terms the appropriateness of various dispute resolution mechanisms to different civil proceedings to ensure expedition and cost management, both of which denote access to civil justice with which this study is partly concerned.

Idornigie presents an overview of ADR in Nigeria and underscores the significance of customary jurisprudence in the civil justice system. He underscores the importance of customary arbitration and mediation as recognised means of resolving disputes in Nigeria. He also discusses the notion of a dispute in traditional African societies where it is seen as a social disequilibrium that

94 W Wood (QC) 'Mediation: The Next Ten Years' (August 2007) 73(3) The International Journal of Arbitration, Mediation and Dispute Management p.312.

95 M Marinari 'ADR and the Role of the Courts' (February 2006) 72(1) The Journal of the Chartered Institute of Arbitrators p.49.

requires to be reconciled to restore equilibrium. Idornigie traces the development of the judicial system from the colonial rule when Nigeria embraced common law and statutory arbitration to the post-independence system where ADR is seen as a restatement of customary jurisprudence that focuses on the needs and interests of the parties,⁹⁶ which is a fundamental principle of access to civil justice with which this study is concerned. The author hails the introduction of the multi-door courthouses to achieve the course of justice in Nigeria. Using the comparative experiences of Marinari and Idornigie, this study appraises the policy and legislative frameworks in the context of conceptual imperatives for equal access to civil justice in Kenya.

Although the policy, legislative and organisational frameworks for the administration of civil justice in Kenya continue to dominate the reform and governance agenda, they have not attracted noteworthy attention among scholars. Various reports and recommendations for law and judicial reforms generated over the years by an array of commissions, committees and taskforces comprise a growing mound of work plans and programmes for which there is little to show. This study examines the limitations of the proposed reform initiatives and suggests the way forward, including the need to formulate a stand-alone national policy on access to civil justice. The policy documents reviewed in this study for the most part concern themselves with proposed legal and organisational reforms designed to improve access to justice. These documents include: (a) Kenya Vision 2030; (b) the Medium Term Plan of Vision 2030 (2009-2012); (c) the Judiciary Strategic Plan 2009-2012; (d) the Governance, Justice, Law and Order Sector-wide Reform Programme (GJLOS); and (e) the 2008 Kenya National Dialogue and Reconciliation: Agenda item IV.

96 PO Idornigie 'Overview of ADR in Nigeria' (February 2007) 73(1) *The International Journal of Arbitration, Mediation and Dispute Management* p.73.

Kenya Vision 2030 is the country's new development blueprint covering the period 2008-2030. It aims to transform Kenya into a newly industrialising middle-income country providing a high quality life to all its citizens by the year 2030. The Vision proposes reform of the governance system through a range of constitutional, legal and administrative reforms. One of the proposed strategic areas is the rule of law and human rights where it is intended to promote adherence to the rule of law applicable to a modern market-based economy in a human rights-respecting state. Under its political pillar, the goal for 2012 is "to enact and implement a legal and institutional framework that is vital to promoting and sustaining fair, affordable and equitable access to justice. Specific strategies involve aligning the national policy and legal framework with the needs of market-based economy, human rights and gender equity commitments; increasing service availability and access (or reducing barriers) to justice".⁹⁷

In the medium term, Kenya is committed to putting in place structures to guarantee access to justice.⁹⁸ Other policy, legislative and organisational reform measures identified under the strategic initiatives include the improvement of access to justice by passing legislation, including a Small Claims Court Bill, a Private Prosecutions Bill, a Legal Aid Bill, a Court of Petty Sessions Bill, appropriate alternative dispute resolution (ADR) legislation as well as a Judicial Service

97 Transparency International Kenya *Adili 108* (Nairobi Kenya February 2009) p.7 available at: <<http://www.tkenya.org/documents/Adili103.pdf>> (last accessed on 20 April 2010).

98 Government of the Republic of Kenya *Kenya Vision 2030 First Medium Term Plan 2008-2012* (Government Printers Nairobi) p.124
available at: <<http://www.scribd.com/doc/18345790/vision-2030-medium-term-plan-20082012>> (last accessed on 20 April 2010).

Bill, the Evidence Act and a Land Disputes Tribunal Act.⁹⁹ The recommendations, which the study identifies as tantamount to inappropriate policy, legal and organisational frameworks, have not been implemented. This inquiry highlights the reasons behind the failure to implement the proposed reforms. It makes appropriate recommendations to ensure that policies designed to guide the effective administration of civil justice are founded on a sound conceptual framework.

This study addresses the need for interim measures that do not require comprehensive organisational reforms or the establishment of multiple organs for dispute adjudication. It appraises the propriety of introducing more judicial institutions resulting in fragmented initiatives and takes the view that the snail pace of legal and organisational reforms in Kenya is a clear indication of the pressing need for the adoption of diverse and appropriate market mechanisms of civil dispute resolution through private contractual initiatives and dispute resolution with the support of, *inter alia*, a national legal aid scheme in proper cases, expeditious and accessible judicial services for enforcement of agreements and awards within the existing institutional framework.

The Governance, Justice, Law and Order Sector-wide Programme (GJLOS) launched by the Government of Kenya on 11th November 2003 formulated a sector-wide approach to dealing with problems affecting justice, law and order sector institutions. This ambitious programme covered four key ministries and up to thirty two government departments and agencies. GJLOS was supported by nine countries and eight international organisations. At the inception of the

99 *ibid* pp.131-2.

programme, the donor community anticipated that GJLOS would lead to far reaching reforms in all the legal and justice sector institutions.

The five-year programme was implemented in two phases (which included a one-year short term priority programme-STPP and a four-year medium term strategy-MTP). It was intended “to develop good governance and a speedy and fair dispensation of justice-affordable and accessible for all people”.¹⁰⁰ Its broad strategic goals included, among others, achievement of access to justice through organisational reforms, including the increase of Court of Appeal sessions, construction of more court premises, increasing mobile courts, and automation of court registries.¹⁰¹ Although the programme has developed several judicial reform initiatives, its implementation has faced serious challenges. In September 2009, the donor’s ceased engagement with GJLOS, citing the overly ambitious nature of the project goals and the absence of intended results as the major reasons for the withdrawal of funding¹⁰² leaving the organisational reform agenda to the Government virtually unaided. This study explores the reasons behind the Government’s inability to realise these ambitious goals and proposes measures which the study considers realistic for equal access to civil justice in the prevailing economic, social-cultural and political circumstances in Kenya. It draws attention to conceptual imperatives without which policy, legal and organisational reforms would be in vain.

100 ‘Governance, Justice, Law and Order Sector-wide Programme (GJLOS)’ Delegation of the European Union to the Republic of Kenya available at:

<<http://www.delken.ec.europa.eu/en/information.esp?menuid=2&submenuid=7&thirdmenuid=3&fourthmenuid=1>> (last accessed on 20 April 2010).

101 International Legal Assistance Consortium and the International Bar Association Human Rights Institute *Restoring Integrity: An Assessment of the Needs of the Justice System in the Republic of Kenya* (Report) (February 2010) p.16 available at: <<http://www.ibanet.org/document/default.aspx?documentuid=dcd20276>> (last accessed on 20th April 2010).

102 *ibid* pp.31-32.

The Strategic Plan for the judiciary 2009-2012 launched on 20th March 2009 constitutes the blueprint for judicial reforms and stipulates strategic objectives and activities for the reform of various aspects of the judiciary. In particular, the Plan identifies the enactment of the Judicial Service Bill, improving human resource capacity within the judiciary and establishing a communications department as important objectives.¹⁰³ In order to catalyse these reform initiatives, the Government appointed a multi-disciplinary taskforce on judicial reforms to identify the reforms that needed to be carried out in the judiciary. Among its mandate, the taskforce chaired by Justice William Ouko was to consider and make recommendations on short and long-term measures for addressing backlog of cases.¹⁰⁴ The other items of its mandate included organisational reforms on which most other initiatives focussed.

In its interim report presented on 29th June 2009 and the final report presented on 10th August 2010, the taskforce recommended measures to address the backlog of cases, including-

- (a) increase numbers of various judicial personnel;
- (b) standardisation and automation of court processes;
- (c) the establishment of weekend and twenty four hour courts;
- (d) introduction of Small Claims Courts;
- (e) review of court procedures and processes;

103 ibid.

104 ibid.

- (f) enhancement of legal aid;
- (g) introduction of alternative dispute resolution mechanisms; and
- (h) better information management.

Even though the reform measures proposed may appear comprehensive, this study demonstrates that the mounting backlog of cases is not attributable entirely to the inadequacies of the judicial institutions. The lack of sound conceptual basis for the extant policy and legal frameworks explains the prevalent impediments to civil justice. Other factors, including complex rules of procedure, lack of competent legal representation of parties, prohibitive costs of litigation, laxity and unethical conduct on the part of counsel and judicial officers, the very nature of adversarial systems of dispute resolution and want of diligence on the part of counsel and their parties are significant contributories to the slow pace at which the wheels of civil justice turn.

The Kenya National Dialogue and Reconciliation also sets out the Government policy on organisational reforms. This Policy draws from the political settlement led by the former UN Secretary General Kofi Annan and the Panel of Eminent African Personalities in January 2008, who established a reform agenda designed to address the underlying causes of the 2007-2008 post-election violence. One of the four agenda items identified for the purposes of addressing the causes of the crisis, reconciling communities and preventing future conflicts in the country was agenda item four, which concerns itself with long term issues, including constitutional, legal and organisational reforms. By agenda item four of the National Dialogue, the coalition government committed itself to addressing long term issues that may have constituted underlying causes of

the prevailing social tensions, instability and the cycle of violence, including the need for constitutional, legal and organisational reforms.¹⁰⁵

Among the recommendations made by the Report (at page 52) for organisational reforms in the judiciary are:

- (a) the need for improved communication and the creation of awareness through public education and information materials in order to facilitate access to justice for illiterate users of judicial services;
- (b) the need to enhance public relations by provision to litigants of information on court procedures and processes, and directional information, with a view of enhancing access to justice; and
- (c) the need to combat judicial corruption by implementing the Harmonised Draft Constitution regarding the qualification, procedures for appointment, training, removal and discipline of judges, and the enhancement of quality and efficiency of the justice system.

This study suggests that much more is required to facilitate full and equal access to civil justice than the recommended organisational reforms, provision of public education to ignorant litigants, information on the court procedures and processes, and combating judicial corruption. In addition to these basic measures, the study recommends far-reaching reforms in the judicial processes and civil procedure to ensure inclusion of, among other things, alternative dispute resolution mechanisms to enhance expedition, proportionality, participatory justice and fairness

105 *ibid.*

of process, which are considered in this inquiry as critical for the equalisation of opportunity to access civil justice to the ends of effective remedies. The study suggests that the statutory entrenchment of suitable market mechanisms in the existing legal and institutional frameworks, supported by legal aid in appropriate cases, and the prescription of simple and accessible rules of procedure for the adjudication of small claims in magistrates' courts and community based methods of dispute resolution, would go a long way in guaranteeing equal access to civil justice. Indeed, the solution lies in the establishment of appropriate policy and legal frameworks based on apposite conceptual foundations for an expedient and efficient civil justice system.

1.10. Methodology

The outcome and success of every inquiry are determined by the researcher's choice of strategy and sampling techniques. Although the ideal method of sampling is by random selection (or probability sampling) of targets or units of inquiry in a scientific study, which is common in quantitative research methodology, sampling designs in social research are more often than not non-probability. This inquiry was undertaken through a combination of four main non-probability strategies, namely:

- (a) theory generation by means of qualitative research methodology, which included ethnographic, phenomenological and hermeneutic research designs;¹⁰⁶

106 M Mann (ed) *Macmillan Student Encyclopedia of Sociology* (the Macmillan Press London and Basingstoke 1989) pp.115-116; pp.154-155; and pp.286-287. Phenomenology is a qualitative research strategy which involves using knowledge to describe the essence and phenomena of everyday experiences so as to derive the true understanding of the subject under inquiry and to test the propriety of existing theories and beliefs. Hermeneutics is a strategy of qualitative research methodology concerned with the interpretation of text. The approach has been

- (b) data generated through a purposive sampling strategy, which is a non-probability sampling design that permits selection of target groups for interviews;
- (c) expert sampling, which involved interviewing individuals who are generally viewed as experts or key informants in their area of expertise;¹⁰⁷ and
- (d) snowball (or chain referral) sampling whereby key informants and target respondents (being subjects who display the qualities the study is interested in investigating) suggest other persons who share similar qualities and would be willing to provide information on the subject of inquiry.¹⁰⁸ The chain referral process is usually repeated until the researcher gets the number of cases he/she requires to give him/her enough information on the topic of inquiry.

Mugenda explains that purposive sampling (a sampling technique based on purpose) is a non-probability sampling technique that allows a researcher to use cases that have the required information with respect to the objectives of his/her study.¹⁰⁹ In other words, they are handpicked because they are informative and possess the characteristics required to meet the objectives of the inquiry. This sampling design is common in social-legal research and was considered suitable for this study.

applied to a wide range of texts in the fields of literature, history and the law. Ethnography is an approach which is applied to study social constructs by examining the actions and social practices of relevant social groups, such as parties to civil proceedings, legal practitioners and judicial officers.

107 AG Mugenda *Social Science Research Theory and Principles* (Applied Research and Training Services Nairobi 2008) p.198.

108 *ibid* pp.196-197.

109 *ibid* p.196.

In their study on the ‘International Comparison of Publicly Funded Legal Services and Justice Systems,’ Roger Bowles and Amanda Perry adopted a research strategy that involved compiling a set of secondary data on the countries selectively covered in their study. The data referred to both the operation of legal aid and to the economic and social characteristics of the countries in question and were purposively drawn from a wide variety of reports and accounts of legal sources, including aid organizations, national statistical sources, and more specialist reports that included European and other international surveys of legal institutions.¹¹⁰

Paul Mason and others carried out a study on minority groups that shared a common experience of social exclusion and vulnerability. Their exploratory investigative review also focused on studies based on purposive sampling designs. They selectively targeted reports of existing evidence of the experiences of specific minority groups based on ethnicity, identity and sexuality, and their vulnerability with regard to access to justice, which the pertinent research questions were designed to explore. In their study, the researchers focused on black and minority groups, gypsies and travelers, refugees and asylum seekers, and on minority groups identified on the basis of sexuality. Their sources of data included handpicked research studies, analytical or theoretical research, gray literature not likely to be peer reviewed or published by formal sources (such as working papers, campaign group materials and policy documents) in which the groups under study were clearly identified.¹¹¹

110 R Bowles and A Perry ‘International Comparison of Publicly Funded Legal Aid and Justice Systems’ (Centre for Criminal Justice, Economics and Psychology University of York 2009) in *Ministry of Justice Research Series 14/09* available at: <[http:// www.justice.gov.uk/publications/research.htm](http://www.justice.gov.uk/publications/research.htm)> (last accessed on 5 November 2009).

111 Mason op. cit. note 41.

For the purpose of this inquiry, handpicked population groups of legal practitioners, court registry and clerical staff, judicial officers and litigants and other users of the judicial system were interviewed because they possess information and share experiences relevant to this study. Purposive sampling of those groups was appropriate because they were informative and possessed the required characteristics by virtue of status as key players in the justice system. The criteria for choosing the particular cases for target respondent interviews were therefore justifiable. With the exception of researchers and theorists whose works aided in the qualitative strategy of this study, no other population groups outside the consumers and players in the provision of judicial services shared the main variables of interest or possessed information relevant to this inquiry.

Due to logistical and financial constraints, the inquiry was restricted by purposive sampling to five High Court stations, which included Nairobi, Mombasa, Kisumu, Eldoret, Meru, and to a number of subordinate courts located in or near those main towns. Those handpicked judicial stations and population groups mentioned above respectively constituted units of observation as well as units of interest which had the required characteristics necessary to meet the objectives of this study. Otherwise, an attempt to conduct this inquiry by generating data from all judicial stations and population groups in Kenya, which is tantamount to a census inquiry,¹¹² would have involved a great deal of money, time and energy. Undoubtedly, the field of inquiry is large, and a census inquiry would have been overwhelmingly beyond the capacity of this study and therefore

112 CR Kothari *Research Methodology: Methods and Techniques* (2nd edn New Age International (P) Ltd New Delhi 2004) p.68. Kothari defines a census inquiry as a complete enumeration of all items in the “population” whereby it is presumed that when all items are covered, no element of chance is left and highest accuracy is obtained.

inappropriate. Hence the preference for an appropriate sampling technique and purposive selection of respondents¹¹³ which did not in any way compromise the outcomes of the inquiry.

In order to deal with the specific objectives and research questions effectively, the study limited the geographical sampling and social units comprised of the handpicked population groups to manageable numbers. The purposive sampling methodology was complemented with expert sampling. Expert sampling involved interviewing individual respondents (including policy makers, academics and opinion leaders) who were recognised as experts or key informants¹¹⁴ in the fields of policy development, access to civil justice, civil litigation and adjudication of disputes by arbitration and other ADR mechanisms.

The purposive sampling design facilitated the undertaking of case studies on those specially selected judicial stations which were considered to be suitably located for inclusion in a pilot scheme to be proposed for the implementation of the suggested reforms. The handpicked key informants and members of the social units of inquiry were interviewed by means of questionnaires (Appendix A) suitably designed to facilitate the gathering of data on relevant variables of interest.

There was good reason for using a case study of the Kenyan policy and legislative framework and for purposively sampling only a few of the judicial institutions and population groups for investigation. As Mugenda observes, it should be appreciated that a case study is not a particular

113 *ibid.*

114 Mugenda *op. cit.* note 107 p.198.

research method but a strategy of investigating a phenomenon within its real life context.¹¹⁵ In other words, it is not a methodological choice but a choice of what is to be studied. Mugenda defines a case as including “a person, an organisation, a social group or any other entity that operates as a system”.¹¹⁶ The Kenyan judicial system, and the handpicked judicial stations, constitutes a case with which this study is concerned. The preference of a case study was therefore realistic. It was intended to keep the inquiry within a practically manageable level of engagement, taking account of limitations on time and financial constraints. Above all, this research strategy ensured that the subject of inquiry remains specific and focused.

The data generated from the purposive, key informant and snowball sampling designs was gathered in the form of responses to interviews on the basis of questions designed to suit the research questions in relation to the relevant variables of interest. The qualitative data took non-numerical (or qualitative) forms. This is because, as Kothari explains, the qualitative approach is concerned with subjective assessment of attitudes, opinions and behaviour by means of focus group interviews, projective techniques and depth interviews¹¹⁷ and not with quantifiable variables or results that would ordinarily be subjected to a rigorous quantitative analysis. The multiple methods and data used followed from, and fitted in with, the research questions, which dictated the appropriate choice of the multiple strategies and respective designs applied in the study. The qualitative inquiry was undertaken by use of various strategies or analytical tools of research, including theoretical research, analytical research, conceptual philosophical research and historical research methodologies. The four general ways of approaching and

115 ibid p.192.

116 ibid.

117 Kothari op. cit. note 112 p.6.

conceptualizing the research issues and questions and the related research designs were combined as appropriate.

The combination of strategies in this inquiry was designed to approach the research process in a disciplined manner so as to generate meaningful and objective data and knowledge. Moreover, a well-structured and disciplined inquiry places a high premium on objectivity and evidential test.¹¹⁸ These strategic choices were informed by recognition of the fact that there were many popular sources of information, opinions and beliefs that could have been relied upon to generate objective findings. These sources include experience, tradition, authority and expert opinion.¹¹⁹

Qualitative research strategy has a particularly distinctive role to play in the creation of a knowledge base for policy and practice, and was perhaps the most appropriate approach in dealing with the greater number of issues under inquiry. This research strategy helped in gaining new perspectives on things about which much was already known and in gaining more in-depth information that may be difficult to convey quantitatively. In addition, certain elements of the inquiry unfolded as events progress. In other words, the qualitative research design was flexible. The methods used in collecting and analyzing qualitative data emerged during the research process, which allowed simultaneous observation and interpretation of meanings in context.¹²⁰ The various issues and research questions formulated and interpreted were dealt with in the context of the modern sociological jurisprudence, the cultural and historical context of the

118 LJ Cronbach and P Suppes *Research for Tomorrow's Schools: Disciplined Inquiry for Education* (Macmillan New York 1969).

119 Mugenda op. cit. note 107 p.25.

120 ibid p.82.

institutions and systems under inquiry, the social-economic context of the legal system, and the context or professional orientation within which the study was located.

In addition to the interviews, the study applied qualitative research designs by utilizing texts of existing primary and secondary sources of information. The primary sources of information included international conventions and protocols, relevant human rights instruments, the Constitution of Kenya, relevant domestic legislation and subsidiary legislation, legislative instruments of a selected number of comparable developed and developing common law jurisdictions, including statutory and institutional rules and regulations governing alternative dispute resolution (ADR) mechanisms. Secondary sources of information included textbooks, professional journals and periodicals, research papers and conference materials, official government and civil society reports and policy papers, the internet and on-line library materials, newspapers and media reports. All information and data was collated, coded, analysed and interpreted to clarify conceptual issues, to answer the relevant research questions and finally to provide the basis for recommendations on the way forward.

Having given due regard to alternative and competing sampling designs, the study considered the purely scientific approach of random sampling common in quantitative research methodology inappropriate. This is notwithstanding the fact that the scientific research design, as Mugenda observes, usually guarantees that the characteristics in the populations are accurately reproduced in the sample.¹²¹ However, this scientific strategy and sampling design is complex and was therefore likely to generate data that has no real value or bearing on the relevant research

121 ibid p.180.

questions and objectives. For instance, if a purely scientific strategy were to be adopted for this inquiry and a random sample of respondents taken to establish the degree of satisfaction with the average time taken for final determination of civil disputes in a particular judicial station, the sample would likely have included respondents who would have had no personal experience or interest in the judicial process under inquiry. It is also likely that other random samples taken to test other variables in the quest to establish the degree of access to civil justice would likewise have lacked relevant variables of interest. Consequently, the data generated from such a strategy would have been of no real value to this inquiry however accurate the quantitative data might have been. For this reason, it was preferred to apply the purposive, expert and snowball sampling strategies in combination with qualitative research methodology. Moreover, the research questions under inquiry are unique. It is therefore not reasonable to presume that the variables of interest are evenly or normally distributed across the populations from which random samples would have been taken. In any case, It is not necessary that all sampling strategies suitable to a particular study be applied simultaneously. One or two sampling designs would, in combination with other suitable research methodologies, sufficiently meet the research objectives.

C R Kothari defines a variable as “a concept which can take on different quantitative values”.¹²² According to him, concepts like weight, height, and income are all examples of variables in which respondents in a random sample should share an interest for a quantitative research strategy to be valid. In this study, we were concerned with access to civil justice in the context of the current policy and legal frameworks of the civil justice system in Kenya. The notion of access denotes *inter alia* considerations of time taken in the adjudication of civil disputes, the

122 Kothari op. cit. note 112 p.42.

average cost of adjudication and the numerical distribution of national tribunals across Kenya's geographical expanse. According to this study, these constitute variables of interest that cannot be evenly distributed across populations from which random samples of respondents may be drawn. It is for this reason that random sampling was considered to be inappropriate for this inquiry.

1.11. Scope and Chapter Breakdown

The first chapter of this thesis is introductory in scope and content. The chapter titled "Introduction" presents the background to the problem, the statement of the problem, the theoretical and conceptual frameworks, the study methodology, the justification for the study, the research questions and issues significant to the study, the hypothesis for the study, literature review and the chapter breakdown.

Chapter two titled "The Concept of Justice in the Context of Sociological Jurisprudence" addresses the theoretical foundation of the study and examines the concepts of conflict and justice, focusing special attention on Rawls' theory of Egalitarian Justice. In this regard, the theory of distributive justice is discussed along with other contemporary and validating theories. The chapter concludes with a comprehensive discussion of the procedural notion of the concept of justice around which the inquiry is oriented. It explains the meaning of civil justice and the constituent elements of access with particular emphasis on equality, expedition, proportionality, party autonomy, fairness of process and need satisfaction in the resolution of competing claims.

Chapter three titled “The Status of the Kenyan Civil Justice System” outlines the historical origins and development of colonial administration, the justice system, the social, economic and political orientation of the policy and legal frameworks under inquiry, the hierarchy and jurisdiction of courts in the colonial and post-colonial Kenya, and the status of the extant policy and legal frameworks for the administration of civil justice.

The fourth chapter titled “Overview of the International Standards of Access to Civil Justice Binding on Kenya” examines the extent to which the Kenyan policy and legal frameworks for the administration of civil justice accord with various international treaty obligations binding on Kenya by virtue of Article 2(6) of the Constitution of Kenya, 2010. The findings in this and the preceding chapter are confirmed by statistical data reported in chapter five.

The information and data gathered from the various research designs is collated, coded, analysed and interpreted in chapter five titled “Access to Civil Justice in Kenya: Policy and Practice” to clarify conceptual issues and answer the relevant research questions. It outlines the research design and methodology, the profile of participants, research instruments, ethical considerations and the integrity of the study. As it presents the research findings, the chapter addresses issues of validity, reliability, trustworthiness and data triangulation. The findings provide the foundation for chapter six, which consolidates the factors that hamper access to civil justice and presents the compelling case for reform.

Chapter six titled “The Case for Reform of the Civil Justice System in Kenya” discusses the course of organisational reforms of the judicial system before making the compelling case for

reform in policy and legislation to meet contemporary challenges. The chapter then discusses tested strategies for dismantling procedural, social and economic barriers to the delivery of civil justice and examines the critical role of suitable market mechanisms and alternative dispute resolution strategies in the context of what the study considers as the conceptual imperatives for the delivery of civil justice. It draws from beneficial examples of tested models in developed common law and other comparable jurisdictions, laying ground for recommendations in chapter seven.

Finally, the seventh chapter draws conclusions for the study and recommends strategic interventions to reform policy and legislation for the administration of civil justice in Kenya in order to guarantee equal access to civil justice. The chapter further outlines the delimitations of the study and identifies gaps for future inquiry on pertinent issues not addressed in the study.

CHAPTER TWO

THE CONCEPT OF CIVIL JUSTICE IN THE CONTEXT OF SOCIOLOGICAL JURISPRUDENCE

2.1. Introduction

The preceding introductory chapter sets out the main objective of the study and identifies the research problem. It outlined the research questions from which the hypothesis is developed. The chapter clarified the rationale and justification for, and the key concepts used in, the study, before discussing the theoretical framework, literature review and methodology.

This chapter explains the concept of civil justice in the theoretical orientation of sociological jurisprudence and identifies the primary indicators of access to civil justice in an idyllic judicial system. It addresses the theoretical foundation of the study and examines the concept of justice with its derivative notions of egalitarian, distributive, procedural and participatory justice. The chapter explains the meaning of civil justice and the constituent elements of access to justice with particular emphasis on equality, expedition, party autonomy, fairness of process and need satisfaction in the resolution of competing claims. It provides the conceptual basis for the proposed reforms in policy and legislation to facilitate the efficient administration of civil justice in Kenya.

2.2. The Notion of Conflict

To understand the concept of civil justice, one must appreciate the appurtenant notions of conflict and effective dispute resolution. It is in relation to these notions that the principles of fairness of process and quality of outcomes play a critical role in determining the degree of access to civil justice in the resolution of competing claims.

The idea of justice, conflicts and disputes are as old as the human race. They are a common feature of social and legal relations, which are characterised by conflicting interests and competing claims for incompatible needs and entitlements. The terms “conflict” and “dispute” are often used interchangeably. Both terms denote disagreement over incompatible interests. In lexical terms, a conflict has been defined as “a serious disagreement or argument... a prolonged armed struggle...an incompatibility between opinions, principles...”¹

Arbetman and others accentuate the fact that “conflict is a natural part of everyday life, a possibility in every encounter.”² Because of its inevitability, it is important to consider how best to handle conflicts in our life. Understanding the social dynamics and progression of conflicts into disputes helps us to adopt appropriate mechanisms for dispute resolution, whether in judicial proceedings or out of court through alternative dispute resolution mechanisms.

1 J Pearsall (ed) *The Concise Oxford Dictionary* (10th edn Oxford University Press New York 1999) p.299.

2 LP Arbetman, ET McMahon and EL O’Brien *Street Law: A Course in Practical Law* (5th edn West Publishing Company Minneapolis/St. Paul 1994) p.41.

As this study demonstrates, conflicts have been dealt with in a variety of ways, all of which are intended to generate quality outcomes. As this study suggests, the choice as to what means to employ in any event is weighed against the effectiveness of the attainable remedies and their impact on the relationship in respect of which the conflict in issue arises. A number of theorists and practitioners in the study of conflict resolution (including John Paul Lederach) advocate for the pursuit of “conflict transformation as opposed to “conflict resolution” or conflict management” with which this study is not concerned. Lederach addresses the notion of conflict, its variant phases and a means of resolution in his book titled *Preparing for Peace, Conflict Transformation Across Cultures*.³ G Burgess and H Burgess explain that conflict transformation differs from conflict management and conflict resolution because it reflects a better understanding of the nature of conflict itself.⁴

Conflict transformation suggests that we simply eliminate or control conflict, but rather recognise and work with its “dialectic nature”.⁵ What this means is that social conflict is naturally created by humans who are involved in relationships, yet once it occurs, it changes (i.e., transforms) those events, people and relationships that created the initial conflict. On the other hand, conflict resolution on which the study focuses implies that conflict is bad-hence something that should be eliminated. It also assumes that conflict is a short term phenomenon that can be “resolved” permanently through mediation or other intervention processes.⁶

3 JP Lederach *Preparing for Peace, Conflict Transformation Across Cultures* (Syracuse University Press New York 1995).

4 G Burgess and H Burgess ‘Conflict Transformation’ (1997) available at: <<http://www.colorado.edu/conflict/transform/jplall.htm>> (last accessed on 16th December 2010).

5 *ibid.*

6 *ibid.*

While conflict management correctly assumes that conflicts are long term processes that are often not capable of quick resolution, the notion of “management”, which is not pertinent to dispute resolution, suggests that people can be directed or controlled as though they were physical objects. In Burgess’ view, the notion of management additionally suggests that the goal is the reduction or control of volatility more than dealing with the real source of the problem.⁷

Lederach conceptualizes conflict as a progression rather than a static phenomenon.⁸ According to him,

Conflict is never a static phenomenon. It is expressive, dynamic and dialectical in nature. Relationally based, conflict is born in the world of human meaning and perception. It is constantly changed by human interaction, and it continuously changes the very people who give it life and the social environment in which it is born, evolves, and perhaps ends.⁹

The characteristics of conflict and the patterns that it follows are of vital importance in determining the effectiveness of the various processes of conflict resolution. Conflict is said to be dialectical in the sense that it is concerned with, or acts through, opposing forces¹⁰ or conflicting interests and competing claims that are of primary concern to proponents of distributive justice. In his appraisal of Curle’s works in the book titled *Making Peace*¹¹, Lederach advances the proposition that conflict moves along a continuum from unpeaceful to peaceful

7 *ibid.*

8 Lederach *Building Peace: Sustainable Reconciliation in Divided Societies* (United States Institute of Peace Press Washington DC 2008) p.63.

9 *ibid* pp.63-64.

10 Pearsall *op. cit.* note 1 p.395.

11 A Curle *Making Peace* (Tavistock Publications Limited London 1971).

relationships and "... [t]his movement can be charted on a matrix that compares two key elements, namely: the level of power between the parties in conflict; and the level of awareness of conflicting interests and needs",¹² which must in the viewpoint of this study be effectively resolved at a proportionate cost and without undue delay or technicality of procedure.

The appropriateness of the conflict resolution functions and activities depend upon the situation and location of the conflict in the continuum or progression, which Curle charts into four quadrants, namely: (i) latent (or "hidden"), because people are unaware of the imbalances of power and injustices that affect their lives (and relationships); (ii) confrontation, which brings the conflict to the surface and involves a series of choices regarding how to express the conflict and how to address the concerns,¹³ such choices ranging between violent or non-violent mechanisms or a combination of both; (iii) confrontation moves toward negotiation if those involved increase the level of awareness of their interdependence through mutual recognition;¹⁴ and (iv) successful negotiation and mediation, which leads to a restructuring of the relationship that deals with the fundamental substantive and procedural concerns of those involved,¹⁵ resulting in what may be referred to as "increased justice" or "more peaceful relations".¹⁶

Lederach explains that change will require a rebalancing of power in the relationship by which all those involved recognise one another in new ways. Such recognition will increase the voice and participation of the less powerful in addressing their basic needs and will legitimate their

12 Lederach op. cit. note 8 p.64.

13 ibid p.65.

14 ibid.

15 ibid p.66.

16 ibid.

concerns. This explanation supports the suggestion in this study that fair equality of opportunity to participate in the decision-making process and the fairness of such process significantly contribute to need satisfaction (and the effectiveness of remedies), a constituent ingredient of access to civil justice. Accordingly, need satisfaction results in acceptance, and hence the effectiveness, of the remedies generated through the participatory intervention. The study also advances the argument that enhancing party autonomy in the choice of dispute resolution mechanism and the procedures to be employed improves need satisfaction and guarantees acceptance of the outcomes.

As respects the third quadrant, Lederach observes that “mutual recognition is a form of power balancing and a prerequisite of negotiation”.¹⁷ According to him, the roles of conciliation and more formal mediation are aimed principally at helping to establish and support the movement from violent confrontation (or legal battles characteristic of civil litigation) toward negotiation. With regard to the fourth quadrant, This study advances the argument that procedural concerns of those involved in the course of conflict resolution are crucial in determining the extent to which full and equal access to justice and the restoration (and maintenance) of peaceful relations between them can be guaranteed. This is not to suggest, though, that negotiations always lead to restructured relationships; nor does confrontation always end in negotiation.¹⁸ According to this study, civil justice concerns itself with, among other things, the extent of accessibility and fairness of the processes employed in the resolution of disputes. The quality of procedures is therefore as critical as the quality of outcomes in the determination of competing claims. Hence

17 ibid p.65.

18 ibid p.66.

the need for an efficient legal system in which a wide range of conflicts and disputes are resolved with fairness and impartiality.¹⁹

2.3. Natural Law Theory

The concept of justice with which this study is concerned is best understood in the framework of the natural law theory, whose historical development requires clear understanding. Stone explains that in the early history of jurisprudence, attention to the natural law theory of justice on which this study is premised gradually declined among positivist English legal philosophers, such as Jeremy Bentham (1748-1832) and John Austin (1790-1859), who according to Stone discredited the natural law thinking because of what was viewed as its intuitionism, that is, drawing its values and principles from instinct, and as an obstacle to Bentham's concept of utilitarianism and to Austin's analytical and imperative delimitation of positive law.²⁰

Finch explains that "natural law theory supposes that there is a law (or set of laws) of nature according to the tenets and principles of which all things, including man himself, ought to behave."²¹ According to him, "... the law of nature must contain guiding principles if it is to have any relevance to the laws which human beings make for the regulation of themselves and others."²² Though not expressly encoded in any form, these norms or guiding principles inform

19 M Galanter 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1994) in *Law for Life: the Foundation for Public Legal Education* p.30 available at: <http://www.lawforlife.org.uk/data/files/whythehavescomeoutahead-33.pdf> (last accessed on 7th June 2012).

20 J Stone *The Province and Function of Law* (Associated General Publications Sydney 1946)p.9.

21 J Finch *Introduction to Legal Theory* (Sweet and Maxwell London 1974) pp.21-22.

22 *ibid.*

the formulation of substantive and procedural laws that regulate binding human relations and the fair resolution of competing claims.

The history of the law of nature (*jus naturale*) began with the Greeks who sought the absolute standards of right or justice based on what Finch refers to as "... a belief in the eternal and immutable, in an absolute supernatural validity for the laws which men ought to obey."²³ Though not expressed in any particular form or content, the *jus naturale* became to the Romans a higher law against which the validity or rightness of human positive law could be measured, and as such it was absolute and unalterable in the same sense as the divine ordinance of Christian morality. According to the philosophy of Thomas Aquinas (1225-1274), all things and beings including man, strive to reach their own perfected nature which has been stipulated by divine ordinance. The law of nature thus becomes closer to the law of God, and the normative ought of the rules of right living, which have been ordained for man, derive further reinforcement from the moral ought of christian morality.²⁴

Subscribing to this school of thought, Sir William Blackstone clarified that the law of nature with which man was endowed, is immutable and was designed to regulate and restrain his free-will and to be able to discover the purport (or spirit) of the laws which were laid down for his

23 ibid p.23.

24 ibid.

governance.²⁵ Accordingly, the superior authority of the laws of nature was such that “... no human laws (laws made by man) are of any validity if they purport to contradict them.”²⁶

According to Hart, the modern theory of natural law presupposes that there are universally recognised principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims.²⁷ These principles may be considered the minimum content of natural law on which the concept of justice is deeply rooted. According to Hart, “... without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other. In the absence of this content, men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of cooperation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible”.²⁸

Blackstone stated with a measure of exactitude what the law of nature entailed when he wrote:

Man, considered as a creature, must necessarily be subject to the laws of his creator This will of his maker is called the law of nature. For as God, ... when he created man, and endued him with free will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby

25 W Blackstone ‘Commentaries of the Laws of England’ in KL Morgan “A Constitutional Presidency Part 1” (2010) available at: <<http://www.lonang.com/conlaw/3/c35a.htm>> (last accessed on 5th November 2010).

26 *ibid.*

27 *ibid.*

28 HLA Hart *The Concept of Law* (2nd edn Oxford University Press New York 1994) p.158.

that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.²⁹

Blackstone recognised that the law of nature is the will of God. According to him, “men may ascertain the law by their reason, though not as clearly as discovering it by revelation”.³⁰ He concluded that “upon these two foundations, the law of nature and the law of revelation depend on all human laws; that is to say, no human laws should be suffered to contradict these.”

It is the intuitive content and nature of these immutable laws or “guiding principles” that could not be formulated into legislation, which Bentham and Austin considered to be of little utility value to the legal jurisprudence of their day. Henceforth, the theory of justice as a concept that could not be codified and formulated into legislative instruments continued to elude the attention of succeeding scholars and legal practitioners, being generally viewed as “a body of ideas beyond the proper scrutiny of the discreet lawyer, rather than a necessary part of his equipment”³¹ worthy of comprehensive analytical inquiry. But the dynamism of increasing social change gradually exerted pressure on the modern juristic thought to accommodate the appreciable interaction between law and society, giving way to what has been viewed as varied forms of sociological jurisprudence advanced by, among others, Herbert Spencer (1820-1903); Sir Henry Maine (1822-1888); Oliver Wendell Holmes Jr. (1841- 1935) and Roscoe Pound (1870-1964).

29 Blackstone op. cit. note 25.

30 ibid p.42.

31 Stone op. cit. note 20 p.11.

Notable among those jurists is Roscoe Pound who, in his work on sociological jurisprudence, viewed legal phenomena (in relation to which justice is conceptualized) in a social context and as a phenomena deserving of observation and study for the benefit of social science in general as well as for jurisprudence. In his reasoned view, Pound validly argued that lawyers should consciously and avowedly, as befits the science of today, make a survey of their legal systems in order to ascertain "... what claims or wants or demands have pressed or are now pressing for recognition and satisfaction and how far they have been or are recognized or secured."³² His statement is perhaps in recognition of the fact that various claims that find expression in conflicting interests, wants and demands in politically organised society press for recognition and satisfaction through various regimes of public and private laws by which they are recognized, sanctioned, satisfied and secured. It is in this context that the interaction of law and men, as known to political philosophy, which pertains to the principle of justice and sociological jurisprudence in particular, is inevitable.

As a proponent of sociological jurisprudence, Pound proposed socialisation of law, recognising the increasing range of social classes and interests pressing demands on the legal system.³³ He viewed modern law as capable of functioning as a mechanism of social engineering, directed towards minimizing waste and friction and maximizing conflict resolution and the satisfaction of human claims.³⁴ Accordingly, every legal system should be suitably designed to effectively address the needs of, and competing claims in, society, a proposition that justifies this inquiry. Similarly, justice, which is inextricably bound up with the conceptions of law, can only be

32 R Pound 'A Theory of Social Interests' (1921) 15 Proceedings American Sociological Society p.1.

33 A Hoogvelt 'Jurisprudence (Sociological)' in Michael Mann (ed) *Macmillan Student Encyclopedia of Sociology* (The Macmillan Press Ltd London and Basingstoke 1983) p.180.

34 *ibid.*

attained and secured where the legal framework (as a mechanism for social engineering) provides adequate procedural safeguards for the “maximization of dispute resolution” and the “satisfaction of human claims” on an equal basis. The efficacy of such legal regime is in turn dependent on proper policy for the administration of justice. In effect, efficient policy and legislation suitably designed to maximise access to justice minimize what Pound terms as “waste” (of both time and material resources employed in dispute resolution) when conflicts escalate.

2.4. The Concept of Justice

The notion of civil justice with which this study is concerned is a derivative of the wider concept of justice. Accordingly, civil justice can only be explained within the broader sphere of justice. The concept of justice embraces a multiplicity of elements that define its phenomenal complexity. Yet there is no consensus on what the terrain of justice really represents, except that there is an uncontested rudimentary principle that justice concerns itself with what people are due,³⁵ a principle applied in this study to the essential elements of civil justice.

As a composite of essentials, justice encompasses, among other things, peace, doing no harm, equality, reward, welfare (in the sense of social justice), righteousness (in the perspective of religious-mystical justice), individual agency, and utilitarianist justice supplementary to private

35 D Schmitz *The Elements of Justice* (Cambridge University Press New York 2006) preface.

ethics.³⁶ It is the element of equality and the sense of fairness of process in accessing civil justice in the context of enabling policy and legislation in Kenya that are of particular interest to this study.

Banakas views justice as having a global appeal motivated by “global market forces” towards “global legal norms”.³⁷ Such norms are viewed in this study as necessary for the proper enjoyment of the advantages of social life and the benefits of justiciable rights that draw from an array of legal relations. These globally recognised norms include fairness of process in the apportionment of reciprocal obligations. They also include universally recognised standards of access to justice expressed in various treaty instruments discussed in chapter four. Justice is a universal concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial systems, traditional or informal dispute resolution mechanisms are equally relevant³⁸ in any plural legal order.

Legal justice is essentially “a distributive principle” prescribing a certain dispersion of liberties and benefits rather than “an aggregative principle” prescribing the maximization of such goals over a population.³⁹ It is classically defined as “giving each person his or her due” and as “treating equals equally (and unequals proportionately unequally)”.⁴⁰ However, theories differ

36 S Banakas ‘A Global Concept of Justice - Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today’s World’ in Social Science and Research Network Comparative Law eJournal (May 2009) available at: <<http://ssrn.com/abstract=1400067>> (last accessed on 8th October 2009).

37 ibid p.2.

38 Commission on Legal Empowerment of the Poor and United Nations Development Programme *Making the Law Work for Everyone* (Consolidated Graphics New York 2008) p.3.

39 H Steiner ‘Justice’ in Michael Mann (ed) *Macmillan Student Encyclopedia of Sociology* (The Macmillan Press Ltd London and Basingstoke 1983) p.181.

40 ibid.

over the appropriate criterion for this allocation-over what counts as a person's "due" or as "equals" and "unequals".⁴¹ Notwithstanding this theoretical difference, equality and fairness stand out in this study as common themes in conceptualizing civil justice in the context of universal standards set out in Conventions and Protocols discussed in chapter four.

These injunctions to fairness and impartiality are given a procedural interpretation in this study, focusing on the fairness of process in adjudicating between conflicting claims rather than on a substantive construal that focuses on the merits of determining what entitlements each person has. The study explores the ideals of justice not merely with reference to a person's just entitlements, equality or proportionality, but also with regard to the fairness of process, expedition and accessibility of the due process for the guarantee of effective civil remedies in the extant judicial system. This study argues that want of expedition and inordinate delay in the delivery of judicial services amounts to denial of justice. Similarly, inaccess to the institutional process of dispute resolution or deprivation of one's just entitlements (by either forcible expropriation or exploitation) negate equality and fairness and amount to injustice.⁴² Likewise, inaccess to fair and expedient dispute adjudication process that satisfies the competing interests amounts to deprivation by the state of one's just entitlements in breach of the social contract.⁴³

41 C Ngondi-Houghton *Access to Justice and the Rule of Law in Kenya* (paper developed for the Commission for the Empowerment of the Poor) (November 2006).

42 H Steiner 'Justice' in Michael Mann (ed) *Macmillan Student Encyclopedia of Sociology* (The Macmillan Press Ltd London and Basingstoke 1983) p.181.

43 The natural law theory of social contract is discussed in part 1.8.1 of chapter one with specific reference to the works of T Hobbes 'The Leviathan' pt 2 ch 21 in MDA Freeman *Introduction to Jurisprudence* (8th edn Sweet and Maxwell London 2008) p.106.

The concept of justice as a legal ideal does not entirely lay claims on either relativism or absolute (or fixed) criteria even though it shares both absolutist and relativist positions that are not easily demonstrable.⁴⁴ Though essentially indeterminate, the abstract principle of legal justice is nonetheless a vital “ideal” and a necessary ingredient for social control embodied *inter alia* in due process, reason, the common good and public policy in any particular case or social context. It is in this sense relative in nature as opposed to rigid criteria for judicial decision-making, which would be contrary to juristic expediency and pragmatism.

As Stone observes, “[w]hen justice is sought in some formula such as reason, or due process, or equal liberty, or natural law, or utility which shall embrace the particular applications of it and yet allow for varied social context, it becomes increasingly indeterminate, that is, increasingly inapt for directing judgment towards a single assured result in a given case.”⁴⁵ In other words, what is just in one case may not be viewed as such in another. He explains that “... when we seek justice in the particularity of decisions on the special situation in a given time and place, on the merits of the particular case... it would appear not to be capable of application to the decision of other cases.”⁴⁶ Indeed, what is just in one case may not hold for another, even though the sense of justice in any particular case is discernible from the spirit and content of the underpinning policy and legal frameworks.

44 Stone op. cit. note 20 p.374.

45 ibid.

46 ibid.

Notably, though, the intricate concept of justice, which essentially denotes legal validity, fairness and equality, is largely relative. To illustrate the intricacy of the concept of justice and the difficulty of isolating material factors in legal validity, Hart states:

A tall child may be the same height as a short man, a warm winter the same temperature as a cold summer, and a fake diamond may be a genuine antique. But justice is far more complicated than these notions because the shifting standard of relevant resemblance between different cases incorporated in it not only varies with the type of subject to which it is applied, but may often be open to challenge even in relation to a single type of subject.⁴⁷

Though generally cherished as an ideal for human behaviour, justice is not absolute or fixed in value. The apparent relativity of value-judgments attributed to the concept of justice was even more formally emphasized in the words of Hans Kelsen when he stated:

If the history of human thought proves anything, it is the futility of the attempt to establish, in the way of rational considerations, an absolutely correct version of human behaviour, and that means a standard of human behaviour as the only just one, excluding the possibility of considering the opposite standard to be just too. If we may learn anything from the intellectual experiences of the past, it is the fact that only relative values are accessible to human reason; and that means that the judgment to the effect that something is just cannot be made with the

47 Hart op. cit. note 28 p.156.

claim of excluding the possibility of a contrary judgment of value. Absolutely justice is an irrational ideal or... an illusion ...⁴⁸

According to Kelsen, the relativism of justice imposes upon every man the moral responsibility of deciding what is right and what is wrong, a responsibility that may be assumed by a higher authority or even by God.⁴⁹ Kelsen's relativism of justice and the appurtenant moral responsibility accords with the theory of natural law, which holds that "there was a kind of perfect justice given to man by nature and that man's laws should conform to this as closely as possible".⁵⁰ This suggests that there are certain normative rules of conduct which any social organisation must contain if it is to be viable.⁵¹

The spirit and value of legal justice in any organised society cannot be overemphasized. Its prominent place in the security of social order calls for the establishment of apposite policy and legal frameworks for equal and full access to justice. As argued in this study, justice (and the derivative notion of civil justice) cements the very fabric of social order as it seeks to resolve competing interests in the distribution of goods and services and in the apportionment of burdens and benefits.

In the same context, justice was conceptualized by Garland as a "motive power"⁵² that seeks "to give each his due."⁵³ In this regard, Stone observes that in modern democratic society, "the

48 H Kelsen *What is Justice? Law and Politics in the Mirror of Science* (1971) p.21.

49 *ibid.*

50 EA Martin (ed) *A Dictionary of Law* (4th edn Oxford University Press New York 1997).

51 Hart *op. cit.* note 28 p.193.

52 EN Garland *Legal Realism and Justice* (Columbia University Press New York 1941) p.127.

search for justice...represents a social-psychological phenomenon of great importance” to which all its members aspire for recognition and full satisfaction of their valid claims, wants and demands in the legitimate expectation of each according to their dues.⁵⁴

It is the social phenomenon of justice that Garland views as “motive power” that inspires the international community to set and promulgate standards of access to justice as formulated in various Conventions and Protocols containing treaty obligations binding on States Parties. These treaty obligations, some of which are discussed in chapter four, substantially influence the functional blueprint and content of municipal law designed to regulate social order and provide the means of access to justice. As proponents of monism would argue, to be enforceable, the human rights instruments ratified by Kenya need not be domesticated by legislation. This is because they form “... part of the law of Kenya” by virtue of Article 2(6) of the Constitution of Kenya, 2010, except perhaps to the extent only of requisite subsidiary legislation or administrative procedures designed to give effect to what is in that regard part of Kenya’s legal framework. On the other hand, it is arguable whether pure monism exists, or whether, in reality, there wouldn’t be need for municipal law, as dualism would require. However, the two sides of the debate are beyond the scope of this study.

Built upon “the ground of actual social relations in the time and place,” justice may therefore be viewed as “a standard (albeit relative) evaluation of law” as applied to “the relations of men *inter se* and with the environment, to the effects of law and its machinery upon those relations, and to

53 JCH Wu ‘The Juristic Philosophy of Roscoe Pound’ (1923) 18 Illinois Law Review p.285.

54 Stone op. cit. note 20 p.784.

the effect, in turn, upon the propositions and machinery of the law.”⁵⁵ Accordingly, its conceptual and functional design must withstand the metaphorical heat and stress of the actual social climate⁵⁶ and also accommodate the needs, tastes and capacities of the particular society.⁵⁷ This study appraises the extent to which the functional design of law in Kenya withstands the “heat and stress” of the dynamic “social climate” characterized by a costly, procedurally complex and slow-paced process of dispute resolution, and whether the extant policy and legal frameworks are well suited to meet the needs, tastes and capacities of the Kenyan society.

In this spirit, Roscoe Pound suggests that “... courts must... go on finding out by experience and developing by reason the modes of adjusting relations and ordering conduct which will give the most effect to the whole scheme of interests with the least friction and waste.”⁵⁸ Pound’s pragmatic description of justice is further reflected in the core of his theory, viewing it not as “an individual virtue” or “the ideal relation among men” but rather “an adjustment of conduct as will make the goods of existence...go round as far as possible with the least friction and waste.”⁵⁹ To this end, justice is often interpreted in the context of two related themes, namely: (a) the fairness of process, or the relationship between formal or procedural justice (on which this study focuses); and (b) substantive or substantial justice signified by the quality of outcomes or the effectiveness of remedies.

55 ibid.

56 ibid.

57 FS Cohen *Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism* (Falcon Press New York 1933).

58 R Pound *Social Control Through Law* (Yale University Press New Haven 1942) p.134.

59 ibid p.65.

Stone sets out the three variables of justice as a social phenomenon and goes on to demonstrate its basic procedural requirements thus:

First, the psychological facts of men's wants, demands, desires or claims, varying constantly in time and place; second, the resources of persons, commodities, environment and services available in the time and place for their satisfaction; and third, the outlets for tensions between these wants, demands, desires or claims and these available resources, outlets ranging to the primitive "running amok" on the one hand, and, on the other, to the refinements of our modern legal systems and the cataclysms of modern mass revolution.⁶⁰

In Stone's view, "society should be so organized that men's felt wants can be freely expressed; and that the law shall protect that expression, and provide it with the channel through which it can completely compete effectively (though not necessarily attain) for the support of politically organized society."⁶¹ The satisfaction of competing interests presupposes the existence of fair dispute resolution mechanisms founded on sound policy and legislation responsive to external factors and the unremitting social transformation. Their response to the incessant demand for effective remedies must of necessity be expeditious to guarantee equal access to civil justice.

Stone further observes that the relation between men's wants, resources and outlets for tension is dynamic while their external environment is in constant transformation by industrial, technological and cultural activity.⁶² Similarly, their experiences are conditioned by the whole

60 Stone op. cit. note 20 p.785.

61 *ibid.*

62 *ibid.*

social order, which in turn can be affected or molded by the law itself. Law in this sense refers to:

... the specific content of an actual body of legal provisions which have been, and are being, produced largely as a result of the activities of a legislature and a body of law courts ...⁶³

It may also be described in terms of its prescriptive nature as:

...some element of regulation which governs our actions and affairs, and which involves something more than mere reprobation or social censure if we step outside the permitted limits, however liberally these limits may be interpreted.⁶⁴

According to Stone, "... the resources available for the satisfaction of human wants are being continually modified by man's own creative activity; and the outlets for tension between wants and their satisfaction are affected not only by the legal and political order, but by men's activity in the non-legal and non-political spheres."⁶⁵ However, the legal and moral content of these regulatory provisions are not merely coincidental. In other words, social values or ideals that belong to the province of morality often find their way into legislation by conscious design to attain what is perceived as legal justice.⁶⁶

The extent to which positive law responds to value judgments and morality as perceived in any particular democratic society varies with its needs and resources available for the satisfaction of

63 ibid.

64 Finch op. cit. note 21 pp.16-17.

65 Stone op. cit. note 20 p.785.

66 ibid.

its wants. There is, according to Fuller, an “inner morality” of law, which takes the form of certain principles of the making and promulgation of laws, and without which undesirable and even iniquitous results may be produced.⁶⁷ According to him, the concept of legality implies a value judgment with regard to the “goodness” or “worthwhileness” of the legal system which is under scrutiny. To be good and worthwhile to any social arrangement, the law must be “clothed” in good sense, responsive and relevant to the individual and collective claims, wants and needs of society. That inner morality by which certain norms and standards are prescribed draws from natural law doctrine, which lends a measure of validity to, or justification for, the convention of human laws and provides the necessary motivation, or vehicle for reform, and “... the desire to discover, or at least the readiness to search for, the answer to problems of human law and to questions of its validity ...”⁶⁸ What this means is that positive law (or other notions of governing influence to human behaviour) is necessarily subject to the test of validity weighed upon the scales of not only the internal standard of the particular legal system of which it claims to be a part but also of those perceived norms and external standards of a higher order attributed to natural law.

Though undefined in form and content in absolute terms, justice is one such external standard or attribute of natural law upon which the “goodness” or “worthwhileness” of any legal system and the validity of human laws is dependent. As this study contends, the prescriptive legal rules by which man’s behaviour is regulated are adaptable and flexible, and should be consciously flexed and adapted to demonstrate good sense and meet contemporary challenges, wants and demands

67 L Fuller *The Morality of Law* (New Haven and London Yale University Press 1969) ch 2.

68 *ibid* p.33.

of organised society. Indeed, this is the underpinning spirit of sociological jurisprudence on which this study is grounded.

Hartzler's conception of justice as a goal calls attention to the vital role of policy and legislation in pursuit of justice and effective remedies. He does not view justice as an invention of law or necessarily even descriptive of law, legal processes or outcomes, but as "an important human goal, which means different things to different people".⁶⁹ He observes that "rarely, as with most goals, is it achieved. Rarely, also, is there complete failure to achieve any part of the goal."⁷⁰

According to Hartzler, "some sense justice when others sense injustice". The desire to sense justice in events may cause people to look to law as an instrument to control those events. In this sense, justice precedes law and in effect "law is made part of events and is itself then viewed as promoting or blocking justice, depending on the role it plays and also depending on the perceived self-interests of the participants in, or viewers of, the events."⁷¹ The appraisal in this inquiry seeks to establish the extent to which the means of law and procedure in the adjudication of civil disputes and the underpinning policy promote or impede access to justice.

On the other hand, it has also been assumed that law produces justice in the perception of those advantaged by the roles of a legal system and that the existence of justice is dependent on the existence of law. But those who perceive themselves as disadvantaged by a legal system may not, to the contrary, assume that law produces injustice. As earlier observed in part 1.7.1 of

69 HR Hartzler *Justice, Legal Systems and Social Structure* (Dunellen Publishing Company New York 1976) pp.3-4.

70 *ibid.*

71 *ibid.*

chapter 1, the derivative words “just” and “unjust” are terms most frequently used in the praise or condemnation of law or the manner of its administration.⁷² Their use appears to suggest that justice and morality are coextensive, a proposition that accords with the natural law theory of justice. Indeed, justice has been correctly viewed as “a virtue of institutions”.⁷³ It has a prominent place in the criticism of legal arrangements, and is a distinct segment of morality with reference to which the laws and the administration of laws may have or lack excellencies of different kinds.⁷⁴

Drawing conclusions from the preceding discussion, justice may be broadly viewed as a continuum of principles and values rather than an absolute goal or as an end in itself.⁷⁵ Recognising the complexity of this concept, Connie Ngondi-Houghton perceives justice as engendered and compounded in a range of widely acknowledged principles, verifiable values and factual situations to which this study focuses, and a few of which may be briefly outlined as-

- (a) the endowment and recognition of an individual’s rights at law, and the determination of a proper balance between competing claims;
- (b) the right to seek protection and vindication of those rights by full and equal access to law;
- (c) the provision of equal protection by law of the rights of all without making any arbitrary distinctions between persons in the assigning of basic rights and duties; and

72 Hart op. cit. note 28 p.157.

73 JO Tomasi ‘Justice - Modern Theories of Distributive Justice., The Subjects of Justice., whom’ available at: <<http://law.jrank.org/pages/18715/Justice.html>> (last accessed on 22nd September 2010).

74 AP D’Entreves ‘Essay C, A Call of Good Sense: Reflections of Hart’s Theory of Natural Law’ (1970) in A Barron and others *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (Oxford University Press New York 2005) p. 89.

75 Ngondi-Houghton op. cit. note 41 p.4.

(d) the full and equal access to all judicial mechanisms for the protection of such rights, and the respectful, fair, impartial and expeditious adjudication of claims by national tribunals (in pursuit of effective remedies).⁷⁶

2.5. The Notion of Civil Justice

The sociological jurisprudence of civil justice is closely linked to legal justice whose spirit is manifested in the general body of accepted norms and standards of law. These norms or standards are expressed in varying form and content usually dictated by the need to ensure their relevance to the particular social context in which individuals advance their competing claims, demands and interests. Antony Kennedy describes justice in this context as “an ideal of accountability and fairness in the protection and vindication of rights ...”.⁷⁷ His conception of justice fits into the theory of distributive justice on which this inquiry is founded.

The term “civil justice” is a derivative of the wider notion of justice. It refers to both “fairness of process” in the adjudication of civil claims and “fairness of outcomes” (which denote the effectiveness of remedies) in addressing justiciable issues.⁷⁸ Justiciable issues may be described as those problems for which there is a potential legal remedy within a civil (or criminal) justice

76 ibid.

77 Commission on Legal Empowerment of the Poor and United Nations Development Programme op. cit note 38 p.3.

78 P Mason and others *Access to Justice: A Review of Existing Evidence of the Experiences of Minority Groups based on Ethnicity, Identity and Sexuality* (Report) (Department for Constitutional Affairs (now Ministry of Justice) May 2009) p.14 available at: <http://www.justice.gov.uk/publications/research.htm>> (last accessed on 4th November 2009).

framework⁷⁹ and in relation to which effective remedies are only attainable where the parties have full and equal access to that system of justice.

The study is premised on the principle that full and equal access to civil justice and the effectiveness of civil remedies are closely bound up with the three facets of the concept of justice. These are summed up by Cooray as: (a) interpersonal adjudication; (b) law based on fault (essentially in the realm of criminal justice system and corrective justice founded on the law of torts); and (c) emphasis on procedures.⁸⁰

This study agrees with Cooray's third aspect of justice by recognizing the importance of procedural justice in the delivery of quality outcomes in competing claims. The emphasis on procedures is demonstrated by the conceptual imperatives discussed in part 2.7 of this chapter and advanced as critical components of civil justice. These include expedition, equality, party autonomy and proportionality, all of which contribute to the fairness of process in the delivery of quality outcomes. The term "proportionality" is used in modern civil procedure both as a general overriding principle and as the basis of "multi-tracking" the process of claim adjudication in civil proceedings. Multi-tracking involves diverse mechanisms of "differential case management" by "fast-tracking" or "expedited proceedings" and "simplified procedures".⁸¹

79 ibid.

80 Dr M Cooray 'The Concept of Justice' in the Rule of Law (1995) available at: <http://www.ourcivilisation.com/cooray/btof/chap182.htm> (last accessed on 22nd September 2010).

81 R Goldschmid 'The Civil Justice Reform Context Behind British Columbia's Expedited Litigation Rule and the Small Claims Court Jurisdictional Limit Increase' (paper developed for the joint Continuing Legal Education/Ministry of Attorney General conference, Restructuring Justice Vancouver June 2005) available at: <http://www.ag.gov.bc.ca/justice-reform-initiatives/publications/pdf/Goldschmid.pdf> (last accessed on 11th July 2011).

As explained by Hon. G. L. Davies, the principle of proportionality underscores the need to “match the extensiveness of the procedure with the magnitude of the dispute”.⁸² By doing so, we balance the interest of justice with cost-effectiveness in order to increase access to justice.⁸³ This is because the primary goal of a civil justice system is the just resolution of disputes through a fair but swift process at a reasonable expense. Conversely, delay and excessive expense negate the value of an otherwise just resolution and erodes the effectiveness of remedies. Moreover, quality outcomes and effective remedies are an integral part of full and equal access to civil justice and that delay in determination of civil claims impede access to civil justice where the remedies come too late in the day.

Goldschmid explains what “just resolution” means in reality. According to him, “[t]he process used to achieve a resolution must not only be fair (a level playing field), it must be designed to produce a just result”. What, then, is a just result? He states in answer that “[j]ust results come in two forms—rights based and interest based. In either case, a just result does not mean perfect justice”. In every case, expedition and cost-effectiveness are critical in accessing justice. As argued in this study, systemic delay and expense (as is characteristic of the Kenyan civil justice system) would render the system inaccessible. While there is no objective or unqualified measure of a reasonable expense, Goldschmid observes that “most jurisdictions around the world have come to realize that the cost of resolving a dispute should be proportional to its magnitude, value, importance and complexity”⁸⁴ so as to deliver quality outcomes.

82 Victorian Law Reform Commission *Civil Justice Review* (Report) (2008) p.14 para 4.1.4. available at: <<http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/resources/8/1/8137a400404a0bed9549fff5f2791d4a/VLRC+Civil+Justice+Review++Report.pdf>> (last accessed on 1st August 2011).

83 Goldschmid op. cit note 105.

84 *ibid.*

An example of the broad application of proportionality as a general principle is the new code of civil procedure in the United Kingdom. The code is guided by an “overriding objective” of enabling the court to deal with cases justly.⁸⁵ Dealing with cases justly includes dealing with the case in ways which are proportionate to (a) the amount of money involved; (b) the importance of the case; (c) the complexity of the issues; and (d) the financial position of each party.⁸⁶ Accordingly, the principle of proportionality obligates the court only to allot a case a share of the court’s resources proportionate to the magnitude of that case while taking into account the need to allot proportional resources to other cases.⁸⁷ The court is bound to give effect to the overriding objective when exercising its powers under the rules or when interpreting any rule.⁸⁸ In every case, the parties are required to assist the court in furtherance of the overriding objective.⁸⁹

The appraisal of the policy and legal frameworks in Kenya is intended to determine the extent to which they facilitate expeditious dispute resolution towards full and equal access to civil justice, paying particular attention to Cooray’s conception of the first and third facets of justice, namely, personal adjudication and emphasis on (quality) procedures. The twin principle of equality and need satisfaction (that is, the notion that no person should be disadvantaged in the pursuit of

85 Civil Procedure Rules 1998 (UK) r 1.1.

86 The Hong Kong Civil Justice Reform, Final Report, (2003) p. 54 suggests that the elements of proportionality should not be specifically set out but should only be guided by “commonsense notions of reasonableness and a sense of proportion to inform the exercise of procedural discretion.”

87 *ibid.*

88 Civil Procedure Rules 1998 (UK), Rule 1.2.

89 Civil Procedure Rules (Quebec), Rule 1.3. In Quebec, the burden of ensuring proportionality is placed on the parties: “Parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute.” Quebec, Code of Civil Procedure, Rule 4.2.

justice and effective remedies) constitute the golden thread that runs through the fabric of this appraisal.

Drawing on the conceptual imperatives discussed in this chapter, this study demonstrates that the concept of justice is not a novel innovation. For centuries, legal justice (and the derivative notions of civil and procedural justice with which the study is concerned) has been of profound concern to the international community. This concern has prompted the setting of guiding principles and minimum standards of access to civil justice and the rule of law, which is the subject of discussion in chapter four. In order to effectively realise fairness of process and equal access to civil justice, the study argues that defined judicial and quasi-judicial institutions should be appropriately designed to support the civil justice system as exemplified in developed common law jurisdictions, such as the United Kingdom and Canada. However, the framework of those judicial institutions and the content of both substantive and procedural rules of law differ from system to system as they adapt to changing needs and circumstances of each State. The study focuses on three critical tenets that it considers to be the pillars of civil justice, that is: (i) procedural justice (which denotes fairness of process); (ii) proportionality; and (iii) participatory justice, against which full and equal access to civil justice may be gauged.

Using the four main non-probability strategies discussed in part 1.10 of chapter one, the study seeks to collect and interpret data to support the recommendations in chapter seven for the augmentation of the quality of procedures and outcomes in the administration of civil justice. The study lays emphasis on the participatory, expeditious, practical and realistic nature of inter-

personal adjudication in dealing with the real problems (and justiciable issues) which arise between individuals, and to do so at a proportionate cost.⁹⁰

2.6. Distributive Justice in Sociological Jurisprudence

The global considerations of distributive justice in the context of human entitlements were influenced by Aristotle, who was of the view that “goods should be distributed to individuals on the basis of their relative claims”.⁹¹ This conception of distributive justice as more ornately formulated by John Rawls denotes-

- (a) the maximization of liberty, subject only to such constraints as are essential for the protection of liberty itself;
- (b) equality for all, both in the basic liberties of social life and also in distribution of all other forms of social goods, subject only to the exception that inequalities may be permitted if they produce the greatest possible benefits for those least well off in a given scheme of inequality; and
- (c) “fair equality of opportunity” and the elimination of all inequalities of opportunity based on birth or wealth.⁹²

This study argues that the tenets of distributive justice, namely: (a) the notions of rights and liberties; (b) equality; and (c) equality of opportunity to enforce one’s rights and claims, are

90 ibid p.103.

91 Freeman op. cit. note 43 p.583.

92 ibid p.584.

foundational to suitable policy and legislation designed to facilitate effective resolution of competing claims.

The historical origins of Rawls' theory of distributive justice may be viewed as an extension of the natural law theory of social contract commonly associated with Thomas Hobbes, John Locke and Jean-Jacques Rousseau. As Solum explains, the traditional “social contract” theory posits a “state of nature” in which there is no government and then asks what would be the content of a social contract, that is, an agreement to enter civil society. If we assume that the state of nature and the social contract are hypothetical, we can then ask the question: is an agreement reached in the state of nature fair? The answer to this question might be in the negative. In reality, a social contract reached in the state of nature would not be fair, because it would favour those who are advantaged by the conditions of the state of nature, such as the “strong”, the “smart”, and the “powerful”.⁹³

Rawls attempted to correct that problem with his classical social contract theory by positing what he called the “original position”. In the original position, the parties are to agree on principles of justice to govern the basic structure of society.⁹⁴ Unlike the state of nature, the original position includes a “veil of ignorance,” which prevents the parties from knowing the specific characteristics of those whom they represent. He argues that the parties to the original position

93 LB Solum ‘Distributive Justice’ in Legal Theory Lexicon available at: <http://www.typepad.com/services/trackback/6a00d8341bf68d53ef00e39826dbfd8833> (last accessed on 22nd September 2010).

94 *ibid.*

would choose the principles of maximisation of liberty and fair equality of opportunity, which constitute the mainstay of distributive justice⁹⁵ as conceptualised in this study.

The general principle in the diverse application of the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality.⁹⁶ The distributive notion of justice is also demonstrated by Hart's suggestion that justice is "... to be respected in the vicissitudes of social life when the burdens or benefits fall to be distributed; it is also something to be restored when it is disturbed",⁹⁷ reinforcing the traditional thought that justice is essential in maintaining or restoring a balance or proportion.⁹⁸

Drawing from Nozick's book titled *Anarchy, State and Utopia*,⁹⁹ Barron and others sum up the theory of distributive justice by arguing that "the complete principle of distributive justice... [is] that a distribution is just if everyone is entitled to the holdings they possess under the distribution". They discuss distributive justice in the wider sense of entitlements and further state that "distribution is just if it arises from another just distribution by legitimate means".¹⁰⁰ Accordingly, the distributive theory of justice is essentially composite in that it merges two fundamental notions of substantive justice (or merits of entitlement) and procedural justice (the means of access or acquisition). They recapitulate this entitlement theory by noting that "the general outlines of the theory of (distributive) justice are that the holdings of a person are just if

95 Freeman op. cit. note 43 pp.583-584.

96 Hart op. cit. note 28 p.159.

97 ibid p.157.

98 ibid.

99 R Nozick *Anarchy, State and Utopia* (Blackwell Oxford 1974) pp.149-264; 167-173; and 228-231.

100 R Reiner 'Justice' in Barron and others op.cit. note 74 p.753.

he is entitled to them by the principles of justice in acquisition and transfer, or by the principle of rectification of injustice If each person's holdings are just, then the total set (distribution) of holdings is just".¹⁰¹

The broad and foundational theory of distributive justice may be even more clearly explained with reference to the allocation of "social goods" that are due to a person. In the modern conception, though, these social goods include "the rights and liberties that people are recognised as holding as citizens, and not just material benefits they may be owed by others".¹⁰² According to Tomasi, theories of distributive justice address themselves to the ordering of a society's basic institutions. Such theories offer themselves as criteria for evaluating not just judicial decisions, or particular laws or policies, but the constitutional essentials of society itself.¹⁰³

In Freeman's view, "distributive justice (primarily) poses the general problem of fairly designing the system of basic legal institutions and social norms that make production, exchange, distribution, and consumption possible, among free and equal persons." Accordingly, "the focus on basic institutions is needed to make distribution a matter of pure procedural justice."¹⁰⁴ Freeman reasonably concludes that distributive justice is, in the first instance, a feature of basic social institutions, including the legal system of property, contract, and other legal conditions for

101 ibid.

102 Tomasi op. cit. note 73.

103 ibid.

104 S Freeman 'Distributive Justice and the Law of Peoples' available at: http://74.220.219.58/~drafting/sites/default/files/paper_article/Freeman%20article_0.pdf (last accessed on 22nd September 2010).

economic production, exchange, and consumption,¹⁰⁵ which provide the font for competing claims, and which require efficient social and legal institutions to address and resolve the appurtenant conflicting interests. Indeed, these institutions should be so suitably designed as to give life to the principles of justice, which should in turn be responsive to human nature and other facts about human society.¹⁰⁶

The conception of distributive justice shared by Barron and others concurs with Rawls' substantive and procedural elements of distributive justice on which this study focuses with specific reference to the constitutional entitlement of all individuals in Kenya to enjoy full access to civil justice on an equal basis. But this study goes further to refine the notion of distributive justice by arguing that the constituent variables of expedition, equality, equity and fairness of process in pursuit of effective remedies can be congealed in the notion of "need satisfaction". In other words, the policy and legal frameworks for access to civil justice can only guarantee effective remedies if they are well suited to transform or resolve conflicting interests to the full satisfaction of the needs and wants of those advancing competing claims, a proposition with which adversarial systems of civil justice do not identify.

105 *ibid.*

106 Freeman *op. cit.* note 104 p.234.

The foregoing remarks are by no means made in disregard of the crucial role of national tribunals and the underpinning policy and legal frameworks in the delivery of judicial services. This study appreciates the core goals of the judicial system, which Tyler¹⁰⁷ defines as:

- (a) to provide people with a forum in which they can obtain justice as defined under the particular legal framework;
- (b) to handle people's problems in ways that lead them to accept and be willing to abide by the decisions made by the courts; and
- (c) finally, the courts want to retain and even enhance public trust and confidence in the judicial tribunals, judges, and the law, which is the key to maintaining the legitimacy of the legal system.

As Tyler correctly observes, people from diverse social and economic backgrounds come to court with a broad spectrum of problems and disputes. Accordingly, the court system has become the branch of government in which people deal with an ever broader variety of issues and concerns. Most of them are unrepresented, which compounds the challenges in an environment in which they have generally lower levels of trust and confidence in all forms of governmental authority.¹⁰⁸ All of these trends pose a challenge for the courts in the attempt to deliver justice.

107 TR Tyler 'Procedural Justice and the Courts' (2007) 44 (1/2) Court Review: The Journal of the American Judges Association pp.26-31 available at: <<http://digitalcommons.unl.edu/ajacourtreview/217>> (last accessed on 22nd September 2010).

108 *ibid.*

2.7. The Notions of Substantive and Procedural Justice

The broad concept of distributive justice manifests itself in two main facets of procedural and substantive justice. Substantive justice generally refers to merits of entitlements¹⁰⁹ while procedural justice denotes fairness (in the sense of fair equality of opportunity) in the processes of dispute resolution, allocation of resources, distribution of rights and benefits and advantages of social life, and in the apportionment of burdens. Procedural justice “or procedural fairness) is closely connected to what is commonly referred to as “due process” or “rule of law”.¹¹⁰ According to Nobles, this means that the promulgation, enforcement and administration of laws and other rules is just only if standards, such as equal treatment of all citizens, are satisfied, demanding nothing of them that did not lie easily beyond their powers.¹¹¹ In effect, a set of rules that require conduct beyond the powers of the affected party results in miscarriage of justice.¹¹² Nobles’ postulation draws from his analysis of Fuller’s *Morality of Law*¹¹³ with reference to which this study concludes that full and equal access to civil justice demands the prospect of every party to enjoy the cost-effectiveness, fairness of process, expedition and need satisfaction of the dispute resolution mechanism in question.

The discussion in this study demonstrates that fairness of process plays a critical role in the legitimacy, acceptance of, and adherence to, the outcomes of dispute resolution. Tyler was of the

109 R Reiner ‘Justice’ in Barron and others op.cit. note 74 p.754.

110 ibid p.719.

111 R Nobles and D Schiff ‘The Evolution of Natural Law’ in Barron and Others op.cit. note 74 pp.74-76.

112 ibid p.77.

113 L Fuller *The Morality of Law* (New Haven and London Yale University Press 1969) p.68.

view that the manner in which disputes are handled by the courts invariably influences people's evaluation of their experience in the conventional judicial system.¹¹⁴ In other words, the way people and their problems are managed by judicial institutions affects the rating of the degree of access to procedural justice. It greatly influences their evaluation of the system of adjudication than the favourability of the outcome (i.e., the substantive justice) of their case.

Tyler concludes that procedural justice has an impact on whether people accept and abide by the decisions made by the courts (both immediately and over time) and that procedural justice influences how people evaluate the law, the judges and other court personnel they deal with, as well as the court system itself.¹¹⁵ As suggested in this study, any impediments to, or diminution of, procedural justice is the main motivation for the alternative dispute resolution movement, which seeks alternative fora to conventional courtrooms in the effort to find a way to increase the willingness to accept the decisions made by third-party authorities. This is because procedural justice approaches provide a mechanism for resolving disputes that produces authoritative decisions while sustaining, and even building, trust and confidence in the courts and the law in what Tyler views as an era of scarce resources and high levels of mistrust.¹¹⁶

Drawing valuable conclusions from reliable findings in numerous studies conducted on family disputes, Tyler observes that "... judges have struggled to find ways to make decisions about child custody and child support that would be willingly followed by both fathers and mothers and that would, to the degree possible, create positive post-separation dynamics in which both

114 TR Tyler 'Social Justice: Outcome and Procedure' (2000) 35 *International Journal of Psychology* p.117; EA Lind and TR Tyler *The Social Psychology of Procedural Justice* (Plenum Press New York 1988).

115 *ibid.*

116 *ibid.*

parents took responsibility for supporting their children financially and emotionally. And, procedural justice is found to be effective in both creating positive dynamics within families and in facilitating long-term adherence to agreements.”¹¹⁷

This study contends that fair and expeditious procedures characterised by party autonomy and equality of opportunity to influence the outcome create a favourable environment for need satisfaction in the course of dispute resolution. As Tyler observes, the parties’ creative collaboration ensures the likelihood of promoting long-term relationships and adherence to the terms of agreements on the resolution of the issues in difference.¹¹⁸ Premised on the aforementioned research findings, this study argues that procedural justice is key to the development of stable and lasting solutions to conflicts in view of the fact that it provides all parties with desirable experiences with the judicial authorities.

Notably, though, the notion of procedural justice is not confined to judicial processes. It may also be applied to non-legal contexts (such as ADR and traditional dispute resolution mechanisms recognised in Article 159(2) of the Constitution of Kenya, 2010) in which certain other processes are employed to resolve disputes, to distribute benefits or to apportion burdens.¹¹⁹ In the context of this study, procedural justice essentially refers to the means of acquisition (in the sense of accessibility), fairness and transparency of the processes by which decisions are made, including judicial decisions.

117 PE Bryan ‘Constructive Divorce: Procedural Justice and Sociolegal Reform’ in TR Tyler op. cit. note 107 p.26.

118 Tyler op. cit. note 107 p.114.

119 R Reiner ‘Justice’ in Barron and others op.cit. note 74 p.754.

Reinforcing Tyler's conception of procedural justice, Spagnoli concludes that procedural justice is not about certain just or fair outcomes that demonstrate just distributions, contributions or punishments, but about fair procedures.¹²⁰ Accordingly, the focus is on the processes of arriving at a certain decision, whether judicial or quasi-judicial, administrative or political. The rules governing the fairness of trials are an example of procedural justice, as are the rules governing legislation in a democracy. Indeed, people may be in agreement on (and be satisfied by) the fairness of process even where they differ over the fairness or merits of the outcomes,¹²¹ provided they had equal access to, and participated in, the dispute resolution process on an equal basis. Some theories of procedural justice hold that fair procedure leads to equitable outcomes, even if the other requirements of distributive or corrective justice are not met.¹²²

Procedural justice may be contrasted with substantive justice (or merits of entitlement) in the sense of fairness in the distribution of rights or resources, to which this inquiry is not devoted. As postulated by Rawls, substantive justice refers to fair equality of opportunity and the merits of entitlement in the distribution of goods and services while procedural justice refers to fair means of acquisition. According to Rawls, perfect procedural justice has two characteristics by which this study is informed, namely: (a) an independent criterion for what constitutes a fair or just outcome of the procedure; and (b) procedure that guarantees achievement of fair outcomes,¹²³ which in turn dictates the satisfaction levels with reference to the resolution of competing claims.

120 F Spagnoli 'Different Types of Justice and the Link to Equality' in Politics Art Philosophy (P.a.p)- Blog, Human Rights Etc (June 2010) available at: <<http://filipspagnoli.wordpress.com/2010/06/28/different-types-of-justice-and-the-link-to-equality/>> (last accessed on 22nd September 2010).

121 *ibid.*

122 M Maiese 'Procedural Justice' in G Burgess and H Burgess *Beyond Intractability* (Conflict Research Consortium, University of Colorado Boulder January 2004) available at: <http://www.beyondintractability.org/essay/procedural_justice> (last accessed on 12 March 2010).

123 JA Rawls *A Theory of Justice* (Oxford University Press Oxford 1999) ch II (at s 14).

Pure procedural justice describes situations in which there is no criterion for what constitutes a just outcome other than the procedure itself. On the other hand, imperfect procedural justice shares the first characteristic of perfect procedural justice (in that there is an independent criterion for a fair outcome), but with no method that guarantees that the fair outcome will be achieved.¹²⁴ The concept of procedural justice is contentious with a variety of views about what makes a procedure fair. As explained by Maiese, these views fall into three main categories, which she refers to as the outcomes model, the balancing model, and the participation model.¹²⁵

According to Maiese, the idea of the outcomes model of procedural justice is that the fairness of process depends on the procedure producing correct outcomes. For example, if the procedure were a legislative process, then such procedure would be fair to the extent that it produced good legislation and unfair to the extent that it produced bad legislation. But this view has many limitations. Principally, if two procedures produced equivalent outcomes, then they are equally just according to this model.¹²⁶ However, there are other features about a procedure that make it just or unjust. For example, many would argue that a benevolent dictatorship is not (as) just as a democratic state (even if they have similar outcomes).

The idea of the balancing model is that a fair procedure is one which reflects a fair balance between the costs of the procedure and the benefits that it produces.¹²⁷ Thus, the balancing approach to procedural fairness might in some circumstances be prepared to tolerate or accept

124 ibid.

125 ibid.

126 ibid.

127 ibid.

erroneous verdicts in order to avoid unwanted costs associated with the administration of the judicial process. The conceptual imperatives for needs satisfaction advanced in this study presuppose that competing claims are more effectively satisfied, and the underlying conflict resolved or effectively managed, where parties to a dispute are prepared to adopt procedures of adjudication that generate outcomes acceptable as beneficial to all. According to the study, the degree of satisfaction is directly proportional to fairness of process, party autonomy and the level of participation in the process of dispute resolution.

The idea of the participation model on which this study is premised is that a fair procedure is one that affords those who are affected an opportunity to participate in the making of the decision. In the context of a trial, for example, the participation model would require that the defendant be afforded an opportunity to be present at the trial, to put on evidence and cross-examine witnesses. This is the principle of fair hearing guaranteed in Article 50 of the Constitution of Kenya, 2010. All in all, due process (as procedural justice is often referred to)¹²⁸ becomes an imperative constituent of the means of access to civil justice. According to Bone, procedural justice refers to the idea of fairness in the processes that resolve disputes and allocate resources. One aspect of procedural justice is related to discussions of the administration of justice and legal proceedings. This sense of procedural justice is connected to due process (US), fundamental justice (Canada), procedural fairness (Australia) and natural justice (other common law jurisdictions), but the idea of procedural justice may also be applied to non-legal context in which some process is employed to resolve disputes or divide benefits or burdens.¹²⁹ Whatever

128 R Bone 'Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness' (2003) 83 Boston University Law Review p.485.

129 *ibid.*

the case, fair procedure leads to equitable outcomes even if the requirements of distributive or corrective justice are not met.¹³⁰

Procedural justice requires that rules or procedures be consistently followed and impartially applied. Fair treatment is often identified with those procedures that generate relevant, unbiased, accurate, consistent, reliable, and valid information. Procedural justice engenders the notion that fair and accessible procedures are the best guarantee for fair outcomes. It is concerned with making and implementing decisions according to fair processes. People feel affirmed if the procedures that are adopted treat them with respect and dignity, making it easier to accept even outcomes they do not like.¹³¹

It may be argued therefore that full and equal access to procedural justice and maximisation of party autonomy and participation in the decision-making process increases the likelihood of need satisfaction and acceptance of the outcomes. In effect, the favourability or merits of the decision becomes secondary to the fairness of process, even though delivery of both components of justice is the ultimate goal of every judicial authority. This conclusion is premised on the reality of the fact that no one likes to lose, however fairly. In Tyler's viewpoint, "people recognize that they cannot always win when they have conflicts with others. They accept 'losing' more willingly if the court procedures used to handle their case are fair."¹³² According to him, this is true for both formal procedures in national tribunals and for the more flexible, informal and

130 M Deutsch 'Justice and Conflict' in M Deutsch and PT Coleman *The Handbook of Conflict Resolution: Theory and Practice* (Jossey-Bass Inc. Publishers San Francisco 2000) p.45.

131 *ibid.*

132 A Marriot 'Mandatory ADR and Access to Justice' (November 2005) 71(4) *The Journal of the Chartered Institute of Arbitrators* p.308.

party-driven alternative dispute resolution strategies, (such as settlement conferences, mediation and arbitral proceedings).¹³³

But what makes procedures fair? First, there is an emphasis on consistency. Fair procedures should guarantee that like cases are treated alike. Any distinctions “should reflect genuine aspects of personal identity rather than extraneous features of the differentiating mechanism itself”.¹³⁴ Secondly, those carrying out the procedures must be impartial and neutral. Unbiased decision-makers must carry out fair procedures to reach a fair and accurate conclusion. Those involved should believe that the intentions of third-party authorities are benevolent in the sense that they want to treat people fairly and take into account the viewpoint and needs of the interested parties.¹³⁵ If people trust the third party, they are more likely to view the decision-making process as fair. Thirdly, those directly affected by the decisions should have a voice and representation in the process. Having fair equality of opportunity to competent representation affirms the status of group members and inspires trust in the decision-making system. This is especially important for weaker parties whose voices often go unheard or otherwise muffled by undue technicalities of procedure. Finally, the processes that are implemented should be transparent and decisions should be reached expeditiously through open procedures without secrecy or deception.¹³⁶ The decision-making process should also be fully accessible on an equal basis by those least well-off in the society.

133 ibid.

134 RT Buttram and others ‘Equity, Equality and Need: Three Faces of Social Justice’ in BB Bunker and M Deutsch *Conflict, Cooperation, and Justice: Essays Inspired by the Work of Morton Deutsch* (Jossey-Bass Inc Publishers San Francisco 1995) p.272.

135 ibid p.273.

136 ibid.

With good reason, Tyler advances the argument that procedural justice results in litigants accepting the reality of “losing” their claims where they are satisfied that quality procedures have been applied in the process of adjudication. In effect, procedural justice “... minimizes the degree to which problems are framed in terms of winning and losing, as well as generally shifting the focus of attention away from outcomes... toward the procedures through which the dispute is... resolved”.¹³⁷ Consequently, fair procedures are primarily concerned with delivering gains to all parties rather than winning over others¹³⁸ and are in effect elevated above the bare outcomes. It is for this reason that fair procedures and equality in accessing the dispute resolution mechanisms determine the extent to which civil justice is considered as being accessible by all.

For procedures to be fair they must be participatory whereby all parties have the opportunity to present their case and to have their needs and interests considered by the judicial or other adjudicating authority.¹³⁹ Their choice of the quality of procedure and of the tribunal, and the extended space for their participation, ensures acceptance of, and adherence to, the outcomes, in an atmosphere of restored or strengthened relations. While so contending, this study underscores the value of recognition and respect for the parties as the prime movers of the process in which legal counsel and the adjudicating tribunal only play a supportive technical role to give legal effect to the process of adjudication.

In every case, the parties’ right to seek justice from the courts should not be burdensome or compromised by costs and technicalities of procedure that place impediments to their full

137 Tyler op. cit. note 107.

138 R Hollander-Blumoff and TR Tyler ‘Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential’ (May 2008) 33 (2) Law and Social Inquiry p.473.

139 *ibid.*

participation in the process. Participatory procedures guarantee recognition and acknowledgement by the courts of the litigants' corresponding needs and interests. Granted, the need for rules to govern procedure cannot be ignored altogether. However, the emphasis in this study is that such rules should be effective and expeditious vehicles for just outcomes but should by no means impede access to civil justice.

In any event, the rules of civil procedure cannot be overemphasised. The inevitability of a code of procedure in the determination of civil disputes was underscored in the words of Lord Collins MR in *Re Coles and Ravenshear* where the learned judge observed that although a court cannot conduct its business without a code of procedure, "the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."¹⁴⁰

The principle of quality of procedures as a measure of access to justice has for many years been a matter of serious concern for the courts, which justifies the objectives of this study in relation to the administration of civil justice in Kenya. In an earlier decision, Lord Penzance had this to say of the need to weed out undue technicalities in the administration of justice:

The spirit of justice does not reside in formalities, or words, nor is the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. After all law is, or ought to be, but the

140 *Re Coles and Ravenshear* [1907] 1 KB pp.1-4.

handmaid of justice, and inflexibility, which is the most becoming robe of the latter, often serves to render the former grotesque.¹⁴¹

It may therefore be concluded that the participatory model of procedural justice, which underpins this study, provides parties with desirable experiences with judicial tribunals. For this reason, procedural justice becomes key to the development of stable and lasting solutions to conflicts.¹⁴²

As Hollander-Blumoff and Tyler observe-

... [t]he beginning point of such solutions is a better and generally less conflictual relationship among the parties to a case. When people have settled their conflict in a less adversarial way, they have better feelings toward one another.¹⁴³

The authors give an example of child custody hearings where both parents are likely to be involved in their children's lives a year or even several years after the hearing if they view the hearing as fair irrespective of the outcome.¹⁴⁴ They explain that, in such cases, "[f]athers who typically lose such hearings are more likely to have contact with their children in the future if the hearing is one they evaluate as being fair," and finally conclude that [i]n addition, having a fair hearing encourages people to view the authority involved and their decision as more legitimate."¹⁴⁵

141 *Combe v Edwards* (1878) LR 3 PD p.142.

142 Hollander-Blumoff and Tyler op. cit. note 138.

143 *ibid* p.473.

144 *ibid*.

145 *ibid*.

Drawing from the foregoing discussion, this study argues that full and equal access to civil justice rests upon five basic requirements, namely:

- (a) consistency in the application of rules to the effect that like cases are treated alike, which in turn guarantees predictability, fairness and equality of opportunity;
- (b) impartial and neutral adjudication that go to the root of the fairness of process;
- (c) fair and accurate outcomes that demonstrate the merits of the decision;
- (d) those affected by the decision should have a voice and representation in the process, a constituent element of participatory justice; and
- (e) the processes are transparent in the sense that decisions should be reached through open (and participatory) procedures.

On the other hand, it may be argued that procedural justice is not sufficient (as the only means) to guarantee equal access to effective remedies. To the consequentialists, for instance, reaching fair outcomes is far more important than implementing fair processes.¹⁴⁶ Other theorists maintain that fair procedures are of central importance in so far only as they are likely to translate into fair outcomes.¹⁴⁷ Whatever the case, fair procedures tend to inspire feelings of loyalty to one's group, legitimize the authority of leaders, and help to ensure voluntary submission to, and compliance with, the rules.¹⁴⁸ In effect, fair procedures substantially guarantee fair equality of opportunity to access civil justice and effective remedies. As argued in this study, fairness of process in the adjudication of disputes goes beyond the resolution of issues toward "... a frame of reference

146 W Nelson 'The Very Idea of Pure Procedural Justice' (July 1980) 90(4) *Ethics* p.506.

147 *ibid.*

148 TR Tyler and MA Belliveau 'Tradeoffs in Justice Principles: Definitions of Fairness' in BB Bunker and M Deutsch *Conflict, Cooperation, and Justice: Essays Inspired by the Work of Morton Deutsch* (Jossey-Bass Inc Publishers San Francisco 1995) p.297.

that focuses on the restoration and rebuilding of relationships,”¹⁴⁹ which in turn maximises need satisfaction and acceptance of the jointly generated outcomes. Moreover, “relationship is the basis of both the conflict and its long-term solution”.¹⁵⁰ According to Saunders and Randaslim, relationships are the focal point for sustained dialogue within protracted conflicts¹⁵¹ in that they create room for mutually generated outcomes to the ends of improved relationships.

The foregoing principles of procedural justice, which focus on restoration and maintenance of relationships, have a direct relationship with success in negotiations that lead to amicable settlement of competing claims. This is because party autonomy and the participatory nature of this dispute resolution mechanism present parties with a fair process, which yield reliable information that can be used by the parties in the collaborative decision-making process.¹⁵² The notion of party autonomy denotes that participants have the liberty to agree beforehand to the processes of dialogue with an equal voice in any decisions that are made.¹⁵³ Accordingly, fair rules of collaboration and the participatory nature of the process are central to successful mediation and negotiation processes in so far as they are the best tools for reaching a legitimate decision acceptable to all parties. Maiese argues that “fair procedures of negotiation or legal proceedings are also central to the legitimacy of decisions reached.” She further explains that “in those cases where parties feel forced to accept the results of a decision-making process they

149 H Assefa *Peace and Reconciliation as a Paradigm: A Philosophy of Peace and its implications on Conflict, Governance and Economic Growth in Africa* (Nairobi Peace Initiative Nairobi 1993) pp.10-16; H Zehr *Changing Lanes: New Perspectives in Crime and Punishment* (Herald Press Scottsdale 1990) p. 177.

150 Lederach op. cit. note 8 p.26.

151 HH Saunders and Randaslim ‘Dialogue to Change Conflictual Relationships’ Higher Education Exchange (a Kettering newsletter) 1994 pp.43-56.

152 Maiese op. cit. note 122.

153 *ibid.*

think was unfair, there may be a backlash effect,” and the decision itself becomes yet another source of conflict.¹⁵⁴

Maiese’s argument validates the proposition in this study that the ends of access to civil justice are better served by maximising party autonomy and participation in the collaborative dispute resolution process, which in turn heightens satisfaction levels and guarantees legitimacy and acceptance of the jointly generated outcomes. To this end, chapter six consolidates the findings in chapters three, four and five and presents the compelling case for reforms in policy and legislation recommended in chapter seven to ensure fairness of process in resolution of civil disputes. The primary objective is that procedures for the adjudication of competing claims are participatory and party-driven to the highest degree possible, taking account of the nature of the claim and the relief sought.

The recommendations advanced by Maiese are premised on the argument that fair and accessible processes that maximise collaboration are crucial and that fair procedures that allow all parties to voice their interests are necessary factors that guarantee legitimate and acceptable outcomes.¹⁵⁵ By so arguing, this study does not in any way downplay the significant role of the organisational framework in the delivery of justice; nor does it hypothesise that the real challenges in accessing civil justice and effective remedies can be overcome by a mechanical formula. Suffice it to observe that an efficient organisational framework results in proficient court operations, which contribute to more than expeditious hearings and lower costs; they make processes more

154 *ibid.*

155 *ibid.*

transparent, hold participants accountable, and demonstrate to the public the professionalism of the courts, an important factor in gaining public trust and confidence in judicial institutions.¹⁵⁶

2.8. Conclusion

The discussion in this chapter of the broad concept of distributive justice in the theoretical context of natural law on which this study is grounded, and of the derivative notion of civil justice in the theoretical orientation of sociological jurisprudence, clarifies the meaning of, and the distinction between, the notions of substantive and procedural justice. This Chapter provides a sound theoretical background provides the conceptual basis for chapter three, which examines the historical development and the current status of the policy and legal frameworks for the administration of civil justice in Kenya as it seeks to answer the question as to whether such frameworks are well suited for guaranteeing full and equal access to civil justice.

156 Spagnoli op. cit. note 120.

CHAPTER THREE

THE CURRENT STATUS OF THE KENYAN CIVIL JUSTICE SYSTEM

3.1. Introduction

Chapter two discussed the general understanding of the concept of civil justice and its constituent principles of procedural and participatory justice in the theoretical orientation of sociological jurisprudence. It lays ground for this chapter, which outlines the social and political context of the historical origins and development in Kenya of the system of civil justice, paying special attention to the social, economic and political context of the policy and legal frameworks for the administration of civil justice.

The appraisal in this chapter of the current status of the policy and legal frameworks for the administration of civil justice helps to gauge the extent to which they accord with the conceptual imperatives for full and equal access to civil justice. The chapter tests the hypothesis stated in part 1.6 of chapter one and lays foundation for subsequent chapters as they reveal various impediments which beg for the strategic interventions recommended in chapter seven.

3.2. The Legal Origins of Colonial Administration in Kenya

The legal origin of colonial power and the beginning of official British rule in Kenya was marked by the declaration of Kenya as a British Protectorate on 15th June 1885.¹ Prior thereto, Britain had gained control over East Africa through a chartered company, the Imperial British East Africa Company. Subsequently, Kenya became a British colony in 1920 and endured direct colonial rule until she attained self rule on 1st June 1963 and, ultimately, independence on 12th December 1963.

Indeed, the legal system for the administration of justice in post-independence Kenya and the present-day civil justice system owe their origin to the British colonial administration in East Africa. Accordingly, the extant policy, legal and organizational frameworks for the administration of justice in Kenya are attributable to the systematic development of the colonial system in a bid to effectively respond to the unremitting challenges and pressing demands for equal access to justice.

The entrenchment of British colonial administration gradually eroded the gains made by the Sultan of Zanzibar, who had established a system of administration over the coastal strip of East Africa in mid 1880s. The Sultanate was supported by a system of Kadhi's courts designed to ensure effective administration of his dominions and resolve disputes between his Muslim

¹ YP Ghai and JPWB McAuslan *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government From Colonial Times to the Present* (Oxford University Press Nairobi Kenya 1970) p.3.

subjects in furtherance of the Sultan's interests in the growing trade and commerce.² But the Sultan was soon to lose his hold on the coastal and mainland territories as Britain pressed hard for the abolition of slave trade against the will of his subjects. As Ghai and McAuslan observe, the fall of the Sultan's control over his dominions was further hastened by Germany's bid for colonies and influence in East Africa, which grossly undermined his authority and gave impetus to the rapid augmentation of British administrative control over the territory leading to the declaration of Kenya as a British Protectorate³ soon after the 1885 Berlin conference.

The conference gave new impetus to the scramble for Africa. It purported to set out the rules of international law relating to the acquisition by European nations and their establishment of authority over various territories in Africa coupled with moral injunctions to bring an end to the rampant slave trade and take "civilization" to Africa.⁴ However, the Conference declined to consider any definitive rules relating to the acquisition of mainland territories because little was known of them.⁵ This left it open to the colonial powers to extend their dominion and spheres of influence over wide areas.

The unrestricted expansion went beyond the initial coastal territories delimited only by bilateral agreements between rival powers with respect to boundaries of influence. Consequently, the African interior was partitioned and mapped out for future expansion of colonial administration.⁶

2 R Kuloba *Judicial Hints on Civil Procedure* (2nd ed Law Africa Kenya Publishing Limited Nairobi 2009) p.1.

3 Ghai and McAuslan op. cit. note 1 p.4.

4 ibid.

5 MF Lindley *The acquisition and Government of Backward Territory in International Law* (Longmans London 1926) p.145.

6 Ghai and McAuslan op. cit. note 1 pp.4-5.

An example is the demarcation agreement made between Britain and Germany in October 1886 setting out their respective spheres of influence in East Africa.⁷ Soon thereafter, a concessional agreement was concluded in May 1887 by which the Sultan of Zanzibar made over to the British East Africa Association under the stewardship of William Mackinnon for a period of fifty years all the power he possessed on the mainland (together with the rights of administration) to be carried out in the Sultan's name and subject to his sovereign rights.⁸ Consequently, the Association was viewed as an indirect but effective means of retaining and expanding British influence in East Africa. This motivated the lending by the British government of greater support by granting it a Royal Charter of Incorporation in September 1888.

Upon incorporation, the Association became known as the Imperial British East Africa Company, which turned out to be a powerful arm of British imperial policy in East Africa under the direction of the Foreign Secretary.⁹ The Company re-negotiated the Concession with the Sultan in 1891 and extended its term from the initial fifty years to last in perpetuity.¹⁰ By the enhanced concession, the Sultan made over "... all the powers and authority to which he [was] entitled on the mainland, the whole administration of which [was] placed in the hands of the Imperial British East Africa Company to be carried out in his name under his flag and subject to his sovereign rights".¹¹ Under the Concession, the Company was empowered to appoint Commissioners to administer districts, promulgate laws, and establish and operate courts of

7 *ibid* p.5.

8 E Hertslet *The Map of Africa by Treaty* (HMSO London 1896) p.339-45.

9 Ghai and McAuslan *op. cit.* note 1 pp.6-7.

10 *ibid* pp.7-8.

11 Hertslet *op. cit.* note 8 pp.350-359; pp.365-366.

justice,¹² laying a firm foundation for what became the modern-day judicial system discussed below in part 3.3. In reality, the British government exercised sovereignty over, and incurred legal liability in relation to, the territories of East Africa by virtue of the Company under whose Charter it exercised jurisdiction under the Foreign Jurisdiction Acts, namely, the 1884 Zanzibar Order-in-Council¹³ and the 1889 Africa Order-in-Council,¹⁴ both of which were made in pursuance of the Foreign Jurisdiction Acts, 1843-78. But the Company's administrative ineptitude, and its inability to open up the interior of East Africa to the expectations of the British imperial government, led to its demise and the ultimate takeover in 1895 of the Protectorate by the British colonial administration.¹⁵ It is in this historical context that this study focuses its attention to the development of the judicial system and the underpinning policy and legal frameworks for the administration of civil justice in colonial and post-independence Kenya.

3.3. The Origins and Development of the Civil Justice System in Kenya

Before the advent of colonial administration in Kenya, African societies were governed by their respective customary laws.¹⁶ The earliest legislation on civil procedure and practice applied in Kenya trace back to the early Arabian and Indian influence through a mercantile linkage with the East Coast.¹⁷ Successive generations of Sultanate and British Colonial governments, which were incidental to the emergent commercial vibrancy, later attempted to erect an edifice of civil

12 Ghai and McAuslan op. cit. note 1 p.8.

13 Zanzibar Order-in-Council, 1884 [1890] 3 Statutes, Rules and Orders (Revised) p.865.

14 Africa Order-in-Council, 1889, [1890] 3 Statutes Rules and Orders (Revised) p.259.

15 Ghai and McAuslan op. cit. note 1 pp.11-12.

16 HBN Gicheru and K Miano *The Constitution and Government of Kenya for Secondary Schools* (Sterling Publishers Private Ltd New Delhi 1987) p.323.

17 Kuloba op. cit. note 2 p.1.

procedure and practice.¹⁸ The embryonic system of laws was copiously absorbent with reference to the Islamic, Indian and British judicial systems that found their way to the East Coast of Africa and ultimately to the hinterland and mainland territories, gradually influencing the character and substance of the judicial system.

The historical pattern of trade within the Persian Gulf, Arabian Sea and the Indian Ocean in the 19th century had captured tremendous business interest in Seyyid Said, an Arabian merchant prince and the then Imam of Muscat. In 1840, Seyyid Said moved his capital to Zanzibar and set up a simple patriarchal administration designed to meet the needs of social order in the interest of the burgeoning commerce.¹⁹ In the absence of a defined system of government, Seyyid Said assumed the authority of lawmaker and dispensed justice to his subjects. He appointed Kadhis to preside over matters of maladministration among the Arabs and other persons who professed Islam.²⁰ The subsequent arrival of Indian traders from the West coast of India bearing their model of dispute resolution mechanisms contributed to the nascent legal framework of the nature hitherto unknown to the indigenous communities.

When Arab Sultans assumed sovereignty over some areas in the Kenyan coast, Indian officials were used in the administration of justice within the dominions of the Sultans. Their experience under the British administration in India substantially influenced the development of Kenya's legal framework, including the laws of procedure. The pace of development of the emerging legal system hastened with the increased interest in the East African territories as a source of the

18 ibid.

19 ibid.

20 ibid.

much-needed raw materials to feed the needs of industrial Europe. Indeed, the development of the administration of justice, and the growth of a judicial system comprised of both civil and criminal jurisdictions, was largely the product of British subjects' desire to expand trade and commerce in East Africa.²¹

East Africa had become a popular destination for European colonial powers as European industrialisation stimulated the scramble for raw materials. Britain entered the east African market to expand her commercial interests through the Foreign Office in London. Her business empire acquired a new dimension from India to the coastal territories of East Africa administered by the Sultan.²² Britain's interests in East Africa were administered through a Consul, who was on the payroll of the Foreign Office in London. Although the Consul was on secondment to the British Indian civil service, he was essentially an agent of the British East India Company and therefore answerable to Bombay. Subsequently, the British Foreign Office set up a consulate in Zanzibar in 1841 after which the consul secured some area of jurisdiction from the Sultan and set up a consular civil court in 1865. Having previously served in India, the British Consul drew on his Indian experience and was largely influenced by the British-Indian model of the judicial system in the exercise of his jurisdiction, heavily relying on the Indian procedures and judicial precedents.

The rapid increase in trade between India and British administered East Africa, and the mounting interests in the coastal territories under the Sultan of Zanzibar, augmented the workload in the consular court in the 1880's, prompting the need to clarify and expand the Consulate judicial

21 Ghai and McAuslan op. cit. note 1 p.126.

22 Kuloba op. cit. note 2.

powers.²³ This pressing need was met by the promulgation of the 1884 Zanzibar Order-in-Council, which as amended comprised part of the legal bases for the exercise by the British colonial administration of jurisdiction in the East Africa Protectorate.²⁴ Zanzibar was deemed a District of Bombay, and appeals from the consulate court lay to the High Court in Bombay. The jurisdiction of the court was to be exercised in accordance with the Indian and Bombay legislation, particularly the Indian Penal, Criminal and Civil procedure Codes, the Indian Evidence and Succession Acts, and the Bombay Civil Courts Act, while English law was to be applied as the residual law.²⁵

The civil and criminal jurisdiction of the consular court at Zanzibar was founded on the 1839 Convention of Commerce and Navigation between Great Britain and Muscat, which provided for the procedure in dealing with mixed' cases between British subjects and subjects of the Sultan and other Muslim powers; and cases between British subjects exclusively; or between them and subjects of other Christian powers.²⁶ The ex-territorial privileges conferred upon British subjects under and by virtue of the 1839 Convention and administered by the Consul were based on the claim that inhabitants of Christian nations could not be expected to submit themselves to Muslim law.²⁷ Yet, there was no law regulating the exercise of this jurisdiction until the 1866 Zanzibar Order-in-Council, which conferred civil and criminal jurisdiction over British subjects and British protected persons on the consular court.²⁸

23 Ghai and McAuslan op. cit. note 1 p.128.

24 *ibid.*

25 Ghai and McAuslan op. cit. note 1 p.24.

26 L Hertslet Commercial Treaties (A Complete Collection of the Treaties and Conventions between Great Britain and foreign powers (HMSO London 1827) p.611.

27 Ghai and McAuslan op. cit. note 1 p.127.

28 *ibid.*

For the purposes of judicial administration, Zanzibar and the East African Coast became part of the British Empire. Accordingly, all civil appeals from the consular court lay to the High Court in Bombay, which had concurrent original jurisdiction. In addition, the 1844 Zanzibar Order-in-Council required the Consul to apply Indian law, as was the practice in Bombay, setting the scene for the application of Indian civil procedure and practice in East Africa. This marked the origins of the modern-day judicial system and the establishment of conventional judicial institutions in Kenya. As Ghai and McAuslan observe, the General Acts of the Berlin and Brussels Conferences of 1885 and 1890 respectively imposed an obligation on the signatory powers (which included Britain) to establish systems of justice in their African possessions and stressed the importance of judicial institutions as a “civilising influence,” resulting in the most significant imperial legacy perceived by the British colonial authorities as the rule of law and justice.²⁹

In his book titled *The Story of a Congo Free State: Social, Political and Economic Aspects of the Belgian System of Government in Central Africa*, Wack explains what was then perceived as the duty of the imperial powers over the African territories as prescribed by the 1890 General Act of the Brussels Conference. Article 2 of the Act stipulates the duties of the colonial powers as:

To support and, if necessary, to serve as a refuge for the native populations; to place those under their sovereignty in a position to cooperate for their own defence; to diminish intertribal wars by means of arbitration; to initiate the natives in agricultural pursuits and industrial arts, so as to increase their welfare; to raise

29 *ibid* p.125.

them by civilisation and bring about the extinction of barbarous customs, such as cannibalism and human sacrifices; and, in giving aid to commercial enterprises, to watch over their legality, controlling especially the contracts of service entered into with natives.³⁰

However, the development of a desirable legal system for the administration of justice throughout the country had its fair share of challenges attributable to the racial and cultural diversity, and the appurtenant competing social, economic and political interests. This required a delicate balance between the conflicting interests manifested in the colonial policy on the one hand, and the indigenous and Arab communities on the other.³¹ Though subordinated and segregated, the indigenous cultural and legal institutions could not be wished away, and hence the emergence of plural legal orders that have continued to endure the test of time.

The British influence on the development of legal and organisational frameworks for the administration of justice gradually took root in the territories of East Africa with the incoming British settlers insistent that they were entitled as of right to the English legal system, which comprised part of their common law heritage. The British colonial administration had to contend with: (a) the need to accommodate and work with the pre-existing African traditional systems of dispute resolution; and (b) the Muslim population (which was predominant in the coastal strip) that wanted their legal system preserved.³² In 1887, the British East Africa Association obtained

30 HW Wack *The Story of a Congo Free State: Social, Political and Economic Aspects of the Belgian System of Government in Central Africa* (GP Puutnam's Sons, New York and London 1905) ch XI pp.134-144 available at: <<http://www.zum.de/whkmla/documents/wack/wackch11.html>> (last accessed on 1st August 2011).

31 *ibid.*

32 *ibid.*

from the Sultan of Zanzibar a concession for a term of 50 years, under which the sultan made over to the association “all the powers which he possesse[d] on the mainland in the Mrima, and in all his territories and dependencies from Wanga to Kipini inclusive, the whole administration of which he concede[d] to and places in their hands to be carried in His Highness’ name, and under his flag, and subject to His Highness’ Sovereign Rights.”³³ Although the Association extended its sovereignty inland, it did not fully exercise its powers conferred under the concession, such as the power to establish courts and appoint judges.³⁴

As noted above, on 3rd September 1888, the British Crown granted a charter to the Imperial British East Africa Company to take over all the administrative powers of the British East Africa Association. Subsequently, the Sultan of Zanzibar surrendered all his mainland possessions to the Company in 1889. However, the jurisdiction of the Company was not subject to any legal regulation until the promulgation in the same year of the 1889 African Order in Council, which was designed to regulate the Company’s judicial powers. In exercise of its powers under the 1889 Ordinance, the company instituted a British court at Mombasa in 1890 presided over by an English Barrister and introduced the Indian penal and civil procedure codes. These Codes were applied in Kenya until the enactment of the Civil Procedure Ordinance No. 4 of 1924, which prescribed the powers of the court and the rules of procedure in civil cases. While the Ordinance was largely modeled on the Indian law, the rules of procedure were substantially in the model of English law.

33 Hertslet op. cit note 26 pp.339-45.

34 Kuloba op. cit. note 2 p.2.

The Foreign Jurisdiction Act 1890 under and by virtue of which the British imperial government exercised jurisdiction and administrative powers over, *inter alia*, the territories of Africa then known as the East Africa, Uganda and British Central Africa Protectorates was also instrumental in shaping the history of the modern-day judicial system in Kenya. After Kenya became a British protectorate on 15th June 1895,³⁵ the subsequent 1897 East Africa Order-in-Council and the Crown Regulations made there under marked the beginning of a system of political administration founded on a defined legal system in Kenya. This legal system comprised of written laws that included the Acts of Parliament of the United Kingdom in force on 12th August 1897, as cited in Part I of the schedule to the Judicature Act (Cap. 8 Laws of Kenya), and as modified in Part II of that schedule.³⁶ Section 3 of the Judicature Act went further and applied in Kenya the substance of the Common law, the doctrines of equity and the statutes of general application in force in England on 12 August 1897, and the procedure and practice observed in the Court of Justice in England at that time, subject to the Acts of Parliament of the United Kingdom, and so far as the same did extend and apply in Kenya.

The 12th day of August 1897 is commonly referred to as the ‘reception date’ with effect from which those specified elements of the English law were applied in Kenya to facilitate the administration of justice. But their application was not without delimitation. Qualifying their application, section 3(1) of the Judicature Act provides that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit, and subject to such qualifications as these circumstances may render necessary.

35 Ghai and McAuslan op. cit. note 1 p.3.

36 The Judicature Act (Chapter 8 of the Laws of Kenya) s 3.

In effect, the embryonic legal system was structured in such a way as to respond and adapt to the social realities of the day and to secure effective administration of colonial authority across the racial divide. To this end, the judicial system was based on a tripartite division of subordinate courts comprised of native courts, Muslim courts and those staffed by administrative colonial officers and magistrates. Accordingly, a dual system of superior courts was established constituting one system of courts for Europeans and the other for African communities,³⁷ an arbitrary distinction made purely on the basis of race. The dual system of superior courts established under the 1897 Order-in-Council comprised of: (a) what was known as Her Majesty's Court for East Africa from which appeals lay to Her Britannic Majesty's Court for East Africa at Zanzibar and the Privy Council; and (b) the Chief Native Courts from which appeals lay to a High Court. Her Majesty's Court for East Africa was presided over by the Judicial Officer of the Protectorate. The 1897 Order-in-Council also empowered the Foreign Secretary to establish provincial courts to be presided over by specified administrative officers with jurisdiction over British subjects and protected persons, and over certain classes of foreigners.³⁸ Indian legislation applied by the 1884 Zanzibar Order-in-Council to the coastal territory was now applied to the entire Protectorate.

The divisive legal framework of the day raises pertinent questions as to the equality of access and fairness of process in the system of dispute adjudication. This is in light of the obtrusive social stratification on the basis of race designed to advance colonial interests, which offended

37 Government of the Republic of Kenya 'Our History' in The Judiciary available at: http://www.judiciary.go.ke/judiciary/index.php?option=com_content&view=article&id=261&Itemid=295 (last accessed on 5th January 2011).

38 Ghai and McAuslan op. cit. note 1 p.130.

the principle of equality. The extent to which the judicial system accorded all the inhabitants what they were rightfully due is questionable and fell short of the legitimate expectation of equal access in accord with the principle that justice concerns itself with what people are due.³⁹ Statute law was in this regard applied as a tool for social and political control founded on no reason or common good. It was tailored on colonial policy to legalize what is viewed in this study as an affront to justice as postulated by Rawls, who conceptualised justice as a guarantee that "... no arbitrary distinctions are made between persons in the assigning of basic rights and duties,"⁴⁰ including the right of access to justice on an equal basis.

Although this study recognises the rightful place of formal judicial systems and the relevance of non-state legal orders typified by traditional or informal dispute resolution mechanisms in the spirit of proportionality and party autonomy for the effective administration of justice,⁴¹ their institution should be founded on the consent of all subjects in the context of "a social contract".⁴² Although law and government may be viewed as necessary means of promoting social order and personal security, this study argues that allegiance and obedience to the law and political power are motivated by the attainment and maintenance of critical standards and values (such as full and equal access to justice) that subjects of the State treasure and hold as fundamental pillars of good and legitimate governance. Yet, these are critical values that the colonial administration failed to uphold so as to secure legitimacy and inspire obedience by all its subjects.

39 D Schmidt *The Elements of Justice* (Cambridge University Press New York 2006) preface.

40 JA Rawls *A Theory of Justice* (Oxford University Press Oxford 1999) ch 2.

41 Commission on Legal Empowerment of the Poor and United Nations Development Programme *Making the Law Work for Everyone* (Consolidated Graphics New York 2008) p.3.

42 The natural law theory of social contract is discussed in part 1.8.1 of chapter one with specific reference to the works of T Hobbes 'The Leviathan' pt 2 ch 21 in MDA Freeman *Introduction to Jurisprudence* (8th edn Sweet and Maxwell London 2008) p.106.

But the bid for legitimacy and obedience to the colonial authorities by the indigenous communities was in vain in the face of failure to reconcile colonial and indigenous systems of justice.⁴³ The British colonial policy of the day fuelled the incessant confrontation between the indigenous tribal and the incoming colonial systems of justice.⁴⁴ In effect, the clash between the administrative and the judicial approach to the administration of justice and the functions of the courts in the advancement of the colonial policy resulted in the establishment of a plural legal order characterised by a segregated legal system to the effect that different systems of dispute resolution applied to different races. As this study demonstrates, the establishment of conventional judicial institutions in Kenya was closely linked to British colonial administrative strategies of what may be viewed as a scheme of divide and rule. The court system founded on racial segregation, for instance, clearly demonstrated the attrition of the principle of equality before the law,⁴⁵ which negated the legitimacy of the sovereign authority to exercise effective political power resulting in the quest for justice and political independence.

The systematic development of the judicial system in Kenya was in the viewpoint of this study designed to give full effect to the British colonial administration over territories that were up till then under the jurisdiction of either the tribal chiefs (in the case of mainland territories) or the Sultan of Zanzibar (in the case of the coastal strip). As noted above, the East Africa Protectorate developed out of agreements made with, and control exerted over, the dominions of the Sultan of Zanzibar. Ghai and McAuslan rightly observe that the system of courts, whose development

43 Ghai and McAuslan *op. cit.* note 1 p.126.

44 *ibid.*

45 The Constitution of Kenya, 2010 art 27(1) provides: "Every person is equal before the law and has the right to equal protection and equal benefit of the law."

began in the protectorate after 1895, was the product of agreements with the Sultan⁴⁶ without any attempt to consult, or take into account the interests of, the indigenous African communities that had a stake in the system.

3.4. The Hierarchy and Jurisdiction of Courts in Colonial Kenya

Highest on the hierarchy of courts established under the colonial administration was the Court of Appeal for East Africa. By virtue and in exercise of the powers in that behalf conferred by the 1890 Foreign Jurisdiction Act, the imperial government constituted what was called his Britannic Majesty's Court of Appeal for Eastern Africa" pursuant to section 2 of the East African Protectorates (Court of Appeal) Order-in-Council, 1902. This court exercised appellate jurisdiction and other powers in relation to the High Court and other courts within the designated territories, as conferred by Ordinances passed from time to time under the provisions of the Order-in-Council relating to the respective protectorates, which were the East Africa (comprised of Kenya and Tanzania), Uganda and British Central Africa. As stated in the preamble of the 1902 Ordinance, "... it [was] expedient that a Court be established for the hearing and determining of appeals from his Majesty's courts in the said Protectorate". Appeals from his Britannic Majesty's Court of Appeal for Eastern Africa lay to the King in Council with leave of the court of appeal on application by Petition only in cases where the subject-matter involved the amount or value of 10 000 rupees or upwards.⁴⁷

46 Ghai and McAuslan op.cit. note 1 p.126.

47 The East African Protectorates (Court of Appeal) Order-in-Council 1902 s 9(1).

The composition and precedence of the Court of Appeal was provided in sections 3-5 of the 1902 Ordinance. According to the mandatory provisions of section 3, the members of the Court of Appeal were to be professional legal practitioners, namely: "... the Judge or Judges for the time being of His Majesty's Court for Zanzibar, and the Judge or Judges for the time being of the High Courts of the said protectorates respectively, and such other competent person or persons, if any, each being a member of the Bar of England, Scotland, or Ireland, of not less than five years standing, ..." as the Secretary of State would appoint from time to time. The precedence of the judges of the Court of Appeal was determined according to instructions given from time to time by the Secretary of State pursuant to section 4 of the Ordinance, taking account of professional qualifications not required of Magistrates or other persons appointed to preside over native courts, a differential treatment that offended the principle of equality. Under section 2 of the Appeals Ordinance 1902, appeals to his Britannic Majesty's Court of Appeal for Eastern Africa lay from His Majesty's Court for East Africa, or from any other court in the Protectorate from which appeals lay to his Britannic Majesty's Court of Appeal for Zanzibar under the East African Order-in-Council 1897, or by virtue of any other order-in-council by which it was amended.

Next on the hierarchy of courts was the High Court of East Africa. The 1902 East Africa Order-in-Council established what was known as "his Majesty's High Court of East Africa," which was a court of record with original civil and criminal jurisdiction over all persons and all matters in East Africa.⁴⁸ The Court consisted of the Commissioner and two senior judges of Her Britannic Majesty's Court at Zanzibar. The rules of civil and criminal procedure in accordance with which

48 The East Africa Order-in-Council, 1902 s 15(1).

the High Court exercised its jurisdiction were the Civil Procedure, Criminal Procedure and Penal Codes of India and other Indian Acts in force in East Africa at the commencement of the 1902 Order-in-Council. These rules of procedure applied only in so far as the circumstances of East Africa permitted.⁴⁹

Below the High Court came the Chief Native Court presided over by the designated Judicial Officer with power to supervise all subordinate courts in the Protectorate, namely, the colonial and indigenous courts.⁵⁰ The Chief Native Court was vested with powers similar to those of Her Majesty's Court for East Africa. Colonial native courts were Provincial, District and Assistant Collector's courts, with such jurisdictional powers of Magistrate's courts as were set out in the Indian Penal and Procedure Codes by which they were guided, and with territorial jurisdiction limited to a radius of fifteen miles of their station. As Ghai and McAuslan explain, indigenous native courts were comprised of two main types, namely: (a) those deriving from the old administration of the Sultan of Zanzibar with jurisdiction in the Coastal Strip only; and (b) those deriving from tribal societies with jurisdiction only over their respective tribes.⁵¹

The coastal courts were courts of the *Liwali* and *Mudir* with powers equivalent to those of the District and Assistant Collector's courts respectively. Appeals from these courts lay to the Provincial and District courts respectively. The court of the Chief Kadhi had jurisdiction throughout the coastal region, while Kadhi's courts had jurisdiction within a district only. Kadhi's courts were Muslim religious courts, which applied Muslim law identical to that observed in the courts of the Sultan of Zanzibar in all cases affecting the personal status of

49 ibid s 15(2).

50 Ghai and McAuslan op. cit. note 1 pp.130-131.

51 ibid p.131.

Muslims. On the other hand, the tribal courts were comprised of the courts of local chiefs and elders, and the Commissioner was empowered under regulation 46 of the Native Courts Regulations 1897 (No. 15 of 1897) to recognise any other chiefs ‘as exercising ... legitimate authority over his tribesmen’. Although the 1897 Regulations were repealed by the Native Courts Ordinance, 1907, section 10(1) of the 1907 Ordinance retained the jurisdiction and powers of the Tribal Chief or Council of elders or village Headman or Headmen.

The legal framework of the day demonstrated the ability to respond to the needs of the territory. For example, section 18(1) made provision for the constituting of courts subordinate to the High Court and courts of special jurisdiction by or under the provisions of any Ordinance as occasion required. Section 20 required all subordinate courts to be guided by native (customary) law in all civil and criminal cases to which natives were parties, but so far as such customary law was applicable and not repugnant to justice and morality or inconsistent with any Order-in-Council or Ordinance or any regulation or Rule made under any Order-in-Council or Ordinance. In exercise of their jurisdiction in the coastal region, these courts were to be guided by the general principles of Islamic law when deciding civil cases of a personal nature involving parties professing Muslim faith. The courts were also mandated under section 20 to “decide all cases according to substantial justice without undue regard to technicalities of procedure and without undue delay”, which was intended to guarantee full and equal access to both substantive and procedural justice notwithstanding the segregation of judicial services on the basis of race, a claw-back on the principle of equality before the law. The provisions of section 20 of the 1902 Order-in-Council are now found in section 3 of the Judicature Act 1967, which is designed to eliminate technical impediments to access justice by all court users.

It may be argued that the apparent responsiveness of the colonial authority in the administration of justice was motivated by the political and economic interests of the imperial government, and not necessarily by the genuine motive of ensuring full and equal access to justice through plural legal orders. Otherwise, there could have been little need to constitute an elaborate judicial system for the colonial settlers on the one hand and a less structured system for the Asian, Arab and African communities on the other, which offended the principle of equality.

The Courts Ordinance of 1907 constituted courts subordinate to the High Court, which had supervisory jurisdiction over them by virtue of section 17. These courts were known as the Subordinate Courts of the first class, second class, third class and Subordinate Native Courts.⁵² In particular, the establishment of the subordinate native courts was designed to institute an all-encompassing judicial system in recognition of the need to set up a legal framework to regulate and superintend the age-old dispute resolution mechanisms in indigenous African communities. The subordinate native courts included the Courts of Liwali (presided over by *Liwalis*); courts of Kadhi (presided over by *Kadhis*); *Mudir* and African native courts (presided over by native administrative officers). The subordinate courts were presided over by lay magistrates comprised of administrative officers, such as (a) Provincial Commissioners and town Magistrates (in respect of subordinate courts of the first class); (b) District or Assistant District Commissioners (in respect of subordinate courts of the second class); and (c) District Officers (in respect of subordinate courts of the third class). The administrative officers presided over the respective courts by virtue of their office in accordance with section 4 of the 1907 Ordinance.

52 The Courts Ordinance, 1907 (No. 13 of 1907) s 2-3.

In addition to the subordinate native courts established by law, the Governor was empowered by section 10(1) of the 1907 Ordinance to exercise his discretion and recognise the jurisdiction of a tribal chief, or council of elders, or village headman over the members of their tribe, or such jurisdiction as the Governor may grant. Section 19 of the Ordinance prescribed pecuniary jurisdiction in all civil matters falling to be determined by the subordinate courts thereby constituted, but limited the Courts of *Liwali*, *Kadhi*, *Mudir* and subordinate native courts, to Mohammedan and other natives. However, section 20 made provision for cross-race cases. Where the Defendant was a native and the Plaintiff was not, the case could, subject to the other provisions of this Ordinance, be brought either in a Subordinate Court or in a Subordinate Native Court as the Plaintiff preferred; but in any action so brought in the Court of a *Liwali* or *Mudir*, the court had jurisdiction to adjudicate on any counterclaim or set off raised by the defendant by way of defence to the action. According to section 21 of the Ordinance, appeals lay from the decrees or from any part of the decrees, and from the Orders of all subordinate Courts (other than *Kadhi's* Courts), to the High Court. On the other hand, appeals from *Kadhi's* Courts lay to the High Court with the *Sheik-ul-Islam* or Chief *Kadhi* as assessor in accordance with section 22 of the 1907 Ordinance.

In addition to the subordinate native courts established under the 1907 Ordinance, the Native Tribunals Ordinance of 1930 empowered a Provincial Commissioner by warrant under his hand, and subject to the approval of the Governor, to establish within his province such native tribunals as he thought fit with power to exercise over his native' subjects such jurisdiction, and within

such limits, as may be defined by warrant.⁵³ According to section 8 as read together with section 11 of the Ordinance, every native tribunal had full jurisdiction, to the extent set forth in its warrant and subject to the provisions of this Ordinance, over causes and matters in which all the parties were ordinarily native residents of the local jurisdiction of the tribunal.⁵⁴ However, native tribunals could only exercise their jurisdiction over Arab natives in civil or criminal cases only with their consent.

The promulgation of the 1930 Ordinance did not in reality establish any new institutions for dispute resolution among native communities. Its effect was to legally recognise the age-old dispute resolution mechanisms presided over by native village elders, headmen and chiefs, and institutionalised their jurisdiction to hear and determine disputes in their respective communities as they had always done prior to the establishment of the colonial administration.

In an attempt to formalise proceedings of native tribunals, the Native Appeals Tribunal's Ordinance of 1930 reduced the number of elders sitting on any such tribunal and required that all proceedings be recorded in writing.⁵⁵ In 1951, these tribunals were eventually converted into courts similar to those that hitherto served non-Africans. The native tribunals were in the end abolished giving way to the African Courts established under the 1951 African Courts Ordinance.⁵⁶ On the other hand, the administration of justice for non-Africans under the relevant English and Indian laws was entrusted to expatriate judges and magistrates.⁵⁷ Under this parallel

53 The Native Tribunals Ordinance, 1930 s 3(1).

54 *ibid* s 8 and 11.

55 *ibid* s 4, 33 and 23.

56 The African Courts Ordinance, 1951 (No. 65 of 1951).

57 Government of the Republic of Kenya *op. cit.* note 37.

system, appeals lay from subordinate courts to the Supreme Court.⁵⁸ This hierarchy of courts was headed by the Chief Justice, while the administrative duties were carried out by the Registrar of the Supreme Court. The main courts were established at the larger urban centres, such as Nairobi, Mombasa and Kisumu. In addition, circuit judges and magistrates served other judicial centres.⁵⁹

The obtrusive racial segregation in the provision of judicial services was backed by the British colonial policy of the day. As Ghai and McAuslan observe with reference to the agrarian policy and the appurtenant legal framework, "[f]or the greater part of the colonial period, agrarian policy was concerned to create and maintain two separate and unequal systems of administration, the African system existing to serve in a subordinate capacity the European one. The dominant economic role of the settlers which this policy was designed to produce was complemented by their dominant political role in the Government of Kenya."⁶⁰

Evidently, the substance of the law, the method of its administration, and the underpinning colonial policy, served to hold the African communities in subordination to the British settlers in order to ensure the advancement of their political and economic interests to the ends of European economic development. In effect, the segregation of judicial services in colonial Kenya was designed to perfect the political and economic dominance of the colonial administrators, who enjoyed exclusive control over the political institutions of government. In the viewpoint of this

58 E Cotran 'Kenya: African Courts (Amendment) Ordinance No. 50 of 1962' (1963) 7 *Journal of African Law* 187-191 available at : <<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=5219860>> last accessed on 29th August 2011.

59 Government of the Republic of Kenya op. cit. note 37.

60 Ghai and McAuslan op. cit. note 1 p.124.

study, this racially segregated system of administration of justice characterised by inequalities offended the fundamental element of equality and the sense of fairness of process in accessing civil justice, which Banakas views as critical constituents of justice.⁶¹

This state of inequality in the accession of judicial services prevailed until 1962 when the administration of African courts was transferred from the provincial administration to the Judiciary. Soon thereafter, the 1963 Kenya Independence Order-in-Council and the independence Constitution of Kenya, 1963 marked the end of the hitherto discriminatory system of administration of justice and the beginning of a new political order in which a truly independent and impartial Judiciary was constituted.

The preceding colonial policy and legal frameworks were in direct conflict with the norms and guiding principles of natural law, which Finch views as immutable and necessary for the formulation of substantive and procedural laws designed to regulate binding human relations (in the context of a “social contract” founded on consent) and fair resolution of competing claims.⁶² To presume such consent (in the sense of voluntary submission by which sovereign authority is legitimated) would be tantamount to construing as legitimate laws that sanctioned racial discrimination and differential treatment of the subjects in the provision of judicial services with no rational explanation. It may be argued therefore that the policy and legal frameworks in colonial Kenya lacked validity and rightness in so far as they purported to contradict or offend

61 S Banakas ‘A Global Concept of Justice - Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today’s World’ in Social Science and Research Network Comparative Law eJournal (May 2009) [available at: <http://ssrn.com/abstract=1400067>](http://ssrn.com/abstract=1400067) (last accessed on 8th October 2009).

62 J Finch *Introduction to Legal Theory* (Sweet and Maxwell London 1974) pp.21-22.

the spirit of the law of nature that was viewed by Blackstone as immutable and of such superior authority as could not be contradicted.⁶³

3.5. The Judicial System in Post-Independence Kenya

The 1963 Independence Constitution was in reality a defining moment in the history of Kenya's civil justice system. It instituted a Supreme Court with unlimited original criminal and civil jurisdiction over all persons regardless of racial considerations.⁶⁴ The judges of the Court were to be appointed by an independent Judicial Service Commission,⁶⁵ which this study views as a decisive step towards an independent judiciary free from the antecedent patronage of the executive colonial administrators. The Constitution further provided for the establishment by statute of a Court of Appeal.⁶⁶

When Kenya attained the status of a Republic in 1964, the Supreme Court was renamed the High Court. In 1967, three major laws were enacted to streamline the administration of justice in Kenya and enhance access to civil justice on an equal basis. These were: (a) the Judicature Act (Chapter 8);⁶⁷ (b) the Magistrates' Courts Act (Chapter 10);⁶⁸ and (c) the Kadhis Courts Act (Chapter 11) of the Laws of Kenya⁶⁹.

63 W Blackstone 'Commentaries of the Laws of England' in KL Morgan "A Constitutional Presidency Part 1" (2010) available at: <<http://www.lonang.com/conlaw/3/c35a.htm>> (last accessed on 5th November 2010).

64 The Constitution of Kenya, 1963 (Kenya Independence Order-in-Council) s 171(1).

65 *ibid* s 184.

66 *ibid* s 176(1) and 177.

67 This is an Act of Parliament to make provision concerning the jurisdiction of the High Court, the Court of Appeal and subordinate courts, and to make additional provision concerning the High Court, the Court of Appeal and subordinate courts and the judges and officers of courts. The Act requires comprehensive amendments to reflect the extensive reforms of the judiciary under the Constitution of Kenya, 2010.

The proliferation of new laws to restructure the judiciary marked the beginning of a long history of policy, legislative and organisational reforms. These reforms were intended to facilitate the realisation of acceptable standards for the administration of justice. These standards must measure up to the tenets of natural law discussed in part 2.3 of chapter two and with which human positive law are required to accord if they are to lay any claim in validity.⁷⁰ The law and judicial reforms briefly discussed below were undertaken in recognition of the hitherto prevailing social context of justice and the underpinning colonial policy. Roscoe Pound views the social context of justice in the perspective of sociological jurisprudence as factors that motivate jurists to make a survey of their legal systems in order to ascertain from time to time what claims, wants or demands press for recognition and satisfaction, and how far they have been recognized, addressed or secured in response to the vitality of social change.⁷¹

3.6. The Current Status of the Organisational Framework of the Civil Justice System

The existence of competent and independent national tribunals is now owed to the provisions of Chapter Ten of the Constitution of Kenya, which was recently promulgated on 27th August 2010,

68 An Act of Parliament to establish magistrates' courts; to declare the jurisdiction and provide for the procedure of such courts; to provide for appeals in certain cases; and for purposes connected therewith or incidental thereto.

69 An Act of Parliament to prescribe certain matters relating to Kadhis' courts under the Constitution, to make further provision concerning Kadhis' courts, and for purposes connected therewith and incidental thereto.

70 Finch op. cit. note 62 p.23

71 R Pound 'A Theory of Social Interests' (1921) 15 Proceedings American Sociological Society p.1.

marking the historic milestone in the arduous course of reforms in policy and legislation, and the ensuing judicial transformation.

Although this study concerns itself with the policy and legal frameworks and the extent to which they support access to civil justice in pursuit of just outcomes and effective remedies, the organisational framework in which the other factors are at play is not the subject of inquiry due to constraints of time and resources that dictate limitation of the scope of this study. However, they cannot escape our due attention for the purpose only of defining the sectoral context of the study. The term “institutional framework” is in the context of this study used with reference to the totality of norms, values, policies, laws and organisational structures that ordinarily define the institution of the judiciary found to be ill-equipped to deliver civil justice, as the findings in chapter five confirm.

The constitutional/legal foundation of the judicial system in Kenya rests on the provisions of Article 159(1) of the Constitution of Kenya, 2010, which states that “[j]udicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.” Accordingly, the people of Kenya consent (albeit tacitly) to the establishment of the judicial system and agree to submit to its authority (which they confer to the national tribunals) under and by virtue of the Constitution that sanctions their legitimacy. This accords with the natural law theory of social contract discussed in part 1.8 of chapter one.

The newly established system of courts and tribunals includes:

- (a) the superior courts consisting of the Supreme Court, the Court of Appeal, and the High Court;⁷²
- (b) courts with the status of the High Court to hear disputes relating to-
 - (i) employment and labour relations; and
 - (ii) the environment and the use and occupation of, and title to, land;⁷³
- (c) subordinate courts established under article 169(2) with such jurisdiction, functions and powers as may be conferred by legislation enacted pursuant to article 169(2). These consist of-
 - (i) Magistrates courts;
 - (ii) the Kadhis' courts;
 - (iii) the Courts Martial; and
 - (iv) any other courts or local tribunal as may be established by an Act of Parliament, other than the courts established pursuant to article 162(2).

The Supreme Court, as established under article 163(1) of the Constitution, shall have-

- (a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President;

72 The Constitution of Kenya, 2010 art 162(1).

73 *ibid* cl (2).

- (b) appellate jurisdiction to hear and determine appeals from-
 - (i) the Court of Appeal; and
 - (ii) any other court or tribunal as prescribed by national legislation.

Appeals lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution. In any other case, an appeal will lie only if the Supreme Court or the Court of Appeal certify that a matter of general public importance is involved.⁷⁴

The Court of Appeal is established under article 164(1) of the Constitution with jurisdiction to hear appeals from the High Court and any other court or tribunal specified by an Act of Parliament.⁷⁵ The High Court established under article 165(1) has, by virtue of clause (3)-

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) jurisdiction to hear any question respecting the interpretation of this Constitution; and
- (d) any other jurisdiction, original or appellate, conferred on it by legislation.

74 ibid art 163(4).

75 ibid.

The High Court has no jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court, or falling within the jurisdiction of the courts having the status of the High Court as contemplated in article 162(2). But the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.⁷⁶ This supervisory jurisdiction includes power to review the decisions of such subordinate court, person, body or authority by calling for the record of any proceedings before any of them and consequently “make any order or give any direction it considers appropriate to ensure the fair administration of justice”.⁷⁷

In addition to the judges of the High Court, the President may appoint commissioners of assize on recommendation by the Chief Justice and the Attorney-General in accordance with section 2 of the Commissioners of Assize Act (Cap.12). The appointment may be made for the purposes of expediting the trial and determination of any criminal or civil causes or matters pending in the High Court. The commissioners constitute a court of the High Court with powers and authority and jurisdiction of a judge of the High Court.⁷⁸ This power is exercised from time to time in an attempt to reduce the backlog of cases in the High Court, which is a major barrier of access to civil justice. Whether this Act is ultimately repealed or remains in force with or without modifications will depend on the course of enabling legislation required to be enacted by Parliament to implement the Constitution of Kenya, 2010 and to rationalise the system of courts as contemplated by Articles 162(2)(b) and 169(1)(d) of the Constitution. Pursuant to Article 162(2)(b) of the 2010 Constitution, Parliament enacted the Environment and Land Court Act,

76 ibid art 165(6).

77 ibid cl (7).

78 The Commissioners of Assize Act (Chapter 12 of the Laws of Kenya) s 4.

2011 and the Industrial Court Act, 2011 on 25th August 2011. Article 169(1)(d) contemplates the establishment of "... any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(1)".

As a specialised segment of the subordinate courts, the Children's Courts may be singled out as being suitably designed to ensure access to justice and the appurtenant need satisfaction in the discharge of their judicial functions. These Courts are constituted under section 73 of the Children Act No.8 of 2001 for the purpose of *inter alia* conducting civil proceedings in matters relating to parental responsibility, children's institutions, custody and maintenance, guardianship, judicial orders for protection of children, children in need of care and protection, foster care placement and child offenders. According to section 76(1) of the Act, the welfare of the child is of paramount consideration in every decision of the court. Under this section, the court shall not make any order in respect of a child unless it considers that doing so would be more beneficial to the welfare of the child. As respects expedition in any proceeding in which an issue on the upbringing of a child arises, "the court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child",⁷⁹ amounting to denial of justice. As the old adage goes, "justice delayed is justice denied". In addition, section 76(3) of the Act requires the court to consider the special needs and interests of the child in making any order relating to a child, which in itself satisfies a fundamental requirement of civil justice.

79 The Children Act (No.8 of 2001) s 76(2).

Besides the organisational framework and the delineation of the jurisdiction of various courts under the Constitution and other written laws, certain principles apply to guarantee fairness of process and effective administration of justice. Among the constitutional principles, the independence of the judiciary is pivotal to fairness of process and the effective administration of justice. This independence is closely guarded by the Constitution. In exercise of judicial authority under the Constitution, the judiciary, which consists of the judges of the superior courts, magistrates, other judicial officers and staff,⁸⁰ shall be subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority.⁸¹ The constitutional guarantee in article 160 of both institutional and operational independence of the judiciary ensures impartiality, fair administration of justice and equality of opportunity for the benefit of everyone seeking just outcome of competing claims.

It must be noted, though, that the adjudication of civil disputes is not the preserve of the conventional judicial institutions. There are other competent and independent local tribunals established and sanctioned by statute with administrative or quasi-judicial functions in the realm of civil justice. These specialised tribunals are suitably designed to expedite and facilitate equal access to their administrative and quasi-judicial services. They differ from the conventional judicial system in that: (a) they are expeditious due to light caseload; (b) they are informal with wide discretionary powers; (c) their costs are nominal; and (d) they have administrative powers to investigate any matter in issue and seek the expert opinion of inspectors and assessors in

80 The Constitution of Kenya, 2010 art 161(1).

81 *ibid* art 160(1).

relation to any dispute before them.⁸² In the following paragraphs, a few examples of such tribunals are discussed.

The Co-operatives Tribunal established under section 77(1) of the Co-operative Societies Act (Cap.490) has power to determine disputes relating to matters governed by the Act. The Act sets out the disputes falling within the jurisdiction of the Tribunal as including disputes concerning the business of a co-operative society arising among members, past members and persons claiming through members, past members and deceased members or between members, past members or deceased members, and the society, its committee or any officer of the society or between the society and any other co-operative society.⁸³

For full and equal access to the Tribunal, and for the avoidance of undue technicalities, the Tribunal is not bound by rules of evidence in the conduct of its proceedings.⁸⁴ Similarly, the Tribunal has power under section 78(5) to regulate its own procedure, which ensures flexibility and access for want of complexity. Parties to a dispute governed by the Act have the right under section 87 to appear before the Tribunal either in person or to be represented by an Advocate, which satisfies the demands of participatory justice. To ensure exhaustion of effective remedies, any appeal against an award or order of the Tribunal lies to the High Court, whose decision is final.⁸⁵

82 The Kenyan Section of the International Commission of Jurists *Strengthening Judicial Reforms in Kenya: Public Perceptions of Administrative Tribunals in Kenya Volume VI* (The Kenyan Section of the International Commission of Jurists) p.7.

83 The Co-operative Societies Act (Chapter 490 of the Laws of Kenya) s 76.

84 *ibid* s 78(1).

85 *ibid* s 80(1) and 81(5).

The Rent Tribunal established under section 4 of the Rent Restriction Act (Cap. 296)⁸⁶ has exclusive jurisdiction and power under section 5(1) *inter alia* to:

- (a) assess the standard rent of any premises to which the Act applies;
- (b) regulate the terms and conditions of the tenancies to which the Act applies;
- (c) apportion the payment of rent among tenants sharing the occupation thereof;
- (d) fix and apportion the amount of service charge (if any) payable in respect of any such premises; and
- (e) investigate and determine disputes arising from tenancy relationships, and to make orders, including:
 - (i) an order for the recovery of possession of premises; and
 - (ii) an order for the recovery of arrears of rent, mesne profits and service charges.

The principle of controlled tenancies under the Act and the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Chapter 301)⁸⁷ facilitates statutory protection and regulation of tenancy relationships to which economically disadvantaged tenants are party. Chapters 296 and 301 of the Laws of Kenya provide for an administrative mechanism by which the competing

86 An Act of Parliament to make provision for restricting the increase of rent, the right to possession and exaction of premiums, and for fixing standard rent, in relation to dwelling-houses, and for other purposes incidental to or connected with the relationship of landlord and tenant of a dwelling-house (whose rent does not exceed KShs.2,500).

87 An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.

interests of landlords and tenants are resolved without undue expense or technicality. The administrative tribunals established under the two Acts are guided by simple rules of procedure contained in the Regulations made under the two statutes for the proper discharge of their functions.⁸⁸ In addition to the simplified procedure, the Schedule of Fees in the Subsidiary Legislation of both Acts reflect modest costs of filing applications in the tribunals, which is critical to the principles of proportionality and fairness of process to the ends of procedural and participatory justice in the resolution of tenancy disputes. However, this is only one of the many types of legal relations from which disputes arise. While these administrative tribunals demonstrate genuine intention to ensure simplicity of procedure, proportionality and access to justice in the resolution of tenancy disputes, this statutory regulation is not universal, and more remains to be done in the wider range of civil disputes in subordinate courts.

Despite the simplicity of procedure and proportionate costs of claim adjudication in these tribunals, there are, however, factors that hinder equal access to justice, namely: (a) institutional irregularities, including corruption; (b) the central nature of their operations; (c) geographical inaccessibility; and (d) lack of awareness by the general public. In effect, these tribunals cannot be viewed as perfect institutions for the administration of civil justice or as having fully achieved their original objectives.

88 In the case of Chapter 296 of the Laws of Kenya, s36; and in the case of Chapter 301 of the Laws of Kenya, s16; empowers the Minister to make regulations for the better carrying out of the provisions of the respective Acts.

3.7. The Policy Framework

- (a) As respects the status of the policy framework in Kenya, six basic documents set out, among other things, the Kenya Vision 2030;
- (b) The Medium Term Plan of Vision 2030 (2009-2012);
- (c) The Judiciary Strategic Plan 2009-2012;
- (d) The Governance, Justice, Law and Order Sector-wide Reform Programme;
- (e) The 2008 Kenya National Dialogue and Reconciliation: Agenda item IV; and
- (f) The 2010 Litigants Charter.

Kenyan judicial policy, strategic objectives, programmes, plans and actions designed to improve access to justice. These include-

Kenya Vision 2030 is the country's new development blueprint covering the period 2008-2030. It aims to transform Kenya into a newly industrialising middle-income country providing a high quality life to all its citizens by the year 2030. The Vision proposes reform of the governance system through a range of constitutional, legal and administrative reforms. One of the proposed strategic goal areas is the rule of law and human rights where it is intended to promote adherence to the rule of law applicable to a modern market-based economy in a human rights-respecting state.

Under its political pillar, the strategic goal is “to enact and implement a legal and institutional framework that is vital to promoting and sustaining fair, affordable and equitable access to justice by 2012. Specific strategies will involve aligning the national policy and legal framework with the needs of market-based economy, human rights and gender equity commitments; increasing service availability and access (or reducing barriers) to justice”.⁸⁹

In the medium term, Kenya is committed to putting in place structures to guarantee access to justice.⁹⁰ The other policy, legal and organisational reform measures identified under the strategic initiatives include the improvement of access to justice by passing legislation, including Small Claims Court Bill, Private Prosecutions Bill, Legal Aid Bill, Court of Petty Sessions Bill, Alternative Dispute Resolution legislation as well as Judicial Service Bill, the Evidence Act and Land Disputes Tribunal Act.⁹¹

Despite its spirited content, the Vision lacks clear conceptual orientation beyond its ambitious agenda for economic development. It fails to clarify the strategic issues addressed in this study and to provide a clear roadmap towards accessible civil justice. Though ambitious, the Vision fails to recognise or lay any significance to the conceptual imperatives for the equal access to civil justice. Accordingly, policy reforms become necessary to ensure that the administration of civil justice is guided by apposite policy and legislation.

89 Transparency International Kenya *Adili 108* (Nairobi Kenya February 2009) p.7 available at: <<http://www.tikenya.org/documents/Adili103.pdf>> (last accessed on 20 April 2010).

90 Government of the Republic of Kenya op. cit. 37.

91 *ibid* pp.131-132.

On 11th November 2003 the Government of Kenya launched one of its most ambitious governance reform programmes, i.e., GJLOS, which sought a sector-wide approach to dealing with problems affecting justice, law and order sector institutions. The programme covered four key ministries and up to thirty two government departments and agencies. GJLOS was supported by nine countries and eight international organisations. At the inception of the programme, the donor community anticipated that GJLOS would lead to far reaching reforms in all the legal and justice sector institutions.

The five-year programme was implemented in two phases (which included a one-year short term priority programme-STPP and a four-year medium term strategy-MTP). It was intended “to develop good governance and a speedy and fair dispensation of justice-affordable and accessible for all people”.⁹² Its broad strategic goals included, among others, achievement of access to justice through organisational reforms, including the increase of court of appeal sessions, construction of more court premises, increasing mobile courts, and automation of court registries.⁹³ Although the programme has developed several judicial reform initiatives, its implementation has been limited. In September 2009, the donor’s ceased engagement with GJLOS, citing the overly ambitious nature of the project goals and the absence of intended

92 ‘Governance, Justice, Law and Order Sector-wide Programme (GJLOS)’ Delegation of the European Union to the Republic of Kenya available at: <<http://www.delken.ec.europa.eu/en/information.esp?menuid=2&submenuid=7&thirdmenuid=3&fourthmenuid=1>> (last accessed on 20 April 2010).

93 International Legal Assistance Consortium and the International Bar Association Human Rights Institute *Restoring Integrity: An Assessment of the Needs of the Justice System in the Republic of Kenya* (Report) (February 2010) p.16 available at: <<http://www.ibanet.org/document/default.aspx?documentuid=dcd20276>> (last accessed on 20th April 2010).

results as the major reasons for the withdrawal of funding⁹⁴ leaving the institutional reform agenda to the Government virtually unaided. In any event, its narrow focus on the judicial institutions adds little value to the reform strategies proposed in this study.

The judiciary has also devised its own blueprint for judicial reforms. Launched on 20th March 2009, the Strategic Plan for the judiciary 2009-2012 stipulates strategic objectives and activities for the reform of various aspects of the judiciary. In particular, the Plan identifies the enactment of the Judicial Service Bill, improving human resource capacity within the judiciary and establishing a communications department as important objectives.⁹⁵ In order to catalyse these reform initiatives, the Government appointed a multi-disciplined taskforce on judicial reforms to identify the reforms that needed to be carried out in the judiciary. Among its mandate, the taskforce chaired by Hon. Mr. Justice William Ouko was to consider and make recommendations on short and long-term measures for addressing backlog of cases.⁹⁶ The other items of its mandate included comprehensive organisational reforms on which most other initiatives focussed.

In its interim report presented on 29th June 2009, and in the final report presented on 10th August 2009, the taskforce recommended measures to address the backlog of cases, including-

- (a) increase numbers of various judicial personnel;
- (b) standardisation and automation of court processes;

94 ibid pp.31-32.

95 ibid p.33.

96 ibid.

- (c) the establishment of weekend and twenty four hour courts;
- (d) introduction of small claims courts;
- (e) review of court procedures and processes;
- (f) enhancement of legal aid;
- (g) introduction of alternative dispute resolution mechanisms; and
- (h) better information management.

While this report may inform future policy and legislation, there is nothing to show that the taskforce went beyond addressing the symptoms rather than the underlying root causes of the judicial ineptitude in the administration of civil justice with which this study is concerned.

It is also the policy of the Government of Kenya to undertake institutional reforms as formulated in the Kenya National Dialogue and Reconciliation. The political settlement led by the former UN Secretary General Kofi Annan and the Panel of Eminent African Personalities in January 2008 established a reform agenda designed to address the underlying causes of the 2007-2008 post-election violence. One of the four agenda items identified for the purposes of addressing the causes of the crisis, reconciling communities and preventing future conflicts in the country was agenda item four, which concerns itself with long term issues, including constitutional, legal and organisational reforms. By agenda item four of the National Dialogue, the coalition government committed itself to addressing long term issues that may have constituted underlying causes of

the prevailing social tensions, instability and the cycle of violence, including the need for constitutional, legal and organisational reforms.⁹⁷

Among the recommendations made at page 52 of the Report for organisational reforms in the judiciary are:

- (a) the need for improved communication and the creation of awareness through public education and information materials, including electronic and print media in order to facilitate access to justice for illiterate users of judicial services;
- (b) the need to enhance public relations by provision to litigants of information on court procedures and processes, and directional information, with a view of enhancing access to justice; and
- (c) The need to combat judicial corruption by implementing the Harmonised Draft Constitution regarding the qualification, procedures for appointment, training, removal and discipline of judges, and the enhancement of quality and efficiency of the justice system.

As a tool for political expediency, the recommendations in Agenda No. 4 to reform the judiciary were rather superficial and did not go far enough to ascertain what in reality was responsible for the judicial ineptitude in the administration of justice and for the erosion of public confidence in

⁹⁷ International Legal Assistance Consortium and the International Bar Association Human Rights Institute op. cit. note 93 p.7.

the judiciary. The proposed organisational reforms are only part of what this study considers as necessary for the improvement of access to justice.

In addition, the 2010 Litigant's Charter expresses the judiciary's commitment to noteworthy policy priorities, namely: (a) to enhance and promote timely, efficient and effective administration of justice; (b) to ensure accessible justice to all; (c) to reduce the backlog of cases; and (d) to reduce the cost of litigation, among other things. These accord with the inspirational "mission" of the judiciary, i.e., "... to provide an independent, accessible, responsive forum for the just resolution of disputes in order to preserve the rule of law and to protect all rights and liberties guaranteed by the Constitution ...".⁹⁸

This study argues that much more is required to facilitate full and equal access to civil justice than the recommended organisational reforms, provision of public education to ignorant litigants, information on the court procedures and processes, and combating judicial corruption. As chapters four and five show, the aspirations expressed in the 2010 Litigant's Charter are yet to be realised. In addition to the basic measures recommended in various policy documents and legislation, chapter six lays ground for recommendation in chapter seven for far-reaching reforms in the judicial processes and civil procedure to ensure inclusion of, among other things, alternative dispute resolution mechanisms to enhance expedition, proportionality, party autonomy and participatory justice to the ends of quality procedures and outcomes.

98 Government of the Republic of Kenya 'The Judiciary Litigants Charter, 2010' (2010).

The study suggests that the statutory entrenchment of suitable market mechanisms in the existing legal and organisational frameworks supported by, among other strategies-

- (a) legal aid in appropriate cases;
- (b) application of simple rules of procedure for the adjudication of small claims in magistrates' courts; and
- (c) statutory support of community-based methods of dispute resolution; would go a long way in guaranteeing equal access to civil justice.

Notably, though, the need for a summative policy framework founded on the conceptual imperatives advanced in this study cannot be overemphasised. The foregoing documents do not constitute formal policy documents even if they contain statements of intent or strategic goals ordinarily contained in policies that provide the basis for appropriate plans, actions and programmes designed to facilitate the realisation of those goals.

3.8. The Legal Framework

The historical development of both substantive and procedural law in the administration of justice in colonial Kenya shaped the architecture of the present-day legal framework on which this section focuses. It was not until 1st August 1927 that the 1924 Civil Procedure Ordinance and the 1927 Civil Procedure Rules came into force vide Government Notice number 230 of 28th January 1927, defining the genesis of the present-day legal framework for the resolution of civil disputes in Kenya. As Kuloba observes, these rules of procedure were universally applied to civil proceedings in both the High Court and subordinate courts regardless of the nature and

magnitude of the claim at hand, even though there was a compelling case for the application of simplified rules in subordinate courts to ensure expedition and accommodation of the technical inadequacies of the lay magistracy.⁹⁹

The desired simplicity of procedure in subordinate courts became a reality in 1934 when both the Civil Procedure Ordinance and the Rules made there under made provision for summary procedure in petty cases where the pecuniary value of the claim did not exceed Shs 200. The rules placed limitations on the right of appeal, as did the Scottish small debt court procedure under the Small Debt (Scotland) Acts 1837-1889. The 1934 Ordinance and Rules made thereunder echoed the principle of proportionality, which is presently reflected in the provisions of the Debts (Summary Recovery) Act (Cap. 42). The Act makes provision for the summary recovery of civil debts, a statutory departure from the complex rules of procedure prescribed under the Civil Procedure Act (Cap. 21).

Rule 2 of the Debts (Summary Recovery) Rules requires the particulars of a complaint for recovery summarily of a civil debt to be in prescribed form setting forth the particulars of the complaint.¹⁰⁰ After commencement of proceedings, the Magistrate before whom the complaint is lodged issues summons “stating shortly the matter of the complaint and requiring the defendant

99 Kuloba op. cit. note 2 pp. 8-9.

100 This contrasts with the formal requirements of a Plaint and the attendant Memorandum of Appearance, Defence, and Reply to Defence, interlocutory applications (for summary judgment etc) or other applications provided for in the Civil Procedure Rules, all of which add to the complexity of procedure even in ordinary debt claims.

to appear at a certain time and place before the court to answer the complaint”.¹⁰¹ If the defendant fails to appear, the Magistrate may proceed *ex parte*.¹⁰²

The procedure for hearing under the Act is notably uncomplicated and relatively expeditious. Section 8(1) of the Act provides that “[i]f on the hearing of the complaint the Magistrate is satisfied that the defendant is liable to pay the sum claimed or any part thereof, he shall make an order that the defendant do pay into court such sum as the Magistrate may adjudge is payable by the defendant” either in lumpsum or by installments.¹⁰³ Where default is made in paying any money payable by virtue of an order made under Cap. 42, a Magistrate may either: (a) commit the defaulter to prison for a term not exceeding six weeks or until payment of the sum due (whichever period is the shorter); or (b) order execution of the order by attachment and sale of any property liable to form such form of execution under the provisions of the Civil Procedure Act. In the alternative, the Magistrate may order attachment of debts, including salary accruing or due to the judgment debtor.¹⁰⁴ On the other hand, the Magistrate may dismiss the claim in accordance with section 9 if satisfied that the defendant is not liable to pay the sum claimed or any part of it.

The simplicity of procedure under chapter 42 of the Laws of Kenya contrasts with the formal requirements of a Plaint and the attendant Memorandum of Appearance, Defence, and Reply to Defence, interlocutory applications (for summary judgment etc) or other applications provided for in the Civil Procedure Rules in chapter 21, all of which add to the complexity of procedure

101 Debts (Summary Recovery) Act (Cap. 42 of the Laws of Kenya) s 4(1).

102 *ibid* s 5.

103 *ibid* s 8(2).

104 *ibid* s 11(1)(a) and (b).

even in ordinary debt claims. The overall effect is to simplify the procedure for recovery of debts, an approach which this study recommends for all appropriate civil claims to the ends of equal access to procedural justice, having regard to the overarching guiding principle of proportionality discussed in part 2.4 of chapter two.

The legal framework for accessing civil justice in Kenya draws heavily from the international and regional instruments discussed in chapter four, but falls short of the international norms and standards. With the exception of the Debts (Summary Recovery) Act (Chapter 42) (which makes provision for summary procedure in debt claims), this study highlights the inadequacies of the civil justice system and shows that the legal framework for the adjudication of competing claims in Kenya does not meet the basic requirements of procedural and participatory justice, or the notion of proportionality, which may be considered as the overarching guiding principle of modern civil procedure.¹⁰⁵

With reference to the historical development of the judicial system in Kenya, the discussion in this chapter demonstrates that the reasons for the foregoing inadequacies are both historical and structural. As Goldschmid explains, our common-law adversarial system of dispute resolution was not designed to be cost-effective; it was designed to elicit the truth by a competition of adversaries at all costs. For the system to work, lawyers must vigorously pursue a case on behalf of their clients. In other words, lawyers must take every reasonable action allowed by the rules of court that may advance their case or diminish their opponent's case.¹⁰⁶ In effect, the role of

105 Goldschmid op. cit. note 81.

106 *ibid.*

counsel (who is viewed as the champion of the client) betrays the historical links of the adversarial system with the old system of trial by battle.¹⁰⁷

Goldschmid's explanation resonates with Justice Singh's perception of counsel as "legal wizards" driven by the urge to expose their talents and "match their wits"¹⁰⁸ in what they consider to be the advancement of their respective clients' competing claims albeit to the detriment of expedition, proportionality and participatory justice, which in consequence offend the spirit of access to civil justice. Goldschmid further explains why the common law adversarial civil justice system of claim adjudication is inevitably slow and costly. According to him, "[t]his zealous representation [by counsel] must be conducted whether a case is worth millions or just enough to be within the jurisdiction of the court. One lawyer cannot unilaterally tone down the level of advocacy to match the value of the case, without granting the opponent an advantage".¹⁰⁹ Consequently, extensive advocacy and more procedural steps are financially rewarded, whereas efficiency is not.¹¹⁰

The appurtenant high cost and complexity of adversarial civil justice system in common law jurisdictions, including Kenya, have over the years been matters of global concern. This is because complex, costly and time-consuming systems impede justice, even though there are other factors to which delay and high costs may be attributed. These include case management

107 J Mbaluto "Advent of 'oxygen rule' breathes life into civil litigation" in International Law Office (2010) available at: <<http://www.internationallawoffice.com/newsletters/detail.aspx?g=a706ecd0-68d7-4027-8ea9-86a1c438d952>> (last accessed on 1st August 2011).

108 Dr. Justice TN Singh 'Constitutional Values and Judicial Process' available at: <<http://www.cili.in/articles/download/1493/1084>> (last accessed on 8 October 2009).

109 *ibid.*

110 Goldschmid *op. cit.* note 81.

issues, such as motion practice (that involve a wide range of interlocutory proceedings inundated by multiple applications under the Civil Procedure Rules), and the lack of awareness, or unavailability of, or failure to use, other appropriate dispute resolution mechanisms well suited for certain cases.¹¹¹ The reality on the ground is that the courts continually face the challenge of striking a realistic balance between ensuring “orderly and efficient conduct of their own processes and procedures...] involving complex steps in interlocutory proceedings] and delivering substantive justice based on a proper consideration of the merits of a case”.¹¹²

It must be borne in mind that even though the ultimate goal of the court is to do substantive justice between parties according to law, this objective cannot be pursued in isolation or in disregard of the critical demands of procedural justice and the appurtenant notions of party autonomy (which is a constituent factor of participatory justice) and proportionality. This study views civil justice as an ensemble of indispensable principles that breathe life to legal rights and obligations by requisite means defined in rules of procedure. Accordingly, civil justice must not be compromised by undue rigidity in the application or complexity of procedural requirements. Yet the rigidity and complexity of the rules of civil procedure in Kenya stand in the way of meaningful proportionality and party autonomy in the process of adjudication of competing claims despite the inspirational, albeit declaratory, provisions of Article 159(2) of the 2010 Constitution, sections 1A and 1B of the Civil Procedure Act (Chapter 21) and sections 3A and 3B of the Appellate Jurisdiction Act (Chapter 9), which are discussed below.

111 ibid.

112 DBM Mosotah ‘Article 159 and Oxygen Principle Not Magic Wands’ (April 2011) Nairobi Law Monthly available at: <<http://nairobi.lawmonthly.com/index/content.asp?contentId=311&isId=7&ar=1>> (last accessed on 27th June 2011).

The provisions of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) and the Appellate Jurisdiction Act (Chapter 9 of the Laws of Kenya) constitute a departure from the rights-based approach to adjudication of competing claims characteristic of the adversarial civil justice system in common law jurisdictions. The rights-based approach to the administration of civil justice in the English legal tradition was echoed in the words of Lord Justice Bowen, who had this to say: “It is a well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights.”¹¹³

This study demonstrates that remedies generated through the adversarial rights-based approach to dispute resolution come at an inordinately high cost. With reference to the system of civil justice in Canada, for example, it was observed that “obtaining a resolution in a British Columbia Supreme Court civil action is prohibitively expensive, takes far too long, and is overly complex,”¹¹⁴ and consequently ineffective on that score. Research data indicated that trials were becoming more complex. A study by British Columbia Supreme Court Justice Donald Brenner showed that between 1996 and 2002, while the number of cases going to trial reduced by half, average trial length doubled.¹¹⁵ However, this problem is not unique to British Columbia. In its Green Paper titled ‘The Foundations of Civil Justice Reform’, the Justice Review Task Force stated that provincial, national and international reports on civil justice systems are all alarmingly similar. They warned that cost, delay and complexity constitute grave problems in the

113 *Cropper v Smith* [1884] 26 ChD p.700.

114 Brenner, “Trends in the Supreme Court of British Columbia, paper presented to TLABC’s Winning at Trial Seminar, October 24, 2003 and published in *The Verdict*, Issue 99, December 2003 p.58.

115 *ibid.*

administration of justice,¹¹⁶ which impede access to civil justice and the realisation of effective remedies.

Delay in the administration of civil justice, the high cost of claim adjudication, and the rigidity of complex procedures discussed in chapter five below negate the principles of proportionality and fairness of process, which invariably bars access to civil justice. Yet, this is not unique to Kenya. Following a number of studies conducted in the early nineties in Ontario, Canada, it was observed that litigants with low-end claims retain little of their award after paying legal fees. When factoring in the legal costs of both parties, the Ontario Civil Justice Review concluded that “... the inference is strong that the combined legal costs of the parties to a lawsuit are, on average, about $\frac{3}{4}$ [75%] of the judgment obtained; and on a median basis, are perhaps more than the judgment obtained”.¹¹⁷ However, the endeavor to enhance equal access to justice with due regard to the principle of proportionality is not altogether in vain, even though the gap between theory and practice is by no means narrow.

In an ideal situation, though, accessibility of the civil justice system would require enactment of some form of multi-tracking, whereby expedited or simplified rules of procedure are created for expeditious determination of cases of lower values.¹¹⁸ But no such distinction is made in Kenya to make provision for simplified and expedited proceedings in cases other than those relating to

116 British Columbia Justice Review Task Force *The Foundations of Civil Justice Reform* (“Green Paper”) (Report) (September 2004) p.1. available at: http://www.bcjusticereview.org/working_groups/civil_justice/green_paper_09_21_04.pdf (last accessed on 1st August 2011).

117 Ontario Civil Justice Review *First Report* (Report) (March, 1995) ch 11.4 available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubscjr/firstreport/cost.asp> (last accessed on 1st August 2011).

118 Goldschmid op. cit note 81.

debt claims under the Debts (Summary Recovery) Act (Cap. 42). As this study demonstrates, Kenya has not meaningfully embraced the overarching guiding principle of proportionality in both policy and legal frameworks that regulate the wide spectrum of civil proceedings. The rules of civil procedure are yet to be modified so as to promote fairness of process and expedition, and enable courts to deal with cases in ways that are proportionate to: (a) the value of the claim; (b) the importance of the case having regard to the rights and interests of the parties; (c) the complexity of the issues in contention; and (d) the financial position of each party.

This study demonstrates that there exists no system of expedited civil procedure that mitigates costs and facilitates proportionality to the ends of participatory and procedural justice, need satisfaction and the realisation of effective remedies, all of which would require a comprehensive and sector-specific policy on access to justice. However, there has been some effort to eliminate the main factors that impede access to civil justice in an attempt to narrow the gap between aspirations and the reality on the ground. To this end, the Constitution of Kenya 2010 implicitly lays the much-needed constitutional/legal framework for the realisation of equal access to civil justice with due regard to the notion of procedural justice and the principle of proportionality.

The fundamental right of access to civil justice in Kenya is guaranteed by article 159(2) of the Constitution of Kenya 2010. The Article sets out the main principles of equality, expedition and simplicity by which courts and tribunals shall be guided in exercising judicial authority, namely:

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted; and

(d) justice shall be administered without undue regard to procedural technicalities.

The promotion and use of traditional dispute resolution mechanisms is qualified by Article 159(3) of the Constitution of Kenya 2010 to the effect that they shall not be used in any way that contravenes the Bill of Rights, or is repugnant to justice and morality, or inconsistent with the Constitution or any written law. In effect, the informal justice systems in various local communities founded on non-state legal orders must meet the threshold of constitutionality and minimum standards of justice and morality regardless of their cultural heritage.

The entrenchment in the Constitution of the overriding principles designed to ensure equality and expedition in, and ease of access to, the civil justice system as prescribed in Article 159(2), are intended to guide the courts and tribunals in exercise of their judicial authority. Even though the declaration of these principles in the Constitution provides a firm foundation for legislative reforms and the formulation of effective policies, programmes and actions, and the establishment of appropriate administrative procedures to guarantee full and equal access to civil justice, such reforms are yet to be realised. Indeed, there is a wide gap between the declaratory constitutional guarantees of access to justice as contemplated, *inter alia*, in Article 48 and the reality on the ground. Article 48 imposes an obligation on the State to ensure access to justice for all at an affordable cost. Yet, the means by which this is attainable has been left to enabling legislation

that has either not been enacted or reformed to substantially satisfy the demands of these constitutional principles.

The recent amendment on 23rd July 2009 of the Civil Procedure Act (Cap. 21 Laws of Kenya) and the Appellate Jurisdiction Act (Cap. 9 Laws of Kenya) (both of which regulate the procedure for adjudication of civil claims) was a significant step towards the adoption of the guiding principles of proportionality and expedition in the conduct of civil proceedings. Section 1A(1) of Cap. 21 sets out the overriding objective of this Act and the rules made thereunder, namely, to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Section 1B of the Act imposes a duty on the court to conduct judicial proceedings in an expeditious and cost-effective manner. In like spirit, section 3A(1) of the Appellate Jurisdiction Act (Cap. 9 Laws of Kenya) sets out the overriding objectives of the Act and the rules made thereunder, that is, “... to facilitate the just, expeditious, proportionate and affordable resolution of appeals ...”. Section 3B of the Act imposes a duty on the court to ensure expedition and cost-effectiveness in the determination of appeals. These amendments accord with the principle that the function of rules is to facilitate the administration of justice, as was held in *Iron & Steel Wares Ltd v C W Martyr & Co.*¹¹⁹

In furtherance of the overriding objective stated in the Constitution of Kenya, 2010, and in the respective provisions of Chapters 9 and 21 of the Laws of Kenya, courts are bound to determine all civil claims with the primary objective of ensuring, among other things:

- (a) the just determination of the proceedings;

119 *Iron & Steel Wares Ltd v C W Martyr & Co.* (1956) 23 EACA p.175.

(b) the efficient use of the available and administrative resources;

(c) the timely disposal of proceedings before the court at a cost affordable by the respective parties; and

(d) the use of suitable technology.¹²⁰

The amendments to Chapters 9 and 21 of the Laws of Kenya gave rise to what is commonly referred to as the 'O2' or 'oxygen' principle. This is derived from the words “overriding objective” that guides courts in the discharge of their judicial functions as prescribed in the 2010 Constitution and Chapters 9 and 21 of the Laws of Kenya. To a large extent, these amendments may be viewed as settling the long-term conflict in Kenyan jurisprudence between procedural rules on the one hand and substantive law on the other, whereby the Oxygen principle clearly directs the courts to favour the latter.¹²¹

This study demonstrates that despite the recent organizational and legislative reforms, the embryonic judicial system in Kenya is in its present form ill equipped to guarantee access to civil justice on an equal basis due to insubstantial policy and legal frameworks that do little to minimise the cost of claim adjudication and increase the quality of procedures and outcome. The rather declaratory constitutional guarantees and the aforecited provisions of chapters 9 and 21 are by no means matched by any reform measures to simplify the rules of procedure, or otherwise give practical meaning to the respective overriding objectives. Indeed, there are no effective mechanisms to minimize the adverse effects of the complex rules of procedure that characterise the adversarial system of civil justice.

120 Mbaluto op. cit. note 116.

121 *ibid.*

The right of access to civil justice has also been the subject of judicial pronouncements, as was the case in *Bremer v South India Shipping Corporation Ltd*¹²² at page 917 where Lord Diplock observed:

Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access

The effort to restructure the judiciary and provide the “means for the just and peaceful settlement of [civil] disputes” has in the viewpoint of this study delivered insignificant gains. This is because the organisational reforms discussed in the study have not been founded on suitable policy and legislation designed to respond to what it advocates as the conceptual imperatives for full and equal access to civil justice. However, this appraisal excludes the organisational framework due to constraints of time and space within which this inquiry is undertaken. Suffice it to say that the organisational reforms and the development of human and other resources of the judiciary, without more, are incapable of delivering quality procedures and outcomes towards full and equal access to civil justice.

Respecting the right of access to justice and the appurtenant principles of expedition, efficacy and affordability of dispute resolution services by judicial and quasi-judicial tribunals, Professor Wade had this to say:

122 *Bremer v South India Shipping Corporation Ltd* [1981] AC p.909.

The process of the courts is elaborate, slow and costly. Its defects are those of its merits, for the object is to give the highest standard of justice; generally speaking, the public wants the best possible article, and is prepared to pay for it. But in administering social services the aim is different. The aim is not the best article at any price, but the best article that is consistent with efficient administration. Disputes must be disposed of smoothly, quickly and cheaply, and for the benefit of the public purse as well as for that of the Claimant.¹²³

Wade's view of the fundamental components of an accessible and effective civil justice system is as true today as it was in 1977. This study demonstrates that the realisation of the desire to ensure smooth, quick and affordable means of resolution of civil claims in Kenya is still far from reality. The elaborate, slow and costly nature of judicial services resulting in impeded access to civil justice is partly attributable to the intricacy of the rules of procedure, whose history is characterised by increasing complexity rather than a shift towards simplicity recommended in this study. As argued in chapter six, simplified rules of procedure and the adoption and statutory entrenchment of market mechanisms of alternative dispute resolution would, among other things:

- (a) expedite civil proceedings;
- (b) enhance party autonomy, proportionality and participatory justice;
- (c) enhance accessibility and promote self representation;

123 HWR Wade *Administrative Law* (4th edn Oxford University Press Oxford 1977) p.741.

- (d) focus on interests of the parties rather than legal rights and technicalities on which legal counsel tend to dwell;
- (e) reduce the costs of litigation; and
- (f) in the end, guarantee need satisfaction and the much-desired effectiveness of remedies.

The complexity of the rules governing the administration of civil justice in Kenya is evidenced by the elaborate provisions of the Civil Procedure Act (Cap.21) and the Rules made thereunder. The 2010 Rules make provision for an array of technical rules that regulate such matters as parties and joinder of parties to suits, conduct of suits, appearance and default of appearance, claims against co-defendants, pleadings generally, formal requirements of pleadings, frame and institution of suits, issue and service of summons, defence and counterclaim, legal representation, hearing and consequence of non-attendance, admissions, production, impounding and return of documents, summoning and attendance of witnesses, prosecution of suits, hearing and examination of witnesses, interlocutory applications, execution of decrees and orders, security for costs, commission and references, interpleader proceedings, originating summons, arrest and attachment before judgment, temporary injunctions and interlocutory orders, appeals, and review, among others.¹²⁴

The Act and the rules of procedure continue to endorse and devote themselves to technicality of procedure despite the progressive spirit of the oxygen principle expressed in Article 159 of the 2010 Constitution, sections 1A and 1B of Chapter 21, and sections 3A and 3B of Chapter 9 of the

124 The Civil Procedure Rules, 2010.

Laws of Kenya. Most of the procedural matters regulated by the 2009 Rules could easily be disposed of in pre-trial conferences and either agreed upon or ordered by the tribunal. This would save costs in time and money often incurred in interlocutory applications.

With the exception of the Supreme Court Rules made pursuant to Article 163(8) of the Constitution and section 31 of the Supreme Court Act (No. 7 of 2011) for the exercise of the Court's jurisdiction, the Court of Appeal Rules made pursuant to section 5 of the Appellate Jurisdiction Act (Cap. 9), the rules contemplated by the recently enacted 2011 Environment and Land Act and the Industrial Court Act, and other rules governing procedure in specialised local tribunals, chapter 21 of the Laws of Kenya and the rules of procedure governing proceedings in civil cases generally apply to all courts regardless of their jurisdiction and degree of complexity of the proceedings before them. What this means is that the legal framework for the administration of civil justice in Kenya defies the essential principles of expedition and proportionality that demand universal application by courts and national tribunals in the administration of civil justice.

The Supreme Court Act, 2011 stands out as mindful of the need to make the course of justice accessible through the Court. Section 31 empowers the Court to make rules for, among other things, regulating the right of any person (other than an advocate of the High Court of Kenya) to practise before the Supreme Court, representation of parties to any proceedings, prescribing forms and fees in respect of proceedings before the Court, and regulating the costs in respect of and incidental to such proceedings, empowering the Registrar (in order to promote access to

justice), to waive, reduce, or postpone the payment of a fee required in connection with a proceeding.¹²⁵

3.9. Conclusion

The review in this chapter of the current status of the policy and legislative frameworks for the administration of civil justice in Kenya reveals wide gaps between policy and practice. The chapter demonstrates that the civil justice system in Kenya is yet to deliver on the fundamental principles of equality, proportionality, and expedition, participatory and procedural justice for the augmentation of the quality of procedures and outcomes. Indeed, the road towards full and equal access to civil justice has not been free of daunting hurdles, some of which are confirmed in the analysis of the data collated and interpreted in chapter five.

The following chapter examines the universally accepted standards of access to justice as prescribed in international Treaties and Protocols binding on Kenya, and seeks to establish the extent to which the system for the administration of civil justice accords with such Treaty obligations.

125 The Supreme Court Act (No. 7 of 2011) s 31.

CHAPTER FOUR

OVERVIEW OF THE INTERNATIONAL STANDARDS OF ACCESS TO CIVIL JUSTICE

4.1. Introduction

The findings in chapter three confirmed the inadequacies of the current policy and legal frameworks in Kenya, leading to the conclusion that the inept policy and legislation render the system for the administration of civil justice ill equipped to deliver accessible judicial services with the requisite expedition, proportionality and fairness. However, chapter three focused only on the historical development of the judicial system and the status of the current policy and legislation that govern the administration of civil justice without reference to the universally accepted standards of access to civil justice prescribed in treaty instruments with which this chapter is concerned.

This chapter appraises the extant policy and legislation for the administration of civil justice against the backdrop of universally accepted standards prescribed in treaty instruments binding on Kenya and in other regional instruments that provide beneficial examples and international best practice. It builds on the preceding research findings to provide the basis for the recommendations in chapters six and seven by drawing on internationally recognised procedures

and practice that meet the needs and resources of all persons, and the potential of informal justice¹ in the context of plural legal orders.

4.2. International Standards of Access to Justice

The global recognition of certain minimum standards of access to justice, and of their appurtenant elements of equality, expedition, proportionality and fairness of process, find meaning in the theory of natural law. The modern theory of natural law (which is discussed in chapter two) presupposes that there are universally recognised principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims.² These principles may be considered the minimum content of natural law on which the concept of justice and the derivative notion of civil justice, with which this study is concerned, are deeply rooted.

Hart explains that:

... without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other. In the absence of this content, men have no reason for obeying voluntarily any rules or coerce those who would not voluntarily conform.³

1 Commission on Legal Empowerment of the Poor and United Nations Development Programme *Making the Law Work for Everyone* (Consolidated Graphics New York 2008) p.3.

2 W Blackstone 'Commentaries of the Laws of England' in KL Morgan "A Constitutional Presidency Part 1" (2010) available at: <<http://www.lonang.com/conlaw/3/c35a.htm>> (last accessed on 5th November 2010).

3 HLA Hart *The Concept of Law* (2nd edn Oxford University Press New York 1994) p.158.

In other words, the minimum principles of conduct and the prescriptive natural law concept of justice with its derivative notion of access to civil justice become the relational imperatives to which all must subscribe.

To ensure its own survival in a world characterized by a dynamic social order, frictions and competing interests, the international community has worked to articulate collectively the substantive and procedural requirements for the administration of justice for more than half a century.⁴ To this end, various international human rights instruments establish principles and minimum rules for the administration of justice in the determination of competing claims and offer detailed guidance to States Parties on human rights and justice. They comprise the 1948 Universal Declaration of Human Rights (UDHR) and specific Covenants, Conventions, rules, guidelines and standards promulgated by the international community under the auspices of the United Nations and various regional organisations.

The shared aspiration to establish and maintain universal standards of access is echoed in express provisions of diverse international Declarations, Conventions, Optional Protocols and municipal laws that provide benchmarks against which Kenya's civil justice system is measured in this study. In prescribing the basic standards of access to civil justice in the quest for effective remedies, these instruments presuppose the existence of competent national tribunals founded on appropriate policy, legal and organizational frameworks for the promotion and protection of

4 UN General Assembly 'Report of the Secretary-General S/2004/616' (2004) UN Doc. (2).

one's rights and freedoms and for the enforcement of effective remedies.⁵ Moreover, those of the international human rights instruments ratified by Kenya form part of the law of Kenya by virtue of Article 2(6) of the Constitution.

Article 8 of UDHR underscores the principle of equality before the law and proclaims that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental human rights granted him by the constitution or by law.”⁶ Kenya fails on the score of equality of opportunity to access civil justice as statistical data reported in chapter five will demonstrate. According to the study, 85.4% of the participants interviewed in the survey were of the view that parties to civil proceedings are not treated with equality and fairness, which negates the principle of equality.

In order to secure “effective remedies” in the enforcement of one's constitutional and legal rights as contemplated in Article 8 of UDHR, the tribunals charged with the task of adjudicating upon those rights and remedies are mandated to ensure fair trial in respect of which Article 10 states that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”. Although the fundamental right to: (a) effective remedies and (b) fair trial by virtue and in the context of Article 8 generally relate to the enforcement of human rights and criminal proceedings respectively, the thematic notions of (i) effectiveness of remedies and (ii) fairness of process are equally critical to the due administration of civil justice.

5 G Metiku ‘Access to Justice under the International Human Rights Framework’ in Abyssinia Law Blog available at: <http://www.abysinnialaw.com/index.php/our-blog/entry/26-access-to-justice-under-the-international-human-rights-framework> (last accessed on 5th June 2012).

6 The 1948 Universal Declaration of Human Rights (UDHR), U.N. Doc. A811, December 10th, 1948.

Policy, legislation and administrative procedures in every State play a significant role in the administration of justice and the extent to which judicial services are accessible on an equal basis. Article 2(2) of the 1966 International Covenant on Civil and Political Rights (ICCPR)⁷ to which Kenya acceded on 1st May 1972 requires each State Party to take the necessary steps, in accordance with its constitutional processes and with the provisions of the ICCPR, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in this Covenant. These rights include *inter alia*: (a) the right to effective remedies as guaranteed by Article 2(3); (b) the right to fair trial guaranteed by Article 14; (c) the right to equal treatment before the law as provided for in Article 16; and (d) the right to freedom from discrimination guaranteed by Articles 2(1) and 26.

The coexistent foursome right to (a) effective remedies; (b) fair trial; (c) equality of opportunity; and (d) non-discrimination (as protected in ICCPR) together set the standard for equal access to civil justice. As the following chapter demonstrates, the civil justice system in Kenya falls short of these standards. Statistical data reported in chapter five shows that economic, social and political factors stand in the way of equal access to civil justice. According to the survey, 84.1% cited economic factors and 63.5% cited social and political status as the main impediments to civil justice.

The right to fair trial (or fairness of process) guaranteed by Article 14 of ICCPR demands equal treatment of “all persons before the courts and tribunals... in the determination of... his rights

7 The 1966 International Covenant on Civil and Political Rights (ICCPR), U.N. Doc. A/6316 (1966).

and obligations in a suit at law”.⁸ This accords with the distributive notion of fair equality of opportunity in judicial proceedings in which all are entitled to a “fair and public hearing by a competent, independent and impartial tribunal established by law”.⁹ But where, in the opinion of the court, publicity would prejudice the interests of justice, the press and the public may be excluded from all or part of a trial. This exclusion may also be invoked on grounds of morality, public order, national security in a democratic society, or when the interest of the private lives of the parties so requires.¹⁰

The article also requires that any judgment rendered in a suit at law shall be made public except where the interest of juvenile persons otherwise requires, or where the proceedings concern matrimonial disputes or the guardianship of children.¹¹ Fairness of process in this context requires due consideration of the parties’ needs and interests, which in turn determine the quality of outcomes and the level of need satisfaction. As this study argues, these rights are constituent elements of civil justice in relation to which litigants should enjoy equality of opportunity to access. They go hand in hand with the fundamental right to equal protection before, and the right to enjoy the benefit of, the law¹² in both substance and procedure. However, these benefits are substantially eroded by the lamentable slow pace of civil proceedings and the inordinate costs of litigation, which in turn diminish the effectiveness of remedies, trust and confidence in the judicial system. As the survey reported in chapter five reveals, 87.0% of the participants attest to the slow pace of litigation with 33.3% of the civil cases sampled constituting a backlog. This

8 *ibid* art 14.

9 *ibid* art 14(1).

10 *ibid*.

11 *ibid*.

12 The Constitution of Kenya, 2010 art 27.

confirms the view expressed by 96.3% of the respondents, who were of the view that civil cases are not disposed of in a timely manner. Neither is it affordable to bring or defend civil proceedings in court according to 76.0% of the respondents.

The broad principle of equality is expressed in Article 26 of ICCPR, which declares that all persons are equal before the law and are entitled to equal protection of the law without discrimination on any ground, including social, economic and political status.¹³ On the other hand, chapter five demonstrates sharp inequalities in the ability of litigants to access civil justice in Kenya. 85.4% of those interviewed were of the view that parties are not treated with equality and fairness. 84.1% cited economic status while 63.5% cited social and political status as the main factors that hamper equal access to civil justice. Yet, the notion of equality essentially denotes parity, fairness, and impartiality on the part of judicial service providers towards those reaching out for protection and equal treatment before the law when their liberty, property, or other justiciable right, is at stake.¹⁴

The statistical data reported in chapter five confirms that the administration of civil justice in Kenya falls short of these standards. The high cost of litigation and the complexity of rules of procedure (which impede party control and fairness of process) erode the notions of parity, proportionality and fairness in pursuit of effective remedies. Even though the legal validity of outcomes and the impartiality of judicial officers in the administration of justice have not been deeply explored in the survey reported in chapter five, the frequently cited economic, social and political inequalities, and the institutional inadequacies (including corruption and other forms of

13 The 1966 ICCPR op. cit. note 7 art 26.

14 Metiku op. cit. note 5.

judicial duplicity) highlighted in chapter six point to the critical need to reform the civil justice system in Kenya to meet the minimum standards of equality prescribed in Article 26 of ICCPR.

The right to equal treatment before the law requires practical measures to eliminate factors that impede fairness of process and equal access to justice. Moreover, the basic rights to fair trial and effective remedies are complementary and (as is the case with all other rights) their effective realisation is dependent on the existence of accessible competent judicial, administrative or legislative authorities and other competent authority provided for by the legal system of the State and the possibility of effective remedies.¹⁵ In addition, the underpinning policy and legislation should be suitably designed to facilitate full access to the dispute resolution mechanisms on an equal basis, and without distinction on the ground of social, economic or political status. But the absence of such policy and the complexity of substantive and procedural law in Kenya contribute to delay in the delivery, and in effect denial, of civil justice. Indeed, 67.4% of the participants expressed concern that the rules of procedure and the law were not easy to understand and apply. According to 86.6% of the respondents, such complexity was directly responsible for the delays experienced in the determination of civil disputes.

This study is premised on the principle that quality procedures and equality of opportunity to access judicial services are critical to the effective delivery of civil justice. Contrary to the views held by consequentialists, who assert that reaching fair outcomes is far more important than implementing fair processes,¹⁶ it is contended in this study that the possibility of judicial remedies is not an end in itself and must of necessity be weighed against fairness of process.

15 The 1966 ICCPR op.cit. note 7 art 2(3)(b).

16 W Nelson 'The Very Idea of Pure Procedural Justice' (July 1980) 90(4) Ethics p.506.

Article 2(1) of ICCPR guarantees fair equality of opportunity in accessing effective remedies and requires the State to establish apposite systems of justice to ensure respect, effective protection and enforcement of the rights recognised under ICCPR.¹⁷ Although these treaty obligations relate to specific civil and political rights, they set minimum standards against which States Parties are expected to gauge and appraise their civil justice systems, taking account of the quality of both procedure and outcome.

Though unenforceable, the directive principles to which Kenya has covenanted provide the basis for the adoption of legislative and administrative measures, and for the formulation of appropriate policies, programmes and actions to ensure full access to civil justice on an equal basis. Directive principles are non-justiciable instructions or guidelines to the legislature and the executive (but are nonetheless fundamental in the governance of a state) whose duty it is to apply them in making law. For instance, article 37 of the Constitution of India, 1950 recognises the place of directive principles in the constitution and their fundamental role in governance and legislation.

Although Kenya has taken significant steps towards the realisation of these measures by promulgating the Constitution of Kenya, 2010, containing fundamental principles that guide the courts and tribunals in the exercise of their judicial authority to the ends of legal validity of outcomes, equality, expedition and simplicity of procedures,¹⁸ the attainment of these aspirations and the implementation of the Constitution is dependent on the efficacy of legislation to be enacted by Parliament, including legislation to give effect to the organizational reforms of the

17 The 1966 ICCPR op. cit. note 7 art 2(1).

18 The Constitution of Kenya, 2010 art 159(2).

judiciary and the underpinning legal system established under Part 1 of chapter ten of the Constitution.

Though significant in their own right, the recent legal and organizational reforms backed by the Constitution are in reality the first step in a very long journey. Besides the much-needed reform of judicial institutions, policy and legislation, the crucial need to undertake public education and expose consumers of judicial services to the diverse range of party-driven alternatives to litigation cannot be overemphasised. As has been rightly observed, “[m]any Kenyans remain unaware of their basic rights”, which is “a major hindrance to accessing justice, especially among poor, vulnerable and uneducated people”,¹⁹ not to mention the prohibitively high court fees and geographically inaccessible court stations, which impede equal access by ordinary Kenyans to judicial services. As Mbote and Aketch observe, most of the courts are found in urban areas as opposed to the rural areas where the majority of Kenyans reside. Thus, many people are compelled to travel long distances to access judicial services.²⁰

The introduction of market mechanisms for the adjudication of civil claims backed by supporting legislation is long due. Moreover, the absence of a defined legal aid scheme in civil disputes compels many to turn to alternative methods of dispute resolution for resolution of their conflicts.²¹ These include traditional and other informal mechanisms not recognised or backed by the conventional state legal order. In effect, the constitutional guarantee of “access to justice” at

19 PK Mbote and M Aketch (eds) *Kenya Justice Sector and the Rule of Law: A review by AfriMAP and the Open Society Initiative for Eastern Africa* (the Open Society Institute for Eastern Africa Nairobi March 2011) p.156.

20 *ibid.*

21 *ibid.*

a reasonable fee²² remains largely declaratory in relation to civil litigation in the face of complex procedures that stifle self representation leaving litigants at the mercy of pricey legal counsel. Indeed, there can be no equality of opportunity to access civil justice in the absence of apposite policy and legislation that guarantee equality, proportionality, party control and fairness of process.

Participatory justice frequently features as a matter of concern to various human rights Instruments. An example of international human rights instruments that concern themselves with general issues of justice with notable reference to matters of civil justice is the 1990 African Charter on the Rights and Welfare of the Child,²³ whose article 4 satisfies the essential demands of participatory justice. Article 4 of Charter provides that in all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and whose views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law. Giving children a voice in judicial and administrative proceedings which affect them guarantees due process or procedural justice, which is essential to the delivery of civil justice.

The 2002 Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography²⁴ mandates States Parties to adopt

22 The Constitution of Kenya, 2010 art 159(2), which is discussed in part 3.8 of chapter three.

23 The 1990 African Charter on the Rights and Welfare of the Child, O.A.U. Doc. CAB/LEG/24.9/49.

24 The 2002 Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, U.N. Doc. A/54/49 (2000).

appropriate measures to protect the rights and interests of child victims of the practices prohibited by this Convention in the criminal justice process, in particular by:

- (a) recognising the vulnerability of child victims and adapting procedures to recognise their special needs, including their special needs as witnesses;
- (b) informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases;
- (c) allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law;
- (d) providing appropriate support services to child victims throughout the legal process to ensure need satisfaction;
- (e) protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims;
- (f) providing, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; and
- (g) avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.²⁵

²⁵ The 2002 Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, U.N. Doc. A/54/49 (2000) art 8.

The Article 8 of the Convention's Option Protocol²⁶ upholds the principle of expedition and promotes the protection of individual interests and welfare of the child in cases to which the Protocol relates. These safeguards guarantee the effectiveness of remedies and serve to inspire trust and confidence in the justice system. As this study argues, need satisfaction, which draws from the effectiveness of remedies, is yet another pillar of procedural justice with which this study is concerned. Its egalitarian agenda aims at guaranteeing benefits to the least advantaged members of society to the ends of equal access to law and justice. In effect, the provisions of Article 8 of the Protocol accord with Rawls' egalitarian principle of equal liberty in the context of distributive justice, which guarantees the greatest benefit to the least advantaged, such as children, who under the Convention access equal rights to the most extensive liberties compatible with similar liberties for all.²⁷

Following its adoption as part of the law of Kenya by virtue of Article 2(6) of the Constitution, article 8 effectively guarantees to all children:

- (a) the endowment and recognition of their rights at law, including the right to protection from sale, prostitution and pornography;
- (b) the right to seek protection and vindication of those rights by full and equal access to justice;
- (c) the provision of equal protection by law of the rights of all children without making any arbitrary distinctions in the assigning of basic rights and duties;

26 ibid.

27 JA Rawls *A Theory of Justice* (Oxford University Press Oxford 1999) p.303.

- (d) the right to corrective and restorative redress for violation of one's rights and guaranteed security of effective remedies (towards need satisfaction);
- (e) the full and equal access to all judicial mechanisms for the protection of such rights, and the respectful, fair, impartial and expeditious adjudication of claims by national tribunals; and
- (f) the right to equal and humane treatment of individual children and their family in, and their right to participate fully in the due process of, the enforcement of law.

As regards fairness of process, Article 7(3) of the 1984 Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment guarantees fair treatment at all stages of the proceedings brought against any person in connection with any of the offences stated in article 4 of the Convention.²⁸ Article 12 mandates each State Party to ensure expedition and impartiality in investigation wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction. The Convention recognises the critical need for effective remedies and requires each State Party to ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the (reparative) means for as full rehabilitation as possible.²⁹

Yet again, the fundamental rights to equality and freedom from discrimination, which are critical to the right of access to civil justice, come to the fore with an international Convention dedicated

28 The 1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/39/51 (1984) art 7(3).

29 *ibid* art 14(1).

to them. Under the 1966 International Convention on the Elimination of all Forms of Racial Discrimination, State Parties undertake to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the right to equal treatment before the national tribunals and all other organs charged with the administration of justice.³⁰ Article 6 of the Convention mandates States Parties to ensure everyone within their jurisdiction effective protection and remedies through the competent national tribunals and other state institutions, against any acts of racial discrimination which violate their human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.³¹

The concepts of equality, fairness of process and effectiveness of remedies stand out as critical to the effectual administration of justice. The standards of access to justice discussed above are universal and obligatory to States Parties to the respective Conventions and Covenants. The universality of the foregoing standards is demonstrated in the elaborate statement in Article 6(1) of the 1950 European Convention on Human Rights, which reads:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.³²

30 The 1966 International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc. A/6014 (1966) art 5.

31 *ibid* art 6.

32 The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 22.1.

Though not binding on Kenya, the 2000 Charter of Fundamental Rights of the European Union is a fitting beneficial example of the standards to which Kenya and other developing common law jurisdictions should aspire. Article 47 of this regional instrument reinforces the provisions of the 1950 European Convention by providing that “everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”.³³ The article then sets out the conditions of the fair trial contemplated in the Charter as:

- (a) fair and public hearing within a reasonable time;
- (b) the trial shall be by an independent and impartial tribunal previously established by law;
- (c) the possibility of being advised, defended and represented; and
- (d) the availability of legal aid to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.³⁴

The two articles of the Convention and Charter fittingly recognise the legitimacy, independence and impartiality of the national tribunals and their ability to expedite the process of adjudication as factors that are crucial to the fairness of any trial. The Charter further imposes conditions of legal advice, defence and representation, and legal aid, as necessary components of a fair trial. Although great attention has been drawn to these factors in the context of criminal justice, this study suggests that effective civil justice is unattainable on an equal basis where access to law by

33 The 2000 Charter of Fundamental Rights of the European Union, 2000/C364/01 art 47.

34 *ibid.*

affordable legal advice and competent representation are beyond the reach of the least well off, unless the civil justice system is suitably structured so as to eliminate economic barriers that hamper access to judicial services. Moreover, inaccess to judicial services stands in the way of the non-derogable right to equality and equal protection and benefit of the law, the respect for which is sought through various legal aid delivery models discussed in part 6.5 of chapter six.

With regard to the universality of these standards, article XVIII of the 1948 American Declaration of the Rights and Duties of Man³⁵ requires that there shall be available to every person who resorts to courts to ensure respect for their legal rights “... a simple, brief procedure”. While recognising a person’s right to a hearing with due guarantees, article 8(1) of the 1969 American Convention on Human Rights³⁶ requires that “... the substantiation of any accusation of a criminal nature made against him or the determination of his rights and obligations of a civil, labour, fiscal or any other nature” be undertaken “... within a reasonable time, by a competent, independent and impartial tribunal previously established by law”. Though not binding on Kenya, the 1948 American Declaration underscores the universal standards of quality procedures and highlights simplicity and fairness of process, expedition and impartiality as indispensable constituents of access to justice, and which are yet to be effectively realised in the administration of civil justice in Kenya.

The 1969 American Convention on Human Rights underscores the need for a “simple and prompt recourse” and puts it thus:

³⁵ The 1948 American Declaration of the Rights and Duties of Man O.A.S Res. XXX, O.A.S. Off. Rec. OEA/Ser.L/V/I.4 Rev. (1965).

³⁶ The 1969 American Convention on Human Rights, , 1144 U.N.T.S. 143.

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention.³⁷

The directive principles of access to justice expressed in various international human rights instruments are also echoed in a range of guiding provisions of regional instruments to which Kenya subscribes. Article 3(1) and (2) of the 1981 African (Banjul) Charter on Human and Peoples' Rights (ACHPR) respectively guarantee equality of all persons before, and the right to equal protection of, the law. To this end, article 7(1) safeguards the right to a fair hearing, including the right to defence and the right to be defended by counsel of one's choice, and the right to an appeal to competent national organs. Though essentially fashioned to suit the demands of criminal justice, the principles of fair trial advanced in this Convention are, in the viewpoint of this study, equally applicable to the processes of civil justice.

Article 10 of the 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and People's Rights sets out basic conditions respecting hearings and representation to ensure fair trial in the context of procedural justice.³⁸ Article 10(1) requires the Court to conduct its proceedings in public, but with discretionary powers to conduct proceedings in camera in certain cases as may be permitted in its Rules of Procedure. Any party to a case before the Court has the right under clause (2) to legal

37 *ibid* art 25(1).

38 The 1998 Protocol to the African Charter on Human and Peoples' Rights, O.A.U. Doc. OAU/LEG/AFCHPR/PROT(III).

representation of his choice and, where the interests of justice requires, free legal representation may be provided. In the realm of substantive justice, the court has power under article 27(1) of the Protocol to make appropriate orders to remedy any violation, including the payment of fair compensation or reparation in any case where it finds that there has been a violation of a human or people's right.

Article 8 of the 2000 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa guarantees access to justice and equal protection before the law. It provides that women and men are equal before the law and shall have the right to equal protection and benefit of the law.³⁹ To the ends of equality and expedition, which are fundamental tenets of access to civil justice, the Protocol mandates States Parties to take all appropriate measures to ensure-

- (a) effective access by women to judicial and legal services, including legal aid;
- (b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid;
- (c) the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women;
- (d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;

39 The 2000 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, O.A.U. Doc. CAB/LEG/66.6.

- (e) that women are represented equally in the judiciary and law enforcement organs; and
- (f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

4.3. The Policy Framework in the Context of International Standards

The foregoing international and regional standards of access to civil justice would only find meaning and effect in Kenya through policy guidelines, legislation and administrative procedures. The extent to which they have been expressed in policy documents domesticated through legislation would perhaps be the best indicator of the degree to which policy, legal and organisational frameworks are well suited to ensure effective access to civil justice in conformity with international standards. It becomes necessary, therefore, to appraise judicial policies and statute law to: (a) gauge the extent to which they guarantee equal access to civil justice; and (b) identify the gaps in policy and legislation that require immediate reform in accord with international standards prescribed in various treaty instruments binding on Kenya.

To inform this appraisal, the study focuses on those common aspects of procedural justice that are accentuated in various human rights instruments that form part of the law of Kenya by virtue of Article 2(6) of the Constitution of Kenya, 2010. These include:

- (a) the existence of competent, independent and impartial national tribunals;
- (b) the application of simple and quick mechanisms for dispute resolution;

- (c) equality of all people before the courts and national tribunals;
- (d) fair equality of opportunity to obtain effective remedies in the context of judicial and administrative frameworks of the national tribunals;
- (e) the existence of suitable procedures for fair treatment and expedition in the disposal of cases and execution of orders or decrees at proportionate costs;
- (f) the possibility of meaningful participation in the judicial process and the availability of appropriate support services, including access to competent legal representation and legal aid; and
- (g) due regard to the special needs and interests of the parties.

The search for a sector-specific policies that address the aforecited indicators of equal access to civil justice turned in a paucity of data. Policy may be described as a formal statement of “the sum of government activities (defining specific goals and the means of their realisation) whether acting directly or through agents,” and which have an influence on “the life of citizens.”⁴⁰ The lack of an overarching or integrated policy framework means that there exists no firm foundation on which to assemble effective programmes, plans and actions to facilitate equal access to civil justice. Previous initiatives, including patchy legislative measures discussed in chapter three, have not delivered any measurable gains beyond their declaratory value that falls short of the requirements of Article 8 of the 1948 Universal Declaration of Human Rights, which upholds the

40 B Guy Peters *American Public Policy: Promise and Performance* (Chatham House/Seven Rivers Chappaqua NY 1999).

principle of equality and non-discrimination and guarantees the fundamental right of equal treatment before the law.⁴¹ This is confirmed by the findings in chapter five, whose statistical data illustrates the dire state of Kenya's civil justice system with reference to the cost of litigation and the complexity of procedures, among other impeding factors to which the reported slow pace of litigation is attributable.

These impediments require intervention by appropriate policy and a responsive legal framework. However, the evident lack of a defined policy has given way to intermittent legislative and patchy administrative interventions designed to address the perennial challenges posed by, among other factors:

- (a) backlog of cases;
- (b) complexity of procedures;
- (c) the high cost of litigation;
- (d) institutional inadequacies;
- (e) work ethic and integrity of judicial officers and staff; and
- (f) geographical accessibility of judicial services.

41 The 1948 UDHR op. cit. note 6 art 8, which states: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental human rights granted him by the constitution or by law", including the right of access to justice guaranteed by the Constitution of Kenya 2010 art 48.

This study demonstrates that any gains made by such intermittent legislative interventions discussed in chapter three remain insignificant to the effect that civil justice is by and large inaccessible to the majority of the consumers of judicial services on an equal basis. While there have been intensive and wide-ranging inquiries into some of the problems faced in the judicial system, no effective solutions have come about. This is because attempts at managing the judicial system have tended to be intermittent and exclusive to the organizational framework without due regard to the conceptual imperatives advanced in this study. Consequently, legislative reforms become cosmetic and do not generate viable solutions. As discussed in chapter six, there is need for a comprehensive stand-alone policy and suitable legislation that address all strategic issues in the appropriate conceptual orientation to complement the ongoing judicial transformation.

The reasons advanced in this study for the scanty gains in the reform initiatives are threefold. First, the legislative framework does not go far enough to observe and uphold the constituent principles of proportionality, expedition, party autonomy, participatory justice and fairness of process in civil litigation. Secondly, lack of a defined policy to establish a legal aid scheme to support indigent litigants in certain civil disputes constitutes a bar to equal access to judicial services. Thirdly, the complexity of procedural rules (without regard to the principle of proportionality) and the lack of tested administrative procedures to ensure effective case management explain the slow pace of civil litigation and the escalating backlog of cases, all of which impede access to effective remedies guaranteed by Article 2(3) of ICCPR⁴² to which Kenya is a State Party.

42 The 1966 ICCPR op. cit. note 7.

The pressing need for reform in policy has recently prompted the formulation of a sector-wide programme to guide the design and implementation of reforms in the Governance, Justice, Law and Order sectors steered by the Ministry of Justice, National Cohesion and Constitutional Affairs. The development of the proposed sector-wide Governance, Justice, Law and Order Sector (GJLOS II Reform Programme (2012-2016) is at an advanced stage. For what it is worth, the overarching 2012-2016 sector-wide GJLOS II programme framework is yet to be implemented once the prerequisite draft national policy is approved by Cabinet and adopted to guide the design and implementation of respective programmes, plans and actions towards the realisation of its broad strategic objectives, namely, to facilitate the implementation of the 2010 Constitution and address the governance challenges facing the country.⁴³

This multisectoral second five-year reform programme is a progression of the preceding GJLOS I Reform Programme implemented for the duration of the period between 2004 and 2009. GJLOS I was launched on 11th November 2003 with the primary goal of improving the quality of life for Kenyans, especially the poor, marginalized and the vulnerable. The Programme was developed in the context of Kenya's then overarching development policy document, the Economic Recovery Strategy for Wealth and Employment Creation. It was designed to more holistically and effectively address the issues of governance, access to justice, enjoyment of human rights and the promotion of the rule of law.

The objective of the second phase of this Programme is to “accelerate reforms for the realization of a united, secure, democratic and prosperous Kenya where all citizens enjoy their human

43 Ministry of Justice, National Cohesion and Constitutional Affairs *Governance, Justice, Law and Order (GJLOS) II Reform Programme 2011/12 to 2015/16 (Report)* (October 2011) p.6.

rights”,⁴⁴ including the constitutional right of access to civil justice with which this study is concerned. Though still in draft, the proposed Programme focuses on a number of legal, policy, institutional and service delivery intervention strategies targeting eight priority areas or “Pillars”, which include:

- (a) the rule of law;
- (b) access to justice;
- (c) human rights and social justice; and
- (d) public (including judicial) service delivery.

These Pillars constitute the priority areas or themes around which interventions in terms of planning, resource mobilization and implementation in the reform sector are organized. Under each Pillar, the interventions are designed to achieve a set of broad interdependent strategic objectives linked to the overall national objective, and which are intended to be pursued concurrently in order to maximize their effectiveness.

Though yet to be adopted for implementation, the GJLOS II Programme embodies the Government’s commitment to improve governance in all spheres of public life, including the administration of civil justice. Notably, though, the context in which this reform programme was formulated makes it inappropriate as the basis or instrument of policy orientation for the design and implementation of plans and actions for the realisation of equal access to civil justice. As this study demonstrates, the proposed 2012-2016 reform programme lays emphasis on a range of

44 *ibid.*

organisational reforms that are closely linked to the ongoing judicial transformation in the absence of a defined sectoral policy for effective delivery of judicial services.

Indeed, the Programme does not go beyond the sixteen strategic interventions commonly known as the “Agenda 4 items”, which include:

- (a) constitutional, police, parliamentary, judicial, executive, civil service and land reforms;
- (b) poverty eradication and equitable development;
- (c) combating unemployment (especially among the youth);
- (d) consolidation of national cohesion and integration;
- (e) enhancing transparency and accountability in public affairs; and
- (f) fighting corruption and impunity.⁴⁵

Evidently, the reform programme is almost exclusively oriented around governance as stipulated in its “mission”, namely, “to advance effective and accountable leadership, promote a just and secure environment and establish strong governance, and rule of law institutions to empower citizens for the achievement of socio economic and political development.”⁴⁶

This contextual orientation explains why the reform programme is in the viewpoint of this study inadequate to support effective realisation of equal access to civil justice. As a reform

45 International Legal Assistance Consortium and the International Bar Association Human Rights Institute *Restoring Integrity: An Assessment of the Needs of the Justice System in the Republic of Kenya* (Report) (February 2010) p.16 available at: <<http://www.ibanet.org/document/default.aspx?documentuid=dcd20276>> (last accessed on 20th April 2010).

46 Ministry of Justice, National Cohesion and Constitutional Affairs op. cit. note 39 p. 24.

programme, the GJLOS II Programme spreads rather thinly over a wide range of sectors, having been formulated against the backdrop of the 2007-2008 post-election violence largely attributed to diverse factors, including:

- (a) bad governance;
- (b) endemic poverty;
- (c) widespread unemployment;
- (d) economic and social inequality;
- (e) social exclusion of minority and vulnerable groups;
- (f) rampant impunity;
- (g) historical injustices relating to inequitable land distribution;
- (h) limited transparency and accountability;
- (i) a politically polarized society; and
- (j) a divisive electoral system.

Its reactive nature aligns the reform agenda almost exclusively to issues of governance and does not go far enough to address the conceptual imperatives and the constituent principles of procedural justice or fairness of process promoted by Article 14 of the 1966 ICCPR⁴⁷ towards equal access to civil justice on which this study focuses.

The 2012-2016 GJLOS II Reform Programme (which is subject to adoption and effective implementation) is additionally designed to address the following among other prevalent strategic issues and contemporary challenges, namely:

47 The 1966 ICCPR op. cit. note 7.

- (a) selective application of the law (which offends the principle of equality);
- (b) inadequate knowledge of the law and procedures on the part of the users of judicial services;
- (c) complex justice systems;
- (d) costly dispute resolution mechanisms;
- (e) lengthy and time-consuming dispute resolution procedures (which erode the effectiveness of remedies);
- (f) lack of public confidence in the justice system;
- (g) inefficiency and corruption in the justice system;
- (h) absence of ADR mechanisms in the civil justice system; and
- (i) large backlog of cases.⁴⁸

The strategic objectives and interventions proposed in the 2012-2016 Programme are, in the viewpoint of this study, hardly the means by which equality of opportunity to access civil justice can be effectively guaranteed. While the strategic issues sought to be addressed in the programme are undeniably matters of concern to proponents of procedural justice, the Programme lacks focus and clear vision as respects the constituent principles of proportionality, fairness of process and participatory justice. A quick glance at the two relevant pillars of the reform programme demonstrates why.

The measures proposed to augment the rule of law include:

- (a) the promotion of public participation in the law-making process;

48 Ministry of Justice, National Cohesion and Constitutional Affairs op. cit. note 39 p.17.

- (b) law and organisational reforms to guarantee the right to freedom from discrimination and equal treatment before the law;
- (c) effective implementation of the 2010 Constitution; and
- (d) civic education to sensitise citizens on their fundamental rights and obligations.⁴⁹ As regards the pillar of access to justice, the proposed strategic interventions include:
 - (i) enhancing the capacity, efficiency and accessibility of the justice system particularly for the poor and marginalized groups;
 - (ii) reducing backlog of cases; and
 - (iii) improving the quality of legal education and legal services.⁵⁰

Notably, the inordinately high cost of litigation, complex rules of procedure, and the slow pace of litigation and backlog of cases are recurrently cited as the main impediments to civil justice, which explains the diminution of trust and confidence in the judicial system. These impeding factors are affirmed by the desk research findings in chapter three and the statistical data presented in chapter five. Hence the pressing need for the adoption of market mechanisms (among other interventions) as alternative means of dispute resolution discussed in chapter six. A look at the proposed reform strategies reveals that although the stated impediments are indeed matters of concern in the administration of civil justice, their policy and programmatic orientation renders the 2012-2016 sector-wide reform programme less effective as the means of intervention to guarantee effective delivery of civil justice.

49 ibid p.7.

50 ibid.

As noted above, the GJLOS II Programme is incongruously designed and has the effect of perpetuating what Justice Lokur refers to as “tribunalised justice”⁵¹ by laying undue emphasis on organisational reforms. The programme markedly pays little attention to the principle of party autonomy and the critical need to reduce the adversarial role of parties in dispute resolution. For this reason, chapter seven recommends formulation of a stand-alone policy that focuses attention on the fundamental principles of equal access to judicial services and alternative dispute resolution mechanisms.

This study argues that effective planning and management of judicial services depends on clear-minded appreciation of what we are up against.⁵² While appreciating the undoubted significance of organisational reforms, this study advances the proposition that the odds against full and equal access to civil justice hinge on the extent to which the principles of expedition, equality, proportionality, party autonomy, fairness of process and participatory justice (in the framework of simplified procedures) find their rightful place in policy and legislation.

Chapters three, four and five demonstrate that the policy framework in Kenya is not well suited to ensure effective administration of civil justice. That explains the limited degree of equal access to judicial services attested by the statistical data reported in chapter five, which calls for immediate policy and legal intervention to satisfy the demands of Article 2(2) of the 1966 Covenant⁵³ to give effect to, among others:

51 MB Lokur ‘Case Management and Court Administration’ available at: <<http://server1.msn.co.in/sp03/summerfun/index.asp>> Mercury Rising contest (last accessed on 15th October 2011).

52 *ibid.*

53 The 1966 ICCPR *op. cit.* note 7.

- (a) the right to effective remedies as guaranteed by article 2(3);
- (b) the right to fair trial guaranteed by article 14;
- (c) the right to equal treatment before the law as provided for in article 16; and
- (d) the right to freedom from discrimination guaranteed by articles 2(1) and 26.

The pressing need for policy and law reform is informed by the prevailing circumstances where, according to the findings in chapter five, economic factors and social and political status continue to inhibit equality of opportunity to access civil justice, not to mention the complexity of procedures that negates fairness of process guaranteed by Article 14(1) of the 1966 Convention.

The development-oriented Kenya Vision 2030 constitutes the country's new development blueprint covering the period 2008-2030. The Vision does little to enhance the efficacy of the policy framework in support of legislation, programmes, plans and actions for the improvement of access to civil justice. Even though it proposes reform of the governance system through a range of constitutional, legal and administrative reforms, it does not go far enough to address the specific strategic issues and inhibiting factors identified in chapters three and five. A close look at one of the proposed strategic areas, namely the rule of law and human rights (where it is intended to promote adherence to the rule of law applicable to a modern market-based economy in a human rights-respecting state) reveals nothing beyond a broad developmental approach to governance very much the same way as does the GJLOS II sector-wide governance reform

programme. Apart from its political pillar, which specifies the goal for 2012 as “to enact and implement a legal and organisational framework that is vital to promoting and sustaining fair, affordable and equitable access to justice,⁵⁴ the Vision makes no reference to the strategies by which it is intended to mitigate or eliminate the specific barriers of access to civil justice identified in chapter five.

According to this study, the medium term commitment to putting in place structures to guarantee access to justice⁵⁵ is yet to be realised. The diverse range of policy, legislative and organisational reform measures identified under the strategic initiatives to improve access to justice are far from attainment. The proposed legislation, which includes:

- (a) a Small Claims Court Bill;
- (b) a Private Prosecutions Bill;
- (c) a Legal Aid Bill;
- (d) a Court of Petty Sessions Bill;
- (e) appropriate alternative dispute resolution (ADR) legislation;
- (f) a Judicial Service Bill;
- (g) the Evidence Act; and

54 Transparency International Kenya *Adili 108* (Nairobi Kenya February 2009) p.7 available at: <<http://www.tikenya.org/documents/Adili103.pdf>> (last accessed on 20 April 2010).

55 Government of the Republic of Kenya *Kenya Vision 2030 First Medium Term Plan 2008-2012* (Government Printers Nairobi) p.124 available at: <<http://www.scribd.com/doc18345790/vision-2030-medium-term-plan-20082012>> (last accessed on 20 April 2010).

(h) a Land Disputes Tribunal Act;⁵⁶ have only received partial attention by the enactment of:

(i) the Judicial Service Act, 2011; and

(ii) the Environment and Land Court Act, 2011.

With the exception of the legislation proposed to introduce ADR mechanisms and reform the law of evidence, the envisioned strategic initiatives (even if attained) are largely dedicated to organisational reforms that on their own have over the years failed to deliver on accessible system of civil justice due to lack of proper conceptual orientation. On the other hand, the formulation and application of simplified rules of procedure for the adjudication of small claims in magistrates' courts, a legal aid scheme to support indigent litigants in civil claims, and the introduction of a defined court-mandated or court-annexed ADR or other market mechanisms would go a long way in promoting the principles of proportionality and party autonomy, which would in turn improve fairness of process towards appreciable access to judicial services. But these reforms are far from reality despite the commendable judicial transformation strategies designed to restructure the judiciary and address the prevailing administrative inadequacies..

4.4. The Legal Framework in the Context of International Standards

The promulgation of the 2010 Constitution of Kenya on 27th August 2010 was a historical milestone, which ushered in far-reaching legal and organisational reforms designed to ensure (among other things) good governance and the effective administration of justice. The new

56 *ibid* pp.131-2.

constitutional order is founded on democratic values and fundamental human rights, including the right of access to justice promoted and protected in chapter four of the Constitution. The Constitution of Kenya 2010 prescribes the Bill of Rights as “an integral part of Kenya’s democratic state”.⁵⁷ The Bill of Rights is also “the framework for social, economic and cultural policies”.⁵⁸

The overriding objective and purpose of recognising and protecting human rights and fundamental freedoms (including the right of effective and equal access to justice) is “to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings”.⁵⁹ Accordingly, the effective promotion and protection of the fundamental rights and freedoms recognised in the Bill of Rights depends on the existence of apposite policy, legal and organizational frameworks designed to close the portentous gap between mere declaration of intentions characteristic of broad policy statements and the reality on the ground. The absence of a definitive policy on access to civil justice in Kenya sets legislative and organizational reform initiatives on what may be viewed as a course without direction.

The imperative nature of policy and legislation in the human rights agenda is recognised in Article 21 of the Constitution. Article 21(1) imposes a fundamental duty on the State and every State organ “to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights” by taking appropriate legislative, policy and other measures, including the

57 The Constitution of Kenya, 2010 art 19(1).

58 *ibid.*

59 *ibid* art 19(2).

enactment and implementation of legislation to discharge its international obligations in respect of human rights and fundamental freedoms.⁶⁰ Such legislation shall take account of the relevant international human rights instruments.⁶¹ As respects the administration of justice, article 48 imposes a duty on the State to “... ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice”.⁶²

What this means is that the cost of litigation should not inhibit the realisation of equality of opportunity to access judicial services and effective remedies as contemplated in Article 8 of UDHR.⁶³ However, according to statistical data in chapter five, 85.4% of the participants interviewed in the survey were of the view that parties to civil proceedings are not treated with equality and fairness, which negates the principle of equality prescribed in Article 8 of UDHR.

The principle of equality and equal protection by the law are also guaranteed by Article 3(1) and (2) of the ACHPR to which Kenya subscribes. Article 7(1) safeguards the right to a fair hearing and the right to legal representation, even though in the context of criminal justice. Though essentially fashioned to suit the demands of criminal justice, the principles of fair trial advanced in this Convention are equally applicable to the administration of civil justice.

The findings in chapter five suggest differential treatment of litigants on the basis of economic, social and political status as attested to by 85.4% of those interviewed in the survey. Although

60 ibid art 19(4).

61 ibid art 51(3)(b).

62 ibid art 48.

63 The 1948 UDHR op. cit. note 6.

only 10.3% attribute such differential treatment to gender, economic and social status is likely to prejudice female litigants. In effect, Kenya would fail to meet the standards of equality of opportunity for women to access judicial services as guaranteed in Article 8 of the 2000 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa⁶⁴, notwithstanding the corresponding guarantee in Article 27 of the Constitution. Article 8 of the 2000 Protocol guarantees access to justice and equal protection before the law and provides that women and men are equal before the law and shall have the right to equal protection and benefit of the law. The Protocol mandates States Parties to take all appropriate measures to ensure effective access by women to judicial and legal services, including legal aid and education.

Article 27 of the Constitution of the Kenya 2010, echoes the letter and spirit of international human rights instruments that guarantee the fundamental right to equality and non-discrimination. Article 27(1) states that “[e]very person is equal before the law and has the right to equal protection and equal benefit of the law.” “Equality” includes “the full and equal enjoyment of all rights and fundamental freedoms”⁶⁵ guaranteed in the Constitution, including the right of access to justice guaranteed by Article 48 and the derivative right of full and equal access to civil justice. Article 48 obligates the State to “ensure access to justice for all persons” at a reasonable fee (if any) so as not to hamper access to justice. As the findings in chapter four indicate, this obligation is yet to be realised by reforming policy and legislation to (among other things) establish a legal aid scheme and simplify procedures to facilitate cost-effective and party-driven proceedings in civil claims.

64 The 2000 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, O.A.U. Doc. CAB/LEG/66.6.

65 The Constitution of Kenya, 2010 art 27(2).

The right of access to justice also includes “... the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.⁶⁶ This inspirational provision operates as a directive principle that concerns itself with the essential quality of both procedures and outcomes, which are vital for the due administration of civil justice by competent national tribunals.⁶⁷ It should be borne in mind, though, that constitutional provisions of this nature are in reality not an end in themselves. They are not self enforcing and therefore require enabling substantive and procedural legislation and administrative procedures to give them full effect.

Despite the strenuous effort to reform the legal and organizational frameworks for the administration of civil justice in Kenya, the findings in chapters three and four demonstrate that the extant policy and legal frameworks fall short of the constitutional yardstick of full and equal access to (civil) justice and are ill designed to guarantee quality of procedures in the context of:

- (a) equality of opportunity;
- (b) expedition;
- (c) party control;
- (d) simplified procedures;
- (e) proportionality; and

66 *ibid* art 50(1).

67 The 1948 UDHR *op. cit.* note 6.

- (f) fairness of process, which are together advanced in this study as decisive factors for the realisation of procedural justice in pursuit of effective remedies.

Fairness of process denotes equality of opportunity to access judicial services. The rules of procedure should be designed to facilitate full and equal access to judicial services if they are to accord with the minimum standards prescribed in Article 10 of UDHR. Accordingly, this study argues that procedural justice demands simplicity and flexibility of procedure to the ends of substantive justice signified by effective remedies. In other words, the legislative framework should be such as would serve the interests of the parties on an equal basis in determination of their competing claims, and not for litigants to be put to inordinately high expense in order to serve the demands of technical rules of procedure. This is the spirit of party autonomy posited as a constituent element of civil justice.

Commenting on the place of procedural rules in the delivery of justice, Hon. Justice Hancox observes that "... the relation of rules of practice to the administration of justice is intended to be that of a handmaid rather than a mistress, and that the Court should not be so far bound and tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which would cause injustice in a particular case."⁶⁸ In effect, rules of procedure should serve the interest of, and should by no means be seen to obstruct equal access to, civil justice.

The ongoing reforms in governance, policy and legislation, and the comprehensive restructuring of the judicial system in the implementation of the Constitution of Kenya, 2010, may be viewed

68 *Samuel Mbugua Githere v Muiruri Laban Kimungu* Miscellaneous Civil Application No. NAI56 of 1983 (CA) p.7 (Unreported) available at: <<http://www.kenyalaw.org>> (last accessed on 15th August 2011).

as the beginning of a long journey in the quest for justice. The enactment of enabling legislation and the review of policy and administrative procedures are among the measures contemplated in Article 2(2) of ICCPR.⁶⁹ In the long run, the extent to which litigants access effective remedies is largely dependent on the policy and legislative frameworks for the administration of justice. In addition, administrative procedures and the efficiency of court administration generally determine the manner in which judicial services are rendered to the satisfaction of litigants, whose measure of trust and confidence in the judicial system is one of the key indicators of the degree of accessibility of civil justice.

The findings in chapters three and five indicate diminished trust and confidence in the judicial system in the administration of civil justice. That explains why all the key informants and the majority of the respondents to the survey reported in chapter five prefer alternative dispute resolution mechanisms to court litigation. As statistical data shows: (a) 96.1% of the participants viewed ADR mechanisms as less time consuming; (b) 69.0% view ADR as less costly in comparison to litigation; while (c) 85.0% consider ADR to be less complex. For these among other reasons, 62.3% of the respondents expressed trust and confidence in ADR, which they viewed as suitably party-driven to the ends of quality outcomes and need satisfaction.

In order to boost trust and confidence in the judicial system, this study emphasizes the need for courts to be emboldened by a broad sense of justice and fairness as it applies the principles of equality, expedition and fairness of process, which complement proportionality and party autonomy so as to guarantee procedural justice and deliver effective remedies. Only then can

69 The 1966 ICCPR op. cit note 7 art 2(2).

national tribunals ensure quality outcomes through fair procedures, which in turn inspire heightened trust and confidence in the judicial system.

The recent amendments to the Civil Procedure and the Appellate Jurisdiction Acts (which are discussed in part 3.8 of chapter three) were intended to enhance fairness of process and mitigate (if not altogether eliminate) the lamentable complexity of the rules of civil procedure, which in turn contribute to the chronic backlog of cases. However, the overriding objective expressed in section 1A(1) of Chapter 21 of the Laws of Kenya is, according to this study, merely declaratory in view of the fact that no corresponding policy or legislative measures have been taken to simplify procedures. Similarly, the requirement by section 1B of the Act that courts should conduct judicial proceedings in an expeditious and cost-effective manner adds little value to this system of civil justice, which is plagued by complex procedures and high cost of litigation reported in chapter five. The same may be said of sections 3A and 3B of the Appellate Jurisdiction Act (Cap. 9), which express identical overriding objective and duty of the appellate courts respectively in determination of civil appeals. Consequently, the process of the courts in the adjudication of civil disputes remains elaborate, slow and costly even though the principal objective is that disputes be disposed of smoothly, quickly and cheaply, and for the benefit of the public purse consistent with efficient administration of civil justice.⁷⁰

As respects the cost of litigation, the constitutional right of access to justice imposes a corresponding obligation on the state to take all necessary legislative and administrative measures to eliminate any impediments on account of costs in the adjudication of civil

70 HWR Wade *Administrative Law* (4th edn Oxford University Press Oxford 1977) p.741.

disputes.⁷¹ Accordingly, the legitimacy, independence and impartiality of the national tribunals and their ability to expedite the process of adjudication as factors that are crucial to the fairness of any claim adjudication would count for little if judicial services were inaccessible on account of prohibitive cost. Yet legal advice and representation by legal counsel in certain cases (which are often costly), and legal aid, are necessary components of a fair process of dispute resolution.

Kenya would do well to reform her policy, legal and organizational frameworks to promote and protect the right of access to civil justice as a measure of good governance and due respect for the rule of law and the universally acclaimed standards of access to justice. This study argues that equality of opportunity, simplicity and fairness of process, expedition and impartiality (which are yet to be realised in the administration of civil justice in Kenya) are indispensable constituents of procedural justice to which all democratic states aspire. The right to “simple and prompt recourse” in pursuance of effective remedies is also critical to the pursuit of effective remedies, as contemplated in the prescriptive provisions of article 25(1) of the 1969 American Convention on Human Rights,⁷² which, though not binding on Kenya, nonetheless provides a beneficial example that would inform Kenya’s reform agenda. As this study demonstrates, Kenya is far from attaining to such “simple and prompt recourse” in the administration of civil justice and would do well to adopt measures that would deliver tangible gains to this end.

The foregoing are only some of the international human rights instruments that address the universally recognised standards of access to justice and the derivative notion of civil justice with which this study is concerned. However, there is no intention in this chapter to exhaustively

71 The 1966 ICCPR op. cit note 7 art 48.

72 The 1969 American Convention on Human Rights op. cit. note 36.

discuss each and every relevant provision by which these standards are prescribed. Suffice it to observe that the few universal and regional human rights instruments mentioned above serve as beneficial examples and set the pace for Kenya to realign herself with the international community in the administration of civil justice regardless of whether they are obligatory by virtue of article 2(6) of the Constitution. The reforms proposed in chapter seven are founded on the letter and spirit of these instruments, and on international best practices designed to ensure full and equal access to civil justice. They provide a firm foundation for policy and legislation designed to uphold the principles of equality, expedition, proportionality, party autonomy and procedural justice.

4.5. Conclusion

The appraisal in this chapter of the policy and legal frameworks for the administration of civil justice in Kenya mirrored on the international standards and best practices of developed commonwealth and other jurisdictions reveals systemic failure to meet the conceptual imperatives for equal access to civil justice.

Chapter five collates and analyses the statistical data gathered from various research designs discussed in part 1.10 of chapter one. It applies the proposed research design and methodology, outlines the profile of participants, research instruments, ethical considerations and the integrity of the study. The statistical data reported in the chapter confirms the desk research findings in chapters three and four, providing the basis for the reform strategies recommended in chapter seven.

CHAPTER FIVE

ACCESS TO CIVIL JUSTICE IN KENYA: POLICY AND PRACTICE

5.1. Introduction

Chapters three and four laid bare the gap between policy and practice in the administration of civil justice in Kenya. They demonstrated that the extant policy and legislation fall short of the universally accepted standards and are not well suited to deliver civil justice. This chapter presents' statistical data to confirm and supplement the desk research findings in chapters three and four. In doing so, it presents an overview of the survey, the tools and processes of data collection, the sampling profile, data analysis and reporting and then answers the first research question posed in part 1.4 of chapter one. It seeks to evaluate the effectiveness of the policy and legal frameworks within which national tribunals exercise their judicial functions and present statistical evidence of their inadequacies.

The data presented in this chapter further clarifies conceptual issues and answers the relevant research questions pertaining to the extant policy and legislation for the administration of civil justice in Kenya. It addresses the second limb of the main objective, namely, to evaluate the level of consumer satisfaction in the civil justice system with particular reference to expedition, extent and equality of access, as mentioned in part 1.3 of chapter one.

5.2. Research Design and Methodology

The overview of the research design and methodology presented in this chapter was described in part 1.10 of chapter one. This chapter contains an account of the procedures used in the study, including research design, selection and description of the participants, setting, instruments used for data collection, data analysis, tests of accuracy, validity and trustworthiness of the study. It comprises the report on the appraisal of the policy and legal frameworks of the judicial system in Kenya and evaluates the level of consumer satisfaction with respect to the adjudication of civil disputes through court litigation and alternative methods of dispute resolution (ADR). The research findings provide the foundation for chapter six, which discusses the factors that hamper access to civil justice and lays the ground for appropriate reform strategies recommended in chapter seven.

The term “consumer satisfaction” is narrowly interpreted in this study to mean a sense of contentment or approval by users of the judicial system of the process of dispute resolution on account of the perceived quality of procedure and outcomes. “Satisfaction” is by no means used in the context of the realisation of any of the diverse and complex goals that parties set out to achieve in civil litigation, including:

- (a) self preservation;
- (b) to assert their rights;
- (c) to recoup what they have lost;
- (d) to secure admission of wrongdoing by their opponents;

- (e) to achieve a measure of moral vindication and what they perceive as “justice” (by the system ascertaining the truth and finding their opponent in the wrong);
- (f) self vindication;
- (g) to revenge and harm opponents; or
- (h) to coerce others into doing something that they would otherwise not do.¹

As noted above, the research methodology and the choice of strategy and sampling techniques employed in this study were discussed in part 1.10 of the first chapter. The choice of a non-probability research design was informed by its suitability for social research, as is the case in this study. It is for this reason that random selection of targets or units of inquiry (which is ideal for quantitative research designs common in scientific studies) was not preferred. This inquiry was undertaken through a combination of four main non-probability strategies, namely:

- (a) qualitative research methodology;
- (b) purposive sampling strategy;
- (c) expert sampling; and
- (d) snowball (or chain referral) sampling.

1 T Relis ‘Civil Litigation from Litigants’ Perspectives: What We Know and What We Don’t Know About the Litigation Experience of Individual Litigants’ (2002) 25 *Studies in Law, Politics and Society* p.156.

The combination of the four research strategies or mixed-method approach was considered as the most appropriate strategy for this study because it effectively addresses to research questions of both qualitative and quantitative nature. Accordingly, data collection and analysis techniques from those methodologies were undertaken as proposed. Mixed-methods research strategy has been defined as “the collection or analysis of both quantitative and qualitative data in a single study in which the data are collected concurrently or sequentially, are given a priority, and involve the integration of the data at one or more stages in the process of research”.² The use of multiple research strategies enables researchers to draw on all possibilities³ and provides a broader perspective to the study as the qualitative data helps describe aspects the quantitative data cannot address.⁴ Using diverse forms of data collection strategies allows researchers to simultaneously generalize results from a sample to a population and to gain a deeper understanding of the subject of inquiry.

The use of a combination of four non-probability research strategies in this study also facilitates triangulation to validate data, and guarantees validity and credibility of the findings. Amores defines triangulation as “the collection and comparison of data from two or more separate observations or illustrations of the behaviours (or subjects of inquiry) being studied”.⁵ Data were collected through written survey questionnaires and semi-structured interviews with the expert

2 JW Creswell, VL Clark Plano, ML Gutmann and WE Hanson ‘*Advanced Mixed Methods Research Designs*’ in A Tashakkori & C Teddlie (eds) *Handbook of Mixed Methods in Social and Behavioral Research* (Sage Thousand Oaks CA 2003) p.212.

3 A Tashakkori & C Teddlie *Mixed Methodology: Combining Qualitative and Quantitative Approaches* (Sage Thousand Oaks CA 1998).

4 J W Creswell *Research design: Quantitative, qualitative, and Mixed Methods Approaches* (2nd edn Sage Thousand Oaks CA 2003).

5 MJ Amores ‘A New Perspective on Peer-Editing’ (1997) 30(4) *Foreign Language Annals* p.521.

respondents. The use of these data collection instruments helped validate both the answers in the questionnaires and interviews.

In addition to administering the annexed research instruments, further steps were taken to ensure triangulation on the variable of interest relating to expedition with which civil disputes were resolved through the judicial system. For this purpose, a separate analysis was conducted in various High Court and subordinate court stations to ascertain the general picture as to how long it takes to have civil cases listed for hearing. This survey was conducted by analysing respective daily cause lists over various periods to establish the percentage of cases filed: (a) in the last three years; (b) between four and six years; and (c) over six years; before being listed either for interlocutory or full hearing. The outcome of this survey was intended to validate responses to questions as to the timeliness with which civil disputes were finally determined.

An additional survey conducted to gauge the degree of consumer satisfaction with family mediation by means of the annexed evaluation questionnaire marked “Appendix C” was intended to test the suitability of mediation as an alternative to litigation in the conventional judicial system on matters relating to family disputes. This assessment tool was developed by the Federation of Women Lawyers (FIDA) Kenya to gauge consumer satisfaction with mediation services in family disputes conducted under a legal aid scheme administered by FIDA. The outcomes of this assessment is applied in chapter six to support recommendations in chapter seven for the adoption of market mechanisms in appropriate cases to enhance proportionality, participatory justice and the quality of procedures and outcomes.

5.3. Participants

The population group interviewed in this inquiry consisted of users of the civil justice system in five High Court stations and subordinate courts located in Nairobi, Mombasa, Kisumu, Eldoret, Meru, Kiambu, Embu and Machakos. Handpicked population groups of legal practitioners, court registry and clerical officers, judicial officers and litigants, and other users of the judicial system, who possess information and share diverse experiences relevant to this study, were interviewed by use of the annexed questionnaire marked “Appendix A”. This population group was handpicked because it is comprised of persons who have the required information with respect to the objectives of the study.⁶ The empirical investigation sought to gauge the expectations, experiences, perceptions and feelings of litigants and other users of judicial services in respect of the performance of judicial institutions in delivery of civil justice.

Although litigants are at the core of this inquiry as primary users and consumers of the civil justice system (which exists ostensibly for them and provides them with this essential service)⁷ this study appreciates the critical role of legal counsel, paralegal and judicial officers. In essence, their engagement and response to the research questions proposed in this study presents a broad outlook of the standing as respects performance in the administration of civil justice in Kenya. Table 1 below shows the number and station of respondents (including seven key informants) interviewed in this inquiry.

6 AG Mugenda *Social Science Research Theory and Principles* (Applied Research and Training Services Nairobi 2008) p.196.

7 Relis op. cit. note 1 p.152.

Table 1

Distribution of Participants

Station	Number of Respondents	Station	Number of respondents
Nairobi	71	Mombasa	26
Kisumu	25	Eldoret	7
Meru	22	Kiambu	9
		Machakos	3

Out of the 240 respondents targeted and approached for interviews, 178 (inclusive of seven expert respondents stationed in Nairobi) responded, representing a return rate of 74.2%. It was presumed that the sample was representative of the larger population to obtain a composite profile of that population. 62 (25.8%) questionnaires were either not returned altogether or were not returned in good time for inclusion in the data analysis completed on 17th August 2011. The high return rate ensured that the demographic profile of survey respondents reflects that of the survey population and provided a sufficiently large data set for analysis.⁸

The data on which this chapter focuses was gathered in the form of responses to interviews on the basis of structured questions designed to suit the research questions in relation to the relevant variables of interest. This qualitative research model was concerned with subjective assessment

8 K Kelley, B Clark, V Brown and J Sitzia 'Good Practice in the Conduct and Reporting of Survey Research' International Journal for Quality in Health Care (2003) 15(3)(c) International Society for Quality in Health Care Oxford University Press p.262 available at: <<http://intqhc.oxfordjournals.org/content/15/3/261.full>> (last accessed on 28th September 2011).

of attitudes, opinions, projective techniques and depth interviews of expert respondents.⁹ The expert respondents constituted the proposed category of key informants comprised of persons who this study considers to be highly experienced legal practitioners, chartered arbitrators and mediators drawn from diverse professional backgrounds, including quantity surveyors, lawyers and engineers.

With respect to the structured questionnaire, not all elements of personal data are significant to the study. For example, the age range and gender of the participants were not analysed because they were not considered as relevant or influential on the outcome of the survey. That explains why the age range was omitted from Appendix A, since such data would have been of little or no significance to the findings on the subject of inquiry. In so far as the study focuses on access to civil justice and on the status of the policy and legal frameworks as they influence the degree of access on the basis of equality, the age range and gender of the participants would have had no bearing on the findings of this inquiry. Neither was it necessary to analyse the data collected on the basis of the occupation and years of professional experience of the respondents (with the exception of the seven key informants), even though occupation and experience were some of the items of inquiry sought in Appendix A. The reason for this approach is that subjective views of the participants are substantially dependent on their individual observations in the nature of a snapshot at the time of the inquiry and not necessarily on how long they have been users of judicial services.

9 CR Kothari *Research Methodology: Methods and Techniques* (2nd edn New Age International (P) Ltd New Delhi 2004) p.6.

The question of scope and number of participants or respondents inevitably features in every qualitative research. Likewise, this study faced the question as to how many participants were sufficient to generate reliable data to answer the relevant research questions and meet the proposed research objectives. Notably, though, "... there are no hard and fast rules for determining the correct number of participants".¹⁰ According to Gay and others, "more subjects does not necessarily mean better". The authors further observe that "Qualitative studies can be carried out with a single participant or with as many as sixty or seventy participants.... However, qualitative studies with more than twenty or so participants are rare, and many studies will have fewer."¹¹ Accordingly, the 178 participants interviewed in this study were more than sufficient to support the findings of this inquiry.

The restriction of the number to the 240 (excluding the seven expert respondents) originally approached for interview was influenced by the insufficiency of time and money. However, caution was exercised to determine the adequacy of the number of participants. First, the study ensured that the selected participants represented the range of potential respondents in the setting. Secondly, no useful purpose would have been served by increased numbers of respondents beyond those interviewed, as this would have resulted in redundancy of the information gathered from the participants.¹² In other words, nothing more would be learned from additional respondents, as the same thoughts, perspectives and responses would recur from most or all of the participants. This is commonly known as data saturation.

10 LR Gay, GE Mills and P Airasian *Educational Research: Competences for Analysis and Applications* (8th edn Pearson Prentice Hall New Jersey 2006) pp.114-115.

11 *ibid* p.115.

12 *ibid*.

The purposive sampling research model proposed in part 1.10 of chapter one allowed the study to select participants judged to be thoughtful, informative, articulate and experienced with the research topic and setting.¹³ The inquiry undertook what has been referred to as a “ThoroughScan,” which is a thorough assessment of the studied dispute resolution mechanisms.¹⁴ A ThoroughScan has two distinctive features, namely: (a) it is based on a comprehensive questionnaire that develops the three indicators of costs, quality of the procedure and quality of the outcome in greater detail; and (b) at least two data collection methods are applied in order to guarantee the reliability of the results and findings. The four research methods applied in combination are described in part 1.10 of chapter one. These include qualitative research methodology, purposive sampling, expert sampling and snowball sampling strategies. The methods involve: (i) the qualitative strategy of generating data from existing literature that documents previous studies; and (ii) interviewing the actual users of the judicial system and key informants, and gathering their reflections on their experiences and evaluation of the accessibility, fairness of process and quality of outcomes of the various dispute resolution strategies.

The ThoroughScan measurement system applied in this study was designed to measure the cost, quality of the procedure and quality of the outcome in the determination of competing civil claims through various dispute resolution mechanisms. Costs are a key indicator of accessibility

13 Gay and others op. cit. note 10 p.114.

14 Maklu and Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems ‘A handbook of Measuring the Cost and Quality of Paths to Justice’ (2009) available at: <<http://www.measuringaccesstojustice.com>> (last accessed on 20th November 2010).

to the dispute resolution mechanism under inquiry while the quality of procedure is an indicator of the extent of access to procedural justice. On the other hand, quality of outcomes is an indicator of the extent of access to substantive justice with which this study is less concerned. The appropriate data collection questionnaire was designed to establish how the users of various dispute resolution mechanisms assessed their experiences and the extent to which they were content with the procedures that attempt to address their conflicting interests.

This measurement system is not without limitation. First, although measurement of individual experiences with strongly divergent paths is possible, it gives limited information about the experience of the average user. Secondly, the system does not assess whether outcomes are just in a legal sense.¹⁵ The method is subjective in that it measures the users' perceptions about fairness. Although the tool measures the perceptions with the three indicators, it does not grade their relative importance. Accordingly, there is no attempt in this study to rate the indicators of costs, quality of procedure and quality of the outcome in any order of importance. Rather, the study contends that the three indicators are equally vital in determining the extent of equal access to civil justice. Briefly stated, the measurement system establishes whether the procedure of dispute resolution is affordable and accessible, and the extent to which the principles of proportionality, participatory and procedural justice find their rightful place in the current judicial system.

15 Maklu and Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems op. cit. note 14.

5.4. Research Instruments

Due to the nature of this study, it became necessary to use a combination of data collection strategies, which included the two written survey questionnaires marked “Appendix A” and “Appendix C”. Appendix A was structured in such a way as to enable the participants to assess in their own view the degree of access to civil justice and the status of the policy and legal frameworks in the administration of civil justice in Kenya. More attention was focused on their experiences and perceptions of the conventional dispute resolution mechanisms, the adversarial system of court litigation, and the extent to which such mechanisms facilitate equal access to civil justice in accord with the principles of proportionality, fairness of process, participatory and procedural justice, which in turn dictate the quality of procedure and outcomes. The participants were also required to compare judicial proceedings in civil litigation with ADR mechanisms with respect to costs, expedition, party control, quality of process and the effectiveness of remedies.

As research instruments, questionnaires facilitate efficient and cost-effective collection of large amounts of data from a large sample¹⁶ such as the 178 respondents who participated in this survey. They constitute one of the most common and convenient forms of data collection instruments that are easy to assess for reliability. Reliability refers to the ability of a questionnaire to produce the same results in different research settings, which ensures consistency and dependability of the results.¹⁷ The data relating to the general perceptions of the

16 DR Krathwohl *Methods of Educational & Social Science Research: An Integrated Approach* (2nd edn Longman Reading Massachusetts 1998).

17 ATO Leftwich ‘Expert Technology-Using teachers: Visions, Strategies, and Development’ (Unpublished doctoral dissertation Purdue University West Lafayette Indiana 2007).

various participants gathered by means of the questionnaires was reinforced by face-to-face interviews of seven expert respondents.

Appendix A as the main data collection instrument consists of both open-ended and closed-ended questions structured in six main parts. Section A introduces the study and explains the contextual meaning of the concepts of “civil Justice” and “access to civil justice” as used in the study. Section B contains general personal information of the participants, including name, gender, occupation, area of specialisation, station of duty, and professional experience. Section C focuses on the respondents’ perception of the status of the policy and legal frameworks for the administration of civil justice in Kenya, and whether these frameworks guarantee full and equal access to civil justice. It also seeks to establish from the respondents’ viewpoint what factors (if any) impede equal access to civil justice and the degree of fairness of process in the provision of judicial services.

Section D specially focuses attention on access to civil justice in court litigation and seeks to establish from the participants’ viewpoint- (a) the cost of litigation; (b) the pace and timeliness in the determination of judicial proceedings; (c) the degree of party control; (d) participation levels; and (e) the quality (or fairness) of procedures and the effectiveness of remedies. The fifth section E concerns itself with the participants’ experience and assessment of the extent to which alternative dispute resolution mechanisms are suited to deliver civil justice in comparison to conventional court litigation in terms of (a) expedition; (b) cost; (c) complexity of procedures; (d) the degree of trust and confidence in the system; (e) the quality of outcomes; and (f) the level of consumer satisfaction. Finally, section F invites recommendations for reform in policy and

legislation to enhance equal access to civil justice. In addition to Appendix A, the Disputants' Evaluation of Family Mediation marked "Appendix C" sought to ascertain: (a) the participants' general evaluation of the mediation process; (b) fairness of process; (c) quality of outcome; and (d) the degree of consumer satisfaction.

The data generated in the study helps to answer such questions as:

- (a) To what extent are consumers of civil justice in Kenya able to voice their needs and concerns?
- (b) Did they feel recognised and given the opportunity to participate in the process of adjudication and in the generation of an acceptable outcome?
- (c) Do they feel sufficiently informed to effectively use the procedures of appropriate civil dispute adjudication mechanism?
- (d) Do they view the outcome as fair; and did it help to satisfy their needs and solve their problem?
- (e) Do they think the procedure used was value for money?
- (f) Was the procedure used fair and accessible on an equal basis?
- (g) How much time did they spend?
- (h) Could alternative dispute resolution strategies have worked better as respects expedition, costs and need satisfaction?

These questions are drawn from the more briefly articulated research questions and provide the background for the formulation of the annexed research instrument marked as Appendix A. However, this approach is not limited to evaluating the quality or performance of formal procedures (such as are known in civil litigation) for obtaining civil justice. The same questions could be raised and applied equally to extra-judicial paths to justice, such as negotiation, mediation and conciliation.¹⁸ The indicators of access to civil justice addressed in this chapter are equally applicable to other processes where dispute resolution professionals intervene, including in litigation before courts of law, arbitration, settlement conferences, informal justice processes in developing procedures, complaint handling procedures in various administrative authorities and organisations, and in online dispute resolution procedures.¹⁹

5.5. Interviews

In any qualitative research programme, interviews constitute an important technique for data collection that allows flexibility in questioning to ensure clarity of data. In addition to the 178 returned survey instrument administered on the participants, a combination of face-to-face and telephone interviews were conducted with the seven expert respondents, who as well completed the data collection tool marked as Appendix A. Though systematic and consistent, the interviews were informal and semi-structured. They were designed to allow sufficient time to digress and probe far beyond the answers to their prepared and standardized questions contained in the

18 Maklu and Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems op. cit. note 14.

19 *ibid.*

research instrument.²⁰ Personal interviews with an array of such highly qualified and experienced professionals of great repute provided profound insight into and complimented the survey data on the subject of inquiry. Their solicitous reflections on, and assessment of, the civil justice system as they saw it over decades of professional practice lends weight and effectively triangulates the research data analysed in this chapter.

The in-depth albeit informal or semi-structured interviews took the form of light conversations conducted either face-to-face or on telephone to clarify and explore deeper meaning in the informants perceptions and responses to the open-ended questions.²¹ The interviews (which were conducted after completion of the structured research instrument) took between ten and thirty minutes in each case. Data from the interviews were transcribed instantaneously and without delay to ensure accuracy.

5.6. Ethical Considerations in the Process of Inquiry

In principle, ethical considerations play a critical role in all research studies. Accordingly, all researchers must be aware of and attend to the ethical considerations (if any) related to their study²² Gay and others explain that “in research, the ends do not justify the means” and, accordingly, “researchers should not put their need to carry out a study above the responsibility

20 BL Berg *Qualitative Research Methods: For the Social Sciences* (Allyn & Bacon Inc Boston 1989) p.17.

21 C Marshall and GB Rossman *Designing Qualitative Research 3rd edn* Sage Publications Thousand Oaks CA 1999) p.108.

22 Gay and others op. cit. note 10 p.73.

to maintain the wellbeing of their participants.”²³ This is because research studies are built on trust between the researcher and the participants. According to Gay and others, researchers have the responsibility to behave in a trustworthy manner just as they expect participants to behave in an equally trustworthy manner by providing data that can be trusted.²⁴

For this reason, professional organisations develop codes of ethical conduct, which provide guidelines and specific ethical standards of conduct for their members when undertaking research studies. According to McLeod, “... it is important for anyone carrying out research to be guided by the ethical codes of the professional associations, universities or organisations to which they belong. These ethical guidelines typically specify sensible rules of ‘good practice’ concerning informed consents, confidentiality and avoidance of harm”.²⁵

Although there is no code of ethical standards in force to regulate research studies specifically in the legal profession or other social sciences in Kenya, this study was conducted in conformity with the following among other general ethical standards, namely:

- (a) privacy and confidentiality;
- (b) integrity;
- (c) respect for people’s rights and dignity;
- (d) informed consent; and

23 ibid.

24 ibid.

25 J McLeod *Qualitative Research in Counselling and Psychotherapy* (Sage Publications Ltd London 2001) p.197.

- (e) adherence to public policy²⁶ and to the terms and conditions of the Research
- (f) Clearance Permit issued by the National Council for Science and Technology in accordance with section 4(c) of the Science and Technology Act (Chapter 250 of the Laws of Kenya).

Section 4(c) of the Act empowers the Council “to coordinate and regulate all scientific, technology and research programmes.” Before embarking on the data collection exercise, a Research Clearance Permit Number NCST/RRI/12/1/SS011/341 was obtained on 31st March 2011 in accordance with the 2009 Regulations made under the Act for a period of five months ending on 31st August 2011. In addition to the Permit, the Council issued a letter by which it formally introduced the study “to whom it may concern” and listed the court stations at which the survey was permitted.

The survey was conducted by seventeen enumerators located in various court stations at which the survey was undertaken, and who consisted of:

- (a) three practising legal counsel (who aided in interviewing their clients);
- (b) ten graduates of the Kenya School of Law with the approval of their pupil masters; and
- (c) (four experienced paralegal staff of established law firms (who were carefully selected with the approval of their managing partners to assist their client litigants).

26 *ibid.*

The enumerators were separately inducted immediately upon selection on the nature and purpose of the study by taking them through the research questions, objectives of the study, the profile of the target population, the research instruments and consent form (Appendices A, B and C), the research Permit, Council's letter of authority, and ethical issues. The induction underscored the critical need to avoid being unduly intrusive or compromising confidentiality of the participants.²⁷

The integrity of the study is demonstrated by the accuracy, honesty and truthfulness with which it was conducted. The study demonstrates respect for the dignity and the right of respondents to privacy and confidentiality by giving them the option to remain anonymous, as is evident from the research instrument marked "Appendix A". In addition, the respondents participated in the inquiry voluntarily with informed consent as evidenced by the annexed Consent to Participate marked "Appendix B".

The consent form marked as Appendix B was issued at the commencement of the survey along with the research instrument marked as Appendix A, the Permit and Council's letter of authority, which were at all times open to inspection by the participants. The Consent to Participate explained the nature and purpose of the inquiry and informed the participants of their rights, namely:

- (a) the right to decline to participate in the inquiry;

- (b) the right at any time to withdraw from participation;

27 McLeod op. cit. 25 p.15.

(c) the right to remain anonymous; and

(d) the right to have their data withdrawn from the study after the research has been conducted.

With the exclusion of 10 respondents whose questionnaires were returned too late to be included in the analysis, 52 of those approached declined to participate in the inquiry. 71 participants elected to remain anonymous. However, none of the respondents elected to withdraw from participation or withdraw their data after the inquiry.

5.7. Data Analysis and Validity

Data analysis is a technical skill with which the researcher in this study is not endowed. Accordingly, the data generated from the survey was analysed by use of the Statistical Package for Social Sciences (SPSS) software (Version 16) with the assistance of a statistician, Dr. John M. Kihoro of Jomo Kenyatta University College of Agriculture and Technology.²⁸ Dr. Kihoro assisted with the technical procedures for data entry, computer analysis, interpretation, validity and hypothesis testing.

28 Dr. JM Kihoro holds a Doctor of Philosophy Degree in statistics. He is a senior lecturer in the Department of Statistics and Actuarial Sciences in Jomo Kenyatta University of Agriculture and Technology where he has been teaching statistics since the year 2000. Dr. Kihoro is a statistical consultant.

Data analysis has been described as a process by which data is summarised and interpreted so that it is easily understood and applied to answer the research questions.²⁹ Burns defines data analysis as the process by which the researcher finds meanings from the data and the process by which the investigator interprets it.³⁰ According to Marshall and Rossman, the purpose of data analysis is to bring meaning, structure, and order to the data.³¹ Effective interpretation requires keen awareness of the data, concentration, as well as openness to subtle undercurrents of social life³² usually comprised of intrinsic factors beyond the researcher's control.

Data analysis presents various challenges with which the study has to contend. For instance, the reality of various delimitations that were considered as minor and, therefore, not so critical as to have a bearing on the outcomes were appreciated. Inherent factors, such as honesty, accuracy or utility of the research instrument, level of awareness or knowledge of the matters addressed in the instrument, and which were potentially influential to this study and for which there was no hard data, were not taken into account because they might never have been known and could not possibly have been addressed or by any means controlled.³³ In addition, the study acknowledges the existence of impediments to absolute validity of the study, such as shortage of empirical data

29 Kelley and others op. cit. note 8.

30 RB Burns *Introduction to Research Methods* (Sage London 2000) p.430.

31 Marshall and Rossman op. cit. note 21.

32 Z Ozsevik 'The Use of Communicative Language Teaching (CLT): Turkish EFL Teachers' Perceived Difficulties in Implementing CLT in Turkey' (unpublished thesis University of Illinois, Urbana, Illinois available at: https://www.ideals.illinois.edu/bitstream/handle/2142/16211/Ozsevik_Zekariya.pdf (last accessed on 30th September 2011).

33 Pepperdine University 'Dissertation Assumptions, Limitations and Delimitations' available at: <http://www.services.pepperdine.edu/gsep/writing/resources/DissertationAssumptionsLimitationsDelimitations.pdf> > (last accessed on 21st September 2011).

to support the hypothesis, the restrictive timelines and limited resources, all of which ordinarily have an impact on the depth and accuracy of the study.³⁴

The qualitative nature of this inquiry renders the data largely subjective. In view of the fact that users of judicial services consist of a heterogeneous group of very different personalities, situations, expertise, cultures and expectations, caution was exercised to avoid distorting the true picture by making any broad generalisations as to the respondents' perceptions on any aspect of the subject of inquiry.³⁵ As for their perceptions on the various aspects of the status of the civil justice system in Kenya, it is imperative to appreciate that the reality of the situation is comprised of the respondents' subjective experiences and understandings³⁶

Notwithstanding the subjective nature of the responses collated in this chapter, the validity of the data generated in this inquiry is confirmed by findings of previous surveys and existing literature on the general performance of the courts and national tribunals in the delivery of judicial services, as mentioned in chapter three. Notably, though, the inquiries and reports referred to in the preceding chapter and in the problem statement in parts 1.1 and 1.2 of chapter one did not pay much attention to the subject under inquiry in this study, to wit, the status of policy and legal frameworks for the delivery of civil justice. They are nonetheless relevant in so far as they relate to the organisational framework and to diverse variables of interest by which this study is informed.

34 *ibid.*

35 Relis *op.cit.* note 1 p.153.

36 *ibid* pp.153-154.

The validity and reliability of the findings of this study are critical if any value is to be attached to the recommendations in chapter seven for the reform of the policy and legal frameworks towards the realisation of full and equal access to civil justice. Validity has been defined as “the degree to which the qualitative data we collect accurately gauge what we are trying to measure”.³⁷ In effect, validity denotes accuracy, trustworthiness and credibility of research findings.

According to Guba, the trustworthiness of research findings can be established by addressing their credibility, transferability, dependability and confirmability of the study and findings.³⁸ The research findings are presented in a neutral and objective way that ensures confirmability, credibility (taking account of all the complexities in the study and addressing problems not easily explained), transferability (that enables the consumer to identify with the research setting) and dependability (that ensures stability of the data collected).³⁹ The findings discussed below are characterised by descriptive, interpretive, theoretical and evaluative validity in that:

- (a) the study presents its findings with factual accuracy;
- (b) it presents the participants’ perspective;
- (c) the report explains the subject of inquiry in relation to theoretical principles with which it is concerned; and

37 Gay and others op. cit. note 10 p.403.

38 EG Guba ‘Criteria for Assessing the Trustworthiness of Naturalistic Inquiries’ (181) 29 Educational Communication and Technology Journal pp.75-91.

39 Gay and others op. cit. note 10 p.471.

(d) the report was objective and unbiased in that it was prepared without being judgmental or evaluative of the data.⁴⁰

In addition to the steps taken to ensure validity of the data, several methods of data collection strategies and data sources were used to obtain a more complete picture of the subject of inquiry and to cross-check information. For example, to test the accuracy and cross-check findings of delay in determination of civil disputes, cause lists collected from the handpicked court stations were analysed and interpreted. Similarly, disputants' evaluation of family mediation were undertaken to cross-check findings to the effect that party control enhances fairness of process and improves the level of consumer satisfaction. According to Brewer and Hunter, the use of different methods in concert (known as triangulation), as was the case in this study, compensates for the individual limitations and exploits the respective benefits.⁴¹

The triangulation strengthens the research process by collecting information in many ways rather than relying exclusively on one. The reason is that when two or more research methods are used, the weakness of one is compensated by the strength of another.⁴² Shenton explains that “triangulation may involve the use of different methods, especially observation, focus groups and individual interviews, which form the major data collection strategies for much qualitative research. Whilst focus groups and individual interviews suffer from some common

40 JA Maxwell ‘Understanding and Validity in Qualitative Research’ (1992) 62(3) Harvard Educational Review pp.279-300.

41 J Brewer and A Hunter *Multimethod Research: A Synthesis of Styles Sage Library of Social Research Series* (Sage Publications Newbury Park CA 1989) p.175.

42 Gay and others op. cit. note 10 p.405.

methodological shortcomings since both are interviews of a kind, their distinct characteristics also result in individual strengths”.⁴³

5.8. Research Findings

5.8.1 Overview

The data analysed in this chapter informs the appraisal of the policy and legal frameworks in the extant judicial system. It forms the basis of evaluation of the quality of services in the delivery of civil justice and how civil litigation performs in comparison to alternative dispute resolution mechanisms. The findings also help to expose impediments to accessing civil justice by all on an equal basis. It is in the interest of all users of the judicial system, therefore, to seek answers to the questions as to:

- (a) how much time it would take;
- (b) whether the procedures would be stressful;
- (c) whether they will be treated with fairness and respect; and
- (d) whether they will have an equal opportunity to voice their concerns.⁴⁴

43 AK Shenton ‘Strategies for Ensuring Trustworthiness in Qualitative Research Projects’ (2004) 22 Education for Information (IOS Press) p.65 available at: http://www.angelfire.com/theforce/shu_cohort_viii/images/Trustworthypaper.pdf (last accessed on 26th September 2011).

44 *ibid.*

It is for this reason that the inquiry focuses on the quality of procedures, expedition and equality of opportunity to access judicial services, tested against the principles of proportionality, participatory and procedural justice.

This inquiry is premised on the supposition that “the paths to justice which are cheap and deliver high quality procedures and outcomes are more accessible”.⁴⁵ This is founded on the principle that access to civil justice is a matter of concern to all because courts of law and justice providers should be accountable as are other suppliers of government services.⁴⁶ Moreover, the civil justice system must be responsive to the needs and interests of the users and consumers of its judicial services.⁴⁷ Accordingly, the practical methodology adopted in the inquiry is designed to measure the cost in both time and money, and to ascertain the quality of the paths to civil justice and the effectiveness of remedies from the perception of various users.

It must be borne in mind, though, that there is no objective strategy by which the performance of procedures may be gauged. For this reason, this study suggests that performance and quality of procedures should be gauged in terms of:

- (a) the extent to which parties are free to determine the procedure for adjudication of their dispute;
- (b) the degree of accessibility by all users of the system of civil justice;
- (c) the degree of participation and control of the process by the parties;

45 Maklu and Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems op. cit. note 14.

46 *ibid.*

47 Relis op.cit. note 1 p.156.

- (d) the cost of adjudication in comparison to the nature and complexity of the dispute;
- (e) the level of fairness of the process;
- (f) timeliness; and
- (g) the effectiveness of remedies.

These variables of interest are effectively addressed in the annexed research instruments.

To measure the degree of access to civil justice in Kenya, the actual users of the judicial system and key informants were asked to reflect on their experiences and assess the costs and quality of the paths or dispute resolution mechanisms employed in pursuit of civil justice (in the context of the notion of fairness of process) and the efficacy of remedies. The term “paths to justice” refers to official/formal legal procedures, mediation programmes, or informal processes within a community. It should be appreciated that it is the nature of the specific mechanisms (rather than the underpinning theories and principles) that deliver justice to the people where they need it. A successful justice system meets the essential needs of the people by providing mechanisms for solving disputes in a just and fair manner. As correctly observed, “without effective access to justice, law is not worth the paper it is written on”.⁴⁸ The outcome of the inquiry will help users of the judicial system to voice their needs and prod national and ADR tribunals to improve the quality of procedures.

48 Maklu and Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems op. cit. note 14.

5.8.2 The Organisational Framework

Even though this study principally concerns itself with the status of the policy and legal frameworks for the administration of civil justice, the status of the organisational framework of the judiciary is in reality a mirror-image of the subject of inquiry. Moreover, it is those judicial institutions that give life to policy and legislation that regulate the adjudication of civil disputes. For this reason, frequent reference to the status of the organisational framework becomes inexorable as the locale in which the subject of inquiry is contextualised.

Of the total number interviewed, 52.6% have been party to civil litigation and could authoritatively express their opinion and experiences on matters relating to the status of the system of civil justice. The remaining 47.4% are comprised of judicial officers and legal counsel who, despite their direct involvement in the process of dispute resolution, have never been party to civil litigation. Asked what they considered to be the main factors that impede equal access to civil justice, the respondents mentioned the following in relation to the organisational framework, as illustrated in the table below:

Table 2

Main Factors that Impede Access to Civil Justice

Main Factors	Percentage (%) of Respondents
High court fees	49.1
Backlog of cases and congestion of courts	10.3
Corruption and differential treatment of parties	24.8
Poor time management and delay in determination of cases	12.3
Institutional inadequacies and inaccessibility of court facilities	14.3
Language barriers	1.9

Statistical data generated from this inquiry in answer to other questions in the research instrument indicates that the main factors attributable to the organisational framework and which impede equal access to civil justice include:

- (a) high cost of litigation;
- (b) the economic, social and political status of litigants, which empowers them to influence the pace of proceedings and judicial decisions;
- (c) institutional inadequacies, including inadequate and overworked judicial officers;

- (d) inaccessibility of judicial facilities;
- (e) corruption and differential treatment of parties to disputes;
- (f) complexity of the rules of procedure; and
- (g) backlog of cases, poor case management and endemic delay in determination of disputes, only to mention a few.

Commenting on the accessibility of civil justice in Kenya, Justice Richard Mwongo observed that “[t]he effectiveness of access to justice is tilted towards those who can afford the high cost of litigation. The system is inequitable to litigants as it avails preferable results to the wealthy.”⁴⁹ According to Justice Mwongo, economic and social status determines the manner in which litigants are treated and the extent to which they are able to access judicial services. He cites the “cost of litigation” and “ignorance among the rural citizenry of the whole scope and spectrum of available dispute resolution processes” as the main impediments to the delivery of civil justice.

The attitude of judicial officers and the manner in which they conduct proceedings are also critical in determining the views and feelings of litigants as respects their trust and confidence in the judicial system⁵⁰ and the degree of access to those essential services. It is imperative that

49 Hon. Mr. Justice RM Mwongo is a judge of the High Court of Kenya and one of the expert respondents interviewed in this study. Before his appointment to the Bench in September 2011, Hon. Mr. Justice Mwongo was a practising Advocate of the High Court of Kenya of 24 years standing. He is a long-standing Chartered Arbitrator and a Fellow of the Chartered Institute of Arbitrators (UK). Justice Mwongo was an ADR tutor and practitioner.

50 TR Tyler ‘Procedural Justice and the Courts’ (2007) 44 (1/2) Court Review: The Journal of the American Judges Association pp.26-31 available at: <<http://digitalcommons.unl.edu/ajacourtreview/217>> (last accessed on 22nd September 2010).

courts handle people's problems in ways that lead them to accept and be willing to abide by the decisions made by the courts. In any event, the courts want to retain and even enhance public trust and confidence in the judicial tribunals, judges, and the law, which is the key to maintaining the legitimacy of the legal system.⁵¹ However, the judicial system in Kenya has failed to inspire such trust and confidence in its users who, according to Justice Mwongo, approach it with fear. Mwongo explains that the "face and structure" of the justice system is represented by the police, who are generally "unlikeable", and the courts that are "very unfriendly" and "quite impatient" towards unrepresented litigants, not to mention the overwhelming solemnity characterised by legalese and esoteric procedures likely to be understood or enjoyed by only a few people with a special knowledge or interest.

Gross concurs with Mwongo and attributes delay in the determination of civil disputes to institutional inadequacies and complex rules of procedure.⁵² According to Gross, civil justice is accessible to "the rich", "the political elite", and "the corrupt". He concludes that parties to civil litigation are not treated impartially and are favored on account of their social, economic and political status, which confirms the view of a large majority of participants. In response to the question as to how litigants are usually treated by judicial officers, 85.4% of the other respondents were also of the view that parties to civil proceedings are not treated with equality and fairness, which raises pertinent questions as to the equality of access and fairness of process, and more so in the face of inordinate delay in the determination of disputes. According to the statistical data, 64.4% of the respondents were of the view that the pace of litigation is slow,

51 *ibid.*

52 AF Gross (Advocate of the High Court of Kenya, Chartered Arbitrator and Mediator, and Fellow of the Chartered Institute of Arbitrators) is yet another of the key informants interviewed in this study.

prompting administrative irregularities as individual litigants seek to unduly influence the pace of their own proceedings. According to some respondents, corruption in the judiciary takes the form inter alia of financial inducement to judicial officers or registry staff:

- (a) to influence the quality of outcomes in the determination of disputes;
- (b) to influence the pace of proceedings where claimants seek to hasten the proceedings and the defendants seek to slow the pace;
- (c) to interfere with court records; or
- (d) to obstruct execution of decrees and orders of the court.

These findings are compounded by what 90.8% of the respondents view as failure on the part of courts to adequately monitor the progress of proceedings and take remedial measures in the face of mounting backlogs, as lamented by Mwongo and Gross. This explains why cases are not disposed of in a timely manner, as confirmed by 96.3% of those interviewed. In effect, the pressing need for appropriate court case management strategies and responsive market mechanisms as alternatives to civil litigation in proper cases cannot be overemphasised. In any event, the introduction of case-management techniques into the arsenal of judicial decision-making is complementary and does not detract from its conventional and legitimate character⁵³

Commenting on the quality of procedures in the Ugandan judicial system, Lady Justice J Sebutinde observes that the challenge facing the 21st century judiciary in Sub-Saharan Africa

53 S Flanders 'Blind Umpires-A Response to Resnik' (1984) 35 Hastings Law Journal p.505.

is to appraise the performance of the current court structures, systems and procedures with a view to devising strategies and reforms that will expedite justice while reducing the cost of litigation.⁵⁴ According to her, courts are faced with the ever-increasing problem of case backlog, delayed justice and escalating costs of litigation. The problem is compounded by the fact that many of these jurisdictions have inherited, adopted or retained colonial administrative models and judicial systems that are obsolete and no longer able to meet the growing demands of contemporary courts and court users.⁵⁵ Like Uganda, Kenya inherited the English common law adversarial system of civil justice, which is characterised by strict adherence to rigid rules of procedure that leave little or no room for judicial activism, or settlement of the dispute aided by a defined court case management system.⁵⁶ For this reason, courts are overwhelmed by mounting backlog of cases and are finding it increasingly challenging to keep up with the rate and volume of litigation. “Court case management” may be defined as the process, system or strategy by which courts and court users organise and control the filing, conduct and disposal of court cases. Although the actual process, system or strategy may differ from one jurisdiction to another, the bottom line is that it must be able to meet the needs of the courts and court users, and should ultimately enhance the quality and administration of justice.⁵⁷

54 J Sebutinde ‘Court Case Management and other Procedural Reforms’ (a paper presented at the seminar for legal and judicial reform for improving governance, conducted by the Distance Learning Programme for Anglophone Africa (30th October 2003) p.3 available at: http://info.worldbank.org/etools/docs/library/108523/sebutinde_paper.pdf) (last accessed 24th January 2012).

55 *ibid.*

56 *ibid.*

57 *ibid.*

Arguing the case for alternative dispute resolution strategies as a solution for the endemic delays, Gichuhi attributes what he refers to as a “deluge of cases” or “immense backlog of cases” to a “myriad of problems... in the arduous task of litigation”, including:

- (a) increased awareness of legal rights among the general population;
- (b) an increasingly litigious society; and
- (c) an “overworked judiciary” characterised by “bloated cause lists” and rampant adjournments that, according to him, “have wrecked havoc to the expeditious conclusion of cases”.⁵⁸

He concludes that “[i]n many instances, legal practitioners become disillusioned with litigation practice and reminisce about the good old days when things worked.”⁵⁹ However, he makes no attempt to exhaust the reasons for such backlog.

Gichuhi observes that only cases filed up to 1999 could be confirmed for hearing at the High Court of Kenya at Nairobi as late as 2005, six years after commencement of proceedings.⁶⁰ He underscores the urgent need to embrace court-mandated mediation as an alternative method of dispute resolution,⁶¹ which is discussed along with other voluntary market mechanisms, and with various policy and legislative reforms recommended in chapter seven as some of the strategic interventions to improve access to civil justice.

58 AW Gichuhi “Court Mandated Mediation: The Final Solution to Expeditious Disposal of Cases’ (2005) 2 LSKJ pp.91-92.

59 *ibid.*

60 *ibid* p.92.

61 *ibid* p.93.

Adopting market mechanisms as alternatives to conventional litigation has the effect of, among other benefits:

- (a) spreading out the caseload and relieving the overburdened national tribunals;
- (b) enhancing expedition;
- (c) upholding party autonomy and guaranteeing participatory justice;
- (d) improving the quality of procedures and outcomes; and
- (e) enhancing consumer satisfaction and acceptance of the outcomes of dispute resolution.

However, there is no attempt in this study to suggest that ADR is the long-awaited panacea for access to civil justice. Notably, though, previous surveys on the performance of judicial institutions in Kenya pay little or no attention to the principles of proportionality, participatory and procedural justice, which this study posits as imperative for effective administration of civil justice.

The conspicuous erosion of the quality of procedures and the mounting of barriers to civil justice continue to grow in magnitude as years go by. Reflecting on his assessment of how long civil disputes took to be determined in 2004, Gross states that “as at August 2004, Statistical Returns for the Nairobi’s Milimani Commercial Courts, the High Court Civil Division and the Chief Magistrate’s Courts show at the worst a negative curve as regards disposal of cases and at the

best a waiting time of between 4½ and 10 years.”⁶² When interviewed in this survey, Gross observed that he had been party to many land and commercial cases at all levels of the judicial system and, according to him, they all took more than five years to determine.

All expert respondents, namely, Mwongo, Gross, Mururu, Regeru, Billing, Khan and Farah rate the pace of civil litigation in Kenya as “very slow”. Statistical data in this inquiry demonstrates that little has changed since the aforementioned 2004 survey conducted by Gross. Of those interviewed (apart from the expert respondents), and who have been party to civil proceedings, 53.4% said that their cases took between three and five years to determine while 23.3% took more than five years. In effect, 77.7% of litigants have their proceedings pending for more than three years, which erodes the effectiveness of remedies and undermines public confidence in the judiciary. As more and more proceedings are filed each year with less and less determined during the same period, the number of pending cases continues to mount resulting in the prevalent backlog that begs for urgent and practical solutions if the civil justice system is to live up to the legitimate expectations of its users. Table 3 below illustrates the different timelines spent before cases come up for hearing in various court stations under inquiry. Notably, though, there is no evidence to suggest that those cases (some of which were coming up for interlocutory applications) were heard and determined on the respective days they were listed. They were indeed liable to adjournment for hearing in months or years to come.

62 AF Gross ‘Mediation: A solution for the Legal Sector Crisis’ a paper presented at the conference on The Role of Legal Ethics and Jurisprudence in Nation Building (Strathmore University Nairobi 29th October 2004).

Table 3**Average Duration of Civil Cases Before Hearing**

Court Station	Sample Dates	Up to 3 years	Between 4-6 years	Above 6years
Nairobi High Court (Milimani)	1st, 2nd 3rd and 6th December 2010	58.2%	21.7%	20.1%
Nairobi High Court (Nairobi Law Courts)	8th – 10th December 2010	65.2%	15.6%	19.2%
Nairobi CMC Milimani	1st – 15th December 2010	54.4%	31.8%	13.8%
Kisumu High Court	27th and 28th April; 9th – 20th May 2011	74.9%	13. 3%	11.8%
Kisumu Magistrates Court	27th , 28th and 29th April; 9th – 19th May 2011	75.9%	13.6%	10.2%
Meru High Court	12th April 2011; 23rd – 24th May 2011	45.5%	9.0%	45.5%
Meru Magistrate Court	3rd – 26th May 2011	75.9%	13.7%	10.2%
Eldoret High Court	23rd, 24th and 25th May 2011	57.1%	15.4%	27.4%
Embu Principal	16th May 2011	92.8%	7.2%	0

Magistrate Courts				
Average		66.7%	15.7%	17.6%

On average, 33.3% of all cases listed for hearing on any particular day had been filed more than three years before. Approximately 15.7% of all cases take more than six years before being listed for hearing. The overall effect is a mounting backlog that gets worse by the day. As has been rightly observed, “[c]ase backlog is one of the greatest challenges facing the Judiciary today.”⁶³ Referring to a report on the December 2009 survey of pending cases in Kenyan courts, justice Ouko observes that: (a) the cases pending before the Court of Appeal in Nairobi and its circuit stations were at the time estimated at 2,372; (b) the High Court stations at 115,344; and (c) magistrates’ courts at 792,297, making a total of 910,013.⁶⁴ Of the cases in the magistrates’ courts, 144,963 were classified as criminal cases, 398,136 as traffic cases and the rest as civil cases. In the Taskforce’s view, a case that remains undetermined for a period of three years constitutes backlog,⁶⁵ a position shared by this study.

The Ouko Report explains that case backlog in the Judiciary has arisen from a number of factors, which include:

- (a) shortage of judicial officers and administrative staff;
- (b) inadequate number of courts and infrastructure;

63 Government of the Republic of Kenya *Final Report of the Taskforce on Judicial Reforms (Ouko Report)* (Government Printers Nairobi 2010).

64 *ibid.*

65 *ibid.*

- (c) inappropriate rules of procedure;
- (d) court vacations;
- (e) jurisdictional limits on magistrates courts; and
- (f) mechanical management of court records and proceedings.⁶⁶

In addition, the Taskforce was of the considered view that the problem of backlog arises from weak case management systems in the Judiciary. According to the Report, “the weak case tracking and records control systems make it difficult or impossible to generate quick and accurate statistics on the number of cases before the courts, and their actual status. This in turn undermines effective case management, as well as timely identification of patterns that need remedial action in the interest of the administration of justice.”⁶⁷

This study argues that the backlog of cases and the resulting delay in determination of disputes due to the cited institutional inadequacies have an inescapable multiplier effect on the attempt to eliminate barriers to the effective administration of civil justice. As litigants jostle and scramble for judicial services, such delays invariably lead to corruption and differential treatment of parties on the basis of economic inequalities, which in turn makes civil justice accessible to the highest bidder in circumstances where 76% of the respondents state that it is not affordable to bring or defend cases in court. As respects expedition, 96.2% of the respondents say that cases are not disposed of in a timely manner. The twin evils of cost and delay are compounded by what

66 ibid.

67 ibid.

appears to be poor case management strategies. Case management is a process whereby the court takes over control of the progress of litigation and imposes strict timelines for the completion of critical events. 90.8% of the respondents were of the view that courts do not monitor proceedings and take remedial measures. This view is shared by six expert respondents, including Gross who attributes this state of affairs to “lack of proactive and robust decision-making judges”.

Although institutional inadequacies, costs and complexity of procedures frequently feature as key to the prevalent delays and backlog of cases, this study demonstrates that such delays are equally attributable to litigants and their legal counsel. According to the respondents, other causes of delay include:

- (a) inadequate preparation by legal counsel, who are consequently compelled to seek adjournment on insubstantial grounds;
- (b) frequent adjournments at the behest of parties themselves;
- (c) failure to secure the attendance of witnesses; and
- (d) sheer lethargy, inertia and apathy on the part of the litigants and their counsel after years of protracted delay.

According to this study, appropriate reforms in policy and legislation founded on the proposed conceptual imperatives would motivate diligence and positive attitude towards the judicial system.

This study argues that the prohibitive costs of litigation and the endemic delay in the adjudication of disputes invariably undermine public confidence in the civil justice system and in the end result in denial of meaningful access to justice. It suggests that the institutional and operational inadequacies evidenced by the responses to the inquiry may be attributed to lack of sound policy and appropriate legislative framework for the due administration of civil justice. Accordingly, chapter six lays ground for recommendations in chapter seven for reforming policy and legislation, and the adoption of market mechanisms among other critical reforms designed to address the obtrusive impediments to meaningful and equal access to civil justice.

5.8.3 The Policy Framework

By definition, public or national policy consists of "... political decisions for implementing programs to achieve societal goals".⁶⁸ It may also be described as "a set of interrelated decisions taken by a political actor or group of actors concerning the selection of goals and the means of achieving them within a specified situation where those decisions should, in principle, be within the power of those actors to achieve".⁶⁹ Equal access to civil justice comprises the societal goals with which this study is concerned. Although these goals are reasonably within the power of the State to attain, this study argues that there exists no structured policy framework that defines specific goals and the means of achieving them, or setting out any programmes, plans or actions suitably designed to realise the intentions to facilitate full and equal access to civil justice.

68 CL Cochran and EF Malone *Public Policy Perspectives and Choices* (McGraw Hill New York 1995).

69 W Jenkins *Policy Analysis: A Political & Organizational Perspective* (Macmillan Press Palgrave 1978).

Rajinder Billing⁷⁰ was of the view that the Constitution of Kenya 2010 and the recent amendments to the Civil Procedure and the Appellate Jurisdiction Acts constitute the policy for access to civil justice.⁷¹ While this legal framework lays down the guiding principles in that regard, chapter three confirms that there is no stand-alone policy on the administration of civil justice in Kenya. That explains why 71.5% of the respondents (including the seven key informants) are not aware of the existence of such policy. Out of the 28.5% who think that there exists a policy on access to civil justice:

- (a) 53.8% interpret it to mean that the policy relates to “equal access to justice”;
- (b) 17.9% think that the policy is about “awareness and legal aid”;
- (c) 12.8% think that the policy addresses the need for “an effective judicial system”;
- and
- (d) another 12.8% think that the policy under inquiry addresses the procedural mechanisms of the judicial system.

To some extent, each category of participants has an idea as to what such policy ought to address. Norman Mururu⁷² identifies the critical need to take necessary policy and law reform

70 R Billing is an expert respondent. He is a practising litigation lawyer and commercial arbitrator of more than ten years standing.

71 See: the overriding objectives expressed in article 159(2) of the Constitution of Kenya (2010); sections 1A and 1B of the Civil Procedure Act (Chapter 21); and sections 3A and 3B of the Appellate Jurisdiction Act (Chapter 9), which are discussed in part 3.8 of chapter three.

72 N Mururu is one of the key informants interviewed in this study. He is a reputable Chartered Arbitrator of more than thirty years standing and Fellow of the Chartered Institute of Arbitrators (UK). Mr. Mururu is a trained lawyer and a practising quantity surveyor. He is an international commercial arbitrator and a leading tutor on ADR in Africa, Asia and the Middle East.

measures to simplify procedures and diversify the scope of dispute resolution mechanisms by: (a) establishing small claims courts; and (b) in respect of all mechanisms, promote party control and self representation, a view shared by Khan, Regeru and Billing.

What is clear, though, is that statistical data demonstrates general unawareness on the part of the participants of the existence of any stand-alone policy on equal access to civil justice independent of the six disaggregated documents discussed in part 3.6 of chapter three, namely: (a) Kenya Vision 2030; (b) the Medium Term Plan of Vision 2030 (2009-2012); (c) the Judiciary Strategic Plan 2009-2012; (d) GJLOS; (e) the 2008 Kenya National Dialogue and Reconciliation: Agenda item IV; and (f) the 2010 Litigants Charter.

While these documents contain general declarations of the intention on the part of the State to improve the administration of justice in Kenya, this study suggests that they do not go far enough to provide a clearly defined roadmap and platform for bridging the gap between policy and practice as would an overarching stand-alone policy focused on access to civil justice with specific reference to the constituent principles of proportionality, expedition, party autonomy and fairness of process. As argued in this study, the fragmentation of the various components of the judicial policy in separate and unrelated documents offers little by way of a defined policy framework for the design, development and implementation of appropriate programmes, plans and actions for the effective administration of civil justice. These documents do not in any way provide a mechanism for periodic review of the performance of the institutional, policy and legal frameworks in the delivery of judicial services so as to effectively respond to the contemporary needs of society. According to this study, it is this lack of a defined policy that erodes the gains

that would ordinarily accrue from what has recently emerged as a progressive legislative framework for the administration of civil justice complemented by the current robust scheme of judicial transformation.

5.8.4 The Legal Framework

In addition to institutional and policy frameworks, legislation and administrative procedures equally determine the degree of access to civil justice. As argued in this study, simple and accessible procedures enhance fairness of process and effectiveness of remedies. Conversely, complex procedures impede access to civil justice, as confirmed by the key informants and other participants interviewed in this survey. It may be concluded that complex rules of procedure make legal representation by professional intermediaries inevitable⁷³ and consequently slow the pace of proceedings, all of which escalate the cost of litigation. This explains why Farooq Khan concludes that “it is not affordable to bring or defend cases in court,”⁷⁴ a view shared by Billing and other expert respondents. According to Billing, although the Constitution generally guarantees access to justice in principle, “... the full benefits of these constitutional values are yet to be realised”.

Of those interviewed by means of Appendix A only, 67.4% felt that the rules of civil procedure are complex and difficult to understand. This complexity explains why disputants turn to

73 M Galanter ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1994) in Law for Life: the Foundation for Public Legal Education p.2 available at: <http://www.lawforlife.org.uk/data/files/whythehavescomeoutahead-33.pdf> (last accessed on 7th June 2012).

74 F Khan is an expert respondent presently based in Canada. He is a civil engineer by profession and was for many years (before leaving Kenya) a prolific Chartered Arbitrator and Mediator, and a Fellow of the Chartered Institute of Arbitrators (UK). Mr. Kahn was a leading trainer on ADR in Africa.

lawyers. According to Relis, they do so because “... they are distressed due to conflicts, which they view as serious and which they feel they cannot rectify themselves”.⁷⁵ In the end, legal counsel and courts dictate the manner and pace of civil proceedings, which erodes party autonomy and diminishes the quality of procedures and, ultimately, the effectiveness of remedies. As Gross, Mururu, Mwongo and Khan observe, simplified rules of procedure enhance party control and participation in the proceedings, which in turn guarantee quality and acceptance of the outcomes. According to them, parties have a sense of ownership and are likely to adhere to and respect outcomes of a process that they determine and have control over.

This study underscores the pressing need to simplify procedures and enhance party control in dispute resolution as suggested by Gross, Mururu, Khan, Mwongo and Billing. Only then can disputes be resolved expeditiously and cost-effectively, as the statistical data reported in this chapter suggests. 86.6% of the participants were of the view that the complexity of procedures contributes to delay in the determination of disputes, as the key informants confirm. With respect to party autonomy, 70.3% of the participants feel that the complexity of procedures compels them to relinquish control of the proceedings to their legal counsel and the courts, who invariably dictate the manner and pace of the proceedings. In effect, complexity of procedures impedes party autonomy and participatory justice, erodes fairness of process, results in delay, and escalates costs, which in turn offends the principle of proportionality. The overall effect is to deter parties from lodging their claims in national tribunals or to seek resolution of their disputes through ADR and other non-state legal orders.⁷⁶

75 Relis op.cit. note 1 p.157.

76 Galanter op. cit. note 73.

Regarding the quality of outcomes, only 47.2% of the respondents thought that the outcome of adversarial court proceedings would be more acceptable if the parties were free to determine the procedures to be followed. The other 52.6% did not lend much weight to party autonomy, which this study views as critical to accessibility of procedural justice. This could perhaps be explained by the infrequent exposure to and use by litigants and other consumers of judicial services of alternative methods of dispute resolution, such as conciliation, mediation and arbitration, which in the viewpoint of this study maximise party autonomy to the ends of quality outcomes and enhanced satisfaction levels.⁷⁷ It is understandable, though, that this exposure would hardly be expected in an environment where 62.5% of the respondents cite the prevalence of ignorance (termed as “lack of awareness and knowledge”) as an impediment to accessibility of civil justice.

This study argues that increased awareness of market mechanisms as alternative methods of dispute resolution would expose parties to a continuum of choices that would enhance proportionality, party autonomy and procedural justice. Their direct participation in determining the nature and quality of procedures would in turn enhance quality and acceptance of outcomes, as Gross, Mururu, Khan, Mwongo and Billing suggest. The direct relationship between party control and consumer satisfaction is demonstrated by the results of a second survey conducted by use of Appendix C to ascertain the approval rates of family mediation. Out of 72 participants interviewed in the separate survey conducted with the assistance of Federation of Women Lawyers (FIDA) Kenya: (a) 37.5% rated mediation as an “excellent” dispute resolution

77 P Goes ‘Arbitration: advantages, drawbacks and processes’ in International Law Office (August 2011) available at: < <http://www.internationallawoffice.com/?i=2967157&l=7FS3Y61>> (last accessed on 29th August 2011).

mechanism; (b) 47.2% rated it “good”; and (c) 11.1% thought it “fair”. The remaining 4.2% declined to comment on this question.

Of the 72 disputants who agreed to participate in the evaluation of family mediation, 79.1% had reached an agreement in final resolution of their dispute and 94.7% felt that the agreement was just and equitable. As Mwongo observes, party control, fairness of process, the simplicity and flexibility of procedures associated with ADR inspires consensus, trust and confidence in the system.

This explains why 94.4% of the respondents said they would use mediation again and 97.2% would be willing to recommend mediation to others. 98.6% felt that mediation was helpful as a dispute resolution mechanism. These results tally with those of the survey conducted by means of Appendix A. Of the 178 participants interviewed in the survey, ¹⁶⁹ were familiar with various forms of alternative dispute resolution mechanisms as illustrated in Table 4 below. The majority highly regarded ADR in relation to expedition, fairness of process and cost-effectiveness. Mwongo observes that the very fact that procedures in ADR are “party-designed” and the process itself “party-driven” inevitably makes its outcomes “more acceptable and satisfying”. For this reason, he recommends the introduction of, *inter alia*, court-mandated/court annexed ADR, a view shared by Gross, according to whom the complex rules of procedure in civil litigation diminish party control and hamper participatory justice.

Table 4

Level of Participants' Familiarity with ADR

Type of ADR Mechanism With Which Participants Are Familiar	Percentage (%)
Arbitration	62.7
Mediation	38.4
Adjudication	13.0
Expert Determination	10.0
Early Neutral Evaluation	05.9

The 169 respondents who were familiar with ADR rated alternative dispute mechanisms highly in comparison to conventional court litigation, as did the beneficiaries of FIDA family mediation scheme mentioned above. In summary, 96.1% were of the view that ADR was less time-consuming and 69% considered it less costly. In terms of simplicity and fairness of process, 85% of the participants felt that ADR mechanisms were less complicated. As regards matters of integrity, 62.3% felt that ADR inspires more confidence and trust in view of the fact that it is more party-driven. Consequently, 70.8% of the respondents considered the outcomes of ADR more acceptable and satisfying than those of civil litigation. This high approval rating demonstrated in both surveys (and confirmed by Gross, Mururu, Khan, Mwongo and Billing) forms the basis of recommendations for the adoption of court-annexed or court-mandated mediation schemes and other alternative methods of dispute resolution in addition to other proposed reforms in policy and legislation to facilitate proportionality, participatory and procedural justice.

ADR is a classification of methods used to efficiently, cost-effectively, and equitably resolve disputes without resorting to litigation. ADR is premised upon the supposition that by providing disputing parties with a process that is confidential, voluntary, and adaptable to the needs and interests of the parties, and within party control, a more satisfying, durable, and efficient resolution of disputes may be realised. It is no wonder that there is an increasing trend in Kenya towards resorting to arbitration as the preferred means of adjudication of civil disputes.⁷⁸

As statistical data shows, party autonomy (usually maximised in ADR mechanisms) is a critical feature of civil justice. This study considers party control as a critical component of access to civil justice, while representation by legal counsel in litigation tends to erode participatory justice. As Relis observes, "... when disputants go to lawyers they often relinquish control over many choices in their litigation and frequently get dominated by lawyers who take charge of the relationship, dispute descriptions, and how litigants' cases are conducted and proffered". She goes on to say that "[t]hough cases are about litigants, not lawyers, and are not solely about what occurred but also about clients' life experiences, it is well established that litigants' dispute descriptions get reformulated and translated by lawyers into a new legal language, which may have little meaning for ordinary individuals."⁷⁹ Consequently, legal descriptions of disputes by lawyers may hold little meaning for litigants and could result in them being offered remedies which do not deal with their needs as they perceive them.⁸⁰ Indeed, party control and the ability to influence the outcomes reached under the process are critical to the effectiveness of remedies.

78 Goes op. cit. note 77.

79 Relis op.cit. note 1 pp.161-162.

80 ibid p.162.

62.9% of those interviewed felt that they had no participatory control or ability to influence the outcome reached in determination of their dispute through court litigation. According to 77.6% of the respondents, the rules of procedure, which were applied to all parties on an equal basis, restricted party control over the proceedings.

Unlike mediation, for which there exists no significant policy or legal foundation, arbitration enjoys statutory regulation and support, and stands out as a significant alternative to conventional judicial proceedings. The Arbitration Act (No. 4 of 1995) as amended by the Arbitration (Amendment) Act, 2009 provides the legal framework for arbitral proceedings and for the enforcement of domestic and foreign awards in Kenya.⁸¹ The fact that parties are free to agree on the composition of the arbitral tribunal in accordance with section 12 of the 1995 Act, and the procedure to be followed pursuant to section 20, choose the place of arbitration (section 21) and enjoy procedural flexibility and confidentiality,⁸² expedition and cost-effectiveness with respect to time and resources, makes arbitration stand out as the mechanism of choice for adjudication of civil disputes compared to litigation. The voluntary nature of ADR and the freedom to agree on the composition of the arbitral tribunal, the procedure suitable to the circumstances of the parties, the timetable and the place of arbitration, have the effect of maximising party autonomy to the ends of proportionality, participatory and procedural justice, which in turn guarantee effective remedies.

81 The Arbitration Act (No.4 of 1995) s 36 and 37.

82 *Esso Australia Resources Ltd v The Honourable Sidney James Plowman (Minister for Energy and Minerals)*, April 7 1995 11 *Arb Int* (1995) p.235.

On the global scene, the ADR movement has seen an extraordinary transformation in the last ten years. Little more than a decade ago, only a handful of scholars and attorneys perceived the need for alternatives to litigation. The ADR idea was seen as nothing more than a hobbyhorse for a few offbeat scholars. Today, with the rise of public complaints about the inefficiencies and injustices of our traditional court systems, the ADR movement has attracted a bandwagon following of adherents. Indeed, ADR is no longer shackled with the reputation of a cult movement.⁸³

5.9. Conclusion

The statistical data presented in this chapter confirms the desk research findings discussed in chapters three and four and satisfy the second research objective set out in part 1.3 of chapter one. The findings in chapter five demonstrate that the judicial system for the administration of civil justice in Kenya falls short of the legitimate expectation of its users, addressing the first research question posed in part 1.4. The chapter highlights the factors that impede the delivery of civil justice and discloses general inefficiency in judicial proceedings and inaccess to civil justice attributable to: (a) lack of apposite policy framework for the effective administration of civil justice; and (b) an ineffective legal framework and administrative procedures. Testing the hypothesis stated in part 1.6 of chapter one, the findings in chapter five confirm that the current Kenya's policy and legal frameworks are not well suited to guarantee the effective delivery by national tribunals of equal access to civil justice, as concluded from the desk research findings reported in chapter three.

83 HT Edwards 'Alternative Dispute Resolution: Panacea or Anathema?' 99 (1986) Harvard Law Review pp.668-668.

Chapter six consolidates the findings in chapters three, four and five and draws on beneficial examples and practice in other jurisdictions as it presents the compelling case for reform in policy and legislation recommended in chapter seven.

CHAPTER SIX

THE CASE FOR REFORM OF THE CIVIL JUSTICE SYSTEM IN KENYA

6.1. Introduction

Chapter five presented statistical evidence of the inaptness of the extant policy and legal frameworks for the administration of civil justice in Kenya, confirming the desk research findings in chapters three and four. The conceptual and theoretical frameworks in chapter two, and the findings in chapters three, four and five ,provide the basis for the discussion in this chapter of the compelling case for reform of the system for the effective administration of civil justice in Kenya. The discussion in chapter six of, *inter alia*, appropriate market mechanisms that promote proportional, expeditious and party-driven system of administration of civil justice in accord with international best practices lays ground for the reforms recommended in chapter seven.

The chapter addresses the obligatory reforms in answer to the second and third research questions stated in part 1.4 of chapter one. It rests on the supposition that the principles of equality, economy, proportionality and expedition are fundamental to an effective system of justice, and that a system of accessible civil justice is essential to the maintenance of a civilized society.¹

1 Lord Woolf 'Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales' (HMSO 1995) ch 1 in Lord Woolf *The Pursuit of Justice* (Oxford University Press New York 2008) p.311.

In answer to the second research question posed in part 1.4 of chapter one, chapter six argues the case for the reforms recommended in chapter seven, taking account of beneficial experiences of developed common law and other jurisdictions that have had to contend with comparable impediments to civil justice, paying special attention to the conceptual imperatives for the administration of civil justice. The beneficial experiences considered in this chapter serve as examples of tested models of market mechanisms, contractual choices and plural legal orders that have effectively responded to the contemporary challenges in the quest for civil justice. However, the study recognises that dispute resolution mechanisms from different jurisdictions could only be compared as far as they are similar in terms of procedure and goal.²

6.2. Overview of the Organisational Reforms of the Judiciary

Successful enforcement of rights and expeditious delivery of effective remedies in Kenya depend on an accessible and effective system of civil litigation,³ which the strategic reforms proposed in chapter seven are intended to achieve. Although this study is primarily concerned with the much-needed reforms in policy and legislation to facilitate effective administration of civil justice, the course of reforms of the institution of courts and national tribunals in post-independence Kenya cannot escape attention. Understanding the nature of the reforms undertaken on judicial institutions over the years helps to construct a clear picture of the complex jigsaw puzzle into which apposite policy and legislation fittingly fall to satisfy the demands of civil justice. Indeed,

2 Maklu and Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems 'A handbook of Measuring the Cost and Quality of Paths to Justice' (2009) available at: <<http://www.measuringaccesstojustice.com>> (last accessed on 20th November 2010).

3 O Nwankwo and W Odhiambo 'Country Governance Profile (CGP)' (consultant's report to the African Development Fund on Kenya November 2004) p.19.

appropriate reforms in the judiciary shape the environment in which policy and legislation seek to deliver civil justice.

Despite the intermittent efforts to reform the legal and organisational frameworks culminating in the current judicial system discussed in parts 3.5 and 3.6 of chapter three, an appraisal of the present-day civil justice system reveals deep-rooted inadequacies outlined in the problem statement contained in part 1.2 of chapter one. According to this study, these shortcomings are attributable to the inapt policy and legal frameworks, which are not well suited to effectively respond to the vitality of social change. The reforms highlighted in this study have tended to focus attention on the improvement of the infrastructural component of the conventional judicial system leaving little room for innovative measures to improve the quality of procedures and outcomes, or to enhance proportionality, party autonomy and participatory justice. For example, no meaningful steps have been taken to adopt a market approach to dispute resolution to the ends of participatory and quality procedures in response to contemporary challenges manifested in complex procedures, perennial case backlogs and high cost of litigation. Instead, the drive for organisational reforms of the judiciary has tended to be motivated by concern for good governance and development, paying diminutive attention to the conceptual imperatives advanced in this study.⁴

4 Ministry of Justice, National Cohesion and Constitutional Affairs *Governance, Justice, Law and Order (GJLOS) II Reform Programme 2011/12 to 2015/16* (Report) (October 2011) p.6. The Ministry of Justice, National Cohesion and Constitutional Affairs ‘Governance, Justice, Law and Order Sector (GJLOS II Reform Programme’ (Policy Framework Paper) (2012-2016) commonly known as GJLOS II Reform Programme and the preceding GJLOS I Reform Programme (2004-2009) were designed to address the governance challenges facing the country.

In view of the foregoing, there is pressing need to undertake organisational reforms and statutory entrenchment of market mechanisms for dispute resolution (among other statutory interventions) based on appropriate policy and conceptual framework. This would in turn offer practical choices and effectively match fairness and enterprise⁵ while maintaining a narrow justice gap to ensure equal access to effective remedies. Indeed, attitudes in judicial institutions in Kenya have not changed much so as to effectively respond to contemporary challenges.⁶ The old models of dispute adjudication leave little room for suitable alternatives and value-oriented norms in the judicial process.⁷ According to Justice Singh, the success of the judicial process depends on effective resolution of any dispute in the wider perspective of social and constitutional values.⁸

Other developed common law jurisdictions, such as Canada and the United Kingdom, shared similar experiences in the history of the development of their respective justice systems. Their experiences prompted far-reaching reforms and change in policy and practice. The reforms culminated in what is today viewed as international best practices, some of which are discussed below. They adopted alternative strategies for dispute resolution hitherto unknown to the conventional adversarial civil justice systems, and set the pace for reform in other jurisdictions.⁹ For instance, the market approach to dispute resolution in the United Kingdom stands out as a unique model in which party-driven market mechanisms (which include adjudication, mediation and commercial arbitration) are employed in the quest for equal access to civil justice. Far-

5 P Harris 'Reforming English Civil Justice: A Market Strategy for Delivering Access to Justice' (paper presented at a seminar of the World Bank Legal Institutions Thematic Group April 20 2000).

6 *ibid.*

7 Dr. Justice TN Singh 'Constitutional Values and Judicial Process' [available at: <http://www.cili.in/articles/download/1493/1084>](http://www.cili.in/articles/download/1493/1084) (last accessed on 8 October 2009).

8 *ibid.*

9 G Slapper and D Kelly *Source Book On English Legal System* (Cavendish Publishing Ltd 1996) p.195.

reaching institutional and law reforms in developed jurisdictions have greatly improved the machinery of civil justice by eliminating impeding factors, such as administrative irregularities and inadequacies, prohibitive costs of litigation, clogged systems due to endemic delay in conclusion of civil proceedings and the intimidating solemnity, not to mention the complexity of largely incomprehensible substantive law and rules of adversarial procedure with which lay parties had to contend¹⁰ and which are still common in Kenya, as statistical data presented in chapter five demonstrates.

The discussion in chapter five shows that access to civil justice in Kenya is hampered by, among other things, high cost of litigation, complex rules of procedure and the absence of apposite national policy and an irresponsive legal framework. As was the case in the United Kingdom, the high cost of civil litigation in ordinary cases relate to, among other things:

- (a) court fees and auctioneers costs in execution of Orders and Decrees;
- (b) advocates fees;
- (c) evidential costs of witnesses and experts in certain cases; and
- (d) costs of securing evidential documents, such as reports and expert opinions in other cases.¹¹

These factors offend the principle of proportionality, which this study views as a constituent element of civil justice.

10 *ibid.*

11 *ibid.*

Despite the prohibitive cost of civil litigation reported in chapter five, little has been done to this day to establish defined statutory and organisational frameworks or administrative procedures that guarantee legal aid in civil proceedings at least in cases involving basic human needs. According to this study, the guiding principles prescribed by Article 159 of the Constitution of Kenya 2010, sections 1A and 1B of Chapter 21 and section 3B of Chapter 9 of the Laws of Kenya (which are discussed below) do not go far enough to effectively deliver on their aspirations. The same argument goes for Article 48 of the Constitution, which mandates the State to ensure access to justice for all persons.¹² Yet, great gains could have been made had the Constitution of Kenya, 2010 retained the provisions of Article 204 of the 2005 Proposed Constitution of Kenya (popularly known as “the Bomas Draft”, which recommended the establishment in the public service of the office of “Public Defender” in the context of a State-funded legal aid scheme). The prospective effect of this proposal is discussed below along with Article 48 of the Constitution in answer to the question as to whether there is in reality a constitutional obligation on the State to provide legal aid in any civil proceedings.

This study recognises law as a prescriptive tool of social regulation and transformation in the context of sociological jurisprudence.¹³ Accordingly, law must undergo constant change in order to respond to the contemporary demands of organised society.¹⁴ The egalitarian ethos of the natural law theory of justice discussed in chapter two was indeed the compelling reason for reforms in policy and legislation in response to the transformation in 1963 of the political order and social change from the colonial to independent Kenya. Law played a critical role as a

12 The Constitution of Kenya, 2010 art 48.

13 J Stone *The Province and Function of Law* (Associated General Publications Sydney 1946) p. 785.

14 J Finch *Introduction to Legal Theory* (Sweet and Maxwell London 1974) pp.16-17.

“mechanism of social engineering” in recognition of the need to satisfy competing interests and emerging demands in the redefined political order. This is the essence of sociological jurisprudence as postulated by Roscoe Pound.¹⁵ In effect, the process of social engineering must constantly demonstrate the vitality that matches the contemporary challenges of resolving competing claims and guaranteeing quality procedures and outcomes.

As the findings in chapters three, four and five suggest, the case for substantial reforms in policy and legislation are more urgent today than ever before. The reality of the matter is that over the years little or no attention was demonstrably paid to those determinant principles that dictate the extent to which participatory and procedural justice in civil claims is fully attainable on equal basis, namely: (a) proportionality; (b) economy; (c) expedition; and (d) party autonomy, which are common features of emerging market mechanisms for the adjudication of civil disputes. These features are viewed in this study as conceptual imperatives for equal access to civil justice.

The conscious effort to socialise law to the ends of equal access to civil justice is noticeably demonstrated in the history of reforms in the judicial system in Kenya. Over the years, reforms of the organisational framework for the administration of both civil and criminal justice have been the subject of many committees and commissions before and after independence, and perhaps little remains to be said regarding those reforms. Suffice it to say that the resulting social change in the emergent State toward a more egalitarian social order to which Kenya had aspired

15 A Hoogvelt ‘Jurisprudence (Sociological)’ in Michael Mann (ed) *Macmillan Student Encyclopedia of Sociology* (The Macmillan Press Ltd London and Basingstoke 1983) p.180.

required comprehensive reforms in policy and legislation to satisfy new demands and competing interests in pursuit of justice.¹⁶

Notably, though, no meaningful reform of policy and legislation for the administration of civil justice can be undertaken without first reforming the judicial institutions even though prior reform measures have yielded derisory gains. Below is an outline of some of the key initiatives, which tended to lay undue emphasis on organisational reforms with no more than cursory attention to policy and legislation. These initiatives are presented in chronological order with emphasis on those features and recommendations that are relevant to the subject of inquiry.

Addressing the institutional inadequacies and the need to enhance accessibility of court stations for judicial services, the 1990-91 Mbithi Committee Report recommended, among other things:

- (a) the decentralisation of the judicial service to Provincial and District levels to aid the administration of justice;
- (b) the computerisation of record-keeping in the courts;
- (c) the strengthening of the Kenya School of Law to enable it offer specified and enhanced professional training to paralegal staff; and
- (d) the streamlining of the system of record-keeping in the courts by making use of modern technology.¹⁷

16 ibid.

17 Government of the Republic of Kenya *Report of the Civil Service Salary Review Committee (the Mbithi Committee Report)* (1990/1991) in International Legal Assistance Consortium (ILAC) 'Restoring Integrity: An Assessment of the Needs of the Justice System in the Republic of Kenya' (February 2010) p.29 available at:

While the critical need to address the infrastructural issues was long overdue, much more needed to be done to address the quality of procedures in civil litigation and equalise the opportunity to access judicial services.

Soon thereafter, the 1992 Kotut Committee¹⁸ was established to look into the terms and conditions of service of the judiciary. The Committee set out to explore ways and means of establishing a structure of salaries, conditions of service and related benefits of the judiciary independent of the civil service. It recommended, *inter alia*, that: the judiciary undertakes an assessment of the volume of litigation and situation of courts relative to demand and population centres; the law be amended to provide for additional judges of the High Court and Court of Appeal; and there be established a Supreme Court.

Although there has been a gradual increase in the number of judges and High Court stations complemented by the recent increase in the number of the Court of Appeal judges, the Supreme Court was established only recently with the promulgation on 27th August 2010 of the Constitution of Kenya, 2010 and the subsequent enactment of the Supreme Court Act, 2011. However, the institutional inadequacies on which this report focuses did not go far enough to recognise or address the conceptual imperatives that determine the extent to which civil justice is accessible by all in pursuance of effective remedies. Suffice it to say that, though undoubtedly realistic as a reform measure, increased numbers of judges, judicial stations and officers do not in themselves guarantee expedition in the delivery of judicial services, proportional cost of

<<http://www.sribd.com/doc/26989486/Kenya-Judicial-Reform-2010-Restoring-integrity-An-assessment-of-the-needs-of-the-the-justice-system-in-the-Republic-of-Kenya.html>> (last accessed on 21st October 2011).

18 Government of the Republic of Kenya *Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary (the Kotut Committee Report)* (Government Printers Nairobi 1991-1992).

litigation, fairness of process or party control, which this study views as critical to the effective delivery of civil justice.

Responding to increasing concerns on lengthy case delays and backlog, limited access, allegations of corrupt practices, cumbersome laws and procedures, among other legal and institutional inadequacies and irregularities, the late Hon. Chief Justice Z. R. Chesoni appointed a committee on the administration of justice on 7th January 1998. The Committee, which was chaired by Hon. Justice R. O. Kwach, was mandated to investigate and make recommendations for possible improvement of *inter alia*:

- (a) the maintenance of judicial rectitude of judicial officers in the discharge of their functions;
- (b) the allocation, disposal and follow-up procedure of cases in all courts;
- (c) the improvement of performance appraisal, promotional incentives and training;
- (d) how to make the administration of justice time and cost effectual;
- (e) the institution of the judiciary on a wide range of structural and administrative issues; and
- (f) to look into any other matter pertaining to the improvement of the administration of justice in Kenya and making the same consumer friendly.¹⁹

¹⁹ Government of the Republic of Kenya *Report of the Committee on the Administration of Justice (Kwach Report)* (Government Printers Nairobi 1998) p.6.

In his report, Kwach J highlights psychological, information, economic, physical, and geographical and literacy barriers as additional obstacles that inhibit access to justice.²⁰ These impediments are also restated in the African Development Fund Country Governance Profile on Kenya where it was observed that "... justice is inaccessible to most poor Kenyans through... costs of accessing justice, complex and alien procedures, and deficiencies in traditional justice...".²¹ The Profile echoes the concern in this study that costs, quality of procedures and outcomes need to be addressed with appropriate reforms if the extant policy and legal frameworks in Kenya are to deliver equal access to civil justice. While the report touches on the lamentable complexity of procedure and the prohibitive cost of litigation confirmed in chapter five of this study, its recommendations lack the necessary conceptual clarity that would have helped to dictate the pace and direction of policy and law reform recommended in this study.

For many years, issues of integrity and judicial rectitude have remained top on the priority list of serious concern to the justice sector, prompting reform measures to respond to these persistent challenges. In 2003, for instance, the Integrity and Anti-Corruption Committee of the Judiciary was established and mandated to:

- (a) investigate and report on the magnitude of corruption in the judiciary;
- (b) identify the nature, forms and causes of corruption in the judiciary;
- (c) report on the impact of corruption on the performance of the judiciary;

20 ibid p.54.

21 Nwankwo and Odhiambo op. cit note 2 pp. 15-16.

- (d) identify corrupt members of the judiciary and recommend disciplinary action against them; and
- (e) recommend strategies for the detection and prevention of corruption in the judiciary. The Committee reported:
 - (i) the existence of rampant corruption in the judiciary;
 - (ii) the undermining of the rule of law by corruption, which led to loss of confidence in the judiciary;
 - (iii) the non-availability or inaccessibility of judicial services as a factor that contributed to corruption.²²

The 2003 Ringera Committee recommended, among other things:

- (a) punitive sanctions against errant judicial officers;
- (b) investment in corruption detection institutions and measures;
- (c) that delays in the hearing and determination of cases be eliminated or minimised to reduce avenues of corruption;
- (d) decentralisation of the judicial administration; and

22 Government of the Republic of Kenya *The Judiciary Report of the Integrity and Anti-Corruption Committee of the Judiciary (The Ringera Report)* (2003) available at: http://www.marsgroupkenya.org/Reports/Government/Ringera_Report.pdf (last accessed on 25th January 2012).

- (e) that judicial accounting be delinked from Provincial administration to make the judiciary independent of the Executive.²³

In 2006, the Sub-Committee on Ethics and Governance of the Judiciary was established to, among other things:

- (a) collect information relating to the integrity of judicial staff and court processes;
- (b) investigate all cases of alleged corruption and lack of integrity;
- (c) study and report on the case for in-house disciplinary measures and the processes of punishment for breaches not warranting removal of a judge from office;
- (d) examine and report on the orderly and efficient method consistent with the rules of natural justice for conducting investigations or inquiry into the fitness of a judicial officer to hold office, or the guilt of paralegal staff in corrupt or unethical practice;
- (e) deliberate and report on the content of the litigants' charter to aid comprehension of the process of the courts by litigants;
- (f) study and rationalise the previous committees' reports on the reforms of the judiciary and to recommend a codified and comprehensive reform matrix to entrench integrity; and
- (g) make recommendations for any remedial actions and necessary reforms for governance of, and entrenchment of integrity to, the judiciary.²⁴

23 ibid.

While this study appreciates that trust and confidence in the judiciary have a bearing on the effectiveness of remedies, matters of judicial rectitude are only part of what needs to be addressed to improve the administration of civil justice.

Despite the “remarkable improvement” in integrity of the judiciary and in the administration of justice since 2003 (as observed in the report of the 2006 sub-committee) there were still issues of missing court files, non-attendance of witnesses and congestion of courts,²⁵ all of which required urgent attention. The sub-committee recommended:

- (a) the urgent computerisation of court records;
- (b) the development of a litigants charter explaining court processes to court users and the general public;²⁶
- (c) the development of a positive work ethic;
- (d) amendment of the Civil Procedure Act and the Rules made thereunder to provide a timeframe for the conclusion of civil cases;
- (e) establishment of small claims courts to speedily deal with less complicated matters involving small amounts of money;

24 Government of the Republic of Kenya *The Judiciary Report of the Sub-Committee on the Ethics and Governance of the Judiciary* (2006) available at: < http://www.deontologie-judiciaire.umontreal.ca/fr/textes%20int/documents/KENYA_RAPPORT_COMITe_000.pdf> (last accessed on 25th January 2012).

25 *ibid.*

26 Government of the Republic of Kenya ‘The Judiciary Litigants Charter, 2010’ (2010) was formulated and published in 2010 as recommended.

- (f) incorporation of alternative dispute resolution mechanisms into the court system by appropriate legislation; and
- (g) the introduction into and use of conciliation and mediation in the court process.²⁷

For the first time, issues of proportionality, expedition and simplicity of procedures indirectly featured in the reform agenda with recommendations that alternative dispute resolution mechanisms be adopted to improve the administration of civil justice and, in effect, enhance fairness of process and party autonomy to the ends of quality outcomes in accord with this study. The highlights of recommendations for judicial reforms are contained in the 2010 report of the Taskforce on Judicial Reform (the Ouko Report). Its principal objectives were to consider and advise on:

- (a) the expansion, functions and independence of the Judicial Service Commission;
- (b) the short and long-term measures for addressing the backlog of cases;
- (c) the financial autonomy and accountability of the judiciary;
- (d) any other measures necessary to strengthen and enhance the performance of the judiciary in discharge of its functions; and
- (e) the proposed timelines for the carrying out of the recommended reforms.²⁸

27 *ibid.*

28 Government of the Republic of Kenya *op. cit.* note 24.

As Justice Ouko reports, rampant backlog of cases continues to be a significant impediment to equality of opportunity to access judicial services. According to the 2010 Report, “[c]ase backlog in the judiciary has arisen from a number of factors. These include shortage of judicial officers and staff, inadequate number of courts and infrastructure, inappropriate rules of procedure, court vacations, jurisdictional limits on magistrates’ courts, and mechanical management of court records and proceedings”.²⁹ The taskforce was of the view that the problem of case backlog arose from “weak case management systems” in the judiciary.³⁰

To address these challenges, the 2010 taskforce identifies:

- (a) the urgent need to build the human resource capacity of the judiciary;
- (b) the need to enact enabling legislation for mediation and other ADR mechanisms;
- (c) the need to train judicial officers in alternative dispute resolution mechanisms;
- (d) establish a complaints mechanism and appropriate codes of conduct developed for arbitrators, mediators and other ADR practitioners;
- (e) adopt public interest litigation guidelines to facilitate access to justice on issues of public interest;
- (f) the pauper procedure in civil litigation and appeals be simplified by reviewing Orders 33 and 44 respectively of the Civil Procedure Rules and incorporate the system into the National Legal Aid (And Awareness) Scheme;

29 ibid p.33.

30 ibid.

- (g) encourage legal practitioners to render *pro bono* services as part of their service to society; and
- (h) ensure that litigants (especially children and other vulnerable groups), victims of sexual offences, and those without counsel are accorded a fair hearing within a reasonable time.

Justice Ouko's report constitutes a clear albeit tacit statement of the conceptual imperatives that this study considers as critical to the effective administration of civil justice in Kenya. The study further provides the theoretical framework on which these conceptual imperatives are grounded. It demonstrates that much more requires to be done to give effect to these and other progressive recommendations designed to guarantee quality of procedures and outcomes in the administration of civil justice. A look at the ensuing legislative reforms reveals gaps that require prompt attention to shape the reform agenda towards apposite policy and legislation that address the conceptual imperatives for accessible civil justice in addition to the institutional inadequacies emphasised in all reform initiatives that culminate in the ongoing judicial transformation that began in 2011 and spearheaded by the Honourable Chief Justice Dr. Willy Mutunga.

As regards the issues of integrity and corruption, the Government enacted the Anti-Corruption and Economic Crimes Act 2003 (No.3 of 2003), which facilitated the creation and operationalisation of the Kenya Anti-Corruption Commission, Kenya Anti-Corruption Advisory Board and Special Magistrates (to adjudicate over corruption and economic crime cases) and enactment of the Public Officer Ethics Act 2003 (No.4 2003). The legal framework for the fight against corruption was also bolstered following the enactment of the Statute Law Miscellaneous

Amendment Act 2007, which enhanced the Kenya Anti-Corruption Commission's asset recovery and investigative powers while making public officer wealth declaration publicly accessible. Other key government institutions that have been established during the period include the National Anti-Corruption Campaign Steering Committee (NACCAC), the Public Complaints Standing Committee (PCSC) and the Kenya National Commission on Human Rights (KNCHR), the Kenya National Audit Office (KENAO) and the Public Procurement Oversight Authority (PPOA). The Department of Public Prosecutions (State Law Office) established two new specialised units to deal with anti-corruption, economic crimes, serious frauds and asset forfeiture.³¹

The regime of legislation on ethics and anti-corruption has recently assumed a more robust approach towards the restoration of integrity in public service since the promulgation of the Constitution of Kenya, 2010. Chapter Six of the Constitution prescribes the minimum standards of leadership and integrity for public officers, who are required to exercise their authority in such a way as, *inter alia*, to:

- (a) bring honour to the nation and dignity to the office; and
- (b) inspire public confidence in the integrity of the office.³²

Article 73(2)(b) promotes objectivity and impartiality in decision-making and prohibits corrupt practices by public officers. Similarly, paragraph (i) of clause requires every public officer to

31 Government of the Republic of Kenya *Kenya Vision 2030 First Medium Term Plan 2008-2012* (Government Printers Nairobi) p.124.

32 The Constitution of Kenya, 2010 art 73(1)(a).

demonstrate “honesty in the execution of public duties”.³³ Subject of course to fairness of process, judicial probity would enhance trust and confidence in the judiciary and in turn improve the effectiveness of remedies as the parties respect and adhere to impartial court decisions.³⁴

The recent enactment of the 2011 Ethics and Anti-Corruption Commission Act (and the subsequent establishment of the Commission under the Act) pursuant to Article 79 of the 2010 Constitution was designed to ensure compliance with and enforcement of the provisions of the Constitution relating to the standards of integrity for public officers.³⁵ The recently established Ethics and Anti-Corruption Commission is a successor to the Kenya Anti-Corruption Commission previously established under the Anti-Corruption and Economic Crimes Act 2003 (No.3 of 2003).

While these legislative measures contribute to the raging war against corruption, this study argues that corrupt practices in the administration of civil justice are largely attributable to the incongruity of policy and legal frameworks without whose reform the unethical conduct of judicial officers and clerical staff will continue to triumph. Indeed, corruption is seeded by inapt policy and legislation and is viewed in this study as symptomatic rather than the root cause of inaccessible system of civil justice. However, meaningful reform measures to:

- (a) enhance party autonomy;

33 ibid art 73(2)(c)(i).

34 TR Tyler ‘Procedural Justice and the Courts’ (2007) 44 (1/2) Court Review: The Journal of the American Judges Association pp.26-31 available at: <<http://digitalcommons.unl.edu/ajacourtreview/217>> (last accessed on 22nd September 2010).

35 The Constitution of Kenya, 2010 art 79.

- (b) simplify procedures to minimise the cost of civil litigation; and
- (c) adopt the principle of proportionality and alternative dispute resolution mechanisms; would go a long way in ensuring party control of proceedings.

This would in turn minimise corrupt practices and other administrative irregularities associated with complex procedures.

There are other recommended reforms that this study views as appropriate and long overdue, and which would go a long way in enhancing the efficiency and accessibility of judicial services. These include measures proposed by the 2010 Ouko Taskforce, namely: (a) the improvement of access to justice; (b) the establishment of a national legal aid and awareness programme to aid indigent litigants; and (c) the introduction of alternative dispute resolution mechanisms.³⁶ These recommendations were designed to enhance previous judicial reforms carried out in response to the recommendations of the 1998 Kwach Commission designed to address special needs and interests of the parties, and to enhance expedition and access to civil justice. This led to restructuring of the High Court into various divisions (including civil and commercial divisions) with the intention of improving the efficiency of the court system in Kenya so as to make it more responsive to the needs of the consumers of judicial services.³⁷

36 Government of the Republic of Kenya *Kenya Vision 2030 First Medium Term Plan 2008-2012* op. cit. note 31 p.132.

37 Aluoch J (Hon. Lady Justice) ‘The Recently Established Family Division of the High Court of Kenya’ (paper presented at the Seventh Biennial Conference of the International Women Judges in Entebbe, Uganda 11th May 2004).

Although it was believed that in all reform initiatives the proposed institutional transformation would ensure expeditious delivery of civil justice, this study argues that much more requires to be done by way of reform in policy and legislation to guarantee equality, expedition, proportionality, party autonomy and fairness of process. With the exception of the more comprehensive 2010 Ouko report, all the other reform initiatives tended to be rather patchy and failed to deliver lasting solutions to the wide range of impediments to civil justice. The intermittent manner in which reforms were carried out had the effect of addressing issues singled out of many others despite their interconnectedness. According to this study, the manifestly sporadic and reactive approach to judicial reforms was destined to yield minuscule success in the absence of a defined policy that would otherwise guide effective legislation, administrative procedures, programmes, plans and actions that would ensure a sound conceptual framework in the administration of civil justice.

6.3. The Case for Policy Reforms

The findings in chapters three, four and five disclose lack of an overarching or integrated policy framework to guide the design and implementation of appropriate legislation and effective programmes, plans and actions to facilitate efficient delivery of civil justice and effective remedies. This study recommends that a stand-alone policy be formulated to guide comprehensive reforms in law and procedure to address the strategic issues identified in part 4.3 of chapter four. The strategic issues considered in this study as critical for policy direction include:

- (a) backlog of cases;
- (b) complexity of procedures;
- (c) the high and disproportionate cost of litigation;
- (d) institutional inadequacies;
- (e) work ethic and integrity of judicial officers and staff; and
- (f) geographical accessibility of judicial services.

A defined sector-specific policy would ensure that all legislation and administrative procedures pursuant to the policy are responsive to contemporary challenges in the administration of civil justice and that all programmes, plans and actions in support of judicial services are designed to eliminate the array of impediments reported in chapter five. This would in turn consolidate the gains in responsive legislation and guarantee quality procedures and outcomes. As this study suggests, the impeding factors identified in the preceding chapters need to be addressed collectively and in a systematic manner rather than in the reactive and sporadic approach that characterises previous reform initiatives that evidently did not enjoy the guidance of a defined policy in the attempt to address various strategic issues.

In view of the foregoing, chapter seven recommends that the incoherent policy framework be revised to consolidate and expand the judicial policy, strategic objectives, programmes, plans and actions envisioned in the documents discussed in part 3.7 of chapter three, namely:

- (a) the Kenya Vision 2030;
- (b) the Medium Term Plan of Vision 2030 (2009-2012);
- (c) the Judiciary Strategic Plan 2009-2012;
- (d) GJLOS Reform Programme;
- (e) the 2008 Kenya National Dialogue and Reconciliation: Agenda item IV; and
- (f) the 2010 Litigants Charter.

These policy documents identify the need to take appropriate steps to improve access to justice but fail to address the conceptual imperatives advanced in this study as critical to full and equal access to civil justice.

There are other peripheral policy initiatives which do not substantially address matters of access to judicial services but which need to be assimilated in the proposed overarching judicial policy. These include: (a) the National Poverty Eradication Plan 1999-2015; and (b) the (now spent) Investment Programme for Economic Recovery Strategy for Wealth and Employment Creation 2003-2007, both of which were closely linked to the Kenya Vision 2030. The political pillar espoused in this Vision builds on the various aspects of human rights and the rule of law to ensure good governance and accountability. One of the strategic areas within which the transformation of the country's political governance systems will take place is through increased access and enhanced quality of legal services available to the public, and the reduction of barriers

to service provision and access to justice.³⁸ The Vision is founded on the principle that adherence to the rule of law is central to the culture of respect for human rights, which is viewed as an essential component of a modern market-based economic development.³⁹

These policy documents identify lack of access to justice as having a direct link to poverty.⁴⁰ They recognise the need for access to justice as a critical pillar for economic development and poverty reduction without any reference to the conceptual imperatives advanced in this study. Their thematic orientation in the development agenda is discernible from the recommendation that access to justice must be responsive, affordable, accessible and speedy in promoting sustainable economic development. However, the cursory manner in which these development policy documents address issues of access to justice render them inadequate to guide effective legislation, programmes, plans and actions to facilitate quality procedures and outcomes in the resolution of competing claims. In effect, these policy initiatives are too scanty to yield any tangible benefits to the reform agenda towards full and equal access to civil justice. On the other hand, their assimilation in the proposed integrated policy framework would not be in vain.

The evidently unbalanced emphasis on organisational reforms in disregard of appropriate policy and legislative measures required to enhance equal access to civil justice will, in the viewpoint of this study, invariably yield insignificant gains in the delivery of judicial services. Even though the integrity of a judicial system is critical to good governance and economic development, policy reforms should be issue-specific so as to effectively address the strategic issues articulated

38 Government of the Republic of Kenya *Kenya Vision 2030 First Medium Term Plan 2008-2012* op. cit. note 31 p.24.

39 *ibid.*

40 *ibid.*

in chapters three, four and five. Only then will such policy framework clearly define a visionary roadmap for the delivery of civil justice. As it is, the extant reform programme lacks focus and spreads rather thin over issues of governance and economic development without due regard to the strategic and conceptual issues considered in this study as critical to the effective delivery of civil justice.

It may be argued that disregard of the conceptual imperatives advanced in this study has been responsible for the apparent failure to achieve the strategic goal set out in the political pillar of the Kenya Vision 2030, “to enact and implement a legal and institutional framework that is vital to promoting and sustaining fair, affordable and equitable access to justice by 2012.”⁴¹ The statistical data presented in chapter four discloses an array of impediments to equal access to civil justice, which suggests that much more requires to be done to guarantee quality procedures and outcomes, and to ensure that judicial services are accessible by all on an equal basis. The medium term commitment to establish structures to guarantee access to justice⁴² count for little without due regard to the conceptual imperatives advanced in this study. Neither would other proposed policy, legal and organisational reform measures identified under the strategic initiatives, including the improvement of access to justice by enactment of legislation to establish the proposed small claims courts, a legal aid scheme, courts of petty sessions, and more comprehensive ADR legislation⁴³ (among others) yield any significant value to the reform

41 Transparency International Kenya *Adili 108* (Nairobi Kenya February 2009) p.7 available at: <<http://www.tikenya.org/documents/Adili103.pdf>> (last accessed on 20 April 2010).

42 Government of the Republic of Kenya *Kenya Vision 2030 First Medium Term Plan 2008-2012* op. cit. note 31 p.24.

43 *ibid.*

agenda, unless such legislation is substantially responsive to the strategic issues identified in chapter five and properly aligned to apposite policy and the proposed conceptual orientation.

Likewise, GJLOS I (2004-2009) and the draft GJLOS II sector-wide reform programme (2012-2016), both of which are largely dedicated to institutional and governance reforms, lack proper conceptual orientation to facilitate effective delivery of civil justice. The statistical data in chapter five demonstrates that the intention of the GJLOS Programme “to develop good governance and a speedy and fair dispensation of justice-affordable and accessible for all people”⁴⁴ is far from attainment. Indeed, no measure of organisational reforms however comprehensive, and no degree of infrastructural development however resourceful, would turn the tide of impediments to civil justice unless there is change in strategy as respects the underpinning policy and conceptual orientation.

This study argues that effective delivery of civil justice is only possible where the judicial policy is founded on the conceptual imperatives of equality, expedition, proportionality, fairness of process and party autonomy, which together underwrite the values of quality procedures and quality outcomes. It contends that the solutions to the problems under inquiry largely lie outside the institution of the judiciary and fall squarely on the conventional models of dispute resolution, which leave little room for market mechanisms and the realisation of those conceptual imperatives on which efficient delivery of civil justice heavily depends. This calls for a paradigm

44 ‘Governance, Justice, Law and Order Sector-wide Programme (GJLOS)’ Delegation of the European Union to the Republic of Kenya available at: <http://www.delken.ec.europa.eu/en/information.esp?menuid=2&submenuid=7&thirdmenuid=3&fourthmenuid=1> (last accessed on 20 April 2010).

shift towards market mechanisms that promote party autonomy, simplified procedures and fairness of process.

The 2009 Taskforce on Judicial Reforms chaired by Hon. Mr. Justice William Ouko was appreciably like-minded when in its interim report presented on 29th June 2009, and in the final report presented on 10th August 2010, recommended various institutional and administrative measures to address the backlog of cases. In addition to the proposed organisational reforms, the Taskforce recommended: (a) review of court procedures and processes; (b) the much needed introduction of (court-annexed or mandated) alternative dispute resolution mechanisms; and (c) enhancement of legal aid, which are discussed below.

While the 2006 Report of the Sub-Committee on the Ethics and Governance of the Judiciary (the Onyango Otieno Sub-Committee) Report and the 2010 Ouko Report constitute some of the most progressive reform initiatives in the history of Kenya's judicial system, their recommendations have been substantially effected by the ongoing process of implementation of the 2010 Constitution even though their recommendations have not been implemented on their specific terms. Suffice it to say, though, that the constitutional right of access to justice guaranteed in Articles 48 and 159(2) of the Constitution of Kenya, 2010 presents fresh demands for a more robust approach to the much-needed policy and law reforms to address the strategic issues outlined in the preceding chapters and embrace the conceptual imperatives on which the realisation of this right is firmly anchored.

The continued emphasis on infrastructural and administrative reforms of the judiciary demonstrated in various reform programmes⁴⁵ has done little to address the conceptual imperatives and the constraining costs of civil litigation. Yet, the high cost of civil litigation evidenced by statistical data presented in chapter five calls for strategic intervention. Accordingly, this study recommends formulation of a defined legal aid policy and enactment of supporting legislation to establish a legal aid scheme to support indigent litigants in certain civil disputes. Only then will the fundamental right of access to justice guaranteed by Articles 48 and 159(2) of the Constitution find real meaning to indigent consumers of judicial services.

Evidently, the system of administration of civil justice in Kenya is far from realising the “mission” of the judiciary, namely, to provide an independent, accessible, responsive forum for the just resolution of disputes in order to preserve the rule of law, and to protect all rights and liberties guaranteed by the Constitution.⁴⁶ Hence the need for far-reaching policy reforms to lay firm ground for the design and implementation of legislation, programmes, plans and actions suitable for the realisation of the strategic goal to guarantee full and equal access to civil justice.

6.4. The Case for Reshaping Law and Procedure

In addition to the policy framework and administrative procedures, fairness of process and the degree of access to procedural justice depend on the form and content of both substantive and

45 International Legal Assistance Consortium and the International Bar Association Human Rights Institute *Restoring Integrity: An Assessment of the Needs of the Justice System in the Republic of Kenya* (Report) (February 2010) p.16 available at: <<http://www.ibanet.org/document/default.aspx?documentuid=dcd20276>> (last accessed on 20th April 2010).

46 Government of the Republic of Kenya op. cit. note 24.

procedural laws, which dictate the extent to which the principles of expedition, economy, proportionality and party autonomy are realised in the due administration of civil justice. As this study argues, the extent to which law and procedure respond to contemporary challenges determines the degree of access to justice. Accordingly, the need for policy and legislation responsive to the needs and interests of consumers of judicial services in the just determination of their legal rights and obligations cannot be overemphasised.

The findings in chapters three, four and five present a compelling case for reform in law and procedure to mitigate the historical and structural perils of Kenya's slow-paced and costly common law adversarial system of claim adjudication. The hurdles of complex rules of procedure and the appurtenant prohibitive costs of litigation must be dismantled to give effect to what this study recommends as the necessary overriding principles of proportionality, expedition and fairness of process. There is indeed a pressing need to reform the rules of procedure to make provision for multi-tracking of cases, which involves diverse mechanisms of differential case management by fast-tracking or expedited proceedings through simplified procedures.⁴⁷ The reform process should ensure that rules of procedure generally guarantee that national tribunals handle disputes in such manner as to match the extensiveness of the procedure with the

47 R Goldschmid 'The Civil Justice Reform Context Behind British Columbia's Expedited Litigation Rule and the Small Claims Court Jurisdictional Limit Increase' (paper developed for the joint Continuing Legal Education/Ministry of Attorney General conference, Restructuring Justice Vancouver June 2005) available at: <<http://www.ag.gov.bc.ca/justice-reform-initiatives/publications/pdf/Goldschmid.pdf>> (last accessed on 11th July 2011).

magnitude of the dispute.⁴⁸ By doing so, courts will be able to balance the interest of justice with cost-effectiveness in order to augment access to civil justice.⁴⁹

This study recommends reform in policy and legislation to ensure that differential case management procedures are suitably designed to ensure that the cost of resolving a dispute are proportional to its magnitude, value, importance and complexity,⁵⁰ as the principle of proportionality demands. As an overriding principle, proportionality guarantees simplicity, expedition and practicability in the administration of civil justice. It is the conceptual basis for effective case management. For example, Rule 1.1 of the 1998 United Kingdom Code of Civil Procedure requires courts only to allot a case a share of the court's resources proportionate to the magnitude of that case while taking into account the need to allot proportional resources to other cases.⁵¹ Indeed, proportionality is in the viewpoint of this study a determinant of the effectiveness of remedies. How so? It makes no business sense and offends the sense of justice to spend colossal amounts of money in legal costs and to engage in time-consuming complex procedures to enforce a claim of lesser or relatively insignificant value. Hence the need to ensure that procedure for any claim adjudication suits the process and does not result in needless costs in both time and money.

48 Victorian Law Reform Commission *Civil Justice Review* (Report) (2008) 14 para 4.1.4. available at: <<http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/resources/8/1/8137a400404a0bed9549fff5f2791d4a/VLRC+Civil+Justice+Review+-+Report.pdf>> (last accessed on 1st August 2011).

49 Goldschmid op.cit. note 47.

50 *ibid.*

51 *ibid.*

The overriding objective to deal with cases justly⁵² requires that courts deal with cases by applying procedures suitable for the just determination of competing claims, and in a manner proportionate to the value of the subject-matter in dispute, the complexity of the issues in contention, the degree of public interest at stake, and the economic status of the parties. It has been suggested, however, that the elements of proportionality should not be specifically set out but should only be guided by “commonsense notions of reasonableness and a sense of proportion to inform the exercise of procedural discretion”⁵³ unfettered by mandatory rules of procedure. In effect, “common sense notions of reasonableness” and a “sense of proportion” would effectively dismantle the barriers mounted by complex rules of procedure reported in chapter five. The principle of proportionality has been considered as the overarching guiding principle of modern civil procedure⁵⁴ to which Kenya must adapt to keep pace with the international norms and minimum standards of full and equal access to civil justice articulated in chapter four.

While rules of procedure facilitate the maintenance of orderly disposal of civil proceedings in national tribunals, this study recommends that they be simplified and suitably complemented with appropriate case management strategies to avoid undue technicalities at the expense of expedition. This would ensure that judicial tribunals maintain a realistic balance between orderly and efficient conduct of their own processes on the one hand and delivering substantive justice

52 Civil Procedure Rules 1998 (UK) r 1.1.

53 *Civil Justice Reform The Final Report Chief Justice's Working Party on Civil Justice Reform* (Hong Kong Chief Justice's Working Party) (2003) executive summary 8 available at: <<http://www.legco.gov.hk/yr06-07/english/bc/bc57/papers/bc570611cb2-1960-e.pdf>> (last accessed on 25th January 2012).

54 Goldschmid op. cit. note 47.

on the other.⁵⁵ The suggested reforms in policy and legislation are premised on the fact that a legal regime of rigid and complex rules negate fairness of process and results in escalated cost and delay in the adjudication of disputes, which constitute intractable challenges in the administration of justice.⁵⁶

As this study suggests, accessibility of the civil justice system requires enactment of some form of multi-tracking, whereby expedited or simplified rules of procedure are created for expeditious determination of cases of lower values⁵⁷ or those that do not involve intricate issues. Presently, expedited or simplified procedures are limited to debt claims under the Debts (Summary Recovery) Act (Cap. 42 of the Laws of Kenya). Yet, there is pressing need to establish a system of expedited civil procedure that mitigates costs and facilitates proportionality to the ends of participatory and procedural justice, need satisfaction and the realisation of effective remedies in respect of other civil disputes. This would give life to the constitutional right of access to justice.

Even though Article 159(2) of the Constitution of Kenya, 2010 articulates the principles of equality, expedition and simplicity by which courts and tribunals shall be guided in exercising judicial authority, this provision is not by any means self enforcing. The same applies to Article 48 of the Constitution (which imposes an obligation on the State to ensure access to justice for

55 DBM Mosotah 'Article 159 and Oxygen Principle Not Magic Wands' (April 2011) Nairobi Law Monthly available at: <<http://nairobiawmonthly.com/index/content.asp?contentId=311&isId=7&ar=1>> (last accessed on 27th June 2011).

56 British Columbia Justice Review Task Force *The Foundations of Civil Justice Reform* ("Green Paper") (Report) (September 2004) p.1 available at: <http://www.bcjusticereview.org/working_groups/civil_justice/green_paper_09_21_04.pdf> (last accessed on 1st August 2011).

57 Goldschmid op. cit. note 47.

all at an affordable cost)⁵⁸ and Article 50(1) (which guarantees fair trial or fairness of process in the determination of any dispute).⁵⁹ The three provisions constitute guiding principles on which appropriate judicial policy, legislation and administrative procedures should be anchored to ensure effective administration of, and equal access to, civil justice. This calls for significant steps to enact enabling legislation, and to formulate and implement suitable administrative procedures, programmes, plans and actions that would ensure expedition, proportionality, and fairness of process in order to facilitate the realisation of equality of opportunity to access judicial services.

Although the guiding principle of proportionality in the conduct of civil proceedings by courts and tribunals in Kenya is as well prescribed in section 1A(1) of the Civil Procedure Act (Cap. 21) and section 3A of the Appellate Jurisdiction Act (Cap. 9), the provisions are in the form of an overriding objective of the Acts and the respective rules of procedure made there under to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes and appeals respectively.

The duty imposed on trial and appellate courts by sections 1B of Chapter 21 and 3B of Chapter 9 to conduct their proceedings in an expeditious and cost-effective manner serve to reinforce the principle of proportionality albeit in a rather declaratory manner. Indeed, there is nothing in the body of those rules to demonstrate any attempt to mitigate the high cost of litigation, or to simplify procedures and facilitate expedition in the adjudication of civil disputes so as to improve the quality of procedures and breathe life to this overriding principle. Moreover, the

58 The Constitution of Kenya, 2010 art 48.

59 *ibid* art 50(1).

rules of procedure should be seen to accord with their primary function, namely, to facilitate the proper administration of justice.⁶⁰ Accordingly, there is need for reform in the policy framework, statutory and administrative procedures to facilitate the establishment of a state-funded legal aid scheme in certain cases to facilitate equal access to civil justice. The prospects of legal aid in civil disputes and the proposed strategies for dismantling social and economic barriers of access to civil justice are discussed in part 6.5.

A comprehensive review to ensure simplicity of the rules of procedure is necessary to guarantee expedition, affordability and cost-effectiveness of claim adjudication. Otherwise, the aforementioned amendments to chapters 9 and 21 of the Laws of Kenya would be tantamount to derisory legislative patchwork that serves no practical purpose in the administration of civil justice. The pressing need to dismantle the intricacy of the rules of procedure and to mitigate the highly structured, slow and costly nature of judicial services cannot be overemphasised. As this study suggests, simplified rules of procedure and the adoption and statutory entrenchment of non-state legal orders and market mechanisms of alternative dispute resolution would, among other things:

- (a) expedite civil proceedings;
- (b) enhance proportionality, party autonomy and participatory justice;
- (c) enhance accessibility and promote self representation; and
- (d) reduce the cost of litigation.

This proposed legislative model (which is discussed in part 6.6) would effectively focus on interests of the parties rather than legal rights and technicalities on which the present-day system

60 *Iron & Steel Wares Ltd v C W Martyr & Co.* (1956) 23 EACA p.175.

of civil justice tends to dwell. In the end, the reformed system would in the viewpoint of this study guarantee need satisfaction and the much-desired effectiveness of remedies.

6.5. Dismantling Social and Economic Barriers of Access to Civil Justice

The statistical data reported in chapter five cites high cost of litigation as one of the main restraints to equal access to civil justice. When interviewed during the survey reported in chapter five, Justice R. Mwongo was of the view that “[t]he [civil justice] system is inequitable to litigants as it avails preferable results to the wealthy.”⁶¹ He explained that economic and social status determines the manner in which litigants are treated and the extent to which they are able to access judicial services. This view is confirmed by 84.1% of the participants interviewed in the survey reported in chapter five. They cited economic status as the key factor for differential treatment of litigants by judicial officers, which in the viewpoint of this study erodes equality of opportunity to access civil justice.

Gross concurs and states that civil justice is only accessible to the rich.⁶² In effect, parties are not treated with equality and fairness according to 85.5% of the respondents. This calls for reform in policy and legislation to support appropriate programmes, plans and actions designed to sustain structured and coordinated delivery models for state-funded legal aid so as to eliminate social-economic barriers to full and equal access to judicial services. Additionally, these policy reform

61 Hon. Mr. Justice RM Mwongo is a judge of the High Court of Kenya and one of the expert respondents interviewed in this study. Before his appointment to the Bench in September 2011, Hon. Mr. Justice Mwongo was a practising Advocate of the High Court of Kenya of 24 years standing. He is a long-standing Chartered Arbitrator and a Fellow of the Chartered Institute of Arbitrators (UK). Justice Mwongo was an ADR tutor and practitioner.

62 AF Gross (Advocate of the High Court of Kenya, Chartered Arbitrator and Mediator, and Fellow of the Chartered Institute of Arbitrators) is yet another of the key informants interviewed in this study.

measures would eliminate the perception that the judicial system is discriminatory against the poor and the marginalised sectors of the Kenyan society.⁶³

The legal framework for the provision of judicial services at an affordable cost is founded on the provisions of Article 48 of the Constitution of Kenya, 2010, which mandates the State to ensure access to justice for all, but without any guarantee for legal aid in civil proceedings. Article 48 provides: “The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”⁶⁴ How this is to be attained is left to judicial interpretation and to enabling legislation, and to administrative procedures yet to be formulated to facilitate the realisation of this constitutional ideal. Notably, though, the 2010 Constitution makes no provision for the corresponding right to legal counsel in civil cases as is the case for criminal trials in the circumstances contemplated by Article 50(2)(h). This Article recognises the right “to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result ...” and, in any case, “to choose, and be represented by, an advocate ...”.⁶⁵ However, the Constitution does not define what amounts to “substantial injustice”, which is left to judicial interpretation on the facts of every case. In any event, the notion of “injustice” should not in the viewpoint of this study be restricted to the administration of criminal justice.

Notably, though, the provisions of Article 50(2) of the Constitution and the appurtenant safeguards against “substantial injustice” are exclusively applied in criminal proceedings. In an

63 Legal Resources Foundation (Kenya Human Rights Commission) and Legal Resources Foundation (Zimbabwe) *Balancing the Scales: A Report on Seeking Access to Justice in Kenya* (Legal Resources Foundation Nairobi 2004) executive summary vii-viii.

64 The Constitution of Kenya, 2010 art 48.

65 *ibid* art 50(2)(g).

attempt to clarify when “substantial justice” would likely result and, therefore, avail to the accused State-funded legal representation, the Court of Appeal was of the considered view that under the Constitution, any accused person (regardless of the seriousness of the offence with which they are charged) may receive the services of a lawyer appointed by the court where the court is satisfied that “substantial injustice would otherwise result”.⁶⁶ In the Court’s view, this right avails:

- (a) in (criminal) cases involving complex issues of fact or law;
- (b) where the accused is unable to effectively conduct his/her own defence owing to disabilities or language difficulties;
- (c) where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence; and
- (d) in cases involving any capital offence punishable by death.⁶⁷

However, the court did not go far enough to define what constitutes “public interest” so as to justify legal aid and representation by counsel in criminal trials for offences other than those that carry a death penalty.

The evident exclusion of civil proceedings from the express constitutional safeguards in Article 50 against any miscarriage of justice raises questions as to the degree of commitment by the State to proffer practical solutions to the contemporary challenges of equal access to civil justice. This is notwithstanding the high cost of litigation, the complexity of procedures for the

66 *David Njoroge Macharia v Republic* [2011], Nairobi Court of Appeal, Criminal Appeal No. 497 of 2007, 18 March 2011 available at: <<http://kenyalaw.org/Downloads/FreeCases/81236.pdf>> (last accessed on 16th November 2011).

67 *ibid.*

adjudication of disputes, and the social-economic inequalities that engender differential treatment of the consumers of judicial services on the basis of economic, social and political status. Yet it is the aspiration of all Kenyans towards “... a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.”⁶⁸

Besides the derisory constitutional safeguards cited above, the prevailing procedural ineptitude, institutional and administrative inadequacies, and the perennial backlog of cases in the Kenyan civil justice system reported in chapter four continue to hamper equal access to civil justice. This is compounded by economic and social inequalities that erode the constitutional right to equal protection and equal benefit of the law⁶⁹ for the majority of Kenyans. Accordingly, this study recommends the establishment of a structured and State-funded legal aid scheme to complement the effort of the diverse range of civil society organisations that have over the years attempted to bridge this gap by providing free legal aid, legal assistance, legal education and public interest litigation for indigent litigants. These civil society organisations include legal, religious, women, refugee and children’s rights organizations, institutions of higher learning and paralegal networks, which have initiated projects and programmes geared towards providing legal aid and awareness to sections of the general public. Even though these initiatives have had some appreciable degree of success largely in criminal cases, they are unstructured, uncoordinated and unregulated. As this study argues, lack of standardisation, supervision, and statutory regulation would invariably compromise the quality, reach and effectiveness of the selective legal aid and legal awareness services provided by these non-state actors. Furthermore, the existing legal aid

68 The Constitution of Kenya, 2010 preamble.

69 *ibid* art 27(1).

and awareness programmes are insufficient, and the need for a national legal aid and awareness scheme in Kenya cannot be overemphasised.

This study suggests that a defined national policy and statutory regulation of legal aid schemes would effectively address matters of equality of opportunity to access, regulation and quality of *pro bono* legal services in criminal and civil proceedings by both State and non-state actors. What is more, an efficient, accessible, expeditious, affordable and proportionate legal and judicial system backed by a structured and coordinated legal aid scheme is an essential feature of social, economic and political development. Access to justice is critical in alleviating poverty as it creates an enabling environment for investment and development as envisaged by the 1st Medium Term Plan under the Kenya Vision 2030: to promote and sustain fair, affordable and equitable access to justice. For this reason, this study underscores the need for appropriate measures, including the provision of State-funded and regulated legal aid, to ensure that legal and judicial services are accessible to the indigent, marginalised and vulnerable members of the society on an equal basis. Moreover, the State is obligated by the 2010 Constitution and various international human rights instruments discussed in chapter four to facilitate equal access to justice.

Though largely in the realm of criminal law, the Government of Kenya has expressed its commitment under various regional and international human rights declarations, standards, guidelines and instruments (some of which are discussed in chapter four) to enhance access to justice and provide a state funded legal aid and legal awareness programmes. These include *inter alia*:

- (a) UDHR;
- (b) ICCPR;
- (c) the Basic Principles of Justice for Victims of Crime and Abuse of Power;
- (d) the UN Standards on Access to Justice;
- (e) ACHPR;
- (f) the Convention on the Right of the Child;
- (g) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- (h) the Convention on the Elimination of All Forms of Racial Discrimination;
- (i) the Convention on Discrimination Against Women;
- (j) the UN Standard Minimum Rules for Non-custodial Measures (Tokyo Rules);
- (k) the Administration of Juvenile Justice (Beijing Rules); and
- (l) the Protection of Juveniles Deprived of their Liberty; Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa and the Role of Prosecutors.

In order to give effect to these treaty obligations, Articles 48 and 21(4) of the Constitution of Kenya, 2010 require the State to ensure access to justice for all, and enact legislation to fulfill its international obligations towards respect for human rights and fundamental freedoms of which

equal access to (civil) justice is a critical constituent. Yet there is no defined policy or legislative framework to support the design and implementation of programmes, plans and actions to guide legal aid and awareness initiatives in Kenya. This is notwithstanding the fact that the Constitution provides the guiding principles and minimum standards for policy, legislation and administrative procedures to facilitate the establishment of state-funded, well synchronized and suitably coordinated legal aid and awareness programmes by both State and non-state actors.

The much-needed policy would effectively guide the operationalisation of Articles 48 and 50(1) of the Constitution of Kenya, 2010. When adopted, the policy should be sufficiently responsive so as to provide the framework for effective legislation, implementation, monitoring, evaluation and funding of a national legal aid and legal awareness programmes in not only criminal but also civil cases to facilitate meaningful access to civil justice. Such policy would define the Government's unequivocal commitment to:

- (a) establish an organisational framework for legal aid and awareness to enhance access to civil justice;
- (b) facilitate the provision of legal awareness, assistance, advice and representation for the poor, marginalized and vulnerable members of the society in certain civil proceedings; and
- (c) provide a framework for the promotion, establishment and use of alternative and traditional dispute resolution mechanisms in accord with Article 159(2) of the Constitution.

The effectiveness of the proposed policy would in the viewpoint of this study depend on: (i) the extent to which it embraces the conceptual imperative of equality founded on the constitutional right to equal protection and equal benefit of the law;⁷⁰ and (ii) the extent to which it enhances the administration of civil justice by guiding the establishment of a national, sustainable and quality legal aid and awareness framework towards full and equal access to civil justice. Access to justice in this context denotes the ability of individuals or groups to access judicial institutions and alternative dispute resolution mechanisms, guaranteed representation and the assurance that judicial and administrative outcomes are just, equitable, appropriate, effective and timely.

In addition to the proposed legal aid policy reform, this study recommends that the pauper procedure in civil litigation and appeals under Orders 33 and 44 respectively of the Civil Procedure Rules, 2010 be reviewed and simplified, and incorporated into the proposed legal aid (and awareness) scheme.⁷¹ As it is, the procedure under Orders 33 and 44 is intricate and involves complex procedures for application, presentation and examination of applicants, procedure at hearing and general rules of procedure relating to suits and appeals by paupers. A pauper is defined in Order 33 Rule 1(2) as a person who is not possessed of sufficient means to enable him to pay the fee prescribed by law for the institution of a civil suit. The technicality of procedure for application to sue or appeal as a pauper is equally time-consuming and shuts out litigants who are unable to secure legal representation. In effect, the system has failed to realise the objective for which it was designed. Accordingly, it is unlikely to yield any tangible benefits

70 The Constitution of Kenya, 2010 art 27(1).

71 Government of the Republic of Kenya *Final Report of the Taskforce on Judicial Reforms (Ouko Report)* (Government Printers Nairobi 2010).

for the target groups in a situation where the complexity of procedures reported in chapter five continue to characterise the conduct of proceedings in the administration of civil justice.

The Persons with Disabilities (Legal Aid) Regulations, 2008 made under the Persons with Disabilities Act (No. 14 of 2003) presents similar challenges to prospective applicants, who are required to seek legal aid through the National Council for Persons with Disabilities. Such aid is restricted to cases involving property rights or violation of any disability rights protected under the 2003 Act and in cases involving capital punishment.⁷² Though in force, the 2008 Persons with Disabilities (Legal Aid) Regulations, and the pauper procedures under the 2010 Civil Procedure Rules have made little difference in the bid to enhance access to civil justice for the indigent and vulnerable members of the society due to their procedural complexity and general unawareness on the part of the target groups. According to this study, their technical character contradicts the principles of expedition, proportionality, participatory justice and fairness of process upon which equal access to justice hinges. On the other hand, simplified procedures promote self-representation and fairness of process, and results in reduced cost of litigation, which in turn enhances the equality of opportunity to access judicial services.

Reform in policy and legislation should be suitably designed to contextualise legal aid to access civil justice in a human rights rather than the charity model on which it is presently founded so as to give meaning to the provisions of Article 48 of the 2010 Constitution, which in general terms guarantees the right of access to justice. A human rights approach to legal aid would, in the viewpoint of this study, dictate that state-funded advisory services and legal representation in

72 The Persons with Disabilities (Legal Aid) Regulations, 2008 s 38(1).

civil litigation be restricted to cases involving the enforcement of fundamental rights and freedom of the individual, and those touching on the basic human needs of the indigent, vulnerable minorities (including women, children and the aged members of the society) and of persons with disabilities.

The recommendations in this study for the establishment of a human rights based legal aid scheme are made in recognition of the fact that state-funded civil legal aid is in reality more of an exception than the rule. Accordingly, this study recommends that, in the pilot phase, the scheme be restricted to cases involving (but not limited to) basic human needs⁷³ and fundamental rights relating to:

- (a) expropriation or compulsory acquisition of land;
- (b) decent housing and shelter;
- (c) marital disputes involving child custody, safety and maintenance;
- (d) succession and inheritance involving vulnerable populations (such as children and persons with disabilities);
- (e) environment and natural resources;
- (f) social-economic rights;
- (g) health rights;

73 C Hodges, S Vogenauer and M Tulibacka 'Cost and Funding of Civil Litigation: A Comparative Study' (Report) (December 2009) available at: <<http://www.ssrn.com/link/oxford-legal-studies.html>> (last accessed on 14th October 2011).

(h) employment; and

(i) the rights to which the Persons with Disabilities Act, 2003 applies.

Hodges and others consider cases concerning shelter, sustenance, health, safety, child custody and safety as critical matters for legal aid and state-funding. They also recommend that members of special or vulnerable populations, such as persons with disabilities, children, and senior members of the society, prisoners and immigrants be entitled to legal aid or state-funded representation in civil cases involving basic human needs.⁷⁴

While such a comprehensive scheme would invariably place more demands on the national exchequer, this study agrees that “[t]here are significant social and governmental fiscal costs of depriving unrepresented parties of vital legal rights affecting basic human needs, particularly with respect to indigent parties, including children, the elderly and people with disabilities, and these costs may be avoided or reduced by providing the assistance of counsel where parties have a reasonable possibility of achieving a favourable outcome”⁷⁵ that would, however humbly, improve their social-economic status. What this means is that civil legal aid and state-funded legal representation helps economically disadvantaged individuals or vulnerable groups of persons to secure basic human rights, social-cultural and economic benefits enforceable in civil action, but which would otherwise be beyond their reach. In the end, civil legal aid enhances equality of opportunity to enjoy equal protection and equal benefit of the law towards access to civil justice.

74 ibid.

75 LK Abel and S Vignola ‘Economic and Other Benefits Associated with the Provision of Civil Legal Aid’ (Working Paper) (November 6, 2009) p.1 available at: <<http://www.lawforlife.org.uk/data/files/economic-and-other-benefits-associated-with-the-provision-of-civil-legal-aid-2009-274.pdf>> (last accessed on 25th January 2012).

There are beneficial examples of civil legal aid programmes in other jurisdictions that could effectively inform the choices open for Kenya. With reference to the civil legal aid pilot programme in the State of California (USA), Abel and Vignola argue that “civil legal aid programs help people prevent events that would be harmful to them and expensive for the larger society.”⁷⁶ According to them:

- (a) legal services for domestic violence victims reduce the rate of domestic violence and the associated law enforcement costs;
- (b) representation for parents in child welfare cases keeps families together and reduces the time children spend in foster care often at the expense of the state;
- (c) medical legal partnerships for clients with medical and legal needs improve clients’ health and generate revenue for hospitals; and
- (d) civil legal help for children with criminal records reduces re-arrest rates, which in turn lowers law enforcement costs.”⁷⁷ Moreover, fiscal resources expended in civil or other legal aid stimulates the economy by what is commonly referred to as the “multiplier effect”.

According to Abel and Vignola, when government spends money on civil legal aid, the clients, staff and vendors receiving financial benefits as a result in turn spend that money to purchase additional goods and services, and the recipients of that money use it again in the same manner.⁷⁸

76 ibid.

77 ibid.

78 ibid.

For example, when civil legal aid clients obtain wages or child support owed them, they are more likely to be economically self-sufficient, and less likely to need public assistance.⁷⁹

The case for civil legal aid in the administration of civil justice in Kenya cannot be overemphasised. Inability to access judicial services on account of high cost of litigation would invariably lead to escalation of conflicts and possible breakdown of law and order. Yet, equal access to law and to judicial institutions for the enforcement of basic human rights and interests, the enjoyment of the constitutional right to equal protection and equal benefit of the law,⁸⁰ is critical to social order in the context of sociological jurisprudence. According to this study, effective socialisation of law can only be attained by first recognising the increasing range of social classes and interests pressing demands on the legal system,⁸¹ which must be accessed by all on an equal basis.

This study argues that modern law is only capable of functioning as an effective mechanism for social engineering if it is suitably directed towards minimizing waste and friction, and maximizing conflict resolution and the satisfaction of human claims.⁸² Accordingly, the legal system for the administration of civil justice in Kenya should be reformed and suitably designed to enhance accessibility so as to effectively address the needs of society. Moreover, civil justice can only be attained and secured where the legal framework and administrative procedures provide the means for equal access and adequate procedural safeguards for the maximization of

79 M Farrel, A Glosser & K Gardiner Child Support and TANF Interaction: Literature Review (The Lewin Group Washington DC 2003) available at: <<http://aspe.hhs.gov/hsp/CS-TANF-Int03/report.htm#IV>> (last accessed on 25th January 2012).

80 The Constitution of Kenya, 2010 art 27(1).

81 Hoogvelt op. cit. 15 p.180.

82 *ibid.*

conflict resolution and the attainment of effective remedies at a proportionate cost. Only then can every consumer of civil justice successfully lay their claim to what they are due and rightfully expect to be treated equally (in the case of equals) or proportionately unequally (in the case of unequals).⁸³

In recommending state-funded and regulated civil legal aid, this study is not oblivious of the inordinately high cost of legal representation and of the complex procedural architecture that draws back the pace of litigation resulting in perennial backlog and escalated costs of dispute adjudication. Moreover, costs include not just the easily quantifiable costs and disbursements but also aspects of time, delayed relief, psychological and business (opportunity) cost. From the perspective of consumers of judicial services, these costs may be significant.⁸⁴ These direct and indirect costs produce significant challenges for delivery of access to justice at proportionate cost.

6.6. Market Mechanisms in the Administration of Civil Justice

6.6.1 The Role of ADR

Various alternatives to civil litigation, including arbitration and mediation, have emerged over the years as mechanisms of choice in pursuit of effective remedies. Basic treaty and legislative instruments, such as the Geneva Protocol on Arbitration Clauses (1923), the United Nations

83 H Steiner 'Justice' in Michael Mann (ed) *Macmillan Student Encyclopedia of Sociology* (The Macmillan Press Ltd London and Basingstoke 1983) p.181.

84 Hodges, Vogenauer and Tulibacka op. cit. note 73.

Commission on International Trade Law (1985), the New York Convention on the Enforcement of Foreign Awards (1958), domestic legislation, such as the 1995 Arbitration Act, as amended by the Arbitration (Amendment) Act No. 11 of 2009, and institutional rules, only to mention a few, have spurred the establishment of various institutions and promulgation of procedural rules to facilitate enforcement of rights and awards in commercial and other matters capable of settlement by arbitration without undue delay and expense. The 1995 Arbitration Act applies to both domestic and international arbitration.

As an alternative to litigation in the conventional judicial system, commercial arbitration under the 1995 Act provides the legal framework for an alternative pathway in the administration of civil justice in Kenya. Arbitration is an informal process of dispute resolution to which one or more parties submit pursuant either to an arbitration agreement previously made between them or to specific rules of procedure under which their dispute may be referred for settlement by one or more impartial arbitrators appointed by the parties under the agreement or, otherwise, by an appointing authority with the consent of the parties. Reference of a dispute to arbitration may, therefore, be either voluntary or in discharge of a statutory obligation in certain cases. The 1995 Act also applies to arbitration administered by permanent arbitral institutions. Though adversarial in nature, the process of arbitration promotes party autonomy, and may be preceded by negotiation, conciliation or mediation, which if successful brings the dispute to rest.

Save in non-arbitrable disputes, parties in difference can choose whether to litigate or to adopt any of the alternative methods of dispute resolution (ADR).⁸⁵ Donna and Ravitz define ADR as a process or procedure other than adjudication by a presiding judge (or magistrate) in which a neutral third party participates in assisting in the resolution of issues in controversy through processes (that are an alternative to court litigation), such as early neutral evaluation, conciliation, mediation, adjudication, mini trial and arbitration.⁸⁶ The aim of ADR is to reach a consensual resolution of a dispute before or instead of a full trial on the merits. As they correctly observe, any ADR process or procedure may be adopted before, during or after commencement of proceedings in court.⁸⁷ A choice to mediate presupposes desire by the parties to maintain their relationship in spite of the dispute.⁸⁸ The process of mediation is consensual and accommodates mutual interests without undue regard to legal technicalities, or to strict enforcement of legal rights as traditionally sought in litigation.

Mediation (which is discussed in part 6.6.3) is an informal, confidential and facilitative process whereby a third party neutral assists the parties in dispute to find a mutually acceptable resolution of their dispute. The mediator helps the parties to identify their underlying interests, narrow their differences, improve communication and generate mutually acceptable settlement

85 RJN Donna and SRE Ravitz “Guide to Judicial Management of Cases in ADR’ (2001) : available at: <[http://www.fjc.gov/public/pdf.nsf/lookup/ADRGuide.pdf/\\$file/ADRGuide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ADRGuide.pdf/$file/ADRGuide.pdf)> (last accessed on 30th January 2012).

86 *ibid.*

87 *ibid.*

88 CF Forer, Esq, Judge RB Klein and B G. Picker, Esq ‘A Guide To ADR Choices When To Go To Full Mediation, When a Settlement Conference is Enough, and What Other ADR Options Are Appropriate’ (12th January 2011) p.2 available at: <http://www.pbi.org/resources/extras/6738_Estate_11_11/2_Klein.pdf> (last accessed on 25th January 2012).

options.⁸⁹ The parties determine and contribute to the means and the end result of mediation from which they emerge as winners.⁹⁰ Their mutual commitment to agreement and constructive interaction ensures equal participation and joint control over the outcome of the dispute. As a neutral facilitator,⁹¹ the mediator acts with impartiality and does not influence the specific outcome or determine the dispute⁹². Either party in subsequent arbitral or judicial proceedings in the event of breach may reduce the resolution reached on mutually acceptable terms into an enforceable formal agreement. Whether or not the agreement is legally enforceable depends on whether the parties agree that the process and its outcome shall be binding.⁹³

On the other hand, the court may, with the consent of the parties, adopt and implement (of its own motion or at the request of the parties) any appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Civil Procedure Act.⁹⁴ Accordingly, the court is empowered by rule 20(2) to adopt an alternative dispute resolution strategy and make such orders or issue such directions as may be necessary to facilitate such alternative means of dispute resolution. The overriding objective envisaged in section 1A (1) of the Civil Procedure Act is “to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes”, which effectively introduces the principle of proportionality to the realm of civil procedure in Kenya.

89 Donna and Ravitz *op. cit.* note 85.

90 *ibid.*

91 Forer, Klein and Picker *op. cit.* note 88.

92 *ibid.*

93 *ibid.*

94 Order 46, rule 20(1) of the Civil Procedure Rules 2010.

As regards arbitration, fair resolution of disputes by impartial arbitral tribunals is now attainable without undue delay and expense due to the enabling environment directly attributable to supportive legislation and institutional rules which govern procedure in domestic and international arbitration. International commerce and the construction industry in Kenya have for a long time enjoyed this cost-effective and expeditious means of dispute resolution, whose benefits can be extended to other areas, such as business and employment relations, only to mention a few. Other jurisdictions, such as the United Kingdom, Canada, Asia, and the United States of America, enjoy the priceless benefits of the various means of alternative dispute resolution (ADR) in almost all social and economic sectors, including marital disputes, consumer complaints, malpractice claims, labour and trade disputes, local business and international commercial disputes. The expanded scope of ADR is vital to the realisation of the conceptual imperatives advanced in this study for the effective administration of civil justice.

The informal process of ADR offers the parties “the opportunity to tell [a] relatively uninterrupted story”. As Conely and O’Barr observe, “...the opportunity for unconstrained narrative is an important component of informal court procedure”⁹⁵ and contributes to consumer satisfaction and confidence in the dispute adjudication process. Indeed, informal courts or ADR tribunals neutralise conflicts by allowing grievants “to let off steam” and “feel better” even where they do not have a tenable legal case or defence.⁹⁶ This is facilitated by simplified procedures common in such alternative dispute resolution mechanisms as court-supervised or community-based mediation or arbitration⁹⁷ advocated in this study. These informal pathways

95 JM Conely and WM O’Barr *Rules Versus Relationships: The Ethnography of Legal Discourse* (University of Chicago Press London 1990) p.36.

96 *ibid.*

97 *ibid* p.24.

guarantee party autonomy, proportionality and fairness of process, which in turn enhance consumer satisfaction and the effectiveness of remedies.

In addition to the much-needed law reform to simplify procedures in dispute resolution, the principles of proportionality, party autonomy and fairness of process are viewed in this study as the conceptual imperatives for an expedient and accessible system of civil justice. The findings in chapters three, four and five justify the recommendations in chapter seven for reform in policy and legislation to embrace these conceptual imperatives and facilitate the establishment of responsive dispute resolution strategies that are in step with international best practices for the delivery of civil justice. This would in turn address the issues of cost, timeliness and the effectiveness of remedies, as do the various market mechanisms and administrative procedures proposed in this study.

The salient features of an expeditious system for the administration of civil justice should, in the viewpoint of this study, guarantee the effective management of conflicts and the resolution of competing claims at a cost proportionate to the value of the dispute. The process must also be fair and participatory so as to inspire confidence in the quality of outcomes. In every case, costs (in both time and money), the architecture of procedures and the degree of party control determine the extent of access to judicial services. Presently, the amount payable by litigants in legal costs is frequently high and disproportionate to the value of the claim.⁹⁸ Hence the need to reform and simplify the rules of civil procedure so as to reduce delays and costs. The pressing need to adopt case management techniques by courts cannot be overemphasised. The current

98 Hodges, Vogenauer and Tulibacka op. cit. note 73.

concern over high and disproportionate costs is an indication of failure of the case management policy (if any) as applied by the court system. This is a serious challenge to the reputation of courts and judges, and to the ability of a state and society to satisfy citizens' and businesses' legitimate expectations of delivery of civil justice.⁹⁹

And why do costs of dispute adjudication matter to parties? With respect to the principle of proportionality, quality of outcomes and the effectiveness of remedies, Hodges and others attempt to answer this pertinent question. According to them:

From the claimant's perspective, the size and predictability of the costs of a dispute resolution process need to be evaluated to... [ascertain] the risks and benefits of using the process to pursue an action. If the costs or risk are too high, and there is no better alternative pathway, the result will be a denial of access to justice, and wrongs will not be remedied or compensated.¹⁰⁰

This study demonstrates the compelling need for policy and legislation that permits and supports a wide range of market mechanisms for claim adjudication in Kenya. The very prospect of parties to make contractual choices to have their disputes resolved at a proportionate cost upholds the principles of party autonomy and fairness of process. The paradigm shift towards more expeditious market mechanisms for the resolution of civil disputes at proportionate costs continues to gather pace in various jurisdictions. That explains why, compared to the conventional judicial system, ADR strategies are increasingly gaining recognition globally as a way of reducing backlog of cases in court and ensuring speedy, affordable and party-driven

99 *ibid.*

100 Hodges, Vogenauer and Tulibacka *op. cit.* note 73.

access to justice.¹⁰¹ ADR covers a whole range of participatory models of conflict resolution and dispute resolution mechanisms, and includes: (a) arbitration; (b) mediation; (c) a fusion of mediation-arbitration; (d) negotiation; (e) conciliation; (f) adjudication; (g) expert determination; and (h) early neutral evaluation.

The main advantage of ADR mechanisms is that they allow the parties to control the process and arrive at a solution acceptable to them.¹⁰² The ADR process is party-driven and participatory to the extent that the parties to a contract in relation to which the dispute arises have the prerogative of determining the composition of the third party neutral (in the case of conciliation or mediation) or tribunal (in arbitral proceedings),¹⁰³ the substantive and procedural law applicable to their dispute, and the timetable for the resolution of their dispute.¹⁰⁴ This is the essence of the principle of party autonomy, which guarantees fairness of process and is therefore considered in this study as a critical constituent of procedural justice.

The principle of party autonomy concerns itself with contractual choices of procedure and forum (or pathway) for dispute resolution. It is the independence of parties to choose and agree on the manner and forum for resolution of their private controversies in line with the universally acclaimed sanctity of the freedom of contract and the principle of autonomous choice, free from duress, fraud or undue influence.¹⁰⁵ This principle is founded on the idea of liberty upon which

101 Government of the Republic of Kenya *Final Report of the Taskforce on Judicial Reforms (Ouko Report)* op. cit. note 69.

102 *ibid.*

103 The Arbitration Act (No. 4 of 1995) s 11.

104 *ibid* s 20.

105 FR Johns 'Performing Party Autonomy' (2008) 71(3) *Law and Contemporary Problems* p.243 available at:[http://www.law.duke.edu/shell/cite.pl?71+Law+&+Contemp.+ Probs.+ \(summer+2008\)>](http://www.law.duke.edu/shell/cite.pl?71+Law+&+Contemp.+ Probs.+ (summer+2008)>).

parties exercise their contractual autonomy. It owes its conceptual origin to private international law whereby parties to an international contract have the freedom “to choose the applicable law and its corollary, to choose the forum, judicial or arbitral, for the settlement of their disputes arising from such contracts”¹⁰⁶ According to this study, the contractual choice of law and procedure and the forum (whether judicial, arbitral or other forms of ADR) for the determination of civil disputes is the appropriate testing ground for efficiency of, and the effectiveness of remedies generated through, such mechanisms.

There is nothing in theory or practice to restrict the application of this principle to private international law and accordingly contends that its tenets should extend to municipal dispute resolution mechanisms with appropriate modifications to enable parties to a civil dispute to drive the process and:

- (a) agree on the forum and constitution of the tribunal;
- (b) agree on the procedure for the resolution of their dispute;
- (c) set the timetable for the hearing and determination of their dispute; and
- (d) agree on the manner and basis on which costs shall be awarded.

The application of this principle beyond the jurisdiction of commercial arbitration under the Arbitration Act, 1995 requires supportive policy and legislation, which this study recommends as critical for the effective administration of civil justice.

106 P Nygh *Autonomy in International Contracts* (Oxford: Clarendon Press, 1999) p.13.

The autonomy of parties to simplify procedures and elect a pathway that allows effective self-representation results in reduced costs of legal representation. Moreover, it has been observed that more often than not “[t]he level of litigation costs is related to the amount of work done by the non-party actors in the litigation process, notably lawyers, judges and experts.”¹⁰⁷ Accordingly, this study recommends the universal application of the principle of proportionality in the assessment or taxation of costs in litigation, and in determination of lawyers’ costs, in order to motivate the adoption of and adherence to simple procedures, and to curb protracted litigation that continues to engender backlog of cases and delay in the administration of civil justice. As Hodges and others observe, the importance of proportionality of litigation costs has also become particularly relevant where lawyers’ costs have become too high.¹⁰⁸ What has not been settled as a general principle, though, is what it is that costs should be proportionate to: whether to the amount of work done; or to the value of the case to the party; or to the amount at stake.

This study suggests that the amount at stake (or pecuniary value of the matter in dispute) be considered as the most appropriate basis for determining the proportionality of recoverable costs in litigation or other adversarial forms of dispute resolution. The proposed approach would keep in check the tendency of parties and legal counsel in an adversarial system of civil justice to wage legal battles that count for little in the estimation of benefits accruing to the parties. On the other hand, proportionality of costs based on the work done would be tantamount to rewarding legal counsel and the tribunal for what may be the result of complex procedures and sheer disregard for the business value of the parties’ corresponding claims. Yet parties have a

107 Hodges, Vogenauer and Tulibacka op. cit. note 73.

108 *ibid.*

constitutional right to enjoy equal protection and equal benefits of the law,¹⁰⁹ such protection extending to the risk of applying their financial resources in worthless adventure, and such benefits not being tantamount to undue enrichment of their legal counsel or other experts engaged in the process. In every case, the amount at stake (as opposed to the subjective value of the dispute in the eyes of a party) is easily ascertainable and provides an objective model for the assessment of recoverable costs of dispute adjudication. In practice, this is the approach used in the assessment of costs in litigation in accordance with Schedule V (in the case of uncontested claims) and Schedules VI and VII of the Advocates Remuneration Order, 2006 (in the case of contentious claims in the High Court and subordinate courts respectively).

Notwithstanding the observable advantages of ADR strategies on account of *inter alia* expedition, proportionality, party autonomy and fairness of process, its application in Kenya is nevertheless limited. For instance, the attempt to institutionalise court-annexed mediation through the 2009 Statute Law (Miscellaneous Amendments) Bill failed. The only statutory basis for use of mediation in respect of court proceedings is Order 46 of the Civil Procedure Rules, which regulates arbitration under order of the court and other alternative dispute resolution. This presupposes the existence of court proceedings, which ADR strategies seek to avoid. As this study argues, statutory backing of a diverse range of market mechanisms for the resolution of disputes (including mediation) would be necessary to support contractual choices that underpin the principle of party autonomy as parties determine the appropriateness of any particular pathway for their kind of case, taking into account the procedural framework, expedition and the associated costs. The proposed legal framework would also address the need to regulate the

109 The Constitution of Kenya, 2010 art 27(1).

practice of arbitrators and mediators so as to protect end users from professional misconduct, negligence or conflict of interest.

6.6.2 Enhancing the Scope of Commercial Arbitration

Arbitration is a unique form of alternative dispute resolution mechanisms. Unlike negotiation and mediation, which are meant to facilitate value-maximising settlements, arbitration requires parties to submit to the will of an arbitrator (or arbitral tribunal) of their choice. The tribunal (whether of one or more arbitrators) usually issues a binding decision.¹¹⁰ Arbitration and mediation are the most used ADR processes that are characterised by the core principles of voluntariness and party control over the process¹¹¹ and which this study considers as critical for the realisation of procedural justice.

Kenya has taken significant strides in an attempt to adopt market mechanisms for dispute resolution towards enhanced access to civil justice. Of the pathways that provide contractual choices of procedure and forum, commercial arbitration enjoys statutory regulation under and by virtue of the Arbitration Act, 1995 as amended by the Arbitration (Amendment) Act No. 11 of 2009. The 1995 Act regulates both domestic and international commercial arbitration.¹¹²

110 M Parrott 'Is Compulsory Court-Annexed Medical Malpractice Arbitration Constitutional'? How the Debate Reflects a Trend Towards Compulsion in Alternative Dispute Resolution' (2007) 75(5) Fordham Law Review p.2689 available at: <<http://ir.lawlet.fordham.edu/flr/vol75/iss5/17>> (last accessed on 24th January 2012).

111 *ibid* p.2691.

112 The Arbitration Act (No. 4 of 1995) s 2.

Part III of the Act provides for the composition and jurisdiction of arbitral tribunals, including determination of the number of arbitrators and appointment of arbitrators.¹¹³ Part IV regulates conduct of arbitral proceedings. Section 19 of the 1995 Act requires that “the parties (to a dispute) shall be treated with equality and each party shall, subject to section 20, be given a fair and reasonable opportunity to present his case”. The parties have the primary obligation to “... do all things necessary for the proper and expeditious conduct of the arbitral proceedings”.¹¹⁴ According to section 20(1), “... the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings,” subject to the provisions of the Act, and on the juridical seat and the location of any hearing or meeting.¹¹⁵ Failing agreement, “the arbitral tribunal may conduct the arbitration in the manner it considers appropriate, having regard to the desirability of avoiding unnecessary delay or expense”.¹¹⁶ The tribunal is nonetheless bound to afford the parties a fair and reasonable opportunity to present their respective cases whether individually or by their representatives, who need not be professional legal practitioners.

Part V of the Act empowers the arbitral tribunal to make awards enforceable in the High Court, and Part VI provides for recourse to High Court against arbitral awards, including applications for setting aside such awards on limited grounds set out in section 35(2). The principle of party autonomy in matters of procedure as demonstrated in the provisions of the 1995 Act guarantees fairness of process and participatory justice, which is considered in this study as a fundamental tenet of procedural justice. But this dispute resolution framework is restricted to commercial

113 ibid s 11-12.

114 ibid s 19.

115 ibid s 21.

116 ibid s 20(2).

claims and belongs to the realm of market mechanisms that are arguably beyond the reach of the least well-off litigants considering the prevailing rates of charges by the various categories of commercial arbitrators.

According to the 2007 guidelines for the recommended fees and expenses for mediators and arbitrators, the fees payable to the Institute for the appointment of a mediator stands at KShs.10,000 while the amount chargeable for the appointment of an arbitrator is KShs.15,000. In addition, the mediator's fees ranges from KShs.4,000 to KShs.14,000 per hour for every hour during which the mediator is engaged in mediation. In the case of an arbitrator, the hourly rate is between KShs.6,000 and KShs.20,000 for every hour during which the arbitrator is engaged in arbitration. These rates are dependent on the status and experience of the mediator or arbitrator.¹¹⁷ The hourly rates are multiplied by the number of co-mediators or arbitrators comprising the tribunal, as the case may be.

While on the one hand commercial arbitration under the 1995 Act guarantees expedition and participatory justice, the relatively high costs of this party-driven market mechanism on the other hand bars full access on an equal basis. However, there is nothing to restrain parties to a civil dispute from employing the arbitral process by appointment of a tribunal of their choice based on contract and financial capacity. Moreover, the law on arbitration does not impose any requirement for special qualifications of an arbitrator or mediator, as the case may be. It is not

117 The Chartered Institute of Arbitrators (Kenya Branch) 'Remuneration Charges and Appointment Fees' (2007).

uncommon, therefore, for parties to resort to traditional ADR strategies that present pragmatic choices in appropriate cases.

In addition to the 1995 Act, Order 46 of the Civil Procedure Rules, 2010 provides for arbitration under an order of the court and for the application of other dispute resolution mechanisms to cases in respect of which civil proceedings have been commenced in court. Order 46 respects the principle of party autonomy and requires an order referring a dispute to arbitration before pronouncement of final judgment by the court to be made only with the consent of all interested parties.¹¹⁸ Similarly, the procedure for appointment of the arbitral tribunal is subject to agreement of the parties.¹¹⁹ In every case, the order of reference shall specify the time within which an award shall be made¹²⁰ in respect of all matters referred to arbitration for adoption and enforcement in the same manner and to the same extent as if such arbitral award were a judgment of the court.¹²¹

In any other case, the court may of its own motion or at the request of the parties adopt and implement any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Civil Procedure Act (Chapter 21).¹²² Where in exercise of its powers under the 2010 Rules the court adopts an alternative dispute resolution method, it may make such orders and give such

118 The Civil Procedure Rules, 2010 Order 46 Rule 1.

119 *ibid* Rule 2.

120 *ibid* Rule 3(1). The time fixed in the order of reference for the making of an award may be enlarged with the written agreement of the parties in accordance with Rule 8(1).

121 *ibid* Order 46 Rule 18(1).

122 *ibid* Order 46 Rule 20(1).

directions as may be necessary to facilitate such means of dispute resolution.¹²³ While this court-mandated mediation procedure marks a milestone in the administration of civil justice in Kenya, this study suggests reform in policy and legislation to make such procedures a pre-condition to litigation. This would contribute to the overall effort to reduce the backlog of cases reported in chapter five and enhance equal access to civil justice by pre-empting unnecessary litigation with its appurtenant high costs and procedural complexity that contradicts the tenets of fairness of process and participatory justice. As this study suggests, the proposed statutory entrenchment and support of market mechanisms in the conventional judicial system would expand the range of contractual choices and the application of court-based ADR mechanisms in the administration of civil justice.

The case for the promotion of ADR is founded on the fact that ADR is an efficient, cost-effective, and equitable method of resolving disputes without resorting to litigation. It is premised upon the intention that "... by providing disputing parties with a process that is confidential, voluntary, adaptable to the needs and interests of the parties, and within party control, a more satisfying, durable, and efficient resolution of disputes may be achieved."¹²⁴ As Parrott explains, the principles of voluntariness and party control over process (which are traditionally considered essential to effective ADR) makes ADR a permanent fixture in the United States legal framework.¹²⁵

123 *ibid* Rule 20 (2).

124 Parrott *op. cit.* note 110 p.2685.

125 *ibid* p.2686.

6.6.3 Strengthening Mediation and Other ADR Strategies

As a dispute resolution mechanism, mediation is not a new concept. It is an alternative to litigation and arbitration both of which are adversarial in nature. Mediation is an informal process in which a neutral third party assists the parties in conflict to reach a voluntarily negotiated resolution of their dispute.¹²⁶ In effect, mediation is premised on the fundamental principle of self-determination and relies upon the ability of the parties to reach a voluntary, uncoerced agreement and without recourse to litigation.

This participatory process gives the parties the opportunity to discuss the issues arising from the dispute, clear up misunderstandings, determine the underlying interests or concerns, find areas of agreement and incorporate them into a resolution¹²⁷ that accommodates their competing interests. The mediator is said to be neutral in that he/she does not determine the dispute or impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution or settlement agreement, which is binding in honour only unless otherwise agreed to constitute a binding contract. Compared to the often time-consuming and costly process of litigation, mediation is an efficient and inexpensive process. Successful mediation secures prompt resolution of the dispute and has the effect of maintaining and strengthening relationships.

126 The US Equal Employment Opportunity Commission 'Facts About Mediation' available at: <http://archive.eeoc.gov/mediate/facts.pdf> (last accessed on 25th January 2012).

127 *ibid.*

Like other forms of dispute resolution techniques, mediation has been used for centuries to resolve relational disputes and is as old as human civilization itself. In ancient Greece, for instance, the Greek legal culture of dispute resolution took root almost three thousand years ago when civil disputes were settled through mediation or arbitration¹²⁸ in pursuit of justice. The process was based on retribution or reciprocity as conceptualised in retributive justice, which deals with “crime and just punishment).¹²⁹ Mediation has since taken on a course of restorative justice, which denotes the right to corrective and restorative redress for violation of one’s rights¹³⁰ to the ends of effective remedies mutually generated in a participatory process accessible to all parties on an equal basis.

As a voluntary means of settling disputes out of court, ADR is increasingly gaining global recognition as a way of reducing backlog of cases in court.¹³¹ ADR has the advantage of allowing the parties to control the composition of the tribunal, the pace and procedure in the dispute resolution process, and arrive at joint outcomes or solutions acceptable to them. Though popular in developed jurisdictions, the application of ADR in Kenya has limited statutory support. Apart from the Arbitration Act of 1995 (which supports commercial arbitration as a market mechanism) and the provisions of Order 46 of the Civil Procedure Rules (which regulates arbitration under an order of the court), there exists no policy or legal framework for the

128 Surridge and Beecheno ‘Arbitration/ADR Versus Litigation’ (4th September 2006) available at: <http://www.hg.org/articles/article_1530.html> (last accessed on 25th January 2012).

129 R Arneson ‘Rawls, Responsibility, and Distributive Justice’ (1997) p.3 available at: <<http://dalitandtribe.wordpress.com/2010/01/02/theory-of-justice-by-john-rawls-nilesh.htm>> (last accessed on 25th January 2012).

130 C Ngondi-Houghton *Access to Justice and the Rule of Law in Kenya* (paper developed for the Commission for the Empowerment of the Poor) (November 2006) p.4.

131 Government of the Republic of Kenya *Final Report of the Taskforce on Judicial Reforms (Ouko Report)* op. cit. note 71 pp. 37-38.

establishment and entrenchment of ADR mechanisms (such as mediation and adjudication) in the judicial system. This study addresses these gaps with recommendations in chapter seven for a wholesome dispute resolution framework that blends the extant system of civil justice with emerging market mechanisms that contribute to the facilitation of full and equal access to civil justice.

The case for statutory entrenchment of alternative dispute resolution mechanisms in the legal framework in Kenya cannot be overemphasised. Informal procedures characteristic of negotiation (often referred to as “settlement conferences”¹³²), conciliation, mediation and arbitration founded on the procedural justice model advanced in this study maximises the fairness of process and satisfaction levels regardless of the substantive merits of the outcomes.¹³³

Unlike adversarial systems of dispute resolution common in conventional judicial systems, ADR heightens the degree of satisfaction, acceptance and legitimacy of the outcomes. This is because it minimizes the degree to which competing claims are framed in terms of winning and losing.¹³⁴ Accordingly, ADR mechanisms effectively shift the focus of attention away from outcomes toward procedures through which disputes are resolved and the overall benefits of a party-driven outcome. Consequently, fair procedures enhance accessibility to effective remedies on an equal basis and optimise delivery of gains to all parties as opposed to a focus by parties on winning over others¹³⁵ as is characteristic of adversarial models of dispute resolution.

132 Forer, Klein and Picker *op. cit.* note 88 p.2.

133 Tyler *op. cit.* note 34.

134 *ibid.*

135 R Hollander-Blumoff and TR Tyler ‘Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential’ (May 2008) 33 (2) *Law and Social Inquiry* p.473.

The participatory nature of ADR guarantees party autonomy and recognition of the disputants as the prime movers of the process, which in turn secures ownership and legitimacy of the process. It also results in heightened satisfaction levels, which invariably leads to acceptance of and adherence to the outcomes. The desirable experiences of the parties make procedural justice key to the development of stable and lasting solutions to conflicts,¹³⁶ which is viewed in this study as a critical indicator of the effectiveness of civil remedies. What this means is that settlement of disputes in a participatory and less adversarial ways strengthens relations because parties are more likely to have better feelings toward one another both during and after the process of adjudication.¹³⁷ Likewise, fairness of process in arbitral proceedings enhances trust and confidence and encourages the parties to view the tribunal and its award as more legitimate. Fairness of process is guaranteed by party autonomy in arbitral proceedings because parties have the power to agree on procedural matters and appoint a tribunal of their preference. These choices are not available to litigants in adversarial claim adjudication frameworks characteristic of conventional judicial systems. Indeed, the quality of procedure associated with ADR engenders quality of outcomes and the likelihood of respect for, and adherence to, the award of the tribunal.

With reference to fairness of process in judicial proceedings, Tyler observes that procedural justice "... encourages decision acceptance and leads to positive views about the legal system". He concludes that "... people are more likely to continue to abide by a decision if that decision is

136 Tyler op. cit. note 34.

137 *ibid.*

made through [what they consider to be] a fair procedure.¹³⁸ The process legitimates the decision and creates commitment to obeying it that is found to persist into the future. In addition,... people's general commitment to obeying the law is heightened when they experience fair procedures in legal settings."¹³⁹

The proposition in this study to reform the legal framework to reinforce fairness of process by optimising party autonomy and creative collaboration of the parties in a participatory decision-making process is premised on the argument that "... as long as people view the procedures they experience as fair, they are largely unaffected by their outcomes, even when those outcomes are negative".¹⁴⁰ Simply put, the parties are more likely to accept and live with their jointly generated solutions than decisions of a third party reached with minimal participation of the disputants. Studies where people were interviewed before and after their personal experiences with legal authorities show that "trust and confidence in such legal authorities increases when people experience procedural justice, even in situations in which they receive a negative outcome".¹⁴¹ In other words, people develop trust in judicial authorities after receiving a negative outcome than they did before receiving that outcome, as long as the adjudicating authority conducts itself and the proceedings fairly.¹⁴² In effect, quality of process is vital to procedural justice and determines the degree of trust and confidence the parties have in the adjudicating authority, which in turn has a bearing on the effectiveness of remedies. The participatory nature of ADR explains the high approval rating of its outcomes and the high

138 ibid.

139 ibid.

140 TR Tyler *Why people obey the law: Procedural justice, legitimacy and compliance* (Princeton University Press Princeton 2006).

141 TR Tyler and J Fagan 'Why Do People Help the Police Fight Crime in Their Communities?' (2008) p.7 *Ohio State Journal of Criminal Law*.

142 ibid.

consumer satisfaction demonstrated by the statistical data reported in chapter five. 70.8% of the participants interviewed in the survey were of the view that the outcomes of ADR are more acceptable and satisfying in comparison to those of civil litigation. This high degree of trust and confidence associated with ADR was attributed to its participatory nature, simplified procedures, expedition and proportionality of costs advanced in this study as the foundational pillars of civil justice.

The strong linkage between procedural justice and evaluations of the courts was recently affirmed by a study conducted within the State Courts of California. The Administrative Office of the Courts undertook a study in 2005 in which a random sample of the residents of the state were interviewed about their trust and confidence in the California courts. An analysis of that information¹⁴³ suggests that “[h]aving a sense that court decisions are made through processes that are fair is the strongest predictor by far of whether members of the public approve of or have confidence in the California courts.”¹⁴⁴ The courts are rated as being very fair in terms of treating people with dignity and respect, but not particularly fair in terms of allowing them to participate in decisions that affect them.¹⁴⁵ The report argues that “[p]olicies that promote procedural fairness offer the vehicle with the greatest potential for changing how the public views the state courts.”¹⁴⁶ Studies show that public evaluations of state courts are based heavily upon

143 DB Rottman *Trust and Confidence in California Courts, 2005: A Survey of the Public and Attorneys* (A Report commissioned by the Administrative Office of the Courts on behalf of the Judicial Council of California) p.15 available at: <http://www.courtinfo.ca.gov/reference/4_37pubtrust.htm> (last accessed on 10th December 2010).

144 *ibid* p.6.

145 *ibid* p.7.

146 *ibid*.

evaluations of the fairness of court procedures.¹⁴⁷ In particular, people are found to be sensitive to whether the courts protect their rights and to whether they think that judges are honest.

While these procedural justice judgments are the most important factor shaping trust and confidence in the courts in California, those interviewed were also sensitive to whether the courts treated the members of different groups equally, as well as to other structural issues about the courts, such as cost and delay. But their primary basis for evaluation was procedural justice with which this study is concerned. The comparatively low confidence rating of the judicial system in Kenya on account, *inter alia*, of delays, complexity of procedures and the inability of parties to influence the process of dispute adjudication calls for reform in policy and legislation to improve fairness of process and address these perennial impediments to the delivery of civil justice. According to the statistical data in chapter five, high cost of litigation, complex rules of procedure, and the slow pace of litigation and the inability of parties to influence the process were cited as some of the main impediments to equality of opportunity to access civil justice.

The only important question to be answered when considering the proposed reform agenda in favour of the diverse range of market mechanisms for dispute resolution is: how far can the courts go in “enforcing” court-based ADR? The growing trend towards rigorous promotion of mediation in England and in the United States of America, for instance, raises vital conceptual issues. Even though mediation has long been accepted on both sides of the Atlantic as a useful method of resolving many types of disputes without the often unnecessary disruption and expense of litigation, Kirmayer and Wessel observe that there is a limit to which courts can go in compelling

147 TR Tyler ‘Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want for the Law and Legal Institutions?’ (2001) 19(2) Behavioral Science & the Law p.215.

unwilling parties to mediate. In cases where parties voluntarily engage in mediation as a preliminary or parallel method of dispute resolution, the results are generally positive. According to them, even if mediation (or other ADR strategy) does not resolve the dispute, it can focus the parties' arguments and narrow the issues with the effect of shortening the time spent in future litigation and perhaps expediting final determination.¹⁴⁸ The voluntary nature of mediation counteracts any attempt by the courts to exercise their legal authority to enforce mandatory mediation even if it were a matter of public policy. Moreover, ADR is voluntary and consensually agreed to by the participants, usually by means of a binding contract. Indeed, even if mandatory mediation were founded on policy and legislation, there would be no practical means of forcing unwilling parties to mediate.¹⁴⁹ However, nothing should stand in the way of judges to facilitate settlements outside the traditional adjudicatory system by use of negotiation, mediation or arbitration in cases where the litigants had no prior contractual relationship.¹⁵⁰

Following a review of the civil justice system, a case management strategy and the efficacy of mandatory mediation were put to test in Canada on 4th January 1999 by the introduction in Rule 24.1 of a common set of civil rules of procedures mandating mediation for non-family cases in the Superior Court of Justice in Ottawa and Toronto.¹⁵¹ The pilot project had the primary objectives of “cost savings and a reduction in the court backlog” and was subject to continuation in the application of these rules and procedures beyond 4th July 2001 depending on the results of a thorough and independent evaluation to establish whether the introduction of mandatory

148 K Kirmayer and J Wessel 'An Offer One Can't Refuse: Mediate' (18th October 2004) *The National Law Journal* available at: < http://www.crowell.com/documents/DOCASSOCFKTYPE_ARTICLES_418.pdf> (last accessed on 25th January 2012).

149 Kirmayer and Wessel supra note 148.

150 Parrott op. cit. note 110 pp.2702-2703.

151 Rule 24.1 of the Rules of Civil Procedure pilot project in Ottawa and Toronto.

mediation under Rule 24.1 of the Rules of Civil Procedure as a case management strategy made a positive or negative contribution to the administration of civil justice.¹⁵² In the considered view of the Law Commission of Canada, mandatory mediation had the potential for early negotiated settlement and for enhancing access to justice for disputants who were either unwilling or unable to finance protracted litigation.¹⁵³ The pilot scheme was correlated to a case management strategy administered by Masters and judges of the Superior Court within defined timelines¹⁵⁴ to ensure expedition and proportionality in the administration of civil justice.

Upon evaluation, it was established that mandatory mediation reduced the cost of litigation even where mediation failed to elicit settlement. There was statistical evidence to show that "... when cases settle at or soon after the mandatory session, lawyers and litigants believed that money had been saved in avoided legal expenses."¹⁵⁵ As Nirman observes, costs were saved both in cases in respect of which mandatory mediation sessions failed and in those cases settled during or after the mediation sessions.¹⁵⁶ Accordingly, it was recommended that mandatory mediation under Rule 24.1 of the Ontario Rules of Procedure be made a permanent feature of the rules and procedures for the effective administration of civil justice. Though styled "mandatory", parties still retain their autonomy to apply for exemption from this mandatory procedure and the prerogative to

152 D Nirman 'Mandatory Mediation-A Must in Today's World' (2004) available at: <http://www.nirmanslaw.com/wp-content/uploads/2010/07/MANDATORY_MEDIATION.pdf> (last accessed on 30th January 2012).

153 Dr. J Macfarlane 'Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program (2002) available at: <<http://dalspace.library.dal.ca/bitstream/handle/10222/10288/MacfarlaneResearchLitigatorsandMediation.pdf>> (last accessed on 30th January 2012).

154 P Jacobs 'A Recent Comparative History of Compulsory Mediation vs Voluntary Mediation in Ontario, Canada' The International Bar Association Mediation Newsletter (April 2005) available at: <http://www.msmlaw.ca/Resources/Mandatory_vs_Voluntary.Media.pdf>(last accessed on 1st February 2011).

155 Nirman supra note 152.

156 *ibid.*

either reach mediated settlement or revert to litigation, a residual form of voluntariness that accords with the fundamental principles of ADR.

As this study suggests, mediation and other ADR strategies can only take root in the civil justice system if there are sufficient incentives to motivate the paradigm shift from the conventional adversarial system of litigation towards these party-driven market mechanisms. The practice in England provides a beneficial example of how these court-based dispute resolution models may be promoted and applied in the administration of civil justice in Kenya. Rather than compel parties to mediate, the English courts actively apply the supportive rules of procedure to “robustly encourage” parties to mediate suitable claims.¹⁵⁷ The general rule to award recoverable legal costs to the successful party also motivates the parties to elect and submit to mediation¹⁵⁸ or other informal, procedurally simple and inexpensive ADR strategy for the resolution of their competing claims at a proportionate cost. Refusal to award legal costs to a successful litigant who unreasonably refuses to mediate would also reinforce the court’s endeavour to encourage parties to mediate.¹⁵⁹

In addition to the proposed procedural imperatives and the strict application of sanctions in costs, creation of awareness through a sustained legal and civic education targeting legal practitioners, judicial officers, paralegal staff and the public at large would in the viewpoint of this study also motivate change towards ADR as the mechanism of choice in dispute resolution. The enabling legislation and rules of procedure should, on the other hand, be suitably designed

157 Kirmayer and Wessel op. cit. note 148.

158 *ibid.*

159 *Dunnett v Railtrack PLC* [2002] EWCA Civ 302; *Royal Bank of Canada v Secretary of State for Defence* [2003] EWHC p.1841 (Ch).

to accommodate and set out the limited circumstances in which it would be appropriate for a party to refuse an offer to mediate. The overall aim is to extend ADR beyond private contracts into court-based dispute adjudication programmes.

In India, for instance, Rule 8915(1) of the 1908 Special Provisions of the Code of Civil Procedure requires that “Where it appears to the court that there exists elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for... (d) mediation.” In effect, this procedure is voluntary and subject to approval of the court. It operates as a case management strategy while according the parties the autonomy to drive the process towards settlement of their dispute at a proportionate cost.

Nigeria is perhaps the best comparative example of common law jurisdictions in Africa that robustly draws on ADR strategies in case management to clear case backlogs through mediation, arbitration, neutral evaluation, and conciliation and construction adjudication. Every year the Chief Justice sets aside a settlement week during which specific courts facilitate settlement of listed cases through ADR.¹⁶⁰ Cases that qualify for settlement under this scheme include succession and family disputes, claims in libel and slander, medical negligence, debt claims, employment and trade disputes, banking and insurance related disputes, disputes relating to movable and immovable property, tenancy relations and construction claims. The scheme is

160 PM News ‘300 Backlog of Cases in Lagos to be Cleared’ (November 16 2011) available at: <http://www.pmnewsnigeria.com/2011/11/16/300-backlog-of-cases-in-lagos-to-be-cleared/> (accessed on 13th February 2012).

facilitated by trained construction adjudicators, neutral evaluators, mediators, lawyers and retired judges.¹⁶¹

To ensure success and quality outcomes, cases are allocated according to the professional skills and expertise of the facilitators, who are required to satisfy the prescribed minimum standards of professional training and experience, education, and ethical conduct for mediators and other ADR practitioners. The programme is State-funded and does not subject the parties to additional costs over and above the ordinary cost of litigation. On successful resolution, the mediated settlement (in the case of mediation) is signed by the parties, their counsel and the mediator, and subsequently recorded as a consent order of the court. Failing settlement, the cases revert to the courts for trial and judgment.¹⁶²

Kenya has a reservoir of ADR practitioners, lawyers and retired judges and magistrates with a wealth of experience from which she could draw on to facilitate a similar scheme that would go a long way in reducing case backlogs and enhance participatory justice towards quality outcomes. The only question that remains to be answered is the propriety of such schemes in so far as they appear to impose ADR on a conventional judicial system that is by nature adversarial.

The robust means of encouraging parties to adopt mediation or other ADR mechanisms proposed in this study should by no means be tantamount to an imposition of an unacceptable obstruction

161 *ibid.*

162 PM News *op. cit.* note 160.

of their constitutional right of access to the courts¹⁶³ or otherwise amount to breach of Article 14(1) of ICCPR, which guarantees the right to a “fair and public hearing by a competent, independent and impartial tribunal established by law”.¹⁶⁴ In effect, a compulsory system of mediation would amount to involuntary waiver or outright denial of the right of access to justice guaranteed by Article 48 of the Constitution of Kenya, 2010 read together with Article 14(1) of ICCPR Convention and offend the spirit of party autonomy in so far as such a system purports to go beyond the courts’ mandate to promote ADR as contemplated in Article 159(2)(c) of the Constitution.¹⁶⁵ Indeed, as Parrott observes with reference to medical malpractice arbitration in the USA, compulsory court-annexed arbitration law raises basic constitutional concerns and is open to challenge on the grounds of due process.¹⁶⁶ But this becomes a non-issue the moment the parties comply and reach negotiated or mediated settlement.

6.6.4 Community-Based Methods of Dispute Resolution

Effective resolution of disputes is not the preserve of state legal orders and their conventional judicial institutions. In many traditional societies, customary laws play a significant role in community-based dispute resolution processes in a wide range of matters involving individual behaviour, relationships and social interaction, including: (a) marital disputes; (b) inheritance; (c) land and property disputes; (e) claims over community land and natural resources; and (e) debt claims, only to mention a few.

163 *Steel v Joy and Halliday* [2004] EWCA Civ p.576.

164 The 1966 International Covenant on Civil and Political Rights, U.N. Doc. A/6316 (1966).

165 The Constitution of Kenya, 2010 art 159(2)(c).

166 Parrott op. cit. note 110 p.2689.

In such communities, the council of elders and eminent persons, tribal chiefs and village headmen, are instrumental in the enforcement of customary laws and practices, and in the resolution of disputes by negotiation, conciliation and mediation. As Van Nes and Strong explain, legal structures and ways of thinking about law are specific to particular times and places, and that in virtually all societies, justice is pursued using both formal and informal proceedings. Because the legal system confronted growing crises of confidence in the legitimacy of its formal structures, a series of proposals followed for informal alternatives, with “an emphasis on (a) increased participation, (b) more access to law, (c) deprofessionalisation, decentralisation and delegalisation, and (d) the minimisation of stigmatisation and coercion.”¹⁶⁷

According to Dr. Ibrahim Ali Farah, Mediation and traditional methods of dispute resolution in the Somali community in Kenya is self-sufficient and hardly ever requires the support of the conventional legal and judicial systems for the enforcement of the retributive or restorative reliefs either agreed between the parties or handed down by the clan elders failing agreement¹⁶⁸ in a unique process that combines both mediation and arbitration techniques. Depending on the circumstances of each case, the presiding elder or council of elders sit as a mediation panel or arbitral tribunal as the case may be. As a mediation panel, they endeavour to secure an agreement of the parties. Failing agreement, they constitute an arbitral tribunal that makes an award with which the parties are bound to comply.

167 DW Van Nes and KH Strong *Restoring Justice: An Introduction to Restorative Justice* (4th ed Mathew Bender and Company New Jersey 2010) pp.12-13.

168 Dr. IA Farah is one of the eight key informants interviewed in the inquiry reported in the fourth chapter. Dr. Farah is an environmental scientist and an eminent person in his Ougaden (also known as Aulian) clan of the Somali community in Kenya. He has been involved in community dispute resolution as a conciliator and mediator since 1983 on matters concerning clan and family disputes.

This community-based dispute resolution mechanism is accessible on an equal basis. It is voluntary, participatory in nature, swift and inexpensive. It is informal in procedure and does not require professionals to drive the process or conform to any formal requirements. In addition to the matters mentioned in the preceding paragraph, the disputes dealt with in this community-based system include conflicts arising from murder, assault, livestock theft, marriage, divorce, contracts and debt recovery. Their concept of justice is restorative and recourse to criminal proceedings is limited to cases involving failure to comply with the decision of the elders, or where for any other reason (such as habitual conduct) it is considered necessary to invoke the retributive or corrective criminal justice system.

According to Dr. Farah, “people always comply with the decisions of the clan elders, and failure to comply might lead to social isolation, reprisal or other retributive measures.” Their restorative approach to dispute resolution is, in Dr. Farah’s view, essential for the maintenance of social values and for the guarantee of peaceful coexistence among individuals and clans in the community. This illustrates the critical role of non-state legal orders in the administration of justice.

A similar system of community-based dispute resolution mechanism exists in rural Pakistan and in the Indian subcontinent generally. The centuries-old *Punchaiat* (also known as *Panchayat*) or *Jirga* constitute effective ADR mechanisms in rural areas where all disputes (whether civil or crime related) are brought before committees of respectable and honourable elders, whose decision binds the parties in dispute.¹⁶⁹ According to Surridge and Beecheno, refusal or willful

169 Surridge and Beecheno op. cit. note 128.

neglect by any party to comply with the decision of the *Punchaiat* or results in social isolation.¹⁷⁰

The council of elders performs its informal and community-based dispute resolution functions voluntarily, which makes this participatory process inexpensive and accessible to all on an equal basis.

Even though this community-based dispute resolution mechanism operates alongside the conventional judicial system, Surridge and Beecheno observe that the traditional customary law-based ADR system is more commonly used throughout Pakistan, including the Federally Administered Tribal Areas bordering Afghanistan where the customary law system of dispute resolution is founded on the precepts of restorative justice.¹⁷¹ The process involves a series of negotiations, conciliation, adjudication, mediation and (failing agreement) arbitration. According to Van Nes and Strong, such customary, traditional or indigenous legal orders and their restorative approach to justice “... reflect an intention to repair harm rather than simply to inflict equivalent harm.”¹⁷²

The primary objective of this informal system is to secure amicable settlement, repair the damage and ultimately restore and strengthen personal and communal relationships. The process is participatory in that “... all the affected parties, i.e. the offender, the victim and the local community, are deeply involved in the process and efforts are made to resolve the conflict to the satisfaction of all concerned. They deal with a range of issues, including conflicting claims to

170 ibid.

171 ibid.

172 Van Nes and Strong op. cit. note 167 pp.13-14.

land and water, inheritance, alleged breaches of the “honour” code and intra-tribal or inter-tribal killings.”¹⁷³

As ADR strategies, negotiation and conciliation are best suited for conflict management by various communities and individuals alike while mediation stands out as the most appropriate mechanism for dispute resolution. The voluntary, participatory, confidential, inexpensive, procedurally simple and expeditious nature of mediation makes this dispute resolution technique the mechanism of choice for resolution of civil disputes. Though in principle its voluntary nature rules out compulsion, this study recommends reform in policy and legislation to facilitate the establishment and support of existing community-based alternative dispute resolution mechanisms. In addition, the proposed statutory entrenchment of mediation in the judicial system would ensure that this market mechanism constitutes the preliminary step towards dispute resolution and, in every case, as a precondition to litigation. This would enhance the equality of opportunity to access civil justice at the community level of administration in the newly established constitutional order of devolved government.¹⁷⁴

Indeed, when supported by the bench and the bar, and utilizing properly trained mediators in a program effectively administered by the court, mediation and other ADR techniques have in the viewpoint of this study the potential to provide a variety of benefits, including: (a) greater satisfaction of the parties; (b) innovative methods of managing conflicts and resolving civil disputes; (c) cost-effectiveness in dispute adjudication; and (d) greater efficiency in achieving

173 Surridge and Beecheno op. cit. note 128.

174 The Constitution of Kenya, 2010 chapter eleven creates a system of devolved government with national and county governments. The counties may be divided into smaller units of administration, including sub-counties and wards designed to facilitate the decentralisation of State organs, their functions and services.

settlement of civil disputes, as compared to the slow-paced, costly and complex process of litigation in the conventional judicial system.

In recognition of the extant plurality of legal orders and the value of community-based ADR strategies, The Constitution encourages communities to settle land disputes through recognised local community initiatives consistent with the Constitution.¹⁷⁵ One of the functions of the National Land Commission established by Article 67(1) of the Constitution is “... to encourage the application of traditional dispute resolution mechanisms in land conflicts”.¹⁷⁶ In addition, the Constitution is dedicated to the promotion of alternative forms of dispute resolution, including conciliation, mediation, arbitration and traditional dispute resolution mechanisms; provided that such traditional or community-based ADR techniques are not used in such a way that: (a) contravenes the Bill of Rights prescribed in chapter four of the Constitution; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with the Constitution or any written law.¹⁷⁷ In the viewpoint of this study, the promotion of such traditional or community-based ADR mechanisms can only find meaning in supportive legislation and administrative procedures suitably designed to facilitate legal recognition and enforcement of collective decisions, awards or agreements made through any of these voluntary mechanisms.

Plural legal orders for the administration of civil justice in Kenya are inevitable and deserve statutory support in so far as they do not offend human rights principles and procedural

175 ibid art 60(1)(g).

176 ibid art 67(2)(f).

177 ibid art 159(2)(c) and (3).

protections, or result in inequity or inefficiency. Moreover, they exist in every part of the world and in all types of political systems to mitigate the inadequacies of State judicial systems. They vary enormously in jurisdiction, procedure, structure and degree of autonomy.¹⁷⁸ As has been observed, numerous interrelated factors influence their evolution. These include: (a) colonialism; (b) the state's need for legitimacy; (c) the quality, reach and relevance of official legal systems; (d) conflict and post-conflict reconstruction; (e) respect for diversity, multiculturalism and identity politics; and (f) privatisation or reduction of public expenditure in the justice sector.¹⁷⁹

These factors have substantially influenced the growth and development of plural legal orders for the administration of civil justice in Kenya.¹⁸⁰ Plural legal orders exist where a dispute or subject-matter is governed by multiple norms, laws or forums that co-exist within a single jurisdiction. They occur in numerous circumstances, such as- (a) where different family laws apply to specific ethno-cultural groups; (b) where customary dispute resolution mechanisms operate without state sanction; (d) where non-state legal orders (such as chiefs' courts) are officially recognised; or (e) where quasi-state legal orders (such as alternative dispute resolution mechanisms) are established.¹⁸¹

Reform strategies need to be adopted in support of the plural legal orders, which would in turn augment the State legal systems to ensure effective access to justice.¹⁸² The devolution of

178 International Council on Human Rights Policy 'When Legal Worlds Overlap: Human Rights, State and Non-State Law' Report (ATAR Roto Press SA Vernier Switzerland 2009) p.iii available at: http://www.ichrp.org/files/reports/50/135_reports_en.pdf (last accessed on 10th April 2012).

179 *ibid.*

180 *ibid.*

181 *ibid.*

182 *ibid.*

services under the Constitution of Kenya, 2010 and the effective administration of civil justice at the county level demands *inter alia*: (a) statutory establishment or recognition of existing community-based dispute resolution mechanisms; (b) statutory regulation of existing initiatives by civil society organisations to administer community-based ADR programmes; (c) training of mediators and judicial officers in court-based ADR strategies; (d) promotion of ADR through civic education; and (e) statutory regulation of ADR practitioners.

State and non-state legal orders play complementary roles in the administration of civil justice. State law (which does not exist in isolation or independent of cultural values) and non-state law (which is not always traditional) are not rigid in nature. They are substantially interdependent and constantly influence one another.¹⁸³ Accordingly, plural legal orders are subject to contemporary influences and may be created by processes that are internally or externally facilitated.¹⁸⁴

Promotion, support and statutory regulation by the State of both court and community-based ADR would enhance expedition and accessibility of inexpensive and participatory dispute resolution strategies. This would in turn guarantee fairness of process and ensure equality of opportunity to access civil justice. The simplified procedures and the expedition associated with party-driven dispute adjudication mechanisms characteristic of ADR (of which mediation is a constituent method) go a long way in ensuring that civil disputes are resolved at a proportionate cost, which in turn ensures the effectiveness of remedies. In addition, mediation enables parties to eliminate the uncertainty of the adjudicating authority common in adversarial systems of

183 ibid p.vi.

184 ibid.

dispute resolution. By so doing, the parties control the quality of outcomes and arrive at a resolution mutually acceptable to them. It has been argued, though, that compared to the state system, non-state legal orders are not always quicker, cheaper, more accessible, more inclusive, focused on restorative justice, or more effective in resolving local disputes.¹⁸⁵ Suffice it to observe that the proposals made in this chapter are based on desk research findings and statistical data discussed in chapters three, four and five. A comparative study of the two systems is a matter for future research. Whatever the case, the proposed statutory support and regulation of traditional ADR strategies should be cautiously designed only to provide broad guidelines and avoid interference with the essential character, flexibility and independence of the non-state legal orders.

6.7. Small Claims Courts

Although the taskforce reports discussed above in part 6.2 of this chapter do not articulate the principles of expedition, proportionality and fairness of process with reference to any defined conceptual framework, the conceptual imperatives advanced in this study inform the pervasive recommendation that small claims courts be established¹⁸⁶ to facilitate just resolution of civil disputes through a “fair but swift process at a reasonable expense.”¹⁸⁷ The need to incorporate these conceptual imperatives in the administration of civil justice is in recognition of the fact that

185 ibid.

186 Government of the Republic of Kenya *The Judiciary Report of the Sub-Committee on the Ethics and Governance of the Judiciary* op. cit. note 24.

187 Goldschmid op. cit. note 47.

intricate rules of procedure, systemic delay and excessive expense impede delivery of civil justice¹⁸⁸ as confirmed in the statistical data presented in chapter five.

The principle that the cost of resolving a dispute should be proportional to its magnitude, value, importance and complexity¹⁸⁹ to facilitate equal access to civil justice calls for: (a) simplified procedures; (b) the establishment of courts suitably designed to adjudicate over disputes in accordance with their magnitude, value, importance or complexity; or (c) the adoption of appropriate market mechanisms and alternative dispute resolution strategies to match the magnitude, value, importance and/or complexity of the disputes in issue in accordance with the principle of proportionality.

The recommendation that small claims courts be established¹⁹⁰ to facilitate just resolution of civil disputes must be viewed in light of their nature. These courts are essentially similar to the magistrate's courts or courts of petty sessions. A magistrate's court or court of petty sessions, formally known as a police court, is the lowest level of courts in England and Wales and many other common law jurisdictions.¹⁹¹ A Magistrate's Court has jurisdiction to hear any complaint.¹⁹² Where a complaint relating to a person is made to a justice of the peace, the justice

188 ibid.

189 ibid.

190 Government of the Republic of Kenya *The Judiciary Report of the Sub-Committee on the Ethics and Governance of the Judiciary* op. cit. note 24.

191 Haywood, Lunn and Allen Solicitors 'The Magistrates' Court' available at: <<http://www.hla-law.co.uk/Magistrates.aspx>> (last accessed on 1st February 2012).

192 Magistrates' Courts Act 1980 (UK) s 51(1).

of the peace may issue a summons to the person requiring him to appear before a magistrates' court to answer to the complaint.¹⁹³

Section 53 prescribes simple procedure on hearing and empowers the court to: (a) state the substance of the complaint to the defendant; (b) upon hearing evidence, make the order for which the complaint is made or dismiss the complaint; (c) make the order with the consent of the defendant without hearing any evidence where the complaint is for an order for the payment of a sum recoverable summarily as a civil debt.¹⁹⁴ The jurisdiction, powers and procedures of the court under the 1980 (UK) Act are comparable to the jurisdiction, powers and expedited (or simplified) procedures of the Magistrates' Court in Kenya as prescribed by the Debts (Summary Recovery) Act (Cap. 42 of the Laws of Kenya), which is discussed above in part 6.4 of this chapter.

The State of Western Australia serves as another beneficial example of a common law jurisdiction that has a system of small claims courts with expedited or simplified procedures. The Magistrates' Court of Western Australia is the first tier court in Western Australia. The court has jurisdiction in respect of criminal and civil matters, as well as a range of administrative matters. These include civil claims, minor cases of the value of up to \$10,000, consumer/trader claims and minor case consumer claims of up to \$10,000. The court came into existence in May 2005 as a result of the amalgamation of the Court of Petty Sessions, the Small Claims Tribunal and the Local Court of Western Australia into a single court. The amalgamation has provided greater

193 *ibid* s 52.

194 The Magistrates' Courts Act, 1980 (UK) s 58(1).

access to, and more efficient use of, the court system, by simplifying court processes, resolving cases more quickly, and with less expense.¹⁹⁵

The South African Small Claims Courts Act No. 61 of 1984 establishes small claims courts with jurisdiction in respect of causes of action: (a) for delivery or transfer of any property, movable or immovable; (b) for ejectment against the occupier of any premises or land within the area of jurisdiction of the court; (c) actions based on or arising out of a liquid document or a mortgage bond; (d) actions based on or arising out of a credit agreement; (e) actions other than those already mentioned above; and (f) actions for counterclaim.¹⁹⁶ Section 15 of the Act requires the value in respect of every cause of action to be determined by the Minister of Justice from time to time by notice in the Gazette.

The Small Claims Courts, Courts of Petty Sessions and Magistrates Courts in England, the State of Western Australia and South Africa, are by nature informal. As originally conceived, these informal courts were to be true “people’s courts”, most of which relax the technical rules of procedure and evidence that apply in formal courts.¹⁹⁷ Trials in these courts are intended to be informal, with many of the specific procedures employed left to the discretion of the judge¹⁹⁸ or magistrate, as the case may be. Such courts offer litigants simplified procedures, reduced cost and delay, limitations of the right of appeal, and, above all, the chance to appear in court without

195 Government of Western Australia Department of the Attorney General ‘Magistrates’ Courts’ (2009) available at : < http://www.courts.dotag.wa.gov.au/L/magistrates_court_print.aspx (last accessed on 1st February 2012).

196 The Small Claims Courts Act No. 61 of 1984 (SA) s 15.

197 Conely and O’Barr op. cit. note 95 p.24.

198 *ibid.*

a lawyer.¹⁹⁹ Indeed, some courts do not permit lawyers to appear, requiring those wishing to have a lawyer represent them in court to transfer the case to a higher court.²⁰⁰ As Conely and O’Barr further observe, early in the history of informal justice, some jurisdictions did not even require judges presiding over such courts “... to decide cases according to the law, as long as their judgments comported with a common sense notion of justice ...”,²⁰¹ thereby subordinating technicalities of law and procedure to the quality of outcomes.

The magistrates’ courts in Kenya constitute a tier of subordinate courts established by the Magistrates’ Courts Act (Cap. 10) pursuant to Article 169 of the Constitution of Kenya, 2010. The Act (which is presently undergoing revision for re-enactment to accord with the Constitution and enhance the courts’ pecuniary jurisdiction) establishes Magistrates’ courts, declares their jurisdiction and provides for their procedure.²⁰² Section 15 of the Act mandates all magistrates’ courts to follow the principles of procedure and practice laid down by or under the Civil Procedure Act, as regards proceedings of a civil nature.²⁰³

There is no difference between the magistrates’ courts in the United Kingdom and Western Australia in respect of their jurisdiction to determine small claims in comparison to the magistrates’ courts in Kenya. Likewise, the courts in Kenya are identical to the small claims courts in South Africa with regard to their jurisdiction, powers, procedures and practice. Accordingly, no useful purpose would be served by the proposed establishment of “small claims

199 ibid.

200 ibid pp.24-25.

201 ibid.

202 The Magistrates’ Courts Act (Cap. 10 of Laws of Kenya) long title.

203 ibid s 15(b).

Courts” as a separate tier of magistrates’ courts in Kenya. However, there is need to expand the range of claims and simplify the rules of procedure to ensure expedition, fairness and proportionality in the administration of small claims. One way of avoiding the complexity of the current civil procedure rules is the enactment of Magistrates’ Courts (Small Claims) Rules, which would simplify procedures and guarantee proportionality in the resolution of civil claims.

6.8. Conclusion

The discussion in this chapter has presented a compelling case for reforms in policy and legislation to enhance the delivery of civil justice in Kenya through state and non-state legal orders. The chapter sets the stage for specific recommendations in chapter seven intended to facilitate: (a) the incorporation of the conceptual imperatives and the theoretical foundation on which policy and legislation for the administration of civil justice should be based; (b) the statutory establishment and support of the much-needed court and community-based ADR strategies; and (c) effective response to contemporary challenges in the administration of civil justice.

CHAPTER SEVEN

RECOMMENDATIONS AND THE WAY FORWARD

7.1. Introduction

Drawing from the conceptual and theoretical frameworks in chapter two, and from the research findings in chapters three, four and five, chapter six presented a compelling case for reform in policy and legislation towards effective delivery of civil justice in the context of plural legal orders. In response to these findings, this chapter makes recommendations and suggests the way forward by recommending strategic reform measures for the augmentation of equal access to civil justice through a combination of legally sanctioned state and non-state legal orders.

These recommendations are in recognition of the fact that informal alternatives to formal justice have over the years been promoted as possible remedies for the ills of the justice system.¹ The discussion in this chapter sums up the research findings and recommendations on the way forward. It stimulates further research and development for the improvement of judicial administration of ADR for the augmentation of civil justice, and raises some theoretical, empirical and practical questions for further research. These recommendations are guided by the conceptual imperatives identified in the study as the fundamental tenets of civil justice. These include: (a) equality (of opportunity to access judicial services or other claim adjudication strategies); (b) expedition or timeliness in the resolution of conflicts and the determination of

¹ WV Heydbrand and C Seron *Rationalizing Justice: The Political Economy of Federal District Courts* (State University of New York Albany 1990) p.5.

competing claims; (c) proportionality; (d) party autonomy (in the sense of maximizing party control over the process of claim adjudication); (e) fairness of process (which is a constituent element of procedural justice); and (f) the effectiveness of remedies (towards need satisfaction) and the resolution of conflicting interests.

The concepts mentioned above are considered as the guiding principles of, and the key indicators of equal and full access to, civil justice. They also constitute the twin notions of quality of procedure and quality of outcomes on which equal access to civil justice is largely dependent. Accordingly, the reform strategies recommended in this chapter must be guided by these conceptual imperatives for effective delivery of civil justice. Only then can the policy and legal frameworks for the administration of civil justice respond effectively to the contemporary challenges and give meaning to the ongoing organisational reforms of the judiciary under the Constitution of Kenya, 2010.

7.2. Problems Addressed

This study was premised on the principle that a well functioning judiciary is a central feature of civil society and the sole adjudicator over competing claims and interests. Yet, the statistical data reported in chapter five demonstrates that the judiciary in Kenya suffers from administrative irregularities, high cost of litigation, backlogs and delays in the adjudication of disputes mainly attributable to rigid and complex rules of procedure that owe their origins to the adversarial method of claim adjudication. Consequently, expedient resolution of disputes has become increasingly elusive to the ordinary members of public. By and large, judicial tribunals in Kenya

are by nature costly to access, unduly formal, inflexible, bureaucratic, and inundated with complex rules of procedure, which in effect erode fairness of process and the quality of outcomes.

The historical background discussed in chapters one and three reveals that the origins and development of the judicial system during the colonial administration and their subsequent transition and adoption into the post-independence Kenya did little to provide a fair and accessible system for the administration of civil justice. The study has demonstrated that the elaborate rules of procedure have turned the rigid judicial system into an unduly expensive battlefield of technicalities that is difficult to access without representation by legal counsel. Moreover, such representation diminishes party autonomy and escalates the cost of access. In effect, litigation has become a gamble or luxury that only the affluent can afford, putting civil justice beyond the reach of the indigent.

The statistical data presented in chapter five confirms that the national tribunals have largely failed to effectively satisfy increasing demands for fair procedures and effective remedies so as to meet the contemporary challenges of access to civil justice. The overbearing and bureaucratic nature of the judicial process, the high cost of access, the markedly formal nature of civil proceedings, and in many cases outright inaccessibility by ordinary members of public make the civil justice system incapable of delivering quality outcomes.

In addition to the high costs of litigation and the intricate procedural architecture, hard professionalism in the Bar (which diminishes party autonomy and participatory justice) coupled

with undue regard to technicalities (which erodes the quality of procedures) continue to impair the efficacy of the judicial process. Consequently, these impeding factors erode client satisfaction and public confidence in the civil justice system and, in effect, law in itself becomes a secondary source of conflict at an inordinately high psychological and opportunity costs, not to mention the expense in both time and money. The foregoing problems stated in part 1.2 of chapter one were for the most part the motivating factors behind this study, which recommends appropriate reforms in policy and legislation to accommodate what it considers as conceptual imperatives for the effective administration of civil justice.

7.3. Objectives Met

To effectively address the various problems and the research questions respectively outlined in parts 1.2 and 1.4 of chapter one, chapters three, four and five evaluate the effectiveness of the policy and legal frameworks within which national tribunals exercise their constitutionally prescribed judicial functions with the aim of identifying their shortcomings and generating proposals for reform measures recommended in this chapter. This meets the main aim of the inquiry, namely: (a) to conduct an appraisal of the policy and legal frameworks in Kenya; (b) to evaluate the level of consumer satisfaction in the civil justice system with particular reference to the principles of proportionality, party autonomy, fairness of process, expedition, extent and equality of opportunity to access; and (c) to recommend appropriate policy and legislative reform strategies for the improvement of equality of opportunity to access civil justice.

While outlining the recommended reform strategies designed to address the impeding factors identified in chapters three, four and five, the study has addressed the broad issues under inquiry in answer to the research questions posed in part 1.4 of chapter one. Chapter three clarified the current status of the policy and legal frameworks for administration of civil justice in Kenya. It demonstrated that such frameworks are not well suited to guarantee and facilitate full and equal access to civil justice. Chapter four confirmed that the extant policy and legislation in Kenya do not meet the international standards of access to civil justice. Chapter five evaluated the level of consumer satisfaction in the civil justice system with particular reference to expedition, extent and equality of access. It presented an analysis of the current status of the policy and legal frameworks and of the mechanisms employed in dispute resolution in Kenya with a view of establishing the degree of access to civil justice, thereby identifying the main impediments.

The three chapters laid the foundation for chapter six, which discussed various beneficial examples of international best practices that exist in developed common law and other comparable jurisdictions that would be suitable for adoption in Kenya to guarantee full and equal access to civil justice. Chapter six argued the compelling case for reforms in policy and legislation recommended in this chapter for the augmentation of civil justice so as to address the problems stated in part 1.2 of chapter one in line with the objectives of this study.

7.4. Hypothesis Confirmed

The study was based on the hypothesis set out in part 1.6 of chapter one, namely: “The current Kenya’s policy and legal frameworks for the administration of justice are not well suited to

guarantee the effective delivery of, or equal access to, civil justice.” This was confirmed by the findings in chapters three, four and five. Yet, effective and efficient policy and legal frameworks are essential for full and effective access to civil justice, as the discussion in chapters three and six demonstrated.

The proposition that delivery of effective civil remedies depends mainly on an accessible and effective system of procedural justice was confirmed by the statistical data presented in chapter five, which attributed the mounting backlog of cases, the slow pace and the inordinately high cost of litigation, to complex rules of procedure and to the absence of a defined case management strategy. As the findings in chapters three, four and five confirmed, the system of procedural justice in Kenya is ineffective and inaccessible on an equal basis, having been founded on inept policy and legal frameworks that pay little attention to the conceptual imperatives advanced in the study as critical constituents of procedural justice.

This study argues that the absence of a defined or stand-alone policy on access to civil justice has resulted in patchy and often reactive legislation designed to address isolated institutional inadequacies and administrative irregularities that plague the judicial system. These reform measures were undertaken without due regard to the conceptual imperatives that would effectively guide the formulation and implementation of appropriate policy and legislation for the efficient administration of civil justice. The recommendations in this study provide the necessary conceptual orientation for meaningful reform strategies towards this goal.

7.5. Findings and Recommendations

Responding to the findings of inapt policy and legislation in chapters three, four and five, this chapter recommends appropriate reform strategies designed to meet the contemporary challenges and improve the quality of procedures and outcomes in the administration of civil justice. In doing so, the chapter pays particular attention to the principal constituents of civil justice, namely: (a) expedition; (b) economy; (c) equality; (d) proportionality; (e) party autonomy (in the context of participatory justice); and (f) fairness of process, which together guarantee the effectiveness of remedies (in the context of quality outcomes) and consumer satisfaction. As this study confirms, access to procedural justice is attainable by ensuring proportionality, party control and fairness of process in the administration of civil justice. In addition to the proposed reforms in policy and legislation outlined below, this chapter draws from the discussion in chapter six and identifies specific interventions by which the conceptual imperatives for effective delivery of civil justice can be realised.

7.5.1 Recommended Policy Reforms

In light of the inaptness of the extant policy for the administration of civil justice confirmed in chapters three, four and five, this study recommends the design of a stand-alone or integrated policy founded on appropriate conceptual and theoretical framework, and suitably designed, among other things:

- (a) to define a visionary roadmap for the effective delivery of, and equal access to, civil justice;
- (b) to guide future organisational reforms and legislation to entrench market mechanisms for dispute resolution;
- (c) to guide the effective administration of civil justice, including administrative procedures for effective case management;
- (d) to guide legislation, design and implementation of responsive programmes, plans and actions, including administrative procedures, rules and regulations, that would facilitate the realisation of the conceptual imperatives for effective delivery of civil justice;
- (e) to guide institutional and legal reforms to improve the machinery of civil justice by eliminating impeding factors, such as administrative irregularities and inadequacies, prohibitive costs of litigation, clogged systems due to endemic delay in conclusion of civil proceedings, the intimidating solemnity of courts, and the complexity of largely incomprehensible rules of procedure;
- (f) to guide legislation and administrative procedures to support contractual choices for informal dispute resolution mechanisms that would enhance expedition, proportionality, party autonomy, consumer satisfaction and the effectiveness of remedies to the ends of quality procedures and outcomes;
- (g) to guide legislation in recognition and support of plural legal orders, including non-state and community-based dispute resolution strategies (whether customary, traditional or indigenous); and

- (h) to guide the legal establishment and administration of a state-funded legal aid scheme for indigent consumers of civil justice, and the statutory regulation of legal aid by non-state actors.

The strategic issues considered in this study as critical for appropriate policy intervention include: (i) endemic backlog of cases; (ii) complexity of procedures; (iii) the high and disproportionate costs of litigation; (iv) institutional inadequacies; (v) work ethic and integrity of judicial officers and staff; and (vi) geographical inaccessibility of judicial services by the majority of Kenyans. Accordingly, there is need for suitable policy reforms to guide focused organisational reforms towards a responsive judiciary that is free from the administrative irregularities reported in chapter five.

The recommended design and implementation of an appropriate policy would ensure that all legislation and administrative procedures formulated pursuant to the policy are responsive to contemporary challenges, and that all programmes, plans and actions in support of judicial services are suitably designed to eliminate the array of impediments reported in chapter five. In addition to the foregoing, this study recommends that the incoherent policy framework be revised to consolidate and expand the judicial policy, strategic objectives, programmes, plans and actions necessary to give meaning to the reform initiatives mentioned in chapters three and six.

7.5.2 Recommended Reforms in Legislation

Drawing from the discussion in chapter six, the need for statutory intervention to improve the administration of civil justice cannot be overemphasised. Accordingly, this study recommends reforms in legislation, among other things:

- (a) to reform the rules of procedure and provide for multi-tracking of cases, which involves diverse mechanisms of differential case management by fast-tracking or expedited proceedings through simplified procedures;¹
- (b) to reform rules of procedure in accordance with the principle of proportionality and ensure that national tribunals handle disputes in such manner as to match the extensiveness of the procedure with the magnitude of the dispute;²
- (c) to dismantle the intricacy of the rules of procedure and to mitigate the highly structured, slow and costly nature of judicial services;
- (d) to support the establishment of a state-funded and regulated civil legal aid system to aid indigent litigants in certain cases and eliminate social-economic barriers to full and equal access to judicial services;

1 R Goldschmid 'The Civil Justice Reform Context Behind British Columbia's Expedited Litigation Rule and the Small Claims Court Jurisdictional Limit Increase' (paper developed for the joint Continuing Legal Education/Ministry of Attorney General conference, Restructuring Justice Vancouver June 2005) available at: <<http://www.ag.gov.bc.ca/justice-reform-initiatives/publications/pdf/Goldschmid.pdf>> (last accessed on 11th July 2011).

2 Victorian Law Reform Commission *Civil Justice Review* (Report) (2008) 14 para 4.1.4. available at: <<http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/resources/8/1/8137a400404a0bed9549fff5f2791d4a/VLRC+Civil+Justice+Review+-+Report.pdf>> (last accessed on 1st August 2011).

- (e) to ensure that the pauper procedure in civil litigation and appeals under Orders 33 and 44 respectively of the Civil Procedure Rules, 2010 be reviewed and simplified, and incorporated into the proposed legal aid (and awareness) scheme;
- (f) to establish a legal framework to support court-supervised/annexed ADR; and enhance the scope of contractual arbitration and other ADR strategies;
- (g) to provide a comprehensive guide for judicial management of court-based ADR;
- (h) to facilitate the adoption and statutory support of court and community-based ADR strategies; and
- (i) to simplify rules of procedure and regulate summary procedure for the enforcement of small claims in respect of all causes of action in magistrates' courts.

These reforms are critical for the augmentation of equality of opportunity to access civil justice. The need to formulate and implement appropriate policy to guide legislation, programmes, plans and actions for equal access to civil justice, and to facilitate the adoption and support of appropriate market mechanisms and universally acclaimed dispute resolution strategies that promote party autonomy, expedition and fairness of process, cannot be overemphasised.

7.6. Emerging Issues and Gaps for Further Research

In the course of inquiry, various issues that require further research emerged. However, they could not have been fully addressed due to the restrictive time and space within which this study was undertaken. For instance, the proposal to robustly encourage alternative dispute resolution strategies and to vigorously enforce the use of court-based ADR raises fundamental issues as to

the risk of limiting the constitutional right of access to national tribunals. There is also need to explore the appropriate nature and form of the proposed community-based ADR in the context of the imminent system of devolved government to establish how they would fit into the new structure of government. Account must also be taken of the fact that not all local communities have a defined system of traditional dispute resolution mechanisms that would easily benefit from statutory support and regulation. Indeed, statutory establishment or regulation of such community-based ADR mechanisms in cities and urban areas or in communities where no such mechanisms exists would possibly face an immediate challenge of assimilation and sustainability.

The findings in chapters three, four and five suggest that institutional inadequacies, administrative irregularities, and inapt policy and legislation have been the main impediments to accessing civil justice. Yet little is said of the extent to which parties and their counsel contribute to the slow pace and disproportionate cost of litigation. Further research in this regard would shed light on possible intervention strategies that address the attitudes of the primary consumers of judicial services and supplement the reform strategies proposed in this chapter towards a more elaborate and meaningful approach to the administration of civil justice. As respects the proposed establishment and strengthening of existing community-based ADR strategies, there is need for further research to establish:

- (a) whether the outcomes of such mechanisms are in fact self-enforcing, or whether there is tested need for legal regulation for the enforcement of their outcomes;
- (b) whether statutory regulation of non-state legal orders would not interfere with their characteristic flexibility and independence;

- (c) whether, and the extent to which, community-based ADR strategies are in reality immune to the administrative irregularities and institutional inadequacies that plague the conventional judicial system; and
- (d) whether these non-state legal orders for dispute resolution are in reality quicker, cheaper, more accessible, inclusive, focused on restorative justice, or more effective in resolving local disputes in comparison to the state system for the administration of civil justice.

Finally, the precise manner in which the conceptual imperatives advanced in this study are to be assimilated in policy, legislation and administrative procedures for the augmentation of equal and full access to civil justice is a matter of detail for future research and appropriate programmes, plans and actions. As this study suggests, comprehensive reforms in policy and legislation cannot be avoided if the constitutional guarantees of access to justice are to bear any fruit. Moreover, the realisation of the right to full and equal access to civil justice is critical for the legitimacy of the sovereign authority founded on the recently reformed constitutional order under and by virtue of the Constitution of Kenya, 2010.

APPENDIX A
QUESTIONNAIRE

Research Topic:

“Access to Civil Justice in Kenya: An Appraisal of the Policy and Legal Frameworks.”

SECTION A: INTRODUCTION

I, Kibaya Imaana Laibuta, am a Doctor of Philosophy (PhD) candidate in Law at the University of Nairobi Law School where I am undertaking research on the accessibility of civil justice, focusing on the policy and legal frameworks of the judicial system in Kenya. The study has been approved by the Ministry of Higher Education and I was issued with Research Permit Number NCST/RRI/12/1/SS011/341. The information gathered in this research is for academic advancement to inform reforms in policy and legislation. The information given in this questionnaire will be treated with utmost confidentiality. Kindly answer the questions below as accurately as you can. Your positive response will be highly appreciated.

Note: In this questionnaire, the term “civil justice” refers to fairness of process in the adjudication of civil claims, fairness of outcomes and effectiveness of remedies, taking account of expedition, cost-effectiveness and satisfaction levels. “Access to civil justice” refers to ease of entry into the judicial system, and the ability to actively participate in the enforcement of one’s rights and claims without undue delay, expense or technicality of procedure.

0-5 years []

6-10 years []

Above 10 years []

5. Area of specialization (Advocates only)

Civil litigation only []

Alternative dispute resolution (ADR) []

Civil litigation and ADR []

None of the above []

6. Where are you stationed?

.....

.....

SECTION C: STATUS OF THE POLICY AND LEGAL FRAMEWORKS

Policy on Access to Civil Justice

7. Are you aware whether there is in force a national policy on access to civil justice?

Yes []

No []

If yes, briefly state the policy as you understand it

.....

.....

Legal Framework

8. In your view does the current legal framework guarantee equal access to civil justice?

Yes []

No []

Explain

.....

.....
.....
9. What do you consider as the main factors that impede full and equal access to civil justice?

List them.

.....
.....
.....
.....

10. In your experience, are all parties to civil proceedings treated with equality and fairness?

Yes [] No []

If not, what do you consider to be the main reasons for unequal treatment?

Economic status [] Social or political status [] Gender [] Other []

Explain

.....
.
.....
.....
.....
.....

SECTION D: ACCESS TO CIVIL JUSTICE IN COURT LITIGATION

(to be completed by litigants and advocates)

11. Have you been party to civil proceedings in court?

Yes []

No []

If yes, explain nature of dispute.....
.....

Name court (Court of Appeal/ High Court/ Magistrate's court)

.....
.....

12. What, in your view, is the pace of civil litigation?

Fast [] Satisfactory [] Slow [] Very slow []

13. In your experience, do the courts adequately monitor the progress of cases and take remedial measures?

Yes [] No []

If yes,
explain.....
.....
.....
.....

14. In your view, are cases disposed off in a timely manner?

Yes [] No []

15. How long did it take to determine your dispute? (Advocates may give an average duration in response)

Within 2 years [] Between 3 and 5 years [] More than 5 years []

16. If you consider the pace of your case or cases you have represented a party to be slow, what were the main causes of delay? List them.

.....

.....

.....

17. In your experience, is it affordable to bring or defend cases in court?

Yes [] No []

How do you rate the cost of legal representation?

Very high [] Reasonable [] Generally affordable []

18. Do you consider the laws and rules of procedure easy to understand and apply?

Yes []

No []

If no, does the complexity of the rules contribute to delay in resolution of disputes?

Yes []

No []

19. How would you rate the participation levels in court proceedings by parties to the dispute?

Parties are usually in full control of the proceedings []

Parties have little control over the proceedings []

Legal representatives/ courts dictate the manner and pace of the proceedings []

(Parties to civil proceedings and advocates are requested to freely respond to the following questions designed to measure the degree of fairness of process and satisfaction levels in civil litigation)

20. In your view, would the outcomes of court proceedings be more acceptable if parties were free to determine the procedures to be followed?

Yes [] No []

Explain

why?.....
.....
.....
.....

Were you able to express your views and feelings during the process?

Yes [] No []

Were your views and feelings considered during the process?

Yes [] No []

Were you able to influence the outcome arrived at by the process?

Yes [] No []

Were the same rules applied to you and the other party?

Yes []

No []

Was the process objective and unbiased?

Yes []

No []

Was the process based on accurate information?

Yes []

No []

Were you able to correct wrong information during the process?

Yes []

No []

Did you find the process fair?

Yes []

No []

Were you satisfied with the process?

Yes []

No []

SECTION E: ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

21. Which of the following alternative dispute resolution mechanisms are you familiar with?

Arbitration []

Mediation []

Adjudication []

Early Neutral Evaluation []

Expert Determination []

Others

(explain)

.....

.....

22. Which of those mechanisms have you used in determination of civil claims?

.....

.....

23. How do these methods of dispute resolution compare with court litigation?

In terms of expedition:

More time consuming [] Takes the same time [] Less time consuming []

In terms of cost:

More costly to undertake [] No difference in cost [] Less costly to undertake []

In terms of complexity:

More complicated [] No difference in complexity [] Less complicated []

In terms of integrity and independence:

The process inspires more confidence and trust in the system and is more party-driven []

The process inspires equal confidence and trust in the system and is equally party-driven []

The process inspires less confidence and trust and is less party-driven []

Consumer satisfaction:

The outcomes of ADR are more acceptable and satisfying []

The outcomes of ADR and those of civil litigation are equally satisfying and acceptable []

The outcomes of ADR are less satisfying and acceptable than those of civil litigation []

SECTION F: REFORMS

24. In your view, what steps should be taken at policy level to enhance equal access to civil justice?

.....

.....

.....

.....

.....

25. What reforms in law and procedure would you recommend to guarantee equal access to civil justice?

.....

.....

.....

.....

.....

Thank you for taking the time to complete this questionnaire.

APPENDIX B

Consent to Participate in the Inquiry on

“Access to Civil Justice in Kenya: An Appraisal of the Policy and Legal Frameworks”.

By: Kibaya Imaana Laibuta

University of Nairobi Law School

You have been asked to participate in this research on the status of the policy and legal frameworks of the civil justice system in Kenya with special emphasis on access to civil justice in pursuit of effective remedies. The purpose of the study is to establish whether the existing policy, legal and organisational frameworks are well suited to facilitate full and equal access to civil justice, to determine what factors (if any) impede such access, and to explore what reforms would be necessary to enhance access to civil justice in Kenya and other developing common law jurisdictions.

In view of your professional orientation and experience, you have been selected as an expert and key informant on the main issues under inquiry by the researcher. The researcher seeks your consent to participate in interviews conducted by him during the months of October, November and December 2010, which you are at liberty to accept or decline on your own terms. By signing this form, you are giving consent to the researcher to use any information from the interview in his thesis entitled “*Access to Civil Justice in Kenya: An Appraisal of the Policy and Legal Frameworks*”. Your response to the research questions may be cited using your name unless you wish to remain anonymous. If you prefer anonymity, a suitable pseudonym should be suggested below.

Your participation in this inquiry will substantially contribute to the academic literature on the subject of access to civil justice in Kenya, which is under-researched.

Your participation in this interview is voluntary, and you have every right to decline to sign this consent form or to answer all or any questions put to you. If you opt to participate in the inquiry, you may withdraw at any time during the interview. In addition, you have the right to have your data withdrawn from the study after the research has been conducted.

If you wish to know more about this research project, please contact me on telephone numbers 020-2602218 or 0722-521708 or by E-mail: laibuta@lkjurists.com or arbitrators@lkjurists.com.

Kindly retain a copy of this form for your personal records.

Date:

Name:

Occupation:

Signature:

APPENDIX C

FEDERATION OF WOMEN LAWYERS (FIDA) KENYA

DISPUTANTS' EVALUATION OF FAMILY MEDIATION

Thank you for taking a moment to evaluate your experience with mediation.

1. What is your general evaluation of the mediation process?

_____Excellent _____Good _____Fair _____Poor

2. What could the mediators have done differently in helping resolve your dispute?

3. During the mediation process, what helped the most?

4. Did you reach an agreement during the mediation? _____Yes _____No

5. If you reached an agreement, do you feel it was fair and equitable? ____Yes ____No

Comments:

6. When you have a problem in future, would you use mediation again? ____Yes ____No.

7. Would you be willing to recommend mediation to others? ____Yes ____No

Why or why not?

8. Did you feel the mediator was: Fair? ____ Yes ____No. _____Somewhat

Helpful? ____Yes ____No. _____Somewhat

9. Please write any additional comments you may have regarding the mediation program

Name (optional) _____

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