

AN EVALUATION OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN THE AFRICAN REGION

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SUMMARY

Alternative dispute resolution (ADR) in Africa is growing and flourishing but the region is not a global leader in conflict resolution. The African region still has many challenges to overcome. The region has the potential to expand, grow and thrive with foreign direct investment to boost its economies and ensure stability for its infrastructure. The African region is rich in many natural resources, but, unfortunately, interstate conflict causes instability to social, political and economic rights. This article explores the weaknesses and challenges within the African region with a view to activating the potential of the region to become a global leader in alternative dispute resolution. The enforcement and implementation mechanisms of alternative dispute resolution require an evaluation of current systems to ensure that there is an animate thrust of dispute resolution. The African systems have their strengths, but an evaluation of any system always exposes weaknesses. Corruption within the African region is a common theme, since government does not play an active role in deterring corruption, and this causes the public to mistrust all initiatives that stem from government influence. The article discusses the situation in four African countries, showing that corruption, lack of education and a lack of skilled ADR practitioners cause a dysfunctional system that cannot embrace ADR. For an ADR system to function smoothly, numerous ADR practitioners are needed to resolve conflict competently. Furthermore, a selective system of favouring laws that support only the government as opposed to investors causes an imbalance, and discourages investors from investing in Africa. A way needs to be paved, not to negate international practices relating to investor disputes, but rather to work holistically with national laws, to harmonise laws and overcome any conflict of law within the region.

1 INTRODUCTION

Conflicts arise daily and form part of society. It is thus of fundamental importance when dealing with conflicts to employ mechanisms to create peace and encourage development.¹ To ensure that human rights violations are effectively eliminated in Africa, it is argued that its people should foster a culture of peace that protects human rights and aligns to overcome poverty and illiteracy.² African countries have made active efforts to create frameworks for the local resolution of arbitral disputes in order to attract foreign direct investment. These efforts include the adoption of modern arbitration legislation, joining arbitration-related treaties and creating arbitration centres.³ This is the stimulus for individual human rights to be viewed objectively and recognition that it is essential to protect and realise human dignity, despite persistent challenges.⁴

This article analyses the attempts made by the African continent to attract foreign investment while confronting associated challenges. The challenges are studied in a qualitative manner, showing their nature as they are encountered by African dispute resolution mechanisms and their effect on human rights. The article highlights several aspects of the African context of dispute resolution and makes recommendations to make Africa a leader in dispute resolution.

2 INTERNATIONAL ARBITRAL PLATFORMS

The Permanent Court of Arbitration (PCA) was established as an intergovernmental organisation in the year 1899 at the Hague Peace Conference.⁵ The PCA's main objective was to "facilitate an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy".⁶ Many authors remained sceptical and reserved the view that it was merely an optimistic attempt to create a structure where international disputes could be resolved peacefully. Nonetheless, 26 states went on to establish the PCA, which has grown to having a total of 115 member states, of which 22 members are African

¹ Muigua "Empowering the Kenyan People Through Alternative Dispute Resolution Mechanisms" (2015) <http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf> (accessed 2021-06-30) 13.

² Muigua <http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf> 11; African News Service "Protection of Human Rights Concerns OAU" (1999) <http://allafrica.com/stories/199904150006.html> (accessed 2021-06-30).

³ Bosman and Kimani "Approaches to Investor State Dispute Resolution in Eastern Africa: Rwanda, Kenya and Mauritius" 2018 *Acta Juridica* 123.

⁴ Howard and Donnelly "Human Rights, and Political Regimes" 1986 *American Political Science Review* 805; Bosman and Kimani 2018 *Acta Juridica* 123–124.

⁵ Bosman "The PCA'S Contribution to International Dispute Resolution in Africa" 2014 2 *Stell LR* 309.

⁶ Bosman 2014 *Stell LR* 310; Convention for the Pacific Settlement of International Disputes 1907.

countries.⁷ The PCA has transformed into an organisation that administers an array of dispute resolution services for arbitrations.⁸ From the African continent, the PCA has taken many forms of dispute involving African parties, including resolution of boundary and maritime disputes, resolution of political conflict and resolution of investor-state disputes.⁹

The PCA does this by making use of “host country agreements” with its member states. This allows the host country to enjoy the arbitral legal framework created by the PCA.¹⁰ The early host country agreement entered into between South Africa and the PCA in 2007 set a higher standard for regional cooperation and accessibility to international dispute resolution processes within southern Africa.¹¹ More than eight countries, including Mauritius and South Africa, have entered into host country agreements with the PCA and make use of these agreements to host procedural meetings and hearings.¹² The use of facilities offered by host country agreements provides incentives for local arbitration communities in the southern African region to grow by exchanging ideas and participating in spin-off activities.¹³ The PCA, in addition, provides support to local dispute resolution institutions and provides knowledge and resources for the facilitation of future peaceful dispute resolutions.¹⁴

Foreign investor interests were protected by customary international law principles that assured minimum standards of treatment and were vindicated through courts of the host state or through the mechanism of diplomatic protection. This changed upon the creation and establishment of bilateral investment treaties (BITs).¹⁵ It is argued that the systems used before the proliferation of BITs were not up to standard because outcomes were inconsistent with national law.¹⁶ It is apparent that investors were dependent on the goodwill and political expedience of their own state as to whether and how a claim would be espoused, and substantive protections were not recorded in generally applicable instruments.¹⁷

The current system of investor-state dispute settlement (ISDS) provides that arbitral proceedings are predominantly administered under the arbitration rules of either the International Centre for the Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL).¹⁸ There has been rapid growth in

⁷ Bosman 2014 *Stell LR*.

⁸ Li and Ng “The Permanent Court of Arbitration in 2012” in Lavranos and Kok (eds) *Hague Yearbook of International Law* (2012) 221.

⁹ Bosman 2014 *Stell LR* 313.

¹⁰ Bosman 2014 *Stell LR* 319.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Bosman 2014 *Stell LR* 326.

¹⁵ Bosman and Kimani 2018 *Acta Juridica* 114.

¹⁶ Neumayer and Spess “Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?” (2005) [http://eprints.lse.ac.uk/627/1/World_Dev_\(BITs\).pdf](http://eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf) (accessed 2021-07-03).

¹⁷ *Ibid.*

¹⁸ Bosman and Kimani 2018 *Acta Juridica* 115.

ICSID cases and UNCITRAL-administered proceedings, which can be attributed to increased levels of foreign direct investment (FDI) and the exponential growth in the number of BITs concluded since 1962.¹⁹ This increase is possible because ISDS systems derive largely from the dispute resolution provisions in BITs.²⁰

There are divided opinions on the importance of BITs. Some scholars are of the opinion that BITs have no impact on FDI, as “investors very rarely inquire about BITs while they plan to invest”, whereas other scholars have suggested that they have found direct causal links between the ability to attract FDI and the conclusion of BITs.²¹ Following the findings of the United Nations Conference on Trade and Development (UNCTAD), it is prudent to support both opinions in different cases, despite the contradiction. UNCTAD concluded that a wide range of factors influence FDI flow, and the conclusion of BITs is merely a factor among many that an investor will or might consider before investing in a state.²² UNCTAD found further that, even though such agreements cannot substitute for domestic policies on investment, they do carry value in adding an international dimension to investment as they promote stability and predictability in the resolution of disputes between states and foreign investors.²³

The recognition of BITs by foreign states in the form of FDI is essential to African states because investments theoretically resolve many financial challenges endured by African countries. Four countries are briefly discussed to showcase Africa’s attempts to promote FDI. It is important to emphasise that such attempts have caused many new challenges.

2.1 Mauritius

Mauritius has identified FDI as an important generator of income and a co-creator of employment opportunities that results in higher economic growth.²⁴ The government body responsible for the promotion and facilitation of investment in Mauritius is the Board of Investment of Mauritius, which encourages growth when investment takes place.²⁵ Mauritius enacted numerous statutes to support FDI, such as the Investment Protection Act²⁶

¹⁹ Bosman and Kimani 2018 *Acta Juridica* 117.

²⁰ *Ibid.*

²¹ Bosman and Kimani 2018 *Acta Juridica* 117–118; Neumayer and Spess [http://eprints.lse.ac.uk/627/1/World_Dev_\(BITs\).pdf](http://eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf) 4.

²² UNCTAD “The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014” *IIA Issues Note – Working Draft* (September 2014) <https://investmentpolicy.unctad.org/uploaded-files/document/unctad-web-diae-pcb-2014-Sep%2024.pdf> (accessed 2021-07-03); Bosman and Kimani 2018 *Acta Juridica* 118.

²³ Bosman and Kimani 2018 *Acta Juridica* 118.

²⁴ Bosman and Kimani 2018 *Acta Juridica* 141; OECD “Investment Policy Reviews: Mauritius 2014” (2014) https://www.oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-mauritius-2014_9789264212619-en 33 (accessed 2021-07-03).

²⁵ Bosman and Kimani 2018 *Acta Juridica* 141; OECD https://www.oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-mauritius-2014_9789264212619-en 33.

²⁶ 42 of 2000.

and the Business Facilitation Act,²⁷ which strengthened provisions on investor protection and opened avenues to foreign ownership, in a direct attempt to attract more FDI.²⁸ To facilitate more investment, Mauritius created a network of Investment Protection and Promotion Agreements and double taxation treaties with other countries in an attempt to create the ideal environment and relationships for FDI.²⁹

Mauritius is one of four African countries to have adopted arbitration legislation based on the UNCITRAL Model Law.³⁰ In 2008, Mauritius also enacted its International Arbitration Act,³¹ which applies to all international arbitrations seated in Mauritius and includes provisions regarding stay-of-court proceedings and interim measures for arbitrations seated outside the borders of Mauritius.³² In 2010, the Mauritian government entered into a host country agreement with the PCA; the PCA's first permanent office outside the Hague was thus established, making Mauritius a leader in international dispute resolution.³³

2 2 Rwanda

The Rwandan government's commitment to attracting FDI has resulted in its undertaking a series of pro-investment policy reforms to improve the investment climate.³⁴ Rwanda further established the Rwanda Development Board to provide a "one-stop shop" for both local and foreign investors to set up operations in Rwanda.³⁵ Rwanda's National Investment Policy has tasked the Rwanda Development Board and the Ministry of Finance and Economic Planning with establishing a programme "to support joint-ventures (between FDI, government and local private sector)".³⁶ This was to structure a framework for private foreign investment.³⁷ The Rwandan government emphasised its role by enacting the relevant legal and commercial framework to promote FDI when they adopted the National Investment Strategy in 2009.³⁸

²⁷ 21 of 2006.

²⁸ Bosman and Kimani 2018 *Acta Juridica* 141.

²⁹ Bosman and Kimani 2018 *Acta Juridica* 141; OECD https://www.oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-mauritius-2014_9789264212619-en 33.

³⁰ Bosman and Kimani 2018 *Acta Juridica* 142.

³¹ International Arbitration Act of 2008.

³² Bosman and Kimani 2018 *Acta Juridica* 142.

³³ *Ibid.*

³⁴ Bosman and Kimani 2018 *Acta Juridica* 129.

³⁵ Bosman and Kimani 2018 *Acta Juridica* 129; WTO "Trade Policy Review Reports by the East African Community Members" (2012) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/TPR/G271.pdf&Open=True> (accessed 2021-07-04) 54.

³⁶ Bosman and Kimani 2018 *Acta Juridica* 130.

³⁷ *Ibid.*

³⁸ *Ibid.*

2 3 Kenya

The liberalisation of the Kenyan economy has allowed for investments in all sectors of the economy.³⁹ Kenya promotes export growth and FDI by maintaining two investment regimes:⁴⁰ export processing zones with tax holidays; and a manufacturing-under-bond incentive scheme in which investments operate under bonded warehouses and attract investment allowances of up to 100 per cent on capital, plant and machinery.⁴¹ In addition, to further promote FDI, the Kenyan government established the Kenyan Investment Authority, known as KenInvest, which facilitates and promotes investment.⁴² Kenya further established a government-funded arbitration centre called the Nairobi Centre for International Arbitration, thus indicating to foreign investors that the Kenyan government is committed to developing the practice of arbitration, which in return promotes FDI.⁴³ Kenya's foreign investors are also protected by a network of BITs.⁴⁴

2 4 South Africa

South Africa, on the other hand, has followed a very different approach. It has been terminating its BITs since 2009 and has promulgated new national investment legislation that adopts a contrasting approach to ISDS.⁴⁵ South Africa has never been a signatory to the ICSID Convention, but was party to public investor-state proceedings under the ICSID Additional Facility Rules, which signatory obligations were terminated in 2010.⁴⁶ These proceedings resulted in the re-evaluation by the Department of Trade and Industry of South Africa's policy regarding investment protection and the adoption of an investment protection policy framework.⁴⁷

In 2015, the South African Parliament passed the Protection of Investment Act⁴⁸ (POIA), which entered into force in 2018.⁴⁹ This Act limits the substantive protection of investors to "fair administrative treatment, national treatment, physical security of property, repatriation of funds and the right to property as protected under section 25 of the South African Constitution".⁵⁰ POIA failed to provide for ISDS through international arbitration between an investor and the host state.⁵¹ POIA provides instead for dispute resolution through mediation, recourse to a competent South African court or

³⁹ Bosman and Kimani 2018 *Acta Juridica* 132.

⁴⁰ Bosman and Kimani 2018 *Acta Juridica* 135; WTO <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/TPR/G271.pdf&Open=True> 26.

⁴¹ *Ibid.*

⁴² Bosman and Kimani 2018 *Acta Juridica* 135.

⁴³ Bosman and Kimani 2018 *Acta Juridica* 136.

⁴⁴ Bosman and Kimani 2018 *Acta Juridica* 137.

⁴⁵ Bosman and Kimani 2018 *Acta Juridica* 126.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ 22 of 2015.

⁴⁹ Bosman and Kimani 2018 *Acta Juridica* 127.

⁵⁰ Bosman and Kimani 2018 *Acta Juridica* 127; ss 8 and 11 of POIA.

⁵¹ Bosman and Kimani 2018 *Acta Juridica* 127.

independent tribunal, and state-to-state dispute resolution.⁵² This results in a substantial narrowing of the usual protections included under BITs, such as protection against expropriation and guarantees of fair and equitable treatment.⁵³

African countries mentioned above have taken extensive measures to attract FDI. The first challenge for African countries is imposed by the development of new laws and ADR mechanisms is that there is no guarantee that these “newly created” laws and ADR mechanisms will be accepted by foreign investors. Thus, “recognition” is always the challenge. These newly developed laws and ADR mechanisms carry no weight and have no purpose if foreign investors or foreign states do not recognise them.

Recognition of ADR laws and mechanisms are two-fold: first, the recognition or non-recognition of ADR laws and mechanisms by foreign investors; and secondly, the recognition or non-recognition of ADR laws and mechanisms by local people. Recognition of ADR laws and mechanisms are closely linked to education and training, which is discussed below.

In the pursuit of FDI, some states cease to remember the importance and benefits of having ADR mechanisms available to local people. An “FDI tunnel-vision” can cause the annulment of ADR laws and mechanisms when conflicts arise between national law and international ADR mechanisms and BITs. Once a conflict between national and international law arises, a state must elect either to reject international law not consistent with its national law or amend and/or develop national law in such a manner that the conflict no longer exists.

Upon reflection on the avenue South Africa has chosen to follow, electing to reject BITs and other international laws that are inconsistent with the Constitution results in the narrowing of the prospects of FDI as it creates doubt among foreign investors. The challenge posed is that countries must find a balance between the importance of FDI and the needs of their local people and their human rights.

The rejection of BITs may result in an infringement on the right of access to justice. Access to justice is a term used to refer to the “opening up” of formal court systems and structures of the law to everyone, including disadvantaged groups in society. This is undertaken by removing legal, financial and social barriers such as language, intimidation by the law and legal institutions, and a lack of knowledge or education.⁵⁴ Scholars believe access to justice comprises two dimensions, namely procedural access and substantive justice, and involves these key elements: equality of access to legal services; equality before the law; and national equity.⁵⁵

These elements refer to persons having access (and equal access) to high quality legal services or effective dispute resolution mechanisms, and

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Muigua <http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf> 8.

⁵⁵ *Ibid.*

ensuring that everyone is treated fairly and is a recipient of equal opportunities in all fields and has access to services.⁵⁶ If the legal framework facilitating legal access is absent due to inadequate infrastructure and as a result of this lacuna created does not guarantee rights being realised it will result in an erroneous and grave injustice, and prevent access to justice.⁵⁷

The African countries mentioned above guarantee the right of access to justice under their respective Constitutions and national laws. However, implementation or realisation is yet to be seen owing to various factors hindering effective implementation.⁵⁸ The judicial systems and ADR mechanism of these countries have been affected by various barriers to accessing justice, which include factors like the geographical location of courts, complex rules of procedure, cultural norms and high legal fees.⁵⁹ Alternative dispute resolution mechanisms can be used as an alternative to judicial systems to support and relieve the overburdened formal judicial system. These alternative dispute mechanisms, however, encounter certain challenges such as the absence of arbitration centres and the absence of the recognition of ADR mechanisms.

Many African countries have looked to Western legal systems to find a solution to their problem of backlogged court cases.⁶⁰ ADR mechanisms were seen as one solution to resolving these backlogs. However, incorporating ADR mechanisms and systems into African countries presents new challenges. At first, implementing ADR mechanisms to resolve disputes increased the courts' productivity and led to increased confidence in judicial systems.⁶¹ Thereafter, a backlog in the ADR mechanisms was encountered, owing to a lack of mediators, a lack of money, insufficient allocation of time and the unwillingness of lawyers to participate in such ADR proceedings, which in turn held up the judicial system.⁶²

One example is when Rwanda established commercial courts in 2008, intending to reduce backlogs and the process time of commercial disputes. However, congestion remained a concern.⁶³ In another example, Uganda vowed to bring mediation to all courts to reduce the courts' workload by eliminating cases that are suitable for mediation.⁶⁴ Uganda experienced

⁵⁶ Schetzer and Henderson "Access to Justice and Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW" (2003) [http://www.lawfoundation.net.au/ljf/site/articleDs/EA0F86973A9B9F35CA257060007D4EA2/\\$file/public_consultations_report.pdf](http://www.lawfoundation.net.au/ljf/site/articleDs/EA0F86973A9B9F35CA257060007D4EA2/$file/public_consultations_report.pdf) (accessed 2021-07-04) 7.

⁵⁷ Muigua <http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf> 9.

⁵⁸ *Ibid.*

⁵⁹ Muigua *Settling Disputes Through Arbitration in Kenya* (2012) 22.

⁶⁰ Price "Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?" 2018 18 *Pepperdine Dispute Resolution Law Journal* 404.

⁶¹ Greco "ADR and a Smile: Neocolonialism and the West's Newest Export in Africa" 2010 10 *Pepperdine Dispute Resolution Law Journal* 661.

⁶² Price 2018 *Pepperdine Dispute Resolution Law Journal* 405.

⁶³ Bosman and Kimani 2018 *Acta Juridica* 131.

⁶⁴ Price *Pepperdine Dispute Resolution Law Journal* 404; Greco 2010 *Pepperdine Dispute Resolution Law Journal* 666–668.

114 512 cases where ADR mechanisms caused judicial backlog;⁶⁵ over 1 000 cases in one court required mediation, but had only one mediator; and the civil division of the High Court had over 9 000 pending cases but only four mediators responsible for mediation processes – an impossible task.⁶⁶ This demonstrated the lack of staff and efficient facilities to deal with such matters.

The prospects of ADR success are being challenged by the absence of sufficient government funding, since ADR's prospects of success lie within the training of more competent bodies such as mediators and arbitrators, the education of the public and the building of ADR centres.⁶⁷ It is thus difficult for Kenyan, South African, Rwandan and Mauritian people (in some cases more than others) to seek redress from both the formal court system and alternative dispute resolution mechanisms. The realisation of the right of access to justice is only as effective as the available mechanisms to facilitate it.⁶⁸

It is worth mentioning that the right of access to justice is an essential component of the rule of law, which has been said to be the foundation of justice and security.⁶⁹ The rule of law thus instils or removes people's faith and trust in a country's legal systems and framework. Disadvantaged people may harbour feelings of bitterness, resentment and other negative feelings owing to their inability to seek redress from formal court systems or alternative dispute resolution mechanisms.⁷⁰ They may lose faith or trust in their particular country's legal system or framework, resulting in increased terrorism or theft and having adverse negative effects on the stability and peace of their respective countries.⁷¹

According to Muigua, it is evident that access to justice for the poor and marginalised groups of persons in Kenya is a mirage.⁷² This is so for most African countries as it has been forgotten that access to justice is not only about the presence of formal court systems and ADR mechanisms, but also about the "opening up" of those formal court systems and ADR mechanisms to disadvantaged groups in society and the removal of legal, financial, educational and language barriers.⁷³ Muigua is of the opinion that this has

⁶⁵ ACME Team "Is Mediation Program Backfiring on the Judiciary?" (2016) <https://acme-ug.org/2016/04/10/is-mediation-programme-backfiring-on-the-judiciary-part-ii/> (accessed 2021-07-04).

⁶⁶ Price 2018 *Pepperdine Dispute Resolution Law Journal* 405.

⁶⁷ Price 2018 *Pepperdine Dispute Resolution Law Journal* 406.

⁶⁸ Muigua <http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf> 10.

⁶⁹ Muigua <http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf> 9.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Muigua <http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf> 7.

⁷³ *Ibid.*; UNDP Kenya "Kenya National Human Development Report. Human Security and Human Development: A Deliberate Human Choice" (2006) <https://planipolis.iiep.unesco.org/en/2006/kenya-national-human-development-report-2006-human-security-and-human-development-deliberate> (accessed 2021-07-04).

not yet been achieved in Kenya and that the poor are therefore “condemned to a life of misery without any viable recourse to alleviate the injustices”.⁷⁴ This is a bleak outcome, and needs urgent governmental redress.

3 ACCESS TO KNOWLEDGE, EDUCATION AND TRAINING

Western cultures are highly individualistic, whereas African and Eastern cultures embrace a collective approach.⁷⁵ “ADR in traditional societies cannot be understood without introducing the societal structure, relationships among groups and particularly the relationship between the individual and the group.”⁷⁶ Furthermore, modern ADR proceedings are private and confidential, unlike traditional customary ADR proceedings that emphasise a transparent process.⁷⁷ This indicates that education and training play a role in achieving recognition of laws. Therefore, training has to be undertaken on an international and national level so that foreign states and investors can understand the differences between their ADR mechanisms and national customary ADR.

Similarly, creating an understanding of international ADR mechanisms (for local people) would help them understand the proceedings of which they form part and increase their confidence in such proceedings, which will in turn increase the use of ADR mechanisms and access to justice. This will create understanding on both sides and eliminate miscommunications and misunderstandings. Another aspect of the education and training needed is that for lawyers and judges, many of whom oppose ADR mechanisms as they see them as a threat to their careers and to their control over non-litigation resolutions respectively.

Education plays an important role in promoting sustainable development and improving the capacity of people to address issues.⁷⁸ Training and educating lawyers and judges will create an understanding of the need for and purpose of ADR mechanisms, which will in turn eliminate the fear of ADR mechanisms and create a space where lawyers and judges make use of and support such mechanisms and the sustainable growth thereof. ADR mechanisms must consider the unique culture and needs of each country, as each has its own way of combining modern dispute resolution and traditional methods. This requires investment in education and training to eliminate the confusion of local people who are unsure which avenue to follow to resolve a dispute. Another challenge posed is that caused by a variety of factors as mentioned below.

⁷⁴ Muigua <http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf> 7.

⁷⁵ Price 2018 *Pepperdine Dispute Resolution Law Journal* 402.

⁷⁶ *Ibid.*

⁷⁷ Dickerson “Overview of Commercial Alternative Dispute Resolution in Africa” (2012) <https://www.businessconflictmanagement.com/blog/2012/06/adr-in-africa/> (accessed 2021-07-04).

⁷⁸ Muigua <http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf> 28.

4 POVERTY, CORRUPTION AND POOR MANAGEMENT

Postcolonialism, ignorance, monopoly of power, corruption, religious intolerance, poverty, racism, debt and bad management have all contributed to the abuse of human rights in Africa.⁷⁹ This has led to a widespread violation of the cultural, economic and social rights that are vital to the empowerment of ordinary people.⁸⁰ The development of ADR mechanisms and the use thereof are suppressed and slowed down by factors such as poverty, corruption, debt and bad management.

Africa suffers from poor management and corrupt activities like the illegal distribution of resources, the illegal awarding of tenders and nepotism. These corrupt activities are the result of poor or no delivery at all, meaning that there is a possibility that funds intended for the development and upkeep of ADR facilities and education programmes never serve their purpose. This results in a decrease of ADR usage, as ADR mechanisms cannot grow if there is no support or investment in them. This brings us to the final and biggest challenge encountered by ADR mechanisms in Africa.

5 IMPLEMENTATION

There is a dire need for African countries to implement and enforce the powerful ADR mechanisms. Home speaks of the concept of isomorphism. He states:

“Isomorphic mimicry is where animals show features of other animals so as to appear more dangerous than they actually are, and so enhance their survival chances, while coercive isomorphism refers to enforced similarity of form through external pressures, but without the associated functions.”⁸¹

He makes use of this concept to show how African states may accept international ADR mechanisms (or develop mechanisms similar to international ADR mechanisms), but fail to implement them. Therefore, they mimic ADR mechanisms, but in reality, their functions are not undertaken.⁸² This means that ADR mechanisms are no better than a toothless tiger that has no power to devour and attack its prey.

African countries, in the pursuit of FDI and to provide for human rights, more often than not promulgate and pass legislation intrinsic to the development of human rights and the promotion of FDI. However, the creation and promulgation of legislation does not guarantee or foresee the implementation thereof. In this manner, “isomorphic mimicry”, or adopting

⁷⁹ Magnarella “Achieving Human Rights in Africa: The Challenge for the New Millennium” 2000 4 *African Studies Quarterly* 17.

⁸⁰ Kapindu “Courts and the Enforcement of Socio-Economic Rights in Malawi: Jurisprudential Trends, Challenges and Opportunities” 2013 13 *African Human Rights Law Journal* 125.

⁸¹ Home “Land Dispute Resolution and the Right to Development in Africa” 2020 45 *Journal for Judicial Science* 73.

⁸² *Ibid.*

goals without necessarily performing them, is arguably the greatest challenge encountered by ADR mechanisms in Africa.⁸³

Isomorphic mimicry in Africa has been portrayed in the following examples. The first is a ruling made by the African Commission on Human and Peoples' Rights (ACHPR), which found the Kenyan government to be in violation of the African Charter, and ordered it to rectify and recognise the rights of ownership of the Endorois community.⁸⁴ The Kenyan government has to date not implemented the decision of the ACHPR in the Endorois case.⁸⁵ Another example is the inherent right to dignity and the right to have such dignity respected and protected that is found in the South African and Kenyan Constitutions; yet, many cases of violation of human rights still persist.⁸⁶ Isomorphic mimicry can arise owing to multiple factors, such as lack of investment, poor management, corruption, lack of educated and competent staff, poor leadership and underdeveloped laws. Although African countries have legislation and constitutions that offer hope for their people, there remains an urgent need to facilitate the implementation of their respective constitutions and ADR mechanisms to avoid the impotence of isomorphic mimicry.

6 RECOMMENDATIONS

Implementation can be achieved by establishing mechanisms that hold authorities accountable for their actions and/or inactions. By creating a system that holds authorities accountable, factors such as poor management, corruption and nepotism will inevitably be eliminated, which will in turn ensure sustainable growth of ADR in Africa. Sustainable growth and the elimination of isomorphic mimicry will see the realisation of access to justice on a broader spectrum. ADR systems or mechanisms must have a flexible design structure rooted in satisfying the interests of parties and in administering justice in a culturally sensitive manner.⁸⁷ It is argued that such an ADR system can be achieved by adopting the following recommendations.

First, proper legislation should be enacted. This will increase the use of ADR mechanisms and increase public confidence therein. Legislation also creates a platform for review and provides a space where education and training can take place.⁸⁸ Secondly, incentives should be created to educate lawyers and judges in ADR use and development. This will increase

⁸³ Home 2020 *Journal for Judicial Science* 77.

⁸⁴ Muigua <http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf> 7; *African Commission on Human and Peoples Rights v Republic of Kenya* (006/2012).

⁸⁵ Muigua <http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf> 7.

⁸⁶ *Ibid*; s 28 of the Constitution of Kenya 2010; s 10 of the Constitution of the Republic of South Africa, 1996.

⁸⁷ Price 2018 *Pepperdine Dispute Resolution Law Journal* 414.

⁸⁸ Price 2018 *Pepperdine Dispute Resolution Law Journal* 415.

efficiency, revenue and client satisfaction.⁸⁹ Thirdly, the local public and foreign investors should be educated on the systems and legislation in place in relation to ADR. This will increase productivity, promote the finding of solutions and decrease miscommunications, misplaced hope and false understandings. Fourthly, both international and national governments should be encouraged to invest in capacity building through training and support for the development of ADR advocates and providers.⁹⁰ Lastly, a system that holds parties accountable for their actions and the implementation of rules and regulations should be created. In this way, progress can be measured, resulting in the removal of erroneous practices as well as people who abuse the system. In this way, ADR can grow and flourish in Africa.

7 CONCLUSION

ADR mechanisms are seen as viable conflict management mechanisms because of their focus on the interests and needs of the parties in a conflict, and they therefore boast an array of advantages if the challenges can be reduced or eliminated completely. The concept of ADR should therefore be an alternative to “Western conflict resolution”. Minimising the challenges canvassed in this article will create a stable society where diverse systems can exist. This will result in respect for the rule of law and operational court systems.⁹¹ Such a society will attract FDI which, in turn, if not mismanaged, can further address challenges encountered by African ADR, creating an environment where a right is not just the ability to do something that is among one’s important interests, but a guarantee or empowerment to actually do it. The principle of *ubuntu* is to act for the collective good and in creating an African ADR framework it is aligned to the principle and ethos of *ubuntu*.⁹²

⁸⁹ Uwazie “Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability” 2011 16 *African Security Brief* 5.

⁹⁰ *Ibid.*

⁹¹ Abe and Ouma “A Re-assessment of the Impact of Traditional Dispute Resolution Mechanisms in Post-Conflict Africa” 2017 *Ave Maria International Law Journal* 18.

⁹² Muigua <http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf> 10.